

CORONAVIRUS: IMPACT ON THE ACTIVITY OF COMPANIES IN MOZAMBIQUE

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As more countries close their borders and declare lockdowns to prevent the spread of the virus, economic activity is suffering. The worst affected sectors include hotels and restaurants, handicrafts, and travel and tourism agencies, whose activity depends on suppliers or customers. In response, companies in these sectors have been taking action to mitigate the risks of the spread of the new Coronavirus, while still doing what they need to do as businesses.

As most of these companies deal with customers, they are bound by the duty to inform and protect those customers, and by a general duty of care. Company directors are bound by duties of care and loyalty that require them to control the exposure of companies to the financial risk resulting from the impact of the Coronavirus. These duties require them to adopt a set of proactive measures. Directors are also bound by

preventive information duties intended to protect the public and the people and companies they do business with.

Announcements have been made by the President of the Republic and the health authorities about the contingency measures to tackle the COVID-19 pandemic. However, in terms of legislation, no new changes or rules have been introduced with respect to the activities of companies. Therefore, we will limit ourselves here to addressing the existing legislation.

In this brief analysis, we will look at the following points: A. The decision-making process; B. Directors' responsibilities; C. Economic impact and risk of insolvency; D. Relationships with customers and suppliers.

A. THE DECISION-MAKING PROCESS

The Commercial Code provides that companies have to make their decisions by passing corporate resolutions. Shareholders pass resolutions at the general meeting in accordance with rules that apply to each type of company. This has been the usual model for companies in Mozambique, because it allows the free discussion of matters provided for on the agenda and it is very flexible. However, general meetings bring together large groups of shareholders, therefore, they are a source of danger in the current circumstances.

The Mozambican Commercial Code contains a solution that allows companies to pass resolutions without the physical presence of the shareholders at a meeting. For this to happen, they must all declare their voting intention in writing in a document that includes the proposal to be decided. The document must then be signed and dated, and sent to the company. Despite not being flexible, this is a solution that is worth adopting as we are witnessing the spread of the Coronavirus across the world and in Mozambique in particular.

However, in some situations, it may not be practical to use this solution from the Commercial Code. If so, it falls to companies, represented by their directors, to find solutions, (such as videoconferencing), to hold general meetings in a healthy environment that complies with the greatest extent possible with the health and safety measures in place to protect the shareholders and other participants.

B. DIRECTORS' RESPONSIBILITIES

■ **Protection of shareholders**

Company directors must act with the diligence of a careful and organised manager, in the interest of the company and taking into account the interests of the shareholders and workers.

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This means that company directors are under a duty to inform the shareholders about the risks associated with attending general meetings. They should also consider implementing safety guidelines and on-site contingency plans for holding the meetings. In doing so, they should ensure that shareholders take part in a way that is consistent with the recommendations issued by the public authorities.

If the spread of COVID-19 in Mozambique accelerates and becomes more active, it will be necessary to provide the means necessary to enable distance voting at face at general meetings, in particular, using written resolutions under article 128(4) and (5) of the Commercial Code and participation in the meeting using audio-visual means. Unfortunately, Mozambican legislation still does not provide for electronic voting at general meetings.

■ **Protection of workers**

As employers, companies are subject to a duty to protect their workers and all those they come into contact with (whether this contact is a one-off meeting or a long-standing relationship). Companies must identify foreseeable risks and adopt appropriate measures to eliminate them. When this is impracticable, they must act to mitigate the effects of those risks. In the event of serious and imminent danger that cannot be avoided, a decision may be taken to cease the company's operations or to immediately send people home from their place of work. They would then not be able to resume operations while this danger persists, except in exceptional cases and provided that adequate protection is ensured. Besides being a breach of the duties of the employer under the employment legislation, any failure to comply with them could lead to liability on the part of the company and its directors.

C. ECONOMIC IMPACT AND RISK OF INSOLVENCY

Unlike the situation in other countries, the COVID 19 pandemic has not yet been declared a public emergency or case of force majeure in Mozambique. Consequently, no state of emergency has been declared. For this reason, in general terms, breaches in contractual relations between the creditor and their debtors may not be justified as being a case of force majeure based on COVID 19.

However, it will be important to assess the situations on a case-by-case basis. This is because, as mentioned in the introduction, there are sectors of the economy that are affected to a much greater extent by the Coronavirus crisis. These include the air transport sector, where we have seen the widespread cancellation of trips around the globe by most airlines. In addition to these cancellations, airlines have been forced to take other measures as a result of the pandemic. We believe that, in these cases, the declaration of a force majeure event would justify a breach of contract.

In the event of insolvency, the declaration of insolvency or the acceptance of the application for judicial recovery will suspend the limitation period and all claims and enforcement actions against the debtor, including those of the private creditors of a jointly and severally liable shareholder. This means contracts that have been breached will be subject to the insolvency rules and the debts included in the insolvent estate. However, and above of all, the declaration of insolvency will depend initially on the discretion of the judge who has the power to accept or refuse the application for insolvency.

D. RELATIONSHIPS WITH CUSTOMERS AND SUPPLIERS

First of all, in their relationships with their customers and suppliers, companies are subject to a general duty of information which, in conjunction with the principle of good faith, should guide the relationships between each side. If companies breach this duty, the consequences can include being required to pay compensation. For this reason, it is necessary to assess the impact that the spread of the new Coronavirus could have on complying with the obligations they have already assumed.

We know that in most companies in the sectors affected by the Coronavirus, the consequences of a breach of contract have knock-on effects. For example, the cancellation of a flight has implications not only for the airline, but also for the travel agency that handled the booking. For this reason, depending on the specific contract in question, there may, on the one hand, be grounds to terminate the contract and, on the other hand, a default or definitive breach of the obligations may not be considered unlawful, taking into account the knock-on effect mentioned above.

Any such breach can be justified under general rules including those on a change in circumstances, or because it meets the provision of a force majeure, unforeseeable event or other similar clause.

In any case, through their directors, companies are bound by an ancillary duty to inform the other party to a contract of any current or potential impossibility for them to ensure they comply with the obligations undertaken. And, on the contractual level, it is not mandatory to accept this impossibility.

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