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NEWSLETTER

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Dear Reader:

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We wish you a Happy reading!

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■ ■ INAUGURATION OF THE OFFICES OF SAL & CALDEIRA ADVOGADOS, LDA. IN PEMBA, CABO DELGADO

SAL & Caldeira Advogados, Lda., is pleased to inform its clients, friends and the general public of the opening of its new office in Pemba, which took place on 23 July 2015. The office is located at Rua XV – Bairro de Cimento - City of Pemba.

With this inauguration SAL & Caldeira Advogados, Lda. now has offices in Maputo, Tete, Pemba and a liaison office in Beira.

With the opening of our office in the city of Pemba, we reaffirm our commitment to serve our clients throughout the national territory, continuing our mission of investing in the training of young, talented Mozambican lawyers and contributing to improvement of the administration of justice in Mozambique. 🌐



THE COMPETENCE OF LABOUR COURTS TO DECIDE ON CLAIMS FOR NON - MATERIAL, OR MORAL, DAMAGES

This article is written in light of a somewhat controversial practice observed in our Labour Courts whereby in the implementation of labour contracts the injured party presents a claim for compensation for non-material damages (pain and suffering) alongside a claim for damages for breach of rights under the employment contract.

The purpose of this article is therefore to analyze whether Labour Courts have jurisdiction to hear claims for compensation for non-material damages in the context of contested employment contract terminations, bearing in mind that the responsibility for moral damages is merely civil in character under the terms of articles 496 and 483 of the Civil Code (CC).

Firstly, it should be noted that Labour Courts fall within the special jurisdiction in accordance with paragraph 2 of Article 223 of the Constitution of the Republic of Mozambique (CRM), the head note of Law No. 18/92 of 14th October (law establishing the Labour Courts), Article 66 of the Civil Procedure Code (CPC) and paragraph 2 of Article 29 of Law No. 24/2007 of 20th August (LOJ). As a result their jurisdiction is limited to the areas specifically provided for in law.

However, despite having been created by the aforementioned Law No. 18/92 of 14th October, Labour Courts were in fact never instituted. Instead their role is incorporated within existing specialized Sections in the Provincial Judicial Courts, as is clear from Article 27 of the same law. For example, within the Judicial Court of the City of Maputo, we have the 9th, 11th, 12th and 13th sections; in the Judicial Court of Maputo Province, the 3rd and 4th Sections and in the Judicial Court of Nampula Province, the 4th Section.

Despite the wide range of matters within their jurisdiction as provided for in Chapter II of the Law establishing the Labour Courts, it does not appear that the Labour Courts have jurisdiction to hear and decide on issues arising from non-material injury (which are civil in nature). Furthermore, the law in question maintains the position of Common Courts, whereby these can hear any matter within their competence. For example, clause g) of paragraph 1 of Article 9 of the Law establishing the Labour Courts states that "the Labour Courts are, in particular, responsible for hearing matters between workers employed by the same employer; regarding rights and obligations resulting from acts undertaken between them during their working relationship or resulting from an unlawful act committed while undertaking, or due to, work, the jurisdiction of the Common Courts being maintained for matters of civil responsibility where this is related to criminal responsibility".

It should be noted that Articles 8, 9, 10, 11 and 12 of Law No. 18/92 of 14th October, and Article 14 of the Labour Procedures Code (TPC), provide no express indication that the Labour Courts are competent to hear matters related to moral damages.

On the other hand, the provisions of clause a) of paragraph 1 of Article 9 of the Law establishing the Labour Courts, confer on the Labour Courts competence to hear and decide on matters arising from employer-employee relations.

This provision may create confusion because it does not establish clear parameters for the employment relationships to which it refers, meaning that some understand it to include claims for moral damages arising from acts based on the employment contract or resulting from a contested contract termination.

It is our opinion that matters arising from the subordinate working relationships mentioned in clause a) of Article 9 of Law No. 18/92 of 14th October relate to wages, bonuses and other benefits that may be payable, but exclude moral damages. To claim those rights, the appropriate legal recourse is an action based on the employment contract, unlike contestation of contract termination, claims for indemnity for termination without just cause (resulting from a disciplinary proceeding) and rescission of the employment contract.

Bearing in mind that the Law establishing the Labour Courts provides that these courts have jurisdiction to hear and decide on matters arising from employer-employee relations, the following question arises: can the Labour Courts be considered competent to hear matters relating to moral damages when these have arisen within the scope of paid employment?

We are therefore faced with a situation where we have a special law establishing a broad provision which, although implicitly, leads us to understand that since no exception is provided, the Labour Court (Special Jurisdiction) can decide on matters which are the competence of the Common Jurisdiction, in this case civil matters. Following this reasoning, we could conclude that the Labour Courts can hear and decide on claims for moral damages if said damages have been sustained within the employment relationship. However this conclusion does not seem correct given that the rules governing jurisdiction of the courts are expressly established by law and do not allow extensive interpretation.

Unlike the treatment of violations of employment duties which also give rise to a criminal action, the Law establishing the Labour Courts does not clearly establish a boundary between the competence and jurisdiction of the Labour and the Common Courts in hearing moral damage compensation claims (which are of a civil nature).


In terms of jurisprudence, there has been uniformity at least at the level of the Employment Sections of the Judicial Court of the City of Maputo, with the court considering itself not competent to hear moral damages claims and referring such matters to the Civil Sections of the Common Courts.

Conclusion:

It is our understanding that, although compensation claims for moral damages are often joined to contestations of labour contract terminations and, in some cases, the Labour Courts hear such cases, the Labour Courts should not in fact extend their competence to matters which are civil in nature and therefore fall within the exclusive competence of the Common Courts.

It is important to note that we are not facing a conflict of rules. The special law (Law establishing the Labour Courts) does not establish that these courts have jurisdiction in civil matters. It merely uses a general rule in describing the competence of these courts which could be interpreted to extending the meaning and scope of said rule.

However being a special law, the Law establishing the Labour Courts, should be more clear and precise in defining the competence of these courts.

Those applying the Law must take proper care to only present before the Labour Courts matters strictly within the court's competence and not matters falling within the ordinary jurisdiction, such as claims for moral damages resulting from an employment relationship. 



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As the title suggests this article focuses on execution of a foreign sentence and briefly discusses this from admissibility in the Mozambican legal system to enforceability through national courts.

All execution presupposes the duty to carry out an obligation and is based on an executable title (or enforcement order) which defines the objective and the limits of executive action. The enforcement order determines the ability to execute a right, conferring the requisite certainty on the executive action. The executable title is therefore a necessary and sufficient precondition for enforcement - *nulla executio sine titulo* [there shall be no execution without a title].

The type of action to be executed is always based on the executive title which indicates an obligation to pay a certain amount, hand over a certain item or provide certain information.

In the Mozambican legal system authorised types of enforcement order are listed in Article 46 of the Civil Procedure Code. Based on subparagraph a) of Article 46 and paragraph 1 of article 47 of the Code, final judgments can be executed.

Sentences include those orders, decisions or acts made with the requisite judicial authority which require the fulfilment of an obligation, as well as decisions of domestic and foreign arbitral tribunals.

Examples of enforceable orders include imposition of fines on parties or witnesses, compensation, or fees for experts, trustees or court-appointed liquidators.

However, in order for foreign sentences to take effect in tin Mozambique they are compulsorily subject to review and confirmation. This requirement is found in paragraph 1 of Article 49 of the Civil Procedure Code, taken in conjunction with Decree-Law No. 1/2005 of 27th December 2005, based on which *res judicata* decisions handed down by foreign courts or by foreign arbitrators can only be executed after review and confirmation by the competent court in Mozambique, unless an international treaty or convention provides otherwise. Paragraph 1 of Article 1094 of the Civil Procedure Code further establishes that, without prejudice to that established in treaties and special laws, no decision on private rights delivered by a foreign court is effective in Mozambique whatever the nationality of the parties, without said decision having been reviewed and confirmed.

The power to review and confirm foreign judgments is vested in the Supreme Court, based on Article 1095 of the Civil Procedure Code and paragraph f) of Article 50 of Law No. 24/2007 of 20th August.

However, for a foreign judgment to be reviewed by the Supreme


Court the requirements found in Article 1096 of the Civil Procedure Code must be met, namely: (a) there must be no doubt about the authenticity of the document recording the judgment or about the intelligence of the decision; (b) the judgment must have become final according to the law of the country in which it was made; (c) the judgment must come from a competent court according to the rules of conflict in the Mozambican jurisdiction; (d) the decision cannot use *lis pendens* or *res judicata* exceptions based on a matter before the Mozambican court unless the foreign court prevented the judgment; (e) the defendant must have been duly summoned, except in matters where Mozambican law dispenses with initial summons; and if the judgment was based on lack of objection by the defendant, that lack of objection must have been presented in person; (f) the judgment does not contain decisions contrary to the principles of the Mozambican public order; and (g) if issued against a Mozambican, the judgment does not offend the provisions of the Mozambican private law.

Non-compliance with the foregoing requirements results in Mozambican courts refusing to confirm a foreign judgment.

If a confirmatory decision is obtained, the judgment given by the foreign court then has equal value to any judgment handed down by Mozambican courts. It therefore becomes effective under the Mozambican legal system and may, ipso jure, serve as a basis for execution.

However execution involves breach of obligation, which means that it is not enough for the claimant to have an enforcement order or executive title - in this case, in the form of a foreign sentence. Based on Article 802 of the Civil Procedure Code the obligation contained in the sentence must also be certain, liquid and due. If it is not, then the execution cannot proceed. Certainty is a qualitative element and refers to whether or not the obligation exists, liquidity refers to the *quantum debeatur* (value) of the object of the obligation and being due refers to the maturity of the obligation.

Based on the foregoing, for a foreign sentence to serve as a basis for execution it must be reviewed and confirmed by the Supreme Court and contain the elements necessary for enforcement, i.e., a certain obligation, which is liquid and due.

Execution of a foreign judgment follows the identical procedure used for execution of national enforcement orders which depends on the type of obligation. The executive action is not intended to clarify the facts giving rise to the dispute. It merely ensures coercive enforcement of the obligation within just limits laid down in the executive title, which may include the payment of a certain amount, delivery of a specific item or provision of certain information. 



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REMOTE SURVEILLANCE VS. WORKERS' RIGHTS

The advent of information and communication technology (ICT) has been the subject of debate in various fields especially in the social sciences, due to its impact on people's day to day lives.

The legal sector is also taking note of developments and seeking to evolve and regulate the use of ICTs to ensure these are used properly particularly in respect to handling data gathered and generated by technology.

This brief article reflects on the influence of ICTs in the area of remote surveillance, and the impact of this on the privacy of individuals, especially within employment relationships.

Defining the issue

As a point of departure the employment relationship presupposes the existence of entities with legal personality, whose protection is ensured by the legal system. Workers have rights inherent in their legal person, the exercise of which, while sometimes limited by subordination to the employer's powers, continue to require legal protection during their employment. It is no coincidence that the rights to privacy, image and private life are enshrined in the Constitution (Article 41 of the Constitution of the Republic of Mozambique).

The use of distance surveillance such as video cameras, audio-visual equipment, microphones, listening mechanisms, phone records and GPS, among others, in the workplace or during work, raises questions about legality and legitimacy in respect of the employment relationship particularly where the misuse and / or abuse of such technology can limit the free exercise of creativity and manifestation of workers' personalities.

There can be no doubt about the advantages and practicality of remote surveillance when related to security of people and assets. However, the problem arises because these mechanisms can be considered a real restriction of the fundamental rights of the worker.

How can employers use remote surveillance without compromising workers' rights?

In general, since video surveillance is a technology

that allows the identification of offenders, it is widely accepted and serves as evidence to support convictions.

From an employment point of view the issue is more complex. On the one hand, controlling workers' performance is relevant for employers within the exercise of their management powers. On the other hand, workers can legitimately claim that the use of remote surveillance affects their image and could apply for limitation on the use of video surveillance to safeguard their freedom of expression and privacy, which are fundamental rights with constitutional protection.

These conflicting rights and powers lead us to reflect on the need to impose limits on the use of remote surveillance.

The context of the Labour Law

The Labour Law (Law 23/2007, of 01 August, hereinafter LT) states in paragraph 1 of Article 8 that remote surveillance is prohibited if its purpose is to control workers' performance. However, it can be used for the protection and safety of persons and property as well as when its use is integrated into the production process, in which case the employer must inform employees about the existence and purpose of the surveillance equipment.

It is generally acceptable from an employment point of view to install sound recording equipment (microphones) and surveillance cameras in customer service establishments (banks, airports, petrol stations, etc.) or in establishments where the particular nature of the activity so warrants (communication records in air traffic control and customer service lines)..

However, sound recording cannot be used as a way to monitor the performance of employees and the resulting data cannot serve as evidence in disciplinary proceedings, since the reproduction and dissemination of the recordings violate the worker's right to privacy and image.

Such monitoring can be used only where its purpose is to protect the safety of people and property, especially in public places or areas open

to access by outsiders and where there is a substantiated risk of offenses / crimes against people and property. Such surveillance should be carried out in general terms, with the aim of detecting facts, occurrences or events not connected to the company's normal activities. Installation of equipment designed to directly monitor work stations or to focus specifically on individual workers is prohibited.

The use of remote surveillance should therefore comply with objective criteria in order to avoid abusive and arbitrary use that may lead to limiting the rights of workers.


The LT subtly defines the criteria to be used by employers when deciding on the use of remote surveillance, allowing discretion in applying the technology as long as the employer can justify its use within the purposes provided (safety and security of persons and property) and through necessity (integration into the production process)..

It is therefore necessary that the labour legislator establishes clear procedures and limits to discipline the use of remote surveillance in order to defend and safeguard workers' privacy and image.

In terms of comparative law, the Portuguese Labour Code makes the use of remote surveillance dependent on authorization from the National Data Protection Commission, an application to which must be accompanied by an opinion from the workers' committee.

Conclusion

The use of remote surveillance equipment in the workplace or during work must be understood as an exceptional measure the application of which should be permitted only when strictly necessary, as long as it is demonstrably required to achieve the proposed goals, and where said goals are so important, relevant and essential for the protection of workers and property that they justify the "threat" to workers' rights to privacy and image.

Employers should therefore assess the situation and always strive for a proper control system that ensures minimal intrusion into the privacy of workers. 



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