

**Republic of Mozambique**  
**CONSTITUTIONAL COUNCIL**  
**Judgment No 5/CC/2019 of 3 June 2019**

**Case No 6/CC/2017, Incorporated Case No 8/CC/2017**  
**Successive abstract review of constitutionality**

**- unofficial translation -**  
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**I**  
**Report**

The Budget Monitoring Forum (FMO), Platform of Civil Society Organizations (CSOs), and another 2,000 citizens duly identified in the case file, represented by the lawyer Dr. Stela Santos Stela Santos, with offices at Avenida Eduardo Mondlane, no 149, 2° andar, salas 168 e 169, in Bairro da Ponta-Gêa, Cidade da Beira, and the Digníssimo Provedor de Justiça come to the Constitutional Council to request an assessment and declaration of unconstitutionality or illegality of the rule contained in article 1 of Resolution no 11/2016, of 22 August, which approves the State General Account (CGE) for the financial year 2014 with general mandatory force under the provisions of paragraph g) of paragraph 2 of Article 245<sup>1</sup> of the Constitution of the Republic of Mozambique (CRM), in conjunction with paragraphs g) and f) of paragraph 2 of Article 60 of Law No. 6/2006, of 2 August, with the new wording introduced by Law No. 5/2008 of 9 July, both of the Organic Law of the Constitutional Council (LOCC), stating the following as grounds:

1.1 EMATUM - Empresa Moçambicana de Atum, SA, contracted in 2013 a loan in the amount of USD 850 million, through the issuance of private securities called “euro bonds” with the Credit Suisse Group for the import of vessels and fishing equipment and for coastal protection without having had prior authorization from Law No. 1/2013, of 7 January, which approved the State Budget for the year 2013.

1.2 This credit was guaranteed by the State and in 2015 it was restructured, due to the incapacity verified in the payment of the instalments agreed at the time (see Administrative Court (TA): Report on the State General Account for 2015 (CGE, 2015), p. X-2; Assembleia da República (AR): Conta Geral do Estado de 2014, (CGE, 2014) Vol. I, 2015, pp. 51-52; and AR: Relatório da Comissão Parlamentar de Inquérito da Assembleia da República, para Averiguar a situação da Dívida Pública, de November 2016 (CPI), pp. 28, 33).

1.3 However, Law no. 1/2013, of 7 January, which approved the 2013 State Budget, established in its article 11 that the limit value for the granting of guarantees and guarantees to be granted by the State was 183,500 thousand meticaís, corresponding to the counter value of USD 5 million, which contrasts with the high amount of USD 850 million, value of the debt contracted (AR: CPI, p. 33).

1.4 It should be noted, however, that despite the limits established, the State General Account (CGE) of 2013 was silent as regards the information on guarantees and guarantees granted by the State (TA: Report on the State General Account of 2013, p. X-16).

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<sup>1</sup> With the update of the Constitution of the Republic, by Law no. 1/2018, of 12 June, Article 245 became 244.

1.5 However, the Assembly of the Republic approved the State General Account for the financial year 2014, through Resolution No 11/2016 of 22 August, specifically in its Article 1, by which it intends to validate "acts known to be void".

**A. The contracting of a non-concessional loan, in the amount of USD 850 million, through the issue of private securities "euro bonds", with the Credit Suisse Group.**

2.1 By public deed of 2 August 2013, EMATUM, SA was incorporated as a public limited company; however, its shareholder structure denotes that it is a public limited company exclusively owned by the Mozambican State (see BR. no 71, III series, of 5 September 2013, and BR. no 111, III series, of 16 September 2013, and AR: CPI, pp. 24-25 and 28), however, the Applicants consider that although it was incorporated as a joint-stock company and subject to the provisions of the Commercial Code, it does not acquire, by that fact, the status of "commercial entrepreneur", a position that is based on the terms of Article 15(1) of Decree-Law No 2/2005, of 27 December, which approves the Commercial Code.

2.2 Even if it has a commercial matrix, the fact that it embodies entities governed by public law, its legal regime falls within the scope of the exercise of public administration in a private form (cf. AR: CPI, p. 67), integrating the Public Administration in an objective sense, which means that "to the extent that legal-private action is admissible for the fulfilment of administrative tasks, there are "legal-private forms", but not the freedom and possibilities of private autonomy, since the rules of general Private Law are always complemented, replaced or modified by the rules of Public Law" [...], with the Administration not remaining, regardless of the form of action chosen, except to always act in accordance with the "purpose or set of purposes for which it was established".

2.3 The Applicants also claim that EMATUM, SA, as it does not enjoy full private negotiating autonomy, is bound to a set of legal-public obligations, among which it is important to mention: (1) the principle of pursuing the public interest (art. 249/1, 1.<sup>a</sup> part, CRM); (2) the principle of legality, or rather, of the rule of law (art. 249/2, 1.<sup>a</sup> part, CRM); and (3) the principle of efficiency (art. 250/1, CRM).

2.4 In the conception and management of this type of companies, priority must be given to the pursuit of the public interest, which is defined by the Government, as the highest body of the Public Administration, imbued with a dynamism in its meaning and content, appropriate to the time and options established by law with a view to the pursuit of the common good.

2.5 In the Parliamentary Committee of Inquiry (CPI), after analysing the prerequisites for contracting credit by EMATUM, SA, the understanding was reached that it was mobilised taking into account "the existence of threats to sovereignty, territorial integrity, namely those characterised by illegal activities of maritime piracy, illegal immigration, drug trafficking, illegal fishing, the presence of private maritime security forces protecting private targets in national territorial waters, insufficient financial and human resources for the effective protection of sovereignty" (AR: CPI, pp. 4 and 16-17).

2.6. Although it was established that the primary object of EMATUM, SA, was the exercise of fishing activities for tuna and other fishery resources, including the fishing, reception, processing, storage, handling, transit, marketing, import and export of such products, and may engage in other activities, provided that these activities are duly authorized or that the members so decide; and that these activities are related to the primary activity (cf. BR. no 71, III series, of 5 September 2013, and BR. no 111, III series, of 16 September, and AR: CPI, pp.

24-25 and 28), it was found, however, that of the total loan of USD 850 million, the amount of USD 500 million was allocated to the Ministry of National Defence to ensure maritime safety, and USD 350 million, for the acquisition of tuna fishing vessels, spare parts, licences and other commercial assets.

2.7 The mentioned coastal protection, as it is a matter of exclusive competence of the Mozambican Armed Defence Forces (cf. art. 8 of Law no. 17/97, of 1 October, Law on Defence and Security Policy, and what was written about it in the RA: CPI, pp. 44-47), does not fall within the business purpose of EMATUM, SA, it being clear that the Public Administration should be bound not only by the law, but also by the Constitution (cf. Article 249/2, 2nd part, of CRM), and by a set of principles [...], which bind the Public Administration, even when it acts in the exercise of discretionary powers, or under the modes of action of Private Law, and it is now justifiable to make reference to the "principle of jurisdiction". Thus, entities such as EMATUM, SA "do not cease to be public in the exercise of economic initiative, even if they use forms or instruments of private law, so that they cannot enjoy, by definition, "freedoms", but rather obey the principle of legality".

2.8. The Applicants claim in their petition that the draft budget law to be submitted to Parliament is the initiative of the Government (arts. 204/1 and 206/1 a) of the CRM), must contain all the information on the basis of revenue forecasts, expenditure limits, financing of the deficit, and all the elements that underpin the budgetary policy, and, for purposes of approval, under paragraphs 1, 2 and 3 of Article 30 and paragraph m) of para. 2 of Article 279, both of the CRM. The petitioners conclude that that loan was not, therefore, authorized by Law no 1/2013, of 7 January, which approved the State Budget for 2013 (see AR: CGE, 2014).

2.9 Further, the Applicants point out that the loan was contracted under normal market conditions, and by this fact, the content of Article 9(2) of Law No 1/2013 of 7 January, which approved the State budget for the year 2013, which determines that the loans to be contracted by the State should guarantee a degree of concessionality equal to or greater than 35%, was violated.

3. In line with the petition, the Applicants believe that the CGE approved without incorporating information on public debt under the terms of paragraphs b), c) and e) of Article 47 of (LSISTAFE), also directly violates the CRM, and the RA, in exercising its function under Article 131 of the CRM, has approved an incomplete State General Account, because it did not contain all the essential elements for its assessment, insofar as this loan was contracted, without the due authorisation of the Assembly of the Republic, provided for in Article 179(2)(p) of the CRM, a rule enabling 'to authorise the Government, by defining general conditions, to contract or to grant a loan [...], for a period longer than the financial year". (See AR: CGE, 2014, Vol. I, 2015, p. 52; TA: Report on the State General Account for 2014, p. X-21; CGE, 2015, p. X-22).

## **B. The Granting of the Government's guarantee for the non-concessional loan in the amount of USD 850 million through the issuance of private euro bonds**

4. The Report and Opinion of the Administrative Court issued within the scope of the analysis of the 2013 State Budget state that "the Government, without due authorization, issued guarantees and guarantees in the total amount of 28,346,620 thousand Meticaís" (see TA: CGE, 2015, pp. X-2, p. 16 and 22; RA: CGE, 2014, Vol. I, 2015, pp. 51-52; and RA: CPI, pp. 28, 33), when the limit for such concession for 2013 was 183,500 thousand Meticaís, equivalent to USD 5 million (RA: CPI, p. 33), (see RA: CGE, 2014, Vol. I, p. 52).

## **C. Legal consequences of the addictions invoked**

5. Also in their argumentative line, the Applicants understand that, in the light of Mozambican law, both the referred loan contracted by EMATUM, SA, and the guarantee granted by the Government congregate a set of vices, all of which can be attributed to the qualification and to the nullity regime, and take as basis the following assumptions:

5.1.1 Regarding the loan contracted by EMATUM, SA, in 2013, in the amount of USD 850 million, through the issuance of private securities "euro bonds" with the Credit Suisse Group: The petitioners consider that it is null for usurpation of power, under the terms of subparagraph a) of paragraph 2 of art. ° 129 of Law No 14/2011, of 10 August, Law on Administrative Procedure (LPA), insofar as its contraction did not comply with the provisions of paragraph p) of Article 179.2 of the CRM, i.e., lacked the authorization of the Assembly of the Republic, to which should be added the fact that it was not registered in Law No 1/2013, of 7 January, which approved the said State Budget for the same financial year (cf. AR: CGE, 2014, Vol. I, 2015, p. 52), and also, is null for misuse of power, under the terms of paragraph b) of n. ° 2 of art. 129 LPA, since the Government considered that the primary public interest to proceed with the borrowing would be the protection of sovereignty and national assets.

5.1.2 Having also stated that the loan in question was contracted under normal market conditions and is therefore not concessional, the provisions of Article 9 of Law No 1/2013 of 7 January are violated, so that the loan contract signed at the time is null and void, now for violation of the law, in the strict sense, because it was carried out in accordance with normal market conditions, thus proving to be non-concessional.

5.1.3. In addition, the proposal of the State Budget did not contain all the supporting information on revenue forecasts, expenditure limits, financing of the deficit and all the elements that underpin the budgetary policy (art. 130/3 of the CRM and f) of art. 24/4 of LSISTAFE) pursuant to subparagraphs m) and p) of no. 2 of art. 179 of the CRM and therefore the loan in question was not included in Law no. 1/2013, of 7 January, which approved the State Budget for the year 2013. It is therefore null for violation of the law in the broad sense (the Constitution).

### **5.2.1. As regards the guarantee granted by the Government to the company EMATUM, SA, for the contracting of this loan.**

Due to the fact that the realization of public expenses is limited to its own budget allocations in the respective financial year, the Government is bound to prior authorization to contract loans in that amount and within the purposes and conditions referred to therein, under the terms of paragraph p) of Article 179.2 of the CRM.

### **5.3.1 The Resolution of the Assembly of the Republic approving the State General Account for the financial year 2014, Resolution No 11/2016, of 22/08/2016**

From the evidence and competition of vices of which that Resolution appears to be vitiated, the case for the declaration of unconstitutionality or original illegality with general mandatory force is obvious, which entails as consequences those provided for in no. 1 of article 66 of the LOCC, that is, the nullity of the acts performed and the insusceptibility of producing any financial effect [...]. No validation or a posteriori cure being admissible.

5.3.2 And yet, the fact that (1) the invalidity operates *ipso jure*, renders the effect of the judicial decisions recognizing such invalidity merely declaratory, (2) the invalidity can be invoked at any time (final part of art. 245/1 of CRM), can be challenged by any of the subjects provided for in art. 245/2 of CRM even if not directly interested in the elimination of the act and, finally, (3) the invalidity is impossible to cure or validate. Thus, because the acts are manifestly void, the Assembly of the Republic must refrain from "neutralizing" a possible administrative or jurisdictional declaration of unconstitutionality or illegality, through the retroactive validation, by simple act of normative (or even legislative) content, of a set of acts committed in violation of the constitutional or legal provisions referred to above [...], as was intended with the adoption of the Resolution of the Assembly of the Republic approving the State General Account for the financial year 2014, itself void, for violation of the law in the broad sense.

5.3.3 Thus, the legislator may not 'constitutionalise' by law, let alone a simple act of normative content, such as the Resolution, an act which is unconstitutional or illegal, to be declared by the Constitutional Council, due to the existence of a general binding negative limit of the legislator: the prohibition of a legal reproduction of the rule declared unconstitutional.

The Applicants end by requesting that it be declared unconstitutional or illegal, with general mandatory force, for violation of the law in the broad sense, article 1 of Resolution No 11/2016 (BR n. 100, I Series, of 22/08/2016), which approves the State General Account for the financial year 2014, under the terms of paragraph 1 of art. 245 of CRM, and paragraph 1 of art. 66 of LOCC.

They joined signatures and certified photocopies of Identity Cards.

Once the request was accepted, in compliance with the provisions of article 51 of Law no. 6/2006, of 2 August, the Organic Law of the Constitutional Council (LOCC), it was notified to the Assembly of the Republic, wishing to give its opinion on the request, as the body that authored the contested rule.

However, on the date of expiry of the deadline set out in the above legal provision, in its new wording given by Law No 5/2008 of 9 July, the Ombudsman, in turn, formulated a new request, which stated that its object was coincident with the request presented by the FMO Budget Monitoring Forum and other two thousand citizens, whereupon the Constitutional Council incorporated it into the process concerning the latter and had the Assembly of the Republic notified, under article 64 of the LOCC, to, if it wished, pronounce on the new request, the facts of which are similar to that of the initial Applicants, except for the legal support. The Dignified Ombudsman upheld the illegality, evoking paragraphs 2 and 3 of article 15 of Law no. 9/2002, of 12 February (E-SISTAFE), and as to the unconstitutionality, was legally supported by article 134 of the Constitution of the Republic.

Faced with this situation, the Notified Party unified its response, based on the terms that, in summary, are aligned:

## **1. Previous Questions**

In its capacity as the Author of the Rule, the Assembly of the Republic, hereinafter also treated indistinctly by the RA and Notified, in its pronouncement begins by raising three previous questions, setting them out as follows:

### **1.1 First Previous Question - Resolution no. 11/2016, of 22 August, is not a legislative act (Law).**

The Notified understands that by the content of what is provided for in paragraph a) of Article 244(1) of the CRM, in determining that it is incumbent on the Constitutional Council: [...] a) to assess and declare the unconstitutionality of laws and the illegality of normative acts of State bodies, the powers of the Constitutional Council are restricted to the declaration of unconstitutionality of laws and the illegality of normative acts of the State.

1.2 The Assembly of the Republic, using the provisions of Article 143(1) of the CRM, which establishes laws and decree-laws as legislative acts, and does not include the Resolution in this document, considers that the Constitutional Council is prohibited from having jurisdiction to hear the request. In the same vein, the Notified Party states that Article 182 of the CRM establishes that legislative acts of the Assembly of the Republic shall take the form of a law and other deliberations shall take the form of a resolution and shall be published in the Bulletin of the Republic. Resolutions of the Assembly of the Republic are, by nature, political acts, removed from the scope of the competence of the Constitutional Council, and, not being legislative acts, their effectiveness does not depend on the intervention of the will of other State bodies; and, finally, by their nature are acts of specific institutional relevance, (i) parallel to the political acts of the President of the Republic and the Government, and (iii) immediately subordinate to the Constitution.

1.3 Focusing attention on the Resolutions, it states that the effects of these Resolutions are notorious within the scope of the power state; they conflict with its organisational and functional dynamics; they are linked, above all, to the principle of interdependence of the sovereign bodies. With regard to their political nature, their validity and effectiveness are intrinsically linked to the Assembly of the Republic itself, even when they have a normative character, because they are not bound to the President of the Republic in the context of preventive oversight of constitutionality, as provided for in Article 246(1) of the CRM.

1.4 Based on the theory of political motive, it is also the HR's understanding that due to the fact that certain acts of power cannot be indicated simply by invoking, in the specific case, a reason for political opportunity, she considers that the Resolution approving the CGE should be considered as institutionally limited to the Assembly of the Republic, the body that supervises or controls the execution of the State's financial activity; the Government, as the body that carries out and executes the State's financial activity; and the Administrative Court, as the judicial body with competence for issuing an opinion on the CGE.

1.5 In the same line of argument as the theory of political acts, the Notified Party maintains that there is a state activity which has a political nature in itself, traditionally [...] regarded as not amenable to law or not understandable by law. It is assumed as a legally free, unconditional and autonomous function, outside the legal theory of the State, because it does not fall within the legal, executive or jurisdictional function, nor can it be framed by the tripartite legal-functional formula, identified with the separation of powers. Thus, the Resolution of the Assembly of the Republic, which approved the CGE for the 2014 financial year, embodies par excellence a true political act, and for this reason, the Constitutional Council is incompetent to hear the formulated request.

2. Reinforcing its claim to the petition of the Applicants, the Assembly of the Republic recalls that the powers of the Constitutional Council are described in Article 243 of the CRM, ac-

ording to which it is the responsibility of the Constitutional Council: [...] a) assess and declare the unconstitutionality of laws and the illegality of normative acts of the organs of the State and warns of the need to take into account the title of Article 142 of the CRM, "Normative acts", because it can erroneously conclude that the entire Resolution is a normative act.

2.1 In developing its pronouncement, the AR explains that a Resolution may or may not contain rules. Resolutions that are normally normative are those that may contain positive aspects of social or economic regulation, namely, in cases where the Assembly of the Republic considers decree-laws of the Government, in the event of an appeal; resolutions that ratify international treaties, under article 18 of the Constitution, among others; but already considers as purely political Resolutions those that are linked to the political supervision exercised by the Assembly of the Republic, namely those of appreciation of the General State Account, appreciation of the Annual Implementation Reports of the Government's activities, those of authorization of the President of the Republic to travel abroad, those of election of the organs of the Assembly of the Republic. Hence, it concludes that the Resolution approving the 2014 CGE, because it does not provide for discipline in a social or economic area and is not even subject to a specific law, cannot be qualified as a normative act, but rather as a true political act.

### **3. Second question**

3.1. The Notified Body also adds that, since the loan contract entered into between EMATUM, SA and its creditors, the Credit Swiss Group, signed abroad, between the Mozambican State and private entities with foreign nationality, [...] is an international private legal contract, it is regulated by Conflict of Laws - Private International Law - and is not governed by the law that is applied by the Constitutional Council, in its capacity as a sovereign body.

### **4. Third question**

4.1. As a third issue, the Assembly of the Republic, after recognizing that the loan contracted by EMATUM, SA, was not registered in Law no. 1/2013, of 7 January, although this company has the State as its sole shareholder, the fact is that with regard to the legal-administrative and just-commercial character, it enjoys, however, administrative, financial, and patrimonial autonomy, which translates into the fact that its budgets and contractual activity, including the contracting of loans, have, autonomously, under the guidance of Article 6 of LSISTAFE, their governing bodies and not the State as the decision-making centre.

Hence, the Assembly of the Republic justifies the lack of inclusion in the 2013 CGE of the loan to be contracted by that publicly owned company, a fact which, according to the Notified, was found by the Administrative Court that the Government, without due authorization, issued guarantees and guarantees in the amount of 28,346,620 thousand Meticaís. This finding is maintained in the assessment of the State General Account of 2014, which was approved by Resolution no. 11/2016, of 22 August, whose alleged unconstitutionality it intends to see declared.

4.2 Referring also to the Resolution, points out that its Article 2 states that the Government must comply with the recommendations of the Plenary contained in Opinion No 1/2016 of 24 March, the Committee on Planning and Budget and the Opinion of the Administrative Court on the State General Account of 2014, which are an integral part of this Resolution.

4.3 Following that understanding, the Notified Affirms that the General Account is approved without the validation of such irregularities, since the Resolution states, verbatim, that the

Opinions of the Plenary of the Assembly of the Republic and the Administrative Court are an integral part of the Resolution in question. Hence, according to the Assembly of the Republic, the approval of the CGE in 2014 does not validate the loan in question.

5. Further, pronouncing on the request made by the Honorable Ombudsman, who also requested the declaration of unconstitutionality and illegality of Resolution No. 11/2016, already cited, the Notified Body considered it pertinent to begin by clarifying certain issues raised in that request, namely:

5.1. The general idea that the Assembly of the Republic should have rejected the 2017 Budget and renewed the previous one under Article 27(1) of LSISTAFE, according to which, if the State Budget proposal is not approved, the previous economic year is renewed, with the limits identified therein, including the adjustments verified during that year, thus remaining in force until the approval of the new budget.

In this sense, the Assembly of the Republic states that such an understanding contains a misunderstanding, to the extent that this fact only occurs when the proposed budget for the following year is not approved and as the Government cannot operate without a budget, that mechanism is triggered under Article 27(1) of the LSISTAFE and Article 192 of the Rules of Procedure of the Assembly of the Republic, which has nothing to do with the State General Account, as this is a document of accountability of the State for a certain economic year.

5.1.1 The AR, after referring that the approval of the CGE does not yet occur within normality, considering that the account of the previous financial year is not approved in the following year, points out that in 2016 it was approved late and argues that it makes no sense that in 2016, the Assembly of the Republic had failed the Economic and Social Plan and the respective Budget because the Government has given guarantees without parliamentary authorization in the year 2013.

## **5.2 The (il)legality or (un)constitutionality of the loan**

Still within the scope of the pronouncement on the request, the Assembly of the Republic stresses, after having discussed the functions of the Government, that its discretionary power must be manifested within the legal framework imposed by the Constitution and other laws, i.e., "The State shall be subject to the Constitution and shall be based on legality". Accordingly, in 2013 the Government had the obligation to provide guarantees and sureties within the limits imposed by the Budget Law no. 1/2013, of 7 January.

However, the facts that occurred indicate that the Government took out a loan in an amount greater than the guarantees and guarantees provided for in the Budget Law, which imposed a special duty on the Government, the surplus part, had requested parliamentary authorization to provide guarantees (paragraph p) no. 2 of Article 179 of the Constitution).

5.2.1 Following that finding, the Assembly of the Republic concludes that the guarantees were provided in an unlawful manner, the consequence of which is that they are void. In the meantime, it considers that this nullity must be declared by the competent body, taking into account the practical consequences resulting from the contracts entered into. and the legitimacy of the Government, which, in acting at international level, has done so in the interests of the State.

5.3 With regard to the alleged nullity of the guarantees provided, the AR begins by focusing on the constitution, nature and legal regime applicable to the company EMATUM, SA, and considers it to be part of the State's business sector, arguing that the loan contracted by EMATUM, SA. is public in nature and essentially aims to pursue the public interest at the expense of this company. It also follows that if the company does not pay the due instalments on time, the State, as guarantor of the debt, and as holder of the company, must ultimately pay the due instalments, under penalty of international judicial execution.

5.3.1 With regard to the nullity of the guarantees provided, which is already well established in its judgment, the EESC wonders whether or not the State body can declare the nullity of the guarantees provided, and concludes that the nullity of the act of issuing guarantees does not imply, [...As long as the nullity has not been declared, the loan remains and, once it has been declared by the Assembly of the Republic, pursuant to Article 289(1) of the Civil Code, the debtors will have to repay all that has been provided.

5.3.2 The Notified Party points out that the fact that the State has issued the guarantees has given international commitments and submitted to foreign legislation, in particular the legislation in force in Great Britain, and that, as a result, the Mozambican State will be tried in the United Kingdom without invoking that status (loss of immunity) in commercial or other cases, which ends up placing the State in a delicate situation, as a sovereign body.

5.4 With regard to the thesis that the Assembly of the Republic legalised or validated the debts by Resolution no. 11/2016, of 22 August, the Notified Party recognises that the guarantees provided are vitiated by a violation of the law, stating that the contracting of loans by the State or the granting of guarantees today, and in a generalised manner in the democratic world, requires parliamentary authorisation, therefore, [...] corresponds to one of the aspects of the principle of legality, which covers all the financial activity of the State and [...] its origin lies in the need to ensure that the representatives of the People maintain effective control against attempts to increase public revenue and expenditure.

5.4.1 On that basis, the AR submits that the State cannot refuse or evade international obligations on the grounds that the Government has violated provisions of domestic law. In view of this situation, the Notified Party considered it best to approve the State General Account, which includes the statements of the payments made by the State in relation to the debts of EMATUM, SA. in order to facilitate the control of this financial activity of the State.

5.4.2 From this point of view, the Assembly of the Republic calls in its argumentation for various legal acts, mentioning in particular the CRM which, in its article 131, confers on it the general competence to supervise the financial management of the State, the most crucial and significant moment being [...] that of the approval of the General State Account.

5.4.3 In addition to the legislation already mentioned for the case, the Assembly of the Republic considers that the registration of guarantees and sureties assumed by the State also follows from Article VIII, Section V, of the Agreement for the Accession of Mozambique to the Bretton Woods Institutions, which establishes that the guarantees of the State are considered debts and, for that reason, should be reflected in the General State Account.

The Assembly of the Republic concludes that:

1. The Resolution of the Assembly of the Republic cannot be heard by the Constitutional Council, since it is not law, nor a normative act, covering the nature of a political act, and to

that extent, is outside the powers of that body, under the terms of paragraph a) of no. 1 of article 243 of the CRM.

2. The request for a declaration of unconstitutionality or illegality of Resolution no. 11/2016, of 22 August, must be denied, as its subsistence represents the political opportunity, to be monitored by the Assembly of the Republic, as a body of political control of the Public Administration and by the Administrative Court, as the body that issues an opinion on the General State Account, the financial movements that the Government is making to pay the debts of EMATUM, SA., because the State is the guarantor of the obligation.

3. The Assembly of the Republic ends by considering that the request for a declaration of unconstitutionality of Article 1 of Resolution No 11/2016, of 22 August, approving the State General Account, for the financial year 2014, should be declared unfounded, and that the said Resolution remains in force.

In compliance with the provisions of paragraph 1 of Article 63 of the LOCC, the memorandum was drafted and, subsequently, the Constitutional Council established the guidance under paragraph 2 of the aforementioned legal provision.

## **II Rationale**

This successive constitutionality review procedure was submitted to this Body by legitimate entities, under the terms of paragraphs g) and f), respectively, of article 243 of the Constitution of the Republic, and paragraphs g) and f) of paragraph 2, of article 60 of Law no. 6/2006, of 2 August, already cited above.

The Constitutional Council, a sovereign body, which is especially responsible for administering justice in matters of a legal-constitutional nature, in accordance with Article 240(1) of the CRM, is the competent body to examine and decide the issue raised here, its motivation being relegated to a later date, given the controversy arising from the AR.

In this regard, it is urgent to reconfirm the list of grounds on which the AR bases the incompetence of this Council for the assessment of the request, both the one by the initial Applicants, as well as the one by the Dignified Ombudsman, among which the following excerpts are significant:

*- Legislative acts of the Assembly of the Republic shall take the form of a law and other deliberations shall take the form of a resolution and shall be published in the Bulletin of the Republic. Resolutions of the Assembly of the Republic shall, by their nature, be political acts, removed from the scope of the competence of the Constitutional Council.*

*- (...) A Resolution may or may not contain norms. Resolutions that are normally normative are those that can be found in them positive aspects of social or economic regulation, namely in cases of appreciation of decree-laws of the Government by the Assembly of the Republic, in case of recall; under Article 18 of the Constitution, among others, but already considers as purely political Resolutions those that are linked to the political supervision exercised by the Assembly of the Republic, namely those of appreciation of the General State Account, appreciation of annual implementation reports of the activities of the Government, those of authorization of the President of the Republic to travel abroad, those of election of bodies of the Assembly of the Republic.*

Based on this rationale, the AR considers that the Resolution approving the 2014 CGE, because it does not provide for discipline in a social or economic area and is not even subject to a specific law, cannot be qualified as a normative act, but rather as a true political act.

The vigorous argument that animates the Notified Party, fighting for the non-justiciability of the Resolution under examination, considering it to be purely political, is in line with the classic thesis of the non-justiciability of the resolutions, taken as an eminently internal act of the sovereign body of which it is a part, to which the principle of separation of powers is associated, and this on the assumption that they conform to the constitution and the law.

In the case we are dealing with, there is no controversy regarding jurisdictional controllability or not, given the simplicity of Resolution No. 11/2016, which only limits itself, in its Article 1, to declaring that the State General Account for the financial year 2014 is approved, without providing normatively on substance in any area.

*Jura novit curia.* Contrary to the petitioners' request, who require a declaration of unconstitutionality, disjunctively posing the illegality of that Resolution, the underlying issue in this demand is essentially the violation of the law, in the broad sense, practiced by the Executive, as shown below, in what interests the case, the factualism admittedly exposed by the Assembly of the Republic in its pronouncement, in which, after mentioning that the loan contracted by EMATUM, SA, was not registered in Law no. 1/2013, of 7 January, it expressly states that *the Government contracted a loan in an amount greater than the guarantees and guarantees provided for in the Budget Law, which imposed a special duty on the Government, in the surplus part, to have requested an authorisation to provide the guarantees (article 179, paragraph p), no. 2 of the Constitution).* And, in the same vein, the AR acknowledges that the guarantees were provided illegitimately, the consequence of which is their nullity, except that *this nullity must be declared by the competent body, taking into account the practical consequences resulting from the contracts signed internationally and the legitimacy of the Government, which in acting at international level, did so in the name of the interest of the State.*

As is evident, undoubtedly the Government acted outside the Constitution, in clear violation of the respective paragraph p) of paragraph 2 of Article 178 of the CRM, where it reserves the exclusive competence of the Assembly of the Republic to *authorize (...) to contract or grant loans, to carry out other credit operations, for a period longer than one financial year and to establish the limit of the guarantees to be granted to the State,* on the one hand and, on the other hand, infringed subparagraph a) of paragraph 2 of Article 129 of Law No. 14/2011, of 10 August, by the practice of acts that obviously constitute the usurpation of power, conflicting immediately with Article 134, which enshrines the separation and the interdependence of the powers of the organs of sovereignty, subject to the Constitution and the laws, as also stipulated in Article 2(3), both of the CRM.

Concurrently with the violation of the Constitution, the practice of another illegality that echoes the Assembly of the Republic itself, when it is stated in the document of its hearing that the loan contracted by EMATUM, SA, was not inscribed in Law No. 1/2013, of 7 January, against a provision of an imperative nature, Article 15(2) and (3), of Law No. 9/2002, of 12 February (E- SISTAFE), which incisively provides:

*"1. No expenditure may be assumed, ordered or carried out without being legally inscribed duly in the approved State budget, having a place in the corresponding budgetary allocation and being justified as to its economy, efficiency and effectiveness".*

*“2. Expenditure may only be assumed during the economic year for which it has been budgeted”.*

This is the legal framework [bloco legal] that, in this case, includes the Constitution and the ordinary law that was completely disregarded by the Government in contracting the debt of EMATUM,SA, as well as the sovereign guarantee granted, resulting in its illegality and with serious legal consequences: these are invalid acts, in the form of nullity, by virtue of the provisions of Article 129(2)(a) of the aforementioned law, a fact that is legally reflected in Resolution No 11/2016.

As a corollary of the detected illegality, its assessment is up to the administrative jurisdiction, under the terms of Article 3(b) of Law No. 7/2014 of 28 February, which regulates the procedures relating to the Administrative Litigation Process.

However, as this is a null administrative act, its nullity can be invoked at all times and by any interested party, when it involves usurpation of power, as provided for in Article 35 of Law No. 7/2014 of 28 February. However, this competence is not taken away from this body by virtue of the combined provisions of Articles 294, 286 and 289, all of the Civil Code, which reinforces the conviction that this Constitutional Council has jurisdiction to declare it, thus resolving the controversy then raised by the Assembly of the Republic.

### **III Decision**

Accordingly, the Constitutional Council declares the nullity of the acts inherent to the loan contracted by EMATUM,SA, and the respective sovereign guarantee granted by the Government in 2013, with all the legal consequences.

Register, notify and publish.

Maputo, 3 June 2019

Hermenegildo Maria Cepeda Gamito, Ozias Pondja, Manuel Henrique Franque, Domingos Hermínio Cintura, Mateus da Cecília Feniassa Saize.