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NEWS

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EDITORIAL

Partnership VdA/FBLP

This is the first issue of the VdA/FBLP Partnership Newsletter which, from now onwards aims at periodically highlight our legal practice in this promising Mozambican market and those legislative novelties which we find more important to our clients, as well as conveying our views on relevant issues arising from the referred novelties.

The FBLP/VdA Partnership has been established in June 2009 and it aims at providing local and international clients with top-tested expertise bridging the African and European markets in complex deals, sharing experience, values and One Vision.

The publishing of this Newsletter is also following the sustained growth of FBLP which, with VdA support, has been consolidating and strengthening its competences, client base and both internal and external recognition. Simultaneously, we believe that this Newsletter is also a way for FBLP, with the cooperation of its partner VdA, to perform what we see as a duty of citizenship, that of actively participating in the development of the Mozambican market. We therefore accept this responsibility as lawyers that intend to develop and provide legal services of excellence in Mozambique.

In the end of this first semester of 2010, we find a very active and attractive business environment within which it is expected a boost of big projects and the investment in key economic sectors, such as industry, agriculture, tourism, infra-structures, mineral resources and energy.

Besides a retrospective analysis of the most relevant legal developments in Mozambique, this Newsletter will also look into the present, focusing on relevant legislation and on legislation that the market, in general, and our clients, in particular, have been finding more interesting, hence generating the need for a legal support increasingly comprehensive and efficient.

Within this logic, this issue of our Newsletter shall cover: (i) the time sharing legal framework, which, although dated 2007, still raises doubts and interest; (ii) a brief report on the national Industrial Property context; (iii) the recent public international tender for the licensing of a third operator for cellular mobile telecommunications, which shall certainly bring a new dynamic to the national telecommunications scene;

Index	
Editorial	1
Ten Years of Industrial Property in Mozambique	2
Incoming Challenges for the Mozambique Telecommunications Sector	2
Hiring Foreigners for SMEs	3
<i>Time Sharing: More accessible tourism in the "Pearl of the Indian Ocean"</i>	4

and (iv) the legal regime applicable to the employment of foreigners, a very important topic related to the increasing foreign investment in Mozambique.

In any event, this Newsletter represents, above all, our will to offer our clients quality services in areas of practice within an increasing sophisticated market, as well as, due to an ever more complex legislative environment, to meet the need of more efficient and specialized legal services. This is a challenge that we recognize to be very demanding but to which we intend to give a committed and continuous response. We further wish that this Newsletter lives up to the expectations of many readers, and for this goal to be achieved, we strongly believe in the value of comments and suggestions which readers may wish to convey. We therefore wish to thank in advance for all the feedback that may be sent to either: newslettermocambique@vda.pt or newsletters@fblp.co.mz, regarding both the matters we analyse in this issue, as well as any requests for articles on other matters within the Mozambican legal environment.

Thank you.

Vieira de Almeida & Associados / Furtado, Bhikha, Loforte, Popat & Associados



TEN YEARS OF INDUSTRIAL PROPERTY IN MOZAMBIQUE

Alberto de Deus

Index

Trade marks exist since the ancient times. 3000 years ago the Indian craftsmen used to stamp their signatures on their artistic works before sending them to Iran. Later, the Romans used more than 100 different trade marks in their ceramics.

In the present, it is notorious the increasing importance of trade marks in e-commerce, due to an increase of competition among companies which exercise their activity in more than one country.

The history of Industrial Property in Mozambique dates back to the beginning of 1999, period where the (i) Industrial Property Code was enacted by the Decree No. 18/99, of 4 May, and (ii) the Industrial Property Central Department (*Departamento Central da Propriedade Industrial*) (DCPI) was established.

Taking into account the increasing importance of industrial property in the technological development, in the retention and attraction of foreign investment, in consumer protection, as well as, in the elimination of unfair competition practices, the Industrial Property Institute (*Instituto da Propriedade Industrial*) of Mozambique ("IPI") was established in 2003.

In Mozambique, the industrial property rights are acquired through registration with the IPI in Maputo. Such registration takes 6 months, from the filing date of the application with the IPI.

Registration with the IPI is valid in the national territory. However, it is also possible to register with the IPI some industrial property rights valid in different countries of the world. In this regard, for example's sake, the registration of international trade marks with IPI entitles protection in the countries that are parties of the Madrid Agreement Concerning the International Registration of Marks, of 14 April 1891, and of the Madrid Protocol, of 17 June 1989, since Mozambique has already ratified these international instruments.

In what refers to copyright and related rights, the protection thereof in Mozambique is entrusted to the Book and Disc National Institute (*Instituto Nacional do Livro e Disco*) ("INLD"), a public institution, subordinated to the Ministry of Education. Nevertheless, due to the lack of technical and financial capacity, the said Institute does not use all of its competencies, restricting its action to the allocation of stamping of seals and registration numbers to different edited works in the country, hence not

working at the level of (i) promotion and regulation of discs and tapes, (ii) organization of a copyright sector, (iii) licensing and granting of support to national editors and booksellers. As a consequence, the intellectual property registration in Mozambique is not yet a reality.

With the Football World Cup organized for the first time in the African continent, in South-Africa, there has been an increasing number of requests for trade marks registration, not only in that country but also in other southern African countries. In what specifically concerns to Mozambique, trademarks are, among the industrial property rights, those which have the largest number of registration requests as opposed to the situation in other developed countries where patents registration requests are higher.

Believing that the Mozambican economy will continue to grow as until now, we foresee, and find of most importance, that new investments and market agents call forth an increasing of industrial property rights protection, not only for trade marks but also for patents, utility models and industrial design, logos, trade name, insignia of an establishment, geographical indications and appellations of origin.

INCOMING CHALLENGES FOR THE MOZAMBIQUE TELECOMMUNICATIONS SECTOR

Magda Cocco

Index

The Mozambique government is strongly committed to the development of the country's telecommunications market. For now, such development depends on two recently announced measures: the launch of a public tender for the licensing of a third operator for cellular mobile telecommunications and the revision of the country's basic legislation regarding this sector. A possible privatization of TDM has also been talked about, although nothing has been confirmed in this respect, as of yet.

The public tender was launched on 5 April. Its documentation clearly reflects the government's concern in demonstrating that the project is an attractive one, thereby seeking to capture the interest of telecommunications "giants" in the public tender.

In addition, the documentation reflects the government's strong willing in ensuring the participation of a Mozambican

company and of local resources, which would guarantee that part of the benefits of the project would be kept in the country.

Three candidates are running for the license: TMM, S.A, Movitel and the Consortium Uni-Telecomunicações, CE. The opening session of the application letter and technical proposal occurred on 6 July and Mozambique National Communications Institute (INCM) has now approximately two months for analyzing the technical proposal of each candidate. The opinion session of financial bid is scheduled for the 17 September. Along with this public tender, the Government has also announced its purpose to review the basic telecommunications legislative package – and has stated so in the documentation regarding the public tender for a third mobile operator.

This revision shall include, among other legal instruments, the Basic Telecommunications Law, the Interconnection

Regulation, the Regulation for Infrastructure Sharing and the Regulation for Service Quality (regulation project has already been subject to the public consultation).

The current Basic Telecommunications Law dates from 2004. Being this is a rapidly evolving market, it is only natural that the existing legal structure does not adequately respond to the challenges ahead. Nevertheless, it is necessary to understand which regulatory model the Government will be adopting in this sector: either a European model (thereby privileging a legal/regulatory environment which is familiar, at least to the biggest European operators) or any other model.

As such, publication as soon as possible of the new Mozambican telecommunication legal framework would be of great advantage. Such publication would enable candidates to the public tender to know the rules of the "game" they might play in the future.



HIRING FOREIGNERS FOR SMES

Momedé Popat

Index

Due to its political and economic stability, abundant resources, continuous improvement in the business environment, the existing mega investment projects, and an annual average economic growth above 7% for the last 10 years, Mozambique has become an attractive destination for both domestic and foreign investment.

In such context, coupled with the current domestic incentive policies for investment and the incorporation of small and medium-sized enterprises (“SMEs”), many investors have been setting up companies in Mozambique.

If hiring local labour does not give rise to any substantial difficulties, hiring of foreign labour by National and Foreign Employers (“NFE”) is subject to a specific legal framework and is a common concern to all SMEs.

This is the topic we want to address, which is currently regulated by Law no. 23/2007, of 1 August, (“Law 23/2007”) – the Labour Law – and by Decree no. 55/2008, of 20 December, (“Decree 55/2008”) – Regulations on Mechanisms and Procedures for Hiring Foreign Citizens.

There are currently two legal frameworks for NFEs to hire foreign workers: the Quota Framework (“QF”) and the Labour Authorisation Framework (“LAF”).

In QF, the employer, depending on the company legal status (small or medium), may have foreign citizens at its service according to the following quotas:

- In small enterprises: 10% of the labour force.
- In medium companies (over 10 -100 employees): 8% of the labour force.

An exception to this framework is the case of small companies, which may always have a foreign worker even if the total number of nationals is less than ten. Upon hiring a foreign citizen, the employer has 15 days to communicate the type of admission and the quota level used.

In LAF there are two requirements NFEs have to comply with in order to hire a foreign citizen: (i) such citizen needs to have the necessary academic or professional qualification; (ii) there must be no nationals with such qualification or their number be insufficient.

Excluded from the above rules is the short-term work provided by a foreign worker – work not exceeding 30 days, consecutive or otherwise, extendable to a maximum of 90 days per annum – that does not require authorisation nor is covered by the QF arrangement. In such case, communication to the competent authority is sufficient.

We further allude briefly to law particulars concerning labour contracts entered into with a foreign citizen:

LABOUR CONTRACT WITH FOREIGNERS

- May not be longer than 2 years
- Can be renewed over time, without limitations to the number of renewals, by submitting a new request
- Regardless of the number of renewals, it does never become a permanent labour contract
- Changes to the contract (or changes in labour conditions) must be communicated to the Labour Ministry
- Termination must be communicated – in writing and within 15 days upon termination – by the employer to the Labour Ministry

All aforementioned requests and communications have to be submitted to the entity overseeing the labour department in the province where the citizen in question is to be working must comply with legal provisions and be submitted along with the documents mentioned in such provisions.

Non compliance with legal rules concerning the hiring of foreign labour may be punished with SUSPENSION and/or a FINE of 5-10 monthly salaries of the foreign worker in question.

We could not conclude without a few words about those provisions regulating this matters that have been subject to different interpretations and enforcement, namely:

About QF:

- **Moment when the quota is calculated** – The law prescribes that the quota should be calculated based on the average number of workers in the previous calendar year or, in case of the first year of business, on the day activity starts. Shouldn't such calculation be made based on the total number of workers in the (x) months prior to hiring?
- **Rule of quota rounding** – The law expressly prohibits rounding for the purpose of quota calculation. Shouldn't rounding upwards be permitted whenever the result is equal to, or higher than five decimals?
- **Number of workers for purposes of quota calculation** – The expression “Total Number of Workers” in both Law 23/2007 and Decree 55/2008 has been understood as the number of workers at the head office or company branch where the foreign worker is, or will be, working. To the detriment of such understanding which, in our view, is not supported by neither the text nor spirit of the law, shouldn't such expression be understood as the total number of workers employed by the company nationwide?
- **Communication to provinces** – The common understanding has been that the foreign worker hired under QF may only perform his/her activity in the geographical area where the company (head office or branch) is located and in which there has been made the communication referring to his/her labour contract. To the detriment of this geographic criteria which, in our view, can't be construed from the text or spirit of the law, shouldn't rather prevail the understanding that, regardless of the province where such head office or branch is located, and in which the above referred communication has taken place, the worker may perform his/her duties all over the national territory? Isn't this common interpretation violating the Principle of Equality of Treatment provided in paragraph 2, article 31 of Law 23/2007?

• **Treatment given to administrators, directors, managers, delegates and representatives of foreign companies** – Most of these positions are taken on a mandate basis and there is no bond of legal subordination and/or dependency between holders of such positions and the company in question. In the absence of the referred bond (a feature of labour contracts) should such representatives be subject to the QF?

• **Treatment given to working and non-working company partners:** Foreign partners – working or non-working, remunerated or otherwise – are under the QF. Should the partners, namely non-working and non-remunerated partners, be subject to the QF?

• **Work visa:** Law 23/2007 prohibits hiring foreign citizens entering the country on a diplomatic, visit, official tourist, business or student visa. Neither Law 23/2007 nor Decree 55/2008 require a work visa for hiring a foreign worker under QF. Nevertheless, the Migrant Labour Directorate requires such a visa for a worker hired under QF. How can the requirement of such visa be made compatible with the figure of communication of hiring under QF?

About LAF:

• **Period of 15 days for appraisal of and decision about the work authorisation request:** Non compliance with such period triggers serious economic losses and organisational setbacks to NFEs. Couldn't measures be taken, procedures made swifter, or legal alternatives created in order such a deadline is duly respected?

• **Equivalence certificate required for the work authorisation:** The process to acquire this document is a lengthy one, sometimes originating substantial economic and organisational setbacks to companies. Couldn't the law be made swifter or amended as to accommodate an issuance deadline which, if not met, would allow the beginning of the working authorisation procedures, case in which the certificate in question would be delivered subsequently, sanctions being established should such deliverance does not occur?

We conclude leaving to the reader and the national legislator an incitement for reflexion on these topics of such practical relevance.

TIME SHARING: MORE ACCESSIBLE TOURISM IN THE “PEARL OF THE INDIAN OCEAN”

Tourism Area of FBLP

Index

With the approval of regulations of Law no. 4/2004, of 17 June (Tourism Law), namely the Regulations on Tourism Transportation, the Regulations on Tourism Animation, the Regulations on Tourism Accommodation, Food & Beverage and Nightclubs and the Regulations on Timesharing, the Mozambican tourism now faces new opportunities and became more accessible to national citizens and investors in the sector.

Among the above regulations we hereby highlight Decree no. 39/2007, of 24 August (“Decree 39/2007”), which approved the innovative Regulations on Timesharing. This decree focuses on the creation, exercise, transfer and extinguishment of timesharing rights and on the licensing of tourism timesharing resorts.

It is an unquestionable fact that the purchasing price of infrastructure for holiday and vacation periods is unaffordable for the vast majority of Mozambicans, which consequently discourages the activity of tourism agents. As such, the opportunities provided by Decree 39/2007 become quite attractive. In fact, the timesharing scheme provides for housing for specific periods of time in holiday developments, including the right to use common facilities and amenities in the development in question (e.g. swimming pool, restaurants, recreation areas, etc.), enjoyment of services provided by the owner and, under some circumstances, swap the allocated residential unit with one in other establishments of identical or higher category, in a place close to the development that is the subject of the contract.

The timesharing scheme comprises the following types:

- **Real Timesharing Right (RTR):** which allows the holder to use housing units integrated in tourism resorts with a minimum category of 3 stars, for a limited period of time each year ranging from a minimum of 7 to a maximum of 30 consecutive days. RTR is created by public deed and is subject to real estate registration, upon which the competent Real Property Registry issues a certificate recording such rights, hence entitling the holder to transfer or encumber them.
- **Holiday Accommodation Right (HAR):** is the right of accommodation, for one or more periods of time each year, in residential units integrated in a tourism resort, against a fee. Such right has a contractual nature and is created in the context of contracts pertaining to holiday cards and clubs, travel club cards or other schemes of a similar nature.
- **Right to Fractional Ownership (RFO):** is the acquisition of a right *in rem* to immovable property that is part of tourism resorts with a minimum category of 4 stars. A maximum of 12 fractional ownership rights may be created on each property under such scheme, limited to a period of time each year, which may not be of

less than 7 consecutive days. RFO can be created by means of a public deed of joint ownership or by purchasing shares in a company owning a tourism resort duly licensed for such purpose. In the latter case, RFO is based on the incorporation, by public deed, of a private limited liability company or a public limited liability company.

From the above, the Right to Temporary Housing commonly known by Timesharing is a very interesting tourist product in high demand internationally by both investors and tourists, inasmuch as it makes the use of accommodation units profitable and promotes construction of better, new tourism resorts. Due to its nature, such right fosters the economic democratisation of national tourism – as it embodies an instrument for the use of holiday housing for short periods of time, more accessible for families with less resources – and makes the national real estate profitable and promotes construction of new, better tourism projects.

Besides the above types of timesharing rights, Decree 39/2007 further regulates **Residential Tourism (RT)**. RT provides for the creation of property and other real estate rights for residential purposes integrated in tourism resorts with a minimum category of 3 stars located in areas of public interest (in turn, established and regulated by Decree no. 77/2009, of 15 December). RT is created by means of public deed or shares in company embedding rights to residential tourism.

Trading of housing units for residential/housing purposes in a RT scheme may only be made directly by the owner or, in case of intermediation, the authorised intermediary who has to be duly licensed by the Ministry of Public Works and authorised by the Ministry of Tourism, a safeguard of the legality of transactions and a protection of buyer rights.

Decree 39/2007 is only one example of the Tourism Law regulations and materialises the implementation of new tourist products intended to enhance quality control and the national tourist offer. It therefore enhances de-bureaucratisation of investment procedures and tourism exploitation. We shouldn't forget the relevant component of social development, improved by job creation, professional training and wealth for Mozambicans and, first and foremost, the opportunity for national citizens to enjoy a holiday house at much more affordable prices.

In this perspective, the legal instrument in question is part of a set of instruments intended to provide a legal framework for tourism in this “Pearl of the Indian Ocean”, as the *oyster* that nurture such a jewel still has in its bosom a wealth of unvisited and unexploited opportunities, in a country of 800,000 km² with 2,500 km of coastline and an immense variety of beach, nature and cultural tourist destinations.

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