

PROTECTION AND ENFORCEMENT OF TRADEMARK RIGHTS IN MOZAMBIQUE

For many companies, their brand is their most valuable asset. For that reason, it must be protected. The fact that a brand is well-known in a country due to its notoriety does not mean that it is automatically protected in that jurisdiction. Mozambique is a country that has adopted, as a general rule, the system whereby legal protection only exists upon registration of the trademark. However, there are certain specificities that should be known.

Investing in a foreign country is not for those who are easily discouraged. It is necessary to be prepared to accept different cultural idiosyncrasies, a different set of rules and practices from those one is used to and a very steep learning curve. Before deciding to invest in another country, "prudent man rules" advise doing some "homework", that is, to study the local market, analyse applicable legislation and know the bureaucratic obstacles that will have to be overcome in order to be able to operate in accordance with the law. Foreign investment also implies that a certain level of risk is accepted. However, it is natural for a diligent manager to seek to mitigate this risk by protecting the company's assets in the pursued territory and, for many companies, the company's brand is its most valuable asset.

It is often likely that, when a brand achieves a certain level of notoriety in its home market, some of that fame will spread to other territories as well. Nevertheless, it is important to point out that the fact that a brand is already known in a particular country does not mean that it is automatically protected in that jurisdiction.

Mozambique is a country that has adopted, as a general rule, the system of constitutive effectiveness of registration. Therefore, the interested party only obtains an exclusive right of use over a trademark and the right to prohibit third parties from exploiting identical or similar trademarks for similar or related products or services once said trademark has been registered in Mozambican jurisdiction.

Exclusivity may, however, not be complete since Mozambican law has the unusual particularity of protecting, to some extent, *bona fide* third parties who have been using identical or similar brands before the date of filing or priority date of the trademark. This particularity in Mozambican law is extremely relevant for the planning of the international protection of a trademark, and it is advisable to start the registration process in Mozambican territory as soon as this market becomes part of the long-term expansion plans for the brand.

Currently, one can register a trademark in Mozambique through two separate procedures. The first and most common consists in filing an application for the registration of a national trademark at the Mozambican Industrial Property Institute (MIPI). Alternatively, given that Mozambique has acceded to the Madrid Agreement and Protocol, it is possible to designate the Mozambican jurisdiction in an international trademark application managed by the World Intellectual Property Organisation. In both cases, it is advisable to resort to the services of skilled professionals – lawyers or official agents of industrial property – as errors in the prosecution of applications can lead to long delays and unnecessary costs.

One of the most frequent misconceptions in international trademark protection proceedings is to think that, after the trademark has been granted in a given country, the institutions and authorities of that country will proactively defend the exclusivity of each trademark registered at the national registry. Contrary to what happens in some countries and regions, Mozambique follows a system that requires that trademarks be subjected to an examination on absolute and relative grounds. In other words, the MIPI has a statutory duty to compare all trademarks submitted for registration with those that have already been registered in order to try to detect situations of likely confusion and possible unfair competition. If a risk of confusion or error with an already registered trademark is detected, the MIPI must reject the request for registration.

However, this model is fallible. For various reasons, which are beyond the scope of this article, the MIPI trademark examiners may not be the most suitable persons to assess possible risks of overlapping business areas or situations of abusive competition. Therefore, the company's trademark - which, as mentioned before, could be the most valuable asset of all - deserves personalised and continuous surveillance, in the same way that it makes sense to hire private security for physical assets (factories or commercial establishments).

The MIPI publishes, every two months, a Bulletin of Industrial Property containing all the trademark applications filed since its previous publication. In addition to the filed trademark, the notices in the Bulletin contain the name and address of the applicant, the number of the trademark application, the filing date of the application, the date of publication and the products and services that the brand aims to mark (including the Nice Classification number(s)). These details can be processed manually by the trademark owner although, in most cases, it is more efficient and reliable to use external services that have software tools capable of automatically analysing this information.

The publication of the trademark application opens a sixty day period during which anyone who feels harmed by the possible granting of the trademark can file an opposition. Through this opposition procedure, it is possible to draw the attention of the MIPI to risks of confusion and unfair competition which would most likely have gone unnoticed by a brand examiner. If the losing party in the opposition proceedings does not accept the decision, an appeal may be filed within sixty days from the date of publication of the administrative ruling. The judicial review (the appeal) has a suspensive effect and will be analysed by the Administrative Court.

In addition to the convenience of monitoring new trademark applications and acting vigorously in situations of potential conflicts, there may be situations in which it is necessary to act against counterfeiting and imitations detected in the market. According to the Mozambican Industrial Property Code, the reproduction, commercialisation and use of counterfeited brands and imitations are illegal acts punishable with a fine of 112 minimum wages, in case the infringer is a natural person, and 224 minimum wages, when it comes to a legal person. The practice of unfair competition is punished with the same sanctions. On the other hand, in the event of recidivism, sanctions may double or triple depending on the specific situation. It is up to the General Inspectorate of the Ministry of Industry and Trade, in conjunction with the MIPI, to investigate infringements in matters of industrial property and to apply the aforementioned sanctions.

In a situation of trademark infringement, the rights holder can still act through ordinary judicial courts, demanding that the infringer be prevented from continuing to violate the exclusivity of the trademark and, in addition, that the infringer be ordered to pay compensation for the damages caused.

In short, a company's brand is too important to be overlooked. If an investment in Mozambique is being considered, it is advisable that an appropriate amount of attention is given to the strategy of protection and enforcement of this central asset for the success of the enterprise. Bearing in mind the specificities of the Mozambican law on industrial property, it is essential to be properly advised in order to achieve the desired results with no avoidable mishaps.

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