



# SECURITY FOR COSTS

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# Article 166 of the code de procédure civile

*“Tous étrangers demandeurs principaux ou intervenants, seront tenus, si le défendeur le requiert, avant toute exception, de fournir caution de payer les frais et dommages-intérêts auxquels ils pourront être condamnés.”*

# Article 21 of the Code Civil

*“En toute matières, autres que celles de commerce, l'étranger qui sera demandeur sera tenu de donner caution pour le paiement des frais et dommages et intérêts résultant du procès, a moins qu'il ne possède a Maurice des immeubles d'une valeur suffisante pour assurer ce paiement.”*

# Article 110 of the Courts Act

*Any Court may, on the application of the defendant, in any cause or matter, require the plaintiff to give security for costs in all cases in which under the Code Civil Mauricien security may be required or where the plaintiff is known to be insolvent.”*

# Relationship between article 21 cc and 166 CPC

- Article 21 CC: frais et dommages-intérêts 'résultant du procès'
- Article 166 CPC : frais et dommages auxquels ils pourraient être condamnés
- Article 21 CC prevails

# Art 21 prevails

- **The Court in Vestalane Investments (Pty) Ltd v Federal Trust (Mauritius) Ltd 2007 SCJ 84 referred to Repertoire Droit International Dalloz Verbo Caution “Judicatum Solvi”**

*“42. La caution est due pour garantir, d’après l’article 16 du code civil, ‘le paiement des frais et dommages-interets resultant du proces’ et d’après l’article 166 du code de procedure civile, ‘les frais et dommages-interets auxquels ils (les etrangers demandeurs) pourraient etre condamnes.’ La seconde formule est beaucoup plus extensive, mais c’est le texte le plus restrictif du code civil qui l’a justement emporte, car le code de procedure civile n’est en la matiere qu’un texte d’application ...Les dettes garanties sont donc, d’une part des frais, d’autre part des dommages-interets.*

# To whom does the requirements apply

- Foreigner
- Demandeur-Principaux
- Intervenant

# Court's power to order security for costs

- **D'Agostini v Pison & Co. and Pons and Others 1880 MR 31**

*“...We think therefore that we have the power in virtue of the order in Council, which has organised the Supreme Court, to follow in this matter the practice of the Courts in England both of law and equity to order that security for costs be given by the Plaintiffs...”*



# Is Security for Costs limited to non-commercial action?

- **Atelier Etude Limousin & Ors v BPCE International et Outre Mer & Anor 2016 SCJ 300**

*“This Court has ever since followed the principle therein enunciated, and we think we must take it as a settled part of our local jurisprudence that even where it can be proved to the satisfaction of the Court that the pending action is of a commercial character there is power to order a plaintiff in appropriate circumstances to furnish security for costs.”*

Referred to **Ng King v Lai See Kwan 1940 MR 72**

*“...the court in exercising its equitable powers certainly has the discretion to order security for costs... even in cases not contemplated by law...and could even, in the exercise of such powers, order a foreign plaintiff to provide security in respect of a commercial action, notwithstanding the terms of Article 21 of the Civil Code.”*

Referred to **Al-Rawas I.S.A.A v Al Tani HH S.K.B.H & Ors 2013 SCJ 447** which referred with approval **Gupta v Fincotex Ltd 1996 MR 72**

# Is the action of a commercial nature?

***Al-Rawas I.S.A.A v Al Tani HH S.K.B.H & Ors 2013 SCJ 447***

- Is the action of a commercial nature
- Art I Code de Commerce: list of acte de commerce

*“I. La loi répute actes de commerce:*

*...*

*Toutes opérations d'intermédiaire pour l'achat, la souscription ou la vente d'immeubles, de fonds de commerce, d'actions ou parts de sociétés immobilières;”*

- The Plaintiff's action cannot be said to be of a commercial action.
- There are breaches of Companies Act

# 'Frais'

- **Répertoire Droit International Dalloz Verbo Caution "Judicatum Solvi" Note 43**

*43. Les frais qui sont visés par l'article 16 du code civil sont les frais qui entrent dans les dépenses de l'instance (les frais du procès lui-même et non ceux dont il est l'occasion..., c'est-à-dire les frais que le défendeur français a du faire pendant l'instance pour la défense de ses intérêts, et qui incomberont au demandeur étranger s'il perd son procès. Il s'agit exclusivement des frais susceptibles d'être taxés par la juridiction devant laquelle se déroule l'instance en cours : frais de première instance, ou frais d'appel exclusivement, si la caution n'a été demandée qu'en appel.*

*Vestlane Investments (PTY) Ltd v Federal Trust (Mauritius) Ltd 2007 SCJ 84*

## **‘FRAIS’**

*“...all necessary expenses incurred by the respondents and co-respondent to resist the applicant’s action, like lawyers’ fees, registration fees if any for the documents which may have been produced, travelling and accommodation expenses of a witness ...”*

***Al Rawas I.S.A.A v Pegasus Energy Limited & Ors 2006 SCJ 274***

# Quantum

## **Al-Rawas I.S.A.A v AL Tani HH S.K.B.H & Ors [2013 SCJ 447]**

- Followed English Practice
- Discretion of the Court which will fix such sums as it thinks just, having regards to all circumstances of the case
- Reasonable costs
- Amount ordered should be neither illusory nor oppressive
- Must not stifle the Plaintiff
- Must not impair the Plaintiff's right of access to the Courts in a disproportionate manner to the need to protect the opposing parties' interest to obtain security for costs

## **Atelier Etude Limousin & Ors v BPCE International et Outre Mer & Anor 2016 SCJ 300**

*“With regard to the amount of security for costs to be awarded, it has always been left to the discretion of the Court to order its quantum but same should be restricted to reasonable costs as was held in Al-Rawas v Pagassus Energy Limited 2006 SCJ 274...”*

# Costs subject to taxation

- **Al-Rawas I.S.A.A v AL Tani HH S.K.B.H & Ors [2013 SCJ 447]**

“...the amount that any successful defendant is entitled to claim in respect of Counsel’s and Attorney’s fees are set out in the Schedule to the Legal Fees and Costs Rules and would not exceed 100,000 rupees, which would be approximately equivalent to 3,300 US Dollars.”

“However, in respect of items other than legal fees, the security for costs can, in accordance with Rule 4 of the Legal Fees and Costs Rules, be calculated on the basis of the reimbursement of costs incurred by the defendants as a successful party following taxation of costs by the taxing officer...”

# Rule 4 of the Legal Fees and Costs Rules 2000

4. (a) *Subject to paragraphs (b) and (c), no person shall be entitled to any costs, other than disbursements incurred pursuant to rule 3, except in accordance with Part B of the Schedule.*
- (b) *The taxing officer shall, unless the parties concerned otherwise agree, determine the amount allowable pursuant to paragraph (a) where-*
- (i) it is expressed as a variable; or*
  - (ii) the monetary value of the subject matter is not determined.*
- (c) *An attorney who acts as mandator ad negotia shall, in addition to his costs, be entitled-*
- (i) to such fair and reasonable remuneration as may have been agreed with his client; or*
  - (ii) in the absence of such agreement, to such fair and reasonable remuneration as may be determined by the taxing officer.*

# Schedule to the Legal Fees and Costs Rules 2000

## Part A

(rule 3)

### I. Supreme Court, Admiralty Court, Bankruptcy Court, Master's Court and Judge in Chambers

(...)

- |  |               |
|--|---------------|
| (d) Filing a defence (by whatever name called or otherwise putting in an appearance) | Rs 250 rupees |
| (e) Usher's Fees   |               |
| (i) every original of an inventory in excess of 25,000 rupees                        | 1300 rupees   |
| (i) every original or an inventory up to 25,000 rupees, and every other memorandum   | 650 rupees    |
| (i) every service  | 150 rupees    |

(...)



# Schedule to the Legal Fees and Costs Rules 2000

## Part B (rule 4)

### Counsel's fee

- |       |   |                     |
|-------|---|---------------------|
| (a)   | For an extra judicial act   | 650 to 4000 rupees  |
| (b)   | Where the value of the subject matter does not exceed 500,000 rupees- |                     |
| (i)   | in undefended proceedings   | 1500 rupees         |
| (ii)  | in defend proceedings   | 3000 to 5000 rupees |
| (c)   | Where the value of the subject matter exceeds 500,000 rupees-         |                     |
| (i)   | in undefended proceedings   | 2500 rupees         |
| (ii)  | in defended proceedings   | 4000 to 7000 rupees |
| (...) |   |                     |

### Attorney's fee

The fee payable shall be the same as for counsel

### Expert witness Fee

In the case of professional services such as those of a

Medical practitioner, surveyor, valuer, 400 to 3000 rupees  
accountant, liquidator, trustee, or receiver

(...)

# **‘DOMMAGES-INTÉRÊTS’**

*“The term dommages-intérêts in the context of security “judicatum solvi” appears however to be technical and fairly limitative. It is limited to damages resulting from clearly vexatious, litigious and abusive legal process and does not comprise of damages which may be awarded against a plaintiff/applicant in any cross action brought against him...”*

*Al Rawas I.S.A.A v Pegasus Energy Limited & Ors  
2006 SCJ 274*

# When should D apply for Security for Costs?

- **L'Hoir v Levieux 1909 MR 130**

Referred in **Malletier LV v Tejoo A B 2017 SCJ 399**

*“...As regards to the time when the application for security must be made, the law lays down that it must be in limine, and at any rate before the case is ripe for hearing, but it does not provide for the case of an alien plaintiff against whom art 16 (166) could not have been invoked even in limine...”*

*“The only conclusion that can be reached is that the defendant should be deemed to have waived any right to insist on security for costs and damages which in any event is foreign to our provisions of the law on that issue.”*