

FURNISHING SECURITY FOR COSTS OF LITIGATION - (Karen Phiri, Associate)

In certain instances, a litigant may be required to furnish security for the costs of litigation. In this regard, instances in which security for costs may be demanded include where the party instituting the legal proceedings is a peregrine, an insolvent, or, in the case of a company, where there is good reason to believe that a company will be unable to pay the costs of the litigation if it is unsuccessful in its claim. This article will solely deal with security for costs where the Plaintiff or Applicant is a peregrine, as defined below.

Order 57 Rule (1) of the Rules of the High Court provides that:

“A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which security is claimed, and the amount demanded.”

For purposes of determining liability to furnish security for costs, a peregrine is a foreign litigant (whether an individual or a juristic person) who is not resident in Botswana, and who institutes legal proceedings in a Botswana Court against a person (again whether an individual or a juristic person) who is resident in Botswana. Put differently, a *peregrinus* is a Plaintiff or Applicant who is ordinarily resident outside the jurisdiction of the Botswana courts. An *incola*, on the other hand, is a natural or juristic person who is either domiciled or resident within the court’s jurisdiction.

As a general rule, a *peregrinus* who initiates proceedings in the Botswana Courts must furnish security to the *incola* Defendant or Respondent for his costs, unless he owns immovable property in Botswana. This property should be sufficiently unencumbered to satisfy any costs that may be ordered against the *peregrinus* Plaintiff. The ownership of immovable property is, therefore, a defence to a demand for security for costs. This defence does not, however, extend to movable property owned by a *peregrinus*.

If the party from whom security for costs is demanded contests his liability to pay security for costs, then the judge must hold an enquiry to investigate the merits of the demand for payment of security for costs. The consideration of the judge is not to protect the interests of the *incola* absolutely, instead, he has a judicial discretion to grant or refuse the furnishing of security for costs. The Court in exercising its discretion does not, however, inquire into the merits of the dispute.

Once it has been established that the peregrine Plaintiff or Applicant is liable to furnish security for costs, the quantum of the security must be determined. Failing agreement by the parties, the determination of the quantum of security for costs is usually referred to the Registrar of the High Court to fix the amount of the security to be paid. If the *peregrinus* fails or refuses to pay the amount fixed by the Registrar within 10 Court days of the Registrar’s order, the *incola* Defendant/Respondent can apply to have the proceedings be stayed until such order is complied with. If the security for costs is still not paid within a reasonable time, the Judge may (on the application of the other party) dismiss any proceedings instituted or strike out the pleadings filed by the party in default.