

Republic of Mozambique
CONSTITUTIONAL COUNCIL

*Agreement No. 7 / CC / 2020
of May 8, 2020*

Case No. 05 / CC / 2019

Fisca / izafao successive to the constitutionality and legality framework

Report

I

Two thousand citizens, duly identified in the file, assisted by Associayao N'WETI COMMUNICATION FOR SA UDE and represented by lawyer Dr. Santos Santos, with office at A venida Eduardo Mondlane, n ° 149, 2nd floor, rooms 168 and 169, in Bairro da Ponta-Gea, City of Beira, comes to the Constitutional Council to request, under the provisions of paragraph g) paragraph 2, article 244 of the Constitution of the Republic (CRM) and paragraph 2, article 60, of the Law 6/2006 of 02 August, with the changes introduced by Lein ° 5/2008, of 9 July, Organic Law of the Constitutional Council (LOCC), the declaration of unconstitutionality or illegality of Article 1, of Resolution 10 ° / 2017, published in BR, I SERIE, n ° 203, 16 ° SUPPLEMENT, of December 29, 2017, which approves the GeraJ State Account, referring to to the 2015 financial year.

For that, adduce the fundamentals that are now substantiated:

- 1.1 By public deeds, of December 21, 2012 and April 3, 2014, respectively, Proindicus, SA, and Mozambique Asset were formed Management (**MAM**, SA), in the form of limited liability companies, held exclusively by the Moyambicano State.
- 1.2 In 2013, Proindicus, SA contracted a non-concessional loan in the amount of 622 million American dollars (USD), allegedly destined to the «Establishment of integrated systems for air, space, sea, lake, river and land », with the Credit Suisse Group (Credit Sui ~ v /

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1.3 And, in turn, the company Mozambique Asset Management (MAM, SA) contracted, in 2014, wn loan from the Bank of Foreign Trade of Russia, also not concessional, in the amount of USD 535 million, under the pretext of earmarking it «the construction of a shipyard in Pemba, in the Province of Cabo Delgado and in the Port of Maputo, for the maintenance and repair of vessels on land and at sea, the acquisition of [wna] floating dock, the font of personnel and technical assistance, aiming at providing services in the oil, mining and port areas ”.

1.4 Consider, the plaintiffs, that the loans were borrowed in nonnal terms from the therefore not concessional, which constitutes a clear violation of Onmental Laws, specifically Lein ° 1/2013, of 7 January and Lein ° 1/2014, of 24 January, as these coincidentally establish in paragraph 2 of the respective article 9 that the loans to be borrowed by the State should guarantee a degree of concessionality 35% or more.

1.5 The applicants claim that the contracting of each of these loans was not included in the proposal of the General Budget of the State (OGE) of the respective years, that is, it was not registered at Lein ° 1/2013, which approved the OGE for anode 2013, the loan taken out by Proindicus, SA, and, likewise, does not appear in Lein ° 1/2014, which approved the OGE for anode 2014, the loan granted to MAM, SA, in clear violation of the aHnea p) of Article 178 (2) of the Constitution of the Republic.

1.6 The petitioners maintain that such loans have been guaranteed by the State, with the Government, in any case, issued guarantees above the Federal Laws, in non - authorized terms, and NOT consisted of their accounts subjected to Assembly Republic and the Administrative Court.

1.7 In this regard, the applicants point out that the litnite value for the granting of guarantees and guarantees to be granted by the State, in 2013, was established by article 11/2 of Law no. 1/2013, which approved the State Budget in 2013, having been set at 183,500 thousand Meticaís, corresponding to the equivalent of USD 5 million.

1.8 In 2014, the limit value for the granting of guarantees and guarantees to be made available by the State was established by article 11/2 of Law No. 1/2014, which approved the State Budget in 2014, having been set at 15,783,500 thousand Meticaís, partially depleted with the

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guarantees and sureties declared by] the Government that year, in the total amount of 12,328,900 thousand Meticaís, the remainder amounting to 3,454,600 thousand Meticaís.

1.9 Following their allegation, the plaintiffs recall that paragraph 4 of article 15 of the Law No. 9/2002, of 12 February, which created the State Financial Administration System

(SIST AFE), establishes that budgetary allocations constitute the maximum limit to be used in the realization of public expenses, in the corresponding economic exercise, only that in this if it is found that the value of the guarantees provided by the Government, in the amount of USE 622 million, in favor of Proindicus, SA, in 2013 and of USD 535 million, in benefit of MAM, SA, in 2014, not counting other guarantees granted by the Government to other companies, has clearly exceeded the limits authorized by respective.

1.10 The petitioners point out that in the 2013 State Account a) (CGE), as well as in CG E of 2014 there is no information provided by them to vouchers and guarantees granted by the State.

1.11 Applicants state that borrowers have been contracted without knowledge of the Assembly of the Republic, which was only in 2015 and, consequently, without authorization, thereby violating the imposition of Article 178 (2) (p) CRM, under which it is incumbent on that 6 «to authorize the Government, defining the general conditions, to contract or grant loans [...], for a period exceeding one economic exercise', thereby rendering the respective acts null and void, for violation of the law in a broad sense. On the other hand, they are also null, due to usurpation of power in terms of paragraph a) don no. 2, article 129 of Lein no. 14/2011, of 10 August, which regulates the formation of the will of the Public Administration, establishes the rules for the defense of interests of individuals, as they consider that the Government has invaded the legislative domain.

1.12 Still in their argument, the plaintiffs understand that the act of approving the Account General of the State, which does not contain the public debt information, when it should contain, in the terms of alincas b), c) and e) of article 47, of Law No. 9/2002, of 12 February (SISTAFE) directly violates the Constitution, and on the other hand, non-compliance with 4, of article 15 of the same law, results in the nullity of the acts inherent to the loans then contracted and the respective guarantees granted by the Government ~ for transgressing the law in restricted sense.

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Tenninam, the plaintiffs, requesting that it be declared null, for violating the law in the sense wide, Article 1, of Resoluyao n ° 10/2017 of 29 December, which boasts *And approved Geraldo Estado Account for the 2015 financial year* and, consequently, that its unconstitutionality or illegality is declared, with general mandatory force, in the terms of no. 1, article 244 of the CRM and no. 1, article 66 of the LOCC.

Forensic search, proof of two thousand signatures and respective BI copies signatories, copies and legal duplicates.

Following the case file, the Assembly of the Republic was notified, which will henceforth be dealt with also by AR and Notified, in compliance with the provisions of article 51

LOCC, to comment on the contested Article 1, of the Resolution that has been

mentioned, in its capacity of author of the aforementioned legal provision, setting the deadline for forty-five days.

This period passed without any reaction that was imposed on the RA and as it is in the domain of a process of parties, in which the immediacy of the legal consequence constitutes the touchstone, this Council is required to collect evidence in which the petitioners' request is based, since they were limited to mere references documents in your application, without making the necessary

To this end, a copy of the Parliamentary Committee's report was requested,

regarding **the** companies Proindicus, SA, and MAM, SA, with the Notified, whose result will be brought in by itself.

II

Basis

The present successive abstract enforcement process of constitutionality and legality was triggered by who has legitimacy, in terms of paragraph g) of paragraph 2, of article 244 of Constitution of the Republic and line g) don ° 2, of article 60 of Lein ° 6/2006, of 2 August.

The Constitutional Council **and** the body especially competent to administer justice, in matters of a legal-constitutional nature, under the provisions of paragraph 1, article 240, and, therefore, competent to hear the request under the terms of paragraph a) of paragraph 1 of article 243, both from CRM.

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As stated in the report, *in fine*, the nature of this process required that diligence with the Republic of Assembleia to obtain the factic material then

ascertained by His Parliamentary Commission of Inquiry, concerning **the** companies in question, the exercise of which essentially resulted in proof of the factuality which follows *ipsis verbis*:

- a) *The Government, to provide guarantees to **the** three companies [understand, EMATUM, SA, Proindicus, SA, and MAM, SA], in the amount that exceeds the limit set in the Laws Orfamentals of 2013 and 2014, essential assumption for the wilida emission of those guarantees, did **not request authorization from the Assembly of the Republic, under item p) don 2, article 179 1 of the Constitution and don 2, article 9 of Lein ° 1/2013, from 7 January to Lein ° 1/2014 of 24 January.***
- b) *Lein ° 112013, of 7 January and Lein ° 112014, of 24 January, granted powers the Government to borrow to guarantee a degree of concessionality equal to or greater than 35% (art. 9, n. °2). Only in 2015, the Assembly of the Republic opened the possibility for the Government to take out concessional loans, provided that intended to finance projects or programs with economic viability and social and emergency interventions, taking into account the sustainability of*

Country's debt.

c) From this assertion, the Commission understands that in 2013 and 2014, the Government in addition to the duty to observe the imposition of budgetary limits on the provision of guarantees in the annual value of 183.5 thousand meticais, had the duty to respect the nature of the loan to grant the guarantee.

d) Taking into account also the values for which the State provided the guaranteeing *the* three companies, the Commission concludes that the Government has imposed by the 2013 and 2014 Orphan Laws, which required that, before grant guarantees, the Government had a duty to request *the* Assembly of the Republic legislative authorization for the purpose of providing guarantees.

e) The Commission considers that the process of providing guarantees by the State, in part surplus, without authorization, constitutes a violation of the Constitution and the laws budget, which, under the regime established in Lein ° 7/98, of 15 June.

Current wording of Article 178 (2) (p) of the CRM.

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which prescribes the rules of conduct applicable to holders of government positions and spells out their duties and rights, entails responsibilities.

Regardless of the outcome of the investigation, whose trust him **and** recognized, there is there must be a declared convergence with that of the Court's RELA TO RIO Administrative Report on the State Geml Account for the 2015 fiscal year, published in the *Boletim da Republica*, I Serie, n ° 203, 16th Supplement, of 29 December 2017, which after the analysis carried out then concluded, regarding **the** cause, that *The State*, when issuing guarantees and sureties, it assumes the responsibility of paying the debt, in case of default of the debtor. Thus, guarantees and sureties constitute a public debt indirect and contingent.

(..)

The Government rejects, in the CGE of 2015, that *er: ercicios* of 2013 and 2014, issued guarantees bank accounts in favor of Proindicus, SA, in the amount of US \$ 622 million / hour, and Mozambique Asset Management (MAM, SA) in the amount of US \$ 535 million / hour Americans, which were declared in the respective Accounts submitted to the Court Administrative.

(..)

The reasons for not including these loans are not mentioned in the 2015 CGE in the Accounts Of the respective years.

According to the stipulated number 1 of article 46 of Lein ° 9/2002, of 12 February, which creates the State Financial Administration System, the General State Account must be

drafted clearly, in order to enable **to** his analysis economic and financial.

On this matter, the Government referred, in exercise of the Contradictory law of this Report, that the guarantees issued on 20 J 3 and 2014 were included in the General Account of State of 2015 for the purpose of regularization.

In the documentation provided by DNT [Direc90.o Nacional do Tesouro], during the audit, no mention was made of **the** purpose of these loans.

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From the aforementioned findings, at least two clearly emerge conclusions: the first is related to the disrespect observed in the observance of article 11 constant in each of the 2013 and 2014 Or9311ental Laws, that is, Lein ° 1/2013, of 7 Janeiro and Lein ° 1/2014, of 24 January, which set the limit on guarantees and guarantees to be issued by the Government, in the amount of 183,500.00 thousand Meticaís, and 15,783,500 thousand Meticaís, respectively; and the second term to do with the ~ delays of transparency, and one of informing principles of the performance of the Public Administration / Governance that it finds expression in article 15 of Law No. 14/2011, of 10 August, which has been replaced by abominable secrecy in all the financial operations of the companies involved here.

Faced with this circumstantial framework, the undeniable confirmation of the alleged in the petitioner of the claimants: the Government, as such: it had done in the loan from EMA TUM, SA, which made it in non-final terms of the market, contrary, thus, no. 2 of article 9 of Law no. 1/2013, of 7 January, which establishes that loans to be borrowed by the State must guarantee a degree of concessionality equal to or greater than 35%, the same has come to the case of loans taken out by the Proindicus, SA, and MAM, SA, in violation of paragraph 2, of article 9 of Law No. J / 2014, of 24 January, that is, the (...) *Government exceeded the limits imposed by the Orfamental Laws of 2013 and 2014, which required that, before granting the guarantees, had a duty to request the Assembly of the Republic a legislative authorization for the purpose of providing guarantees.*

Except for the period of conclusion of the respective operations, this case essence, the similarity of Article 1, of Resolution No. 1 J / 2016, of 22 August, which approved the Geraldo Estado Account (CGE), referring to the financial year of anode 2014 which involved the company EMATUM, SA, and whose process of: successive inspection of constitutionality was object of appreciation and decision in this 6th term, through Agreement no. 5 / CC / 2019, of 3 June 2) to which at this moment it is referred, without prejudice to glean some of its excerpts.

In this sense, the Government acted outside **the** Canstitui ~ iio, violating unequivocally the subparagraph p) don no. 2, of article 178 of the CRM, and reserves the exc / usability of the competence Assembly of the Republic to authorize (...) to repay or lend loans, to carry out: other credit constraints, over a period of more than one financial year and to establish the

limit of the vouchers to be granted to the State, this on the one hand and, on the other hand, I infringed,

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No. 2, Article 129 of Lein No. 141201 J, of OJ de Agosto, for the practice of acts that combine, obviously the usurpation of power, starting immediately with article 134, where it is enshrined the separation and interdependence of powers of the sovereign bodies, subordinating itself to It constitutes 900 and the laws, as also stipulated in paragraph 3, of article 2, both of the CRM.

Concurrently with the violation of the Constitution, in the present situation, the existence of other illegalities then practiced **the** *semelhanya* case EMA TUM, SA, namely non-compliance with Lein ° 1/2013, of 7 January, and Lein ° 1/2014, of 24 January, insofar as the loans taken out by Proindicus, SA, and MAM, SA, respectively, were not registered in the 2013 and 2014 budget laws, against a provision of a nature imperative, as is the case, article 15, paragraphs 2 and 3, of Lein ° 9/2002, of 12 February (SISTAFE), that peremptorily has:

- 1. No expense can be assumed, ordered or incurred without being legal if is duly registered in the budget of the approved State, has fit in the corresponding orphan budget and is justified as to its economy, efficiency and efficiency.*
- 2. Expenses can only be assumed during the economic year for which! have been budgeted.*

Returning us to the examination of the contested legal provision contained in the aforementioned Resolution, an instrument that has the dignity of a nonnative act pursuant to Article 142 CRM, it stands out from the simplicity of its statement that it does not about discipline in any **area**, that is, **in** that there are no positive aspects of social or economic regulation and hence its insolvency. For this reason, despite the petitioners request the declaration of unconstitutionality, placing, disjunctively, the illegality of the said nonnative command, the underlying issue in this demand lies only in the breach of the law, in a broad sense, practiced by the Executive.

Identicamente with the already determined in the case No. 6 / DC / 2017 concerning **the** EMATUM SA and because there is complete similarity of circumstantialism under examination, at this moment the ~ its Ac6rdao, as relevant shown: *This and the legal block, if it includes Constitution and ordinary law, that Joi is completely disrespected by the Government in contracting the debt* of Proindicus, SA, and MAM, SA, as well as the inherent guarantees

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These are invalid acts, in the form of nullity, by virtue of the combined provisions of the no. 1, article 35 of Lein no. 7/2014, of 28 February, and paragraph a) don no. 2, of article 129 of Law No. 14/201 t, of 10 August, whose legal consequences are reflected in the respondent Resoluyiio No. 10/2017 and as *null and invoked at any time by any interested party, and can be decoded, also, at any time, by any administrative agency or by any court*, under the terms of paragraph 2, of article 130 of the Law recently indicated, this you will meet her.

*III
Decision*

Attentive to all the above, the Constitutional Council declares the nullity of the acts related to loans contracted by Proindicus, SA, and Mozambique Asset Management (MAM, SA), and the sovereign guarantees granted by the Government, in 2013 and 2014, respectively, with all legal consequences.

Notify and publish.

Manuel Heruique Franque _____

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