

This NL is based on the legislative framework in force on the date of its publication. TTA will update the information in this NL when necessary and if additional regulations are published on the measures to contain the spread of the new Coronavirus that is responsible for the COVID-19 pandemic.

MOZAMBIQUE

Global Vision, Local Experience.

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CORONAVIRUS: INSOLVENCY AND BUSINESS RECOVERY

Besides the human consequences of Covid-19, the virus also has economic consequences. The restrictions and containment measures implemented to prevent the spread of the Covid-19 pandemic are having a global impact.

This legal note follows the entry into force of Law 1/2020 of 31 March to ratify Presidential Decree 11/2020 of 30 March, which declared a state of emergency due to the public health crisis. The state of emergency applies to the whole country and has a duration of 30 days.

We will present some important issues regarding the impact of the declaration of a state of emergency in the particular case of insolvency proceedings and business recovery. These matters are governed by the Legal Framework of Insolvency and Business Recovery (RJIREC), approved by Decree-Law 1/2013 of 4 July.

Article 2(2) of Law 1/2020 of 31 March suspended all procedural and administrative time limits. This measure naturally also applies to the time limits in insolvency proceedings and business recovery processes pending before the Mozambican courts.

THE MAIN DOUBTS IN VIEW OF THE CONSEQUENCES OF THE CURRENT CORONAVIRUS ("COVID-19") PANDEMIC IN RELATION TO INSOLVENCY AND BUSINESS RECOVERY

The World Health Organization declared a public health emergency of international concern (PHEIC) due to Covid-19 on 30 January 2020 and it went on to declare a pandemic on 11 March 2020. Presidential Decree 11/2020 of 30 March declared a state of emergency due to the public health crisis and this applies to the whole country and has a duration of 30 days.

Besides the human consequences of Covid-19, the virus also has economic consequences. The restrictions and containment measures implemented to prevent the spread of the Covid-19 pandemic are having a global impact.

The fact that many business activities operate as a chain means there could be widespread breaches of contractual obligations.

Mozambican and multinational companies are already suffering serious consequences. Some sectors of the economy, such as tourism, food and beverages, and travel are being directly affected more than others. However, the whole of the economy is feeling the effects and this suggests a serious economic and financial crisis is looming.

The fact that many business activities operate as a chain means there could be widespread breaches of contractual obligations.

Faced with this scenario, we have set out below some notes and explanations to address the questions most frequently asked about the possible consequences of breaches of contractual or other legal obligations arising from the current situation. We also take a look at the impact of this situation on the difficult decisions that have to be made by the businesses affected. In this note, "businesses" refers to all types of businesses, from sole traders to large companies. In providing this information, we will refer to the legislation applicable to the insolvency and business recovery.

1. IS THE CURRENT MOZAMBICAN AND INTERNATIONAL SITUATION CAUSED BY THE COVID-19 PANDEMIC JUSTIFICATION FOR (LEGITIMATE) BREACH OF OUR OBLIGATIONS TO CREDITORS?

The classification of a pandemic as a "case of force majeure" may have implications when it comes to compliance with contractual obligations. In some cases, this may lead to the debtor being released from its responsibility and the creditor not being able to demand the performance of an unperformed obligation or the payment of compensation for any loss or damage suffered.

However, to have this effect, performance of the obligation must have become objectively impossible and not just "more onerous". If this situation is confirmed, it could lead to the application of the rules on a "change in circumstances" which, in exceptional cases, allows the party harmed by the change to ask for either (i) the termination of the contract, or (ii) its modification based on equity.

However, this situation must be examined on a case-by-case basis.

The current situation does not stop businesses from taking preventive and proactive action in compliance with their duties under the law and the articles of association of the company. This includes negotiating with their creditors to adapt or modify the previously assumed obligations.

2. IS IT POSSIBLE TO APPLY FOR JUDICIAL RECOVERY OF A BUSINESS WHILE THE STATE OF EMERGENCY REMAINS IN FORCE?

The RJIREC favours business recovery over a declaration of insolvency and it gives the debtor itself procedural standing to apply for that recovery. The legal framework adopted in response to the COVID-19 outbreak does not prevent businesses from beginning judicial business recovery proceedings while the state of emergency is in place. However, considering the suspension of time limits and judicial proceedings determined by Law 1/2020 of 31 March, we believe that judicial recovery proceedings will only continue after the end of the state of emergency. This is because the rules on court holidays apply to procedural acts and judicial proceedings during the state of emergency. The only exception is for urgent acts, including interim injunctions, which should continue to be dealt with in cases that involve fundamental rights such as those relating to defendants in custody and minors at risk.

Furthermore, the Law in question suspends all limitation and expiry periods in relation to all processes and procedures (article 2(3)). Therefore, it should be considered that all time limits are suspended and that no acts will be done and no steps will be taken, unless the provision in article 2(1) of the Law ("urgent acts and steps in which fundamental rights are at issue (...)") is held to apply, and we think that would be difficult in this context.

3. WE HAVE A AN OUT-OF-COURT RECOVERY PLAN THAT WAS APPROVED LESS THAN TWO YEARS AGO AND WE ARE AT RISK OF NOT COMPLYING WITH IT. CAN WE APPLY FOR A NEW OUT-OF-COURT RECOVERY PLAN?

The current legislation does not allow a business to have recourse to a new out-of-court recovery plan if the decision to approve the recovery plan in force was made less than two years ago.

However, it is accepted that Covid-19 is an event of force majeure because it is unpredictable and totally unrelated to the regular operations and decisions made by businesses. Therefore, the current situation could justify recourse to a new out-of-court recovery plan even if the above period of two years has not yet passed.

Moreover, the suspension of time limits and proceedings resulting from Law 1/2020 of 31 March does not apply to the periods established in recovery plans that have already been approved and ratified by the courts.

However, we advise a case-by-case analysis of the situation.

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4. IN THE CURRENT SCENARIO, IT IS POSSIBLE TO APPLY FOR A DECLARATION OF INSOLVENCY IN THE EVENT OF BREACH OF AN OBLIGATION ARISING FROM A JUDICIAL RECOVERY PLAN?

Given the suspension of time limits and procedural steps, any insolvency proceedings that have been started will be suspended until the general suspension is ended. If the business is only in a difficult economic situation or merely in a situation of imminent insolvency, but still capable of recovery, it can use the out-of-court recovery plan to try to recover.

If companies anticipate that it will be impossible to comply with their obligations, or to comply with them on time, they should seek to justify their non-compliance in order to avoid claims of insolvency or other undesirable judicial actions.

5. HAVE THERE BEEN ANY CHANGES TO THE CRITERIA TO CONFIRM AN INSOLVENCY SITUATION?

To date, there has been no legislative change regarding the criteria used to assess whether a business is in an insolvency situation and this is not expected to occur.

Thus, in general terms, a business continues to be in an insolvency situation when it is unable to meet its obligations as they fall due. This is particularly so when there is a general failure by the company to pay its debts to the Tax Authority or the Social Security, to its employees, or to the landlord or mortgage lender of the premises where the company operates. However, these obligations themselves may be changed as a result of the exceptional situation we are experiencing.

The current economic situation caused by the Covid-19 pandemic is affecting numerous Mozambican and international companies. As a result, we are expecting to see increased demands on the courts to analyse the criteria set out in the RJIREC. It is expected, for example, that there will be greater tolerance for possible breaches that may arise in this period of pandemic.

Decree 12/2020 of 2 April approved the Administrative Implementation Measures to Prevent and Contain the Spread of the COVID-19 Pandemic COVID-19 to remain in force during the state of emergency. This Decree establishes that default notices, defaults and enforcement actions arising out of a delay in fulfilling obligations that cannot be performed due to the application of the measures provided for in the Decree are null and void. This means that situations of mass breach of obligations on the part of businesses that have a direct relationship with the pandemic are relatively less likely to trigger processes of judicial recovery and insolvency.

In any case, if companies anticipate that it will be impossible to comply with their obligations, or to comply with them on time, they should seek to justify their non-compliance in order to avoid claims of insolvency or other undesirable judicial actions.