
MEMORANDUM

TO: ACIS - ASSOCIAÇÃO DE COMERCIO E INDUSTRIA
FROM: JOSÉ M. CALDEIRA, ÁSSMA N. JEQUE AND KAINA MUSSAGY
RE: LEGAL MECHANISMS TO BE TAKEN INTO CONSIDERATION IN RESPECT OF THE ACCOUNTABILITY OF THE PUBLIC INSPECTION SERVICE AND RESPECTIVE PUBLIC INSPECTORS FOR DAMAGES CAUSED DURING THEIR WORK.
DATE: 26 MARCH 2012
CC.: MS. CARRIE DAVIES

This memorandum seeks to respond to your request, received by e-mail on January 30th last, for counsel about the legal mechanisms available to individuals to hold accountable the public inspection services and respective public inspectors for damage and prejudice caused in the performance of their duties.

The following legislation was used to respond to your question:

- Constitution of the Republic of Mozambique (hereafter the “CRM”);
 - Law 7/2012 of 8 February, which approves the Basic Law on the Organisation and Operation of the Public Administration (hereafter “Law 7/2012”);
 - Law 14/2011 of 10 August, which regulates the establishment of the will of public administration, establishes standards for the defence of individual rights and interests (hereafter “Law 14/2011”);
 - Law 25/2009 of 29 September, which approves the Organic Law for Administrative Jurisdiction;
 - Law 14/2009 of 17 March, which approves the General Statute of Public Servants and Agents (hereafter “EGFAE”);
 - Law 2/96 of 4 January, which regulates and disciplines the right to present requests, complaints and appeals to the competent authority;
 - Decree-Law 47 344 of 25 November 1966, which approves the Civil Code, applied to Mozambique by Ministerial Order 22 869, of 4 September 1967;
 - Decree 62/2009 of 8 September, which approves the EGFAE Regulations;
 - Decree 46/2006 of 19 August, which creates the National Inspectorate for Economic Activities – INAE;
 - Decree 45/2009 of 14 August, which approves the Regulations for the General Inspectorate of Labour;
 - Decree 18/2007 of 7 August, which approves the Tourism Accommodation Regulations;
 - Decree 19/2005 of 22 June, which approves the Tax Oversight Procedures
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Regulations;

- Decree 12/2002 of 6 June, which approves the Regulation of the Forestry and Wildlife Law;
- Decree 30/2001 of 15 October, which approves the Legal Norms governing the Functioning of the Public Administration;
- Decree of 16 September 1886, which approves the Penal Code;
- Resolution 9/2011 of 2 June, which approves the Internal Regulations of the INAE;
- Resolution 51/2004 of 24 November, which approves the Regulations for the Inspectorate of the Ministry of Industry and Trade;
- Ministerial Diploma 102/2002 of 3 July, which approves the Internal Regulations of the General Tourism Inspectorate.

The remaining part of this memorandum will be structured as follows:

Section 1: Background to the issue;

Section 2: The public inspector and the performance principles for Public Administration;

Section 3: Legal defence mechanisms for companies:

3.1. Rights and obligations laid down in the Constitution of the Republic;

3.2. Guarantees for the defence of individuals;

Section 4: Liability of public inspectors and compensation for damages caused in the performance of public service:

4.1. Disciplinary liability;

4.2. Civil liability;

4.3. Criminal liability;

Section 5: Sectoral requirements; and,

Section 7: Conclusion and recommendations.

SECTION 1 BACKGROUND TO THE ISSUE

Members of the *Associação de Comércio e Indústria* – “ACIS” have reported to the association, problems which they have encountered with public inspections, basically due to the way in which these are sometimes carried out, namely, the apparent arbitrariness in the application of fines, the repetition of applied fines or their application to cases or facts that had not been inspected, among other issues. These situations have in some cases resulted in high costs for the companies, which include, but are not limited to, lawyers’ fees, reduction of liquidity due to the need to deposit the value of fines before appeals can proceed, and the impossibility of obtaining certificates of compliance (*certidão de quitação*) from the relevant authorities.

Taking this into account, ACIS seeks to inform itself about the existing legal mechanisms and instruments that can be used by companies to hold the public inspectors accountable for damages and prejudice caused to the companies, where the unlawfulness of the actions of these inspectors in certain concrete cases has been confirmed.

Thus, the following sections of this memorandum will seek to identify the legal mechanisms for the refutation of administrative acts, as well as the legal liability of public inspectors.

SECTION 2: THE PUBLIC INSPECTOR AND THE PERFORMANCE PRINCIPLES FOR PUBLIC ADMINISTRATION

In general, a public inspector is a State agent,¹ an official who by legal ties performs activities in the Public Administration.² In the performance of his or her functions, the public inspector performs administrative acts³, i.e., performs acts ensuing from his functions and powers, with respect to the body, institution or service to which he is attached.⁴

The powers of State bodies and institutions, as well as those of their agents, are defined by law. In their work public inspectors are obliged to follow the law and the guiding performance principles for Public Administration, especially, respect for legally protected individual rights and interests⁵, within the limits and powers granted by law.⁶

The objective of the regulation of performance principles for Public Administration and its agents is to oblige the Public Administration itself, and its agents to respect legitimate individual rights and interests, as well as other guarantees for individuals.

Thus, as the public inspectors are State agents, their powers are defined by law and they are obliged to perform within the limits and powers granted by law. The powers of public inspectors are laid down in accordance with the sector of activity or the area of inspection to which they are attached. Nevertheless, irrespective of their area of performance, the public inspectors shall not make use of their authority and powers to pursue goals that are different from those stipulated by law.⁷

The Public Administration shall serve the public interest. Thus, the law grants it powers of authority so that it can perform its functions with the necessary speed. Nevertheless, in order that these powers are not used in a manner that is abusive or prejudicial to individuals, the law also establishes principles and other limits that comprise the basis of the performance and formation of the will of Public Administration. Note that the proven violation of these principles results in legal consequences, which may give rise to the act in question being considered null, in addition to the possibility of civil, criminal and disciplinary liability, according to the case at issue, under the law. Thus, it is important to remember that the Public Administration and its respective agents, officials

¹ Decree 30/2001, Article 1(b).

² Public Administration meaning all State entities and bodies

³ An administrative act meaning a decision or conduct arising from a Public Administration body

⁴ Note that an inspector can be an agent or official attached to a specific inspection or oversight directorate or an official who has been specifically indicated for a certain inspection activity without necessarily having such category or irrespective of his or her professional career.

⁵ "Individuals" means natural or legal persons

⁶ Law 14/2011, Article 4(1).

⁷ EGAFE, Article 4 (1) and (2) and Article 5(1).

and office holders are bound by the following principles, as stipulated by Law 14/2011 and by Decree 30/2001:⁸

- a) *Principle of legality*: which determines performance in accordance with the law and within the limits and purposes of the powers granted;
- b) *Principle of pursuit of public interest*: which determines that the public interest shall be the principal aim of the Public Administration, without however setting aside respect for the protected rights and interests of individuals;
- c) *Principle of equality and proportionality*: which prohibits any privilege or prejudice by virtue of subjectivity, or the inspectors' individual or social convictions, and also determines the need to opt, at any time, for legal measures that carry less serious consequences for individuals;
- d) *Principle of justice and impartiality*: which prohibits discrimination and participation in acts, contracts or decisions in which one has personal interest or in which personal interests are in question, as indicated by law;⁹
- e) *Principle of good faith*: which determines that both the Public Administration and individuals shall base their performance on mutual trust and on the fundamental values of justice;
- f) *Principle of collaboration of the Public Administration with individuals*: which determines that the Public Administration shall be open to providing information and explanations to individuals, and to encouraging the participation of individuals;
- g) *Principle of participation by individuals*: which determines that the Public Administration shall promote the participation as well as the defence of individuals in the decisions that affect them;
- h) *Principle of decision*: which determines the obligation to decide about the questions presented by individuals, whether in the defence of their own or of general interests;
- i) *Principle of effectiveness and efficiency and removal of bureaucracy*: which determines the need for an administrative structure that guarantees greater proximity to individuals and more rapid and effective responses;
- j) *Principle of accountability of the Public Administration*: which determines that the Public Administration is accountable for the illegal acts of its bodies, officials and agents in the performance of their functions, which result in damage to third parties;

⁸ Law 14/2011, Articles 4 to 17 and Decree 30/2001, Article 4 to 14.

⁹ The law indicates as cases of conflicts of interest those in which a Public Administration office holder, official or agent shall not participate in administrative procedures, in an act or an administrative contract, as well as the mechanisms for the declaration of impediment and sanctions for the absence of such declaration, which could include annulment of the procedure, act or contract in question, if no other sanction has been specifically determined.

- k) *Principle of justifying administrative acts*: which determines the requirement of justifying acts that imply the rejection of a request or the revocation, alteration or suspension of previous acts;
- l) *Principle of transparency*: which determines the need to publish administrative acts, regulations and other standards to inform the individuals in time about the control and oversight to which the Public Administration is subjected and also the prohibition of accepting benefits in order to favour some parties to the detriment of others;
- m) *Principle of cost*: which determines that, as a general rule, administrative procedures are free, unless the contrary is legally and explicitly stated;
- n) *Principle of access to justice and to the law*: which determines the right of access to the courts for the defence of the legitimate rights and interests of individuals;

Law 7/2012, defines the principles of the organization of the Public Administration, and includes the following which should also be considered:

- a) Principle of decentralization;
- b) Principle of reduction of bureaucracy and simplification of procedures;
- c) Principle of unified action and directive powers of the Government;
- d) Principle of coordination and articulation of Public Administration bodies;
- e) Principle of control and supervision through administrative bodies;
- f) Principle of oversight of Public Administration by the citizen;
- g) Principle of modernization, efficiency and effectiveness;
- h) Principle of approximation of the Public Administration to the citizen;
- i) Principle of citizen participation in Public Administration management;
- j) Continuity of public service;
- k) Principle of hierarchical structures; and,
- l) Principle of personal liability.

Due to its relevance for the question under consideration, we reproduce below the content of Article 17 of Law 7/2012 with respect to the principle of personal liability:

“1. The office holders of Public Administration bodies, their officials and other agents bear civil, criminal, disciplinary and financial liability for the legal acts and omissions they perform in the exercise of their duties, without prejudice to the liability of the State, in accordance with the Constitution and other applicable legislation.

2. To establish personal liability, the Public Administration can use programme contracts and results-oriented management mechanisms.

3. Without prejudice to the internal administrative control standards, the financial liability is established by the Administrative Courts.”

In Section 4 of this memorandum we will continue the discussion of personal liability and compensation.

SECTION 3: LEGAL DEFENCE MECHANISMS FOR COMPANIES

3.1. Rights and obligations laid down in the Constitution of the Republic

The CRM establishes certain individual rights that are relevant to the question under analysis, namely:

- a) The right to State compensation and liability, recognised for all individuals, as a way to compensate for damages caused by the violation of fundamental rights, while the State shall be responsible for any unlawful act by its agents, in the exercise of their functions;¹⁰
- b) The right to contest those acts that violate the rights of individuals, as well as the right of appeal to the courts;¹¹
- c) The right to present petitions, complaints or claims to the competent authority in the defence of violated individual rights or of the public interest;¹²
- d) The right of resistance, i.e., the right not to comply with orders that are unlawful or that infringe individual rights, freedoms and guarantees;¹³
- e) The right to popular action, which can be exercised personally or through associations for the defence of the interests in question, among others, in order to claim compensation to which they may be entitled.¹⁴

3.2. Guarantees for the defence of individuals

The law provides for different legal instruments that individuals can use to assert or contest the violation of a right or legitimate interest, namely:¹⁵

- a) Complaint – challenge of an administrative act or decision made in the presence of the respective author, in this case the issuing inspector. The inspector is requested to revoke or replace the act or decision made. A complaint is always possible, provided that revocation is within the power of the inspector who performed the act. Where this possibility does not exist, the refutation of the act or decision of the public inspector is made in the presence of his immediate superior. The period for lodging a complaint is 15 days from the date of notification of the act or knowledge thereof by the interested party (however, if the aim is to suspend execution of the act while the complaint is analysed, this

¹⁰ CRM, Article 58.

¹¹ *Ibid.*: Articles 69 and 70.

¹² *Ibid.*: Article 79. Law 2/96 of 4 January describes the legal framework for the exercise of the right of appeal in the presence of the competent authorities, including to the Assembly of the Republic.

¹³ CRM, Article 80. This right should be exercised with due care because, if it is verified that there were no grounds for resistance, those involved may be held individually criminally responsible.

¹⁴ CRM, Article 81. In order that this right can really be used by individuals it is fundamental that legislation be approved to define the relevant procedures. A bill was drafted several years ago, but has not yet been approved by the Assembly of the Republic.

¹⁵ Decree 30/2001, Article 15 and Law 14/2011, Article 18.

must be specifically requested within 5 days).¹⁶ The response to the complaint shall be given within 10 days.¹⁷ Nevertheless, if no decision is given within 30 days from the date of submission of the complaint¹⁸, an implied rejection of the complaint must be assumed and the individual may then proceed to use other options as indicated below.

- b) Hierarchical appeal – challenge of an act or decision made in the presence of the immediate superior of the inspector who has performed the act or taken the decision, requesting the revocation or replacement of that act or decision, whether because of its unlawfulness or due to its inconvenience or inopportuneness.¹⁹ A hierarchical appeal is possible whenever the authority that performed the act or took the decision is subject to the control and management power of another authority. A hierarchical appeal shall be lodged within the following time periods:²⁰
- i.* at any time, in cases of invalid or legally non-existent acts (i.e., those whose fault cannot be corrected by a mere passage of time);
 - ii.* within 90 days from the date of notification, in cases of revocable acts (i.e., those that can be corrected with the passage of time); or,
 - iii.* within 1 year, when, in a case which falls under b)ii., above, an implied rejection applies.
- c) Judicial review – challenge lodged with the administrative courts, to a compulsory, executable decision on a specific question, taken by a Public Administration body or agent, in the performance of public service. A judicial review will only be accepted by the court if the act is final and executable, i.e., not subject to an obligatory hierarchical appeal, which the individual has not lodged.

In general, the decisions of inspectors are not final and executable, which implies that there a hierarchical appeal should always be used before starting a court case, on pain of the case being immediately rejected as a result of the appeal route not having been used, unless the law explicitly determines the contrary.²¹ It is therefore always necessary to check if specific sectoral regulations determine different rules. A judicial review is merely a legal declaration of nullity, annullability or inexistence of the act brought before court.

To this end, the basis for a case submitted for judicial review would be an offence to legal principles or standards based on exceeding the limits of powers conferred on the inspector, incompetence, a technicality (for example lack of basis for the decision, or lack of essential components that the act should include), a violation

¹⁶ Law 14/2011, Articles 158 and 159.

¹⁷ *Ibid.*: Article 161.

¹⁸ A copy of the document submitted, stamped by the relevant department receiving said document should be requested and retained as proof of the date of submission

¹⁹ Law 14/2011, Article 163.

²⁰ *Ibid.*: Article 164.

²¹ *Ibid.*: Article 162.

of the law or misuse of power.²² The time periods for initiating a judicial review must be strictly observed and are as follows:²³

- i.* At any time, in cases of invalid or legally non-existent acts;
- ii.* within 90 days from the date of notification, in cases of revocable acts; or,
- iii.* within 1 year, in cases of revocable acts when an implied rejection is involved, or in cases in which the appellant is the Public Prosecutor.

Time Periods

In general, the time periods indicated above are calculated in calendar days. However sectoral legislation may stipulate specific rules.

For the three options outlined above (complaint, hierarchical appeal and judicial review), the calculation of time periods is subject to the following general rules²⁴:

- a) The time period is continuous;
- b) In calculating the time period, the day on which the event occurred is not included;
- c) If a time period that ends on a day on which the public service or court is not open to the public (Saturday, Sunday, public holiday or judicial vacations) the date of conclusion of the period is transferred to the subsequent working day²⁵;
- d) The time period begins irrespective of any formalities, with the exception of a judicial review.
- e) The time period for a judicial review begins after the following have been verified, in accordance with the applicable act:
 - i.* Production of effects of the act/decision; or
 - ii.* Advertising of the act/decision, where the law requires such publication; or
 - iii.* Notification of the act/decision when publication is not required.

In the case of judicial review, for acts whose publication and notification can be legally foregone, the time period starts from:

- i.* the day on which the act is performed, in the case of a verbal act;
- ii.* the day of effective or presumed cognisance of the act by the individual, or of the start of its execution, in the remaining cases.

²² Law 9/2001, Articles 26 and 28.

²³ EGFAE, Article 132 and Law 9/2001, Article 30.

²⁴ Law 14/2011, Article 78; Law 9/2001, Article 31 and Article 279 of the Civil Code, applied by force of Law 9/2001, Article 30.

²⁵ In the case of a contentious lawsuit, there is always the possibility to perform the act with a day of delay, through the immediate payment of a fine equivalent to 25% of the court fees that would be due at the end of the lawsuit.

Regarding the claim and the hierarchical appeal, the term can be extended for another 15 days, if the interested parties reside or are abroad or outside the area where the service is situated.

A complaint or appeal does not suspend the execution of the act or decision, except where the law specifically provides for this, unless the individual requests such suspension based on irreparable prejudice (or damages that would be difficult to recover) that would result from the execution of the act or decision, attaching proof of this fact. This request must be submitted within 5 days from the date on which the individual receives notification of the act or decision.²⁶ In the case of a hierarchical appeal, the act or decision appealed against is suspended.²⁷ In the case of a judicial review, the act or decision is not suspended, except where a non-punitive surety payment is made.²⁸

A complaint or a hierarchical appeal is made in writing and must include the following legal requirements: the full identification and residence of the appellant; the entity to which the complaint or appeal is addressed; clear indication of the act/decision being appealed (attach a copy of the notification); the facts and basis for the appeal; where possible, the legal basis including the legally protected right or interest that is being violated; the date and signature of the appellant's representative. Each application shall not contain more than one appeal.²⁹ It is important to verify whether or not sectoral legislation requires any additional elements in the appeal.

For a judicial review, given the specific requirements of this type of submission the individual would require legal support. A petition addressed to the court must include: indication of the section or plenary court; identification and address of the appellant; indication of third parties, if applicable, which may be prejudiced by the appeal; identification of the author of the act/decision appealed against, as well as if the author acted on the basis of delegation or subdelegation of powers; narrative of the facts and legal reasons comprising the basis for the appeal; clear presentation of the legal standards or principles infringed; formulation of the petition to be considered by the court; indication of the facts that are to be proven; request for evidence; indication of the documents attached to the petition (among which, confirmation of the act appealed against, other documents that prove the veracity of the declared facts, witnesses and facts about which they will testify, as applicable, application for hierarchical review with proof of submission, if this is the case, power of attorney for use in court or equivalent and legal duplicates).

In addition to the three most common options for challenging acts or decisions indicated above, the law also provides for: (i) *inappropriate hierarchical appeal* –lodged to a body without supervisory power over the one that performed the act; (ii) *supervisory appeal* – challenge of an act or decision before the supervisory body responsible for the one which issued the act or took the decision. This is only relevant in cases in which the law explicitly provides for such a possibility and this type of appeal is in general optional, since supervisory powers are generally limited to what is explicitly determined by law;³⁰ (iii) *review appeal* – challenge of an administrative act when facts occur or evidence arises

²⁶ Law 14/2011, Article 159.

²⁷ *Ibid.*: Article 166(2).

²⁸ Law 9/2001, Article 29.

²⁹ Law 14/2011, Article 80 and EGFAE, Article 129.

³⁰ Law 14/2011, Article 173.

that are liable to prove the inexistence or inaccuracy of facts that influenced the original decision. A review appeal must be requested within 180 days from the date of cognisance of the new facts; (iv) complaint and indictment, in general; and, (v) petition, or complaint to the Ombudsman. These may be considered by the Ombudsman but the Ombudsman does not have decision making power, instead having the option to make recommendations after having analysed the complaint, to the relevant bodies, where these under the Constitution are required to collaborate with the Ombudsman.³¹

At judicial level and regarding the Administrative Court, as well as the judicial review described above, the law provides the following options which should be considered:

- a) *Subpoena for information, consultation of a process or preparation of a certificate*: This can be used by an individual who needs to consult documents in a process or obtain documents from the Public Administration to pursue administrative or legal procedures and has not received a favourable response within 20 days from the date of presentation of the request, or the request in question has been refused, or a partially satisfactory response has been obtained.³²
- b) *Suspension of effectiveness of administrative acts*: this is a supplementary procedure that can be lodged to safeguard the effectiveness of the appeal. It must include the following: indication of the possibility of damages that cannot be compensated or the whereby the compensation for these would be difficult if the act is executed (this requirement is not necessary for acts of a sanctioning nature, such as those carried out by public inspectors); indication that the suspension does not represent serious damage to the public interest pursued by the act; and indication that the process does not result in strong signs of unlawfulness of the appeal. The request for suspension can be made before lodging the appeal, simultaneous with or during the appeal. The law lays down the legal requirements that the application for suspension shall comply with.³³
- c) *Warrant to abstain from certain behaviour*: this is also a supplementary procedure. It aims to require that the Public Administration cease the violation of a right or obligation. The violation can be actual or simply expected.³⁴
- d) *Actions aimed at administrative contract issues, liability of the Public Administration or of its agents and officials for prejudices caused, including acts of recovery for the benefit of the State and the recognition of legally protected rights and interests*. In general, these actions can be lodged at any time, without prejudice to exceptions that may be determined in special legislation.³⁵

³¹ CRM, Article 260 and Law 14/2011, Article 175. The Ombudsman is an institution created under the 2004 CRM but which does not yet exist as it has not been formalized by the Assembly of the Republic and also because complementary legislation that will determine the procedures to be followed has not yet been drafted.

³² Law 9/2001, Articles 93 and 94.

³³ *Ibid.*: Articles 108 a 119.

³⁴ *Ibid.*: Articles 120 a 125.

³⁵ *Ibid.*: Articles 98 and 99.

The law also stipulates the terms under which individuals can request the execution of the decisions of the Administrative Court that are not executed by the Public Administration.³⁶

SECTION 4: LIABILITY OF PUBLIC INSPECTORS AND COMPENSATION FOR DAMAGES CAUSED IN THE PERFORMANCE OF PUBLIC SERVICE

In general, the violation of the rights of others as well as of the laws and other legal provisions aimed at the protection of the interests of others implies the (disciplinary, civil and/or criminal) accountability of the agent, official or office holder of the Public Administration, and the obligation to compensate the injured party for damages caused.

4.1. Disciplinary liability

State officials and agents are liable to disciplinary procedures and the application of disciplinary sanctions³⁷, without prejudice to civil or criminal liability that may occur when there is violation of their obligations, abuse of functions or any other action that prejudices the Public Administration.³⁸ Whenever the action or omission is of a fraudulent or culpable nature, a disciplinary sanction will be imposed, irrespective of the existence or not of prejudice to the service.³⁹

The disciplinary sanctions that may be imposed are those established by law, namely:⁴⁰

- a) warning;
- b) public reprimand (in the presence of other officials and agents of the same service);
- c) variable fine equivalent to 5 to 90 days of salary of the official or agent in question;
- d) demotion for 6 to 24 months;
- e) dismissal from the state apparatus for 4 years; after this period readmission may take place, following the requirements laid down in the law; and,
- f) definitive expulsion from the state apparatus, with loss of all rights acquired in the performance of his functions.⁴¹

Demotion applies, among others, to cases of professional incompetence that cause damage to third parties; the abuse of power to obtain advantage, to bring to bear

³⁶ *Ibid.*: Article 164 and ss.

³⁷ The right to start disciplinary proceedings expires after 3 years from the date of occurrence of the infraction, unless this term has been suspended by the institution of an inquiry or investigation – EGFE, Article 80.

³⁸ EGFE, Article 78 (1).

³⁹ *Ibid.*: Article 78 (3). The agent or official is not liable if he is executing work-related orders or instructions from his immediate superior and if he has previously complained or requested in writing confirmation of the order or instruction. This exception will not be applied if following the order or instruction constitutes the practice of a crime, in which case the agent or official is not required to obey the order given – *Ibid.*: Article 79.

⁴⁰ *Ibid.*: Article 82(1).

⁴¹ *Ibid.*: Article 81.

pressure or revenge; the practice of acts that favour outside interests; and the attendance of individuals with lack of good manners and respect.⁴²

Dismissal applies, among others, to cases of serious professional incompetence or repeated non compliance with the law.⁴³

Expulsion applies, among others, to cases of violation of professional confidentiality that cause material or moral prejudice to the State or to individuals; a long-term prison sentence or a prison sentence for serious crimes; the embezzlement of State funds or property; and the use of position to request or receive money or the promise of money or other advantage to which he has no right, in exchange for the practice or omission of an act in violation of his obligations.⁴⁴

Written or verbal communications can be made by individuals about infractions by State officials and agents that will serve to initiate the relevant disciplinary proceedings, if there is found to be sufficient grounds for this.⁴⁵

4.2. Civil liability

Civil liability aims to place the injured party in the situation in which he would have been if the detrimental occurrence had not taken place, by means of compensation.

As indicated above, the CRM and the general performance standards of the Public Administration stipulate explicitly the issue of liability for damages caused to individuals by actions of State officials and agents.

In general, liability for damage or prejudice caused to others is demanded from the originator of the act that caused the damage. There are cases in which the law specifically stipulates that the entity responsible for the person who caused the damage, is liable, irrespective of whether or not the responsible entity intervened in the act that caused the damage. This is known as “liability of the principal for the commissioner”, in civil legislation⁴⁶. In such cases, the liability and compensation for damages is claimed from the entity responsible for the agent, irrespective of any fault of the responsible entity.

In this respect, the CRM clearly states that “*The State shall be responsible for damages caused by the unlawful acts of its agents, in the performance of their functions, without prejudice to rights of appeal*”⁴⁷. As can be inferred from this constitutional provision, the liability of the State is based on the same conditions and principles as those on which the “liability of the principal for the commissioner”, is based. It therefore follows that the individual can demand civil liability from the State and consequent compensation for damage and prejudice suffered, as a result of illegal acts by public inspectors, it being the duty of the

⁴² *Ibid.*: Article 86.

⁴³ *Ibid.*: Article 87.

⁴⁴ *Ibid.*: Article 88.

⁴⁵ *Ibid.*: Article 100 (1) and (2).

⁴⁶ Civil Code, Article 500.

⁴⁷ CRM, Article 58(2).

State to subsequently obtain from its officials whatever it has lost in terms of compensation for acts undertaken by them.⁴⁸

Law 7/2012 introduces a new approach (see Article 17 reproduced in Section 2 of this memorandum), i.e., the introduction of a legal basis for public inspectors to be held civilly liable, i.e., to compensate directly or personally for damages caused through the principle of personal liability, without prejudice to the joint and several liability of the State. The State also continues to have the right of recovery over the agent or official in question, in relation to what it has had to pay in compensation.

Therefore, with this new principle we understand that injured companies can opt for bringing an action against the State or bringing an action directly against the inspector responsible for the damage caused, but can also, jointly and severally, sue the State. Nevertheless, we should bear in mind that this principle is new and we still have to see how it will be effectively applied in practice and interpreted by our courts. There is a possibility that it will be argued that the constitutional provision prevails, i.e., that the State is liable for the acts of its officials and agents, without prejudice to the possibility of afterwards recovering from them what it has lost in damages, particularly considering that the inspector was not acting on his own behalf but as a duly authorised representative of a given State institution.⁴⁹

In addition, the principle of personal liability referred to, serves to clean up another concern that has been raised, specifically, that compensation not only applies to cases of “illegal acts” (as stipulated in the CRM), but also to cases of “illegal omissions” of officials, agents and office holders that cause prejudice to individuals.

Claims for compensation and civil liability against the State are presented to the Administrative Court, as discussed above. To determine the existence of civil liability and the consequent charge against the public inspector who undertook the act, proof of damage is necessary, before anything else. This damage must have a demonstrable causal link between the act (or omission) of the public inspector and the prejudice suffered. In addition the fact that resulted in the damage must be unlawful, i.e., have violated legally protected rights or interests.

Evidence is required to support the facts or rights asserted by the injured party. The injured party is responsible for presenting such evidence to the court or other relevant body in order for a decision to be taken or judgment given. Evidence can comprise: witnesses (*witness evidence*); documents (*documentary evidence*); and experts (*expert evidence*). In addition the Administrative Court can require the presentation of any evidence it considers relevant.

⁴⁸ The same principle of accountability is applied in the State’s private relationships i.e., the State has civil liability for damage caused by acts of its bodies, agents or representatives in the performance of private management activities. Compensation demanded within the scope of private management acts is granted in accordance with the civil law, i.e., cases are brought before the civil courts.

⁴⁹ The same article that introduces the principle of personal liability determines that this does not exclude the joint and several liability of the State, as defined in the CRM and other applicable legislation – cf. Law 7/2012, Article 17(1) *in fine*.

4.3. Criminal liability

Criminal liability is always personal. This is so because under the law only persons having the necessary mental state and liberty can be criminals,⁵⁰ even if they act on behalf of collective entities. Criminal liability falls exclusively and individually upon the perpetrators of crimes and transgressions.⁵¹

Thus, individuals should pay attention to acts by officials, agents and office holders of the Public Administration bodies which may constitute a crime, so that they can report these to the relevant authorities in order that criminal proceedings may be instituted.

Criminal acts are provided in the Penal Code and supplementary legislation. Examples include, corruption, violation of the obligation of secrecy, embezzlement, extortion, abuse of position or function, and the abusive use of goods or services, among others.

SECTION 5: SECTORAL REQUIREMENTS

The procedures and requirements outlined above are the general ones defined under Mozambican law. However, it is important to note that each sector may have its own specific rules. Some of these rules will be merely complementary, for example, infractions and the applicable sanctions which may differ per sector, the time and place of inspections, the means of notification, evidence to be compiled, among others. But sectoral legislation may also contain specific rules that override the general rules outlined previously, for example, regarding time limits, the hierarchical structure to be followed, and powers of inspectors, among others. It is therefore essential to read the general requirements together with the requirements of the sector in question when dealing with each specific case. The general requirements apply wherever sectoral rules do not stipulate specific rules or requirements.⁵²

There is a variety of sectoral legislation. It is not within the scope of this memorandum to describe each specific regime but, by way of example, we discuss below certain sectoral requirements, namely:

- a) Oversight of economic activities, as carried out by the General Inspectorate of the Ministry of Industry and Trade with a view to verifying compliance of industrial, commercial and service provision activities. Companies in these sectors should take into account Resolution 51/2004 of 24 November, which approves the Regulations for the Inspectorate of the Ministry of Industry and Trade. These Regulations deal with the principles and methodology for inspections, requirements for notification, procedures in the event of seizure of assets, the organisational structure and powers,

⁵⁰ Penal Code, Article 26.

⁵¹ *Ibid.*: Article 28.

⁵² Nevertheless, the hierarchy of laws must also be taken into account, i.e., a decree or ministerial diploma must not violate that established by laws, and laws must not violate that laid down in the CRM. In addition, some legal provisions can be considered, explicitly or implicitly, revoked by subsequently approved provisions at the same hierarchical level or a higher hierarchical level. Therefore, to ensure the correct application of the legal recourse available to individuals at any given time, the reading and correct application of all relevant legal provisions in force is required.

professional profile, obligations and rights of the inspector, among other relevant provisions.

- b) Fiscal oversight, carried out by the Tax Administration has as its objective the verification of compliance with fiscal obligations and prevention of tax infractions (also applicable to the General Customs Directorate). In this case it is important to take into account the procedures laid down in Decree 19/2005 of 22 June, which approves the Tax Oversight Procedure Regulations. These Regulations deal with the principles to be considered, the purpose and types of oversight procedures, powers, guarantees of impartiality and oversight performance, locations, times, acts and procedures for oversight and inspection, among other relevant provisions.
- c) Oversight of the forestry and wildlife sector is carried out by the relevant structures of the Ministry of Agriculture, with the aim of monitoring, disciplining and guiding the protection, conservation, utilization and exploitation of forestry and wildlife resources. In this case the applicable procedures are laid down in Decree 12/2002 of 6 June, which approves the Forestry and Wildlife Regulations. Chapter VII of these Regulations deals with oversight and defines the powers, stakeholders, and information to be made available in notifications, as well as treatment of seized assets, among others relevant provisions. Ministerial Diploma 128/2006 of 12 July approves the Statute of Forestry and Wildlife Inspectors.
- d) Labour inspection is undertaken by the General Inspectorate of Labour with the objective of improving working conditions through the oversight and inspection of compliance with legislation and regulations in the area of labour relations. In this case procedures are laid down in Decree 45/2009 of 14 August, which approves the Regulations for the General Inspectorate of Labour. These regulations deal with the powers of the inspectorate, the principles that govern inspection activities, the nature of intervention, the powers and obligations of the inspectors, the procedures to be followed for notification, the time period for submission of contestations and appeals including hierarchical appeal and the effects of such contestations, among others relevant provisions.
- e) Tourism activities are overseen by the supervising entities of the tourism sector, with a view to overseeing and verifying compliance with the tourism legislation and regulations. A key regulation in this sector is Decree 18/2007 of 7 August, which approves the Tourist Lodging, Restaurants, Drinking Establishments and Dance Halls Regulations. Chapter X of these Regulations deals with oversight, inspection and penalties, stipulating who oversight and inspection activities apply to, the requirements to be followed for notifications and indictments, penalties, and power to apply penalties, among other relevant provisions. Ministerial Diploma 141/2007 of 19 October approves the tourism inspector's badge and determines who can use it.

SECTION 6: CONCLUSION AND RECOMMENDATIONS

From the analysis above we highlight the following concluding points:

- Public inspectors are State agents who, in the performance of their function, are limited to the exercise of powers explicitly bestowed upon them by law, as well as by the principles of performance and formation of the will of Public Administration.

- Damage caused by public inspectors in the performance of their duties must be duly verified and confirmed by the Administrative Court. If it is then compensation is due, and is to be provided by the State, which then has the right to recover this from the inspector in question, in accordance with the law.
- In accordance with the new legal principle recently introduced by Law 7/2012, which still is in its *vocatio legis* period (and cannot therefore be invoked as yet as it will only become effective on the date on which it comes into force), in addition to the already cited principle of Public Administration or State accountability for illegal acts performed by its agents, officials and office holders, there will also be a principle of personal liability, which determines that said agents, officials and office holders of the Public Administration can be held individually accountable for illegal acts and omissions, while the State is called upon to participate jointly and severally in such liability. I.e., with the coming into force of Law 7/2012 there will be a legal basis to hold public inspectors directly responsible for their acts or omissions. Nevertheless, the interpretation and practical application of this legislation has yet to be tested before the courts, bearing in mind that the constitutional conditions for compensation laid down in the CRM may limit the application of this provision to individuals.
- The individual (both natural and legal) has various mechanisms at his disposal for the defence of his legitimate rights and interests, but must comply with the relevant legal requirements to ensure that such mechanisms are valid. This includes compliance with time periods and following the necessary legal provisions to determine other types of liability such as disciplinary and criminal liability. This can be done by recourse to the different types of complaint, appeal and indictment described above.

To assist individuals/companies in improving the defence of their rights and interests against illegal acts, in addition to knowing their own legal obligations and ensuring that these are complied with, we recommend that they:

- Know and understand the existing mechanisms for protecting their rights, as provided by law;
- Know the power and scope of the various public authorities that are relevant to their sector of activity;
- Know what procedures and requirements exist for collaboration with public authorities as well as the limits of these. And that they know what procedures must be followed by state agents such as for example, the presentation of credentials, notifications, the information that must be provided and information which does not necessarily have to be provided, among other aspects, and that they prepared to identify illegal acts or threats thereof and react accordingly;
- Either individually or jointly make use of the available legal provisions, thus developing the practice of denouncing cases of illegality and enforcing respect for the law, whenever this is necessary; and,
- Obtain legal counsel for specific appeals or contestations of administrative acts, in order to ensure that the essential elements, time periods, evidentiary

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This memorandum has sought to respond to your request for information about legal mechanisms for the defence of the rights and interests of individuals, specially, the right to compensation for damages suffered due to illegal acts by public inspectors and their effective accountability. We hope that his memorandum is useful to you. Any doubt you may have or addition you may need, please, do not hesitate to contact us.

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