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## EDITOR'S LETTER

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Dear Reader:

In this number you can read: "Versatility of the Legal Regime for Insolvency and Recovery of Business Entrepreneurs" and "Urgent proceedings in administrative litigation: A view over the ancillary procedural means".

We wish you a Happy reading!

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# VERSATILITY OF THE LEGAL REGIME FOR INSOLVENCY AND RECOVERY OF BUSINESS ENTREPRENEURS

The Legal Regime for Insolvency and Recovery of Business Entrepreneurs that we propose to explore was approved by Decree-Law no. 1/2013 of 4 July and will be, for the purposes of this article, referred to as "LRIRBE".

The LRIRBE is nowadays, above all due to the current economic situation of the country, an indispensable instrument for the pursuit of the following two goals:

- a) to maintain employment and protect creditors' interests, ensuring that economic activity, with its social dimension, is preserved and encouraged; and
- b) to promote the efficient liquidation of an insolvent party's assets and the distribution of the proceeds thereof to creditors where it is impossible for the business to recover.

Now, almost 3 (three) years after the LRIRBE was enacted, a growing number of judicial recovery proceedings and insolvency proceedings have been conducted. We note that, per Article 4(1) of the LRIRBE, insolvency proceedings initiated prior to the entry into force of that law are regulated by Articles 1122 to 1324 of the Code of Civil Procedure (CPC), unless the application of the LRIRBE to such proceedings shows greater promise of achieving one of the two goals noted above (Article 5(5) of the LRIRBE).

Although the LRIRBE is not new and has been much commented, it bears note that the LRIRBE can lead to liability of the members of the corporate bodies of firms to which it applies.

It should be noted at the outset that such liability is established at the end of the insolvency proceedings, but not in the (judicial) recovery proceeding, because each of these procedural mechanisms have their own purposes. The insolvency proceedings are aimed at winding up the company's assets, paying its creditors and extinguishing the legal personality of the commercial entrepreneur; while the judicial recovery proceedings, although intended to obtain payment from creditors, does not wind up the asset nor extinguish the legal personality of the business entrepreneur; and hence after completion of a Judicial Recovery proceedings, the commercial entrepreneur still has its legal personality. It is also important to consider that proceedings can commence as a Judicial Recovery and end, as a result of conversion, in an Insolvency proceeding.

Who has standing, under the LRIRBE, to sue the members of the corporate bodies? As noted above, liability can only be established in insolvency (as distinct from recovery) proceedings. Hence the answer: standing to hold the members of the corporate bodies liable is enjoyed by the same persons to whom the law grants standing to institute insolvency proceedings. Per Article 93 of the LRIRBE, that includes the debtor himself, the surviving spouse, any heir of the debtor or designated head of household, the partner or shareholder of the debtor or any creditor.


The liability in question can be criminal and/or civil. However, it excludes labour disciplinary liability, which is carried out internally in the company by direct exercise of the employer or by the employee's immediate boss (see Article 62(2) of Law no. 23/2007, of 1 August).

In cases where criminal liability is imposed on the members of the corporate bodies, those concerned will be held liable in proceedings conducted in a criminal division of the same court that handles the insolvency proceedings (i.e. a civil division). This is a

conclusion that has generated some discussion among the legal profession. Indeed, there is a contrary view, based on article 174 of LRIRBE, that the judge that presides over the insolvency proceedings (i.e. in a civil division) has jurisdiction to attribute criminal liability to those concerned. This understanding of the LRIRBE is based on the idea that, as in other legal systems, judicial economy requires that a single judge (civil) be empowered to decide all matters arising or related to the insolvency proceedings. The debate around this question will be developed in a separate article.

In this perspective and in summary, the refusal or willful impossibility of a debtor to satisfy the claims of its creditors confers on any creditor the right to initiate insolvency proceedings. And, as a consequence of these proceedings, such persons may subsequently seek the civil and criminal liability of the members of the corporate bodies for having fraudulently placed the company in the situation of being unable to honor its commitments.

If there is evidence of a criminal offense of fraud against creditors or of other offenses established in law (Article 167 et seq. of LRIRBE and other criminal legislation), a further criminal proceeding shall follow (which shall run concurrently). The judge may even order the arrest of the agents responsible. Interestingly, and to avoid misuse of the procedure, Article 97 of the LRIRBE provides that if the insolvency application is malicious, the claimant may be ordered to compensate the debtor. And if the application has multiple plaintiffs, all will have joint and several liability for the compensation due.

With regard to civil liability, there is not much room for debate on the competent jurisdiction. We note only the particularity that the suit must be brought before the insolvency court within two (2) years of the final, non-appealable judgment on the insolvency itself, after which time it is barred (Article 76 (2) of the LRIRBE). By contrast, criminal proceedings must be instituted for as long as the relevant statute of limitations allows. 



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# URGENT PROCEEDINGS IN ADMINISTRATIVE LITIGATION: A VIEW OVER THE ANCILLARY PROCEDURAL MEANS

Article 70 of the Constitution of the Republic of Mozambique enshrines the right to appeal to the courts against acts that violate rights and interests recognized by the Constitution and by law.

In the administrative jurisdiction, the right to apply to the courts is embodied in Article 4 of Law No. 7/2014, of 28 February- Law on Administrative Litigation Proceedings (hereinafter referred to as LALP), which sets out the principle of effective judicial protection.

The principle of effective judicial protection includes the right to obtain, within a reasonable period, a judicial decision that appraises, with force of *res judicata*, each claim regularly deduced in court, as well as the possibility of having it executed and obtaining the precautionary measures, anticipatory or protective, aimed at ensuring the effectiveness of the decision. As a corollary of the above principle, LALP has instituted special dispute resolution mechanisms which, by their nature, utility and interest, cannot be subject to normal and possibly time-consuming processing.

These are the urgent proceedings provided for in Article 11 (1) of the LALP, namely, administrative acts relating to the formation of public works contracts, continuous supply and service provision for immediate public use, subpoena for information, process consultation or issuance of certificate and ancillary procedural means.

The aim of this article is to discuss the ancillary procedural means to the LALP, as urgent proceedings, identifying the characteristics, requirements, processing and other aspects inherent to it.

The ancillary procedural means are regulated in Chapter VI of the LALP, namely: suspension of effectiveness of administrative acts, summons to the administrative body, individual or concessionaire to adopt or refrain from certain conduct, early production of evidence and unspecified interim measures.

The ancillary procedural means have three essential characteristics, namely their instrumentality, temporariness and urgency.

As regards the instrumental nature, the ancillary procedural means lack functional autonomy. They are dependent on main proceedings, pending or to be initiated, losing their effectiveness with the delivery of the judgment in the main proceedings (and in other cases provided for by the law).

The temporariness of ancillary procedural means lies in the fact that, once decided, they will remain in force until the final decision of the main proceedings has been reached and may, however, be replaced, maintained or repealed in the event of a change in the factual circumstances which gave rise to them.

Its procedure is in accordance with the terms of the LALP (in cases not covered by the Code of Civil Procedure, pursuant to Article 2 of the LALP) and is of an urgent nature, which may have proceedings pending during judicial holidays, where secretarial acts related to it are performed as soon as possible and with precedence over any others.

There are four accessory procedural means provided in LALP, as described below:

## 1. Suspension of the effectiveness of the administrative act (Article 132 et seq. Of the

### LALP)

It is an ancillary procedural means, generally linked to the judicial appeal for annulment and has the following requirements:

- The performance of the act is liable to cause irreparable damage or difficult reparation for the applicant or for the interests which the action seeks to safeguard;
- The suspension does not represent a serious breach of the public interest specifically pursued by the act; and
- There is no strong evidence that the action is unlawful.

Its procedure follows the terms set forth in articles 137 et seq. of the LALP. It should be noted that, when requested before the lodging of the relevant judicial appeal, the suspension of effectiveness expires with the expiry of the period for bringing an action for annulment.

## 2. Summons to an administrative body, individual or concessionaire to adopt or refrain from certain conduct (articles 144 et seq. of the LALP)

It is an ancillary procedural means which can be used when administrative bodies, individuals or concessionaires violate rules of administrative law or duties arising from an administrative act or contract or when the activity of the former and the latter violates a fundamental right or even when, in both cases, there is a fear of violation.

Public Prosecutors or any interested person to whom the violation of interests causes an offense worthy of judicial protection are entitled to use this procedural means.

Its procedure follows the terms laid down in Article 145 et seq. of the LALP, and particular emphasis is given to the possibility of convulsion, in other words, in view of the complexity of the matter at issue, the rapporteur may, at any stage in the proceedings, determine to follow the terms of the judicial appeal of administrative acts, maintaining the urgency of the proceedings.


## 3. Anticipated production of evidence (articles 150 et seq. of the LALP)

The anticipated production of evidence is intended for, prior to the initiation of the process (or in the process already instituted), testimony, arbitration or inspection, when there is a fair fear that the testimony of certain persons or verification of certain facts by means of expert evidence or inspection will be impossible or very difficult. Its processing follows the terms set forth in Article 145 et seq. of the LALP and the decision is rendered within three days.

## 4. Unspecified interim measures (Articles 154 et seq. of the LALP) Interim measures have as assumptions that:

- There is a well-founded fear that an administrative activity would cause damage to a legally protected right or interest; and
- There is no prior administrative decision or a specific procedural means capable of ensuring effective protection in light of the circumstances of the case.

As regards the procedure, in the Plenary and in the First Division of the Administrative Court, only documentary and testimonial evidence is accepted, the testimonies are given before the rapporteur and in writing. The interim measures issued cannot be replaced by a security deposit.

In view of the foregoing, it is safe to conclude that effective protection of legally protected rights and interests, as well as the effectiveness of judgments issued by the administrative courts, may be prejudiced by the passing of time, as such the ancillary procedural means are important, which, as they are not specifically aimed at definitively resolving the situation involving the dispute, ensure that the passing of time has no negative repercussions on the legal sphere of the persons involved. 



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