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### CONTENTS

No.		Page
ACT		
12	Security Interest in Movable Property Act, 2020 .....	663
GOVERNMENT NOTICE		
27	Statement of Objects and Reasons of The ..... Security Interest in Movable Property Act, 2020	705

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## ACT NO. 12 OF 2020

**Security Interest in Movable Property Act, 2020****Arrangement of Sections****Sections****PART I - PRELIMINARY**

1. Short title and commencement
2. Interpretation
3. Scope

**PART II - CREATION AND PERFECTION OF SECURITY INTERESTS**

4. Security agreement
5. Description of collateral
6. Conditions and enforceability of security agreement between parties

**PART III - SECURITY INTEREST**

7. Perfection of security interest
8. Proceeds
9. Limitations on notice requirement

**PART IV - PREFERENCE OF SECURITY INTEREST IN COLLATERAL**

10. Priority of claims
11. Fixtures
12. Acquisition finance security interest
13. Rules applicable in livestock
14. Crops
15. Right to retain possession of property
16. Accessions
17. Commingled goods
18. Rights of transferees, buyers and custodians
19. Subordination of security interest

**PART V - ENFORCEMENT OF SECURITY INTERESTS**

20. Rights of a security holder
21. Special rules regarding accounts receivables and documents and accounts
22. Taking possession of collateral
23. Duty of security holder to care for collateral

**PART VI - DISPOSITION OF COLLATERAL**

24. Disposition or retention of control
25. Notice of disposition
26. Retention of collateral by security holder
27. Distribution of proceeds
28. Rights of acquiring party

**PART VII - RIGHTS OF DEBTOR**

29. Rights of redemption

**PART VIII - THE REGISTRY**

30. Registry operation
31. Designation, powers and duties of the Registrar
32. Notice of registration of security holders
33. Notice of registration of lien holders
34. Contents of initial notice
35. Identification of debtor
36. Sufficiency of notice
37. Amendment of notice
38. Continuation of notice
39. Term of effectiveness, termination and lapse

**PART IX - APPLICATION OF LAW**

40. Perfection when goods are moved to Lesotho
41. Application to certain collateral across multiple jurisdictions
42. Location of debtor

**PART X - MISCELLANEOUS**

- 43. Transitional and administrative matters**
- 44. Regulations**

## ACT NO. 12 OF 2020

**Security Interest in Movable Property Act, 2020**

An Act to make provision for the creation of security interest in movable property; the prioritization of competing interests in the collateral; simplified and expedited enforcement procedures; the establishment and operation of an electronic public registry for notices of security interests; a transitional period for prior interests; and for incidental matters.

## PART I - PRELIMINARY

**Short title and commencement**

1. This Act may be cited as the Security Interests in Movable Property Act, 2020, and shall come into operation on the date to be appointed by the Minister by notice published in the Gazette.

**Interpretation**

2. In this Act, unless the context otherwise requires -

“accessions” means goods that are installed in, or affixed to, other goods in such a manner that the identity of the goods is not lost;

“account debtor” means a person who is obligated to make a payment on an account receivable, secured sales contract or payment intangible;

“account receivable” means any right to payment of any monetary obligation, whether secured or unsecured, for property that has been or is to be sold, leased, licensed or otherwise assigned, or for services rendered or to be rendered, which is not evidenced by a financial instrument but does not include deposit accounts;

“acquisition finance security interest” means a security interest taken in collateral, other than a financial instrument, by a seller or any other person to secure payment of the collateral sold to the extent the credit is used for that purpose;

“attachment” means the completion of all conditions necessary to make a

security interest enforceable against the debtor, but not third parties, with respect to the collateral;

“cash” means the physical currency, whether in paper form or coins, authorised as a legal tender by the law of Lesotho or any other country;

“collateral” means present movable property that is the subject of a security interest or lien;

“collateral provider” means a person who grants a security interest in collateral, which may be the debtor or a third party who provides the collateral for the benefit of the debtor;

“commingled goods” means fungible goods that are physically blended with other fungible goods in a way that their identity is lost in a product of a mass;

“consumer goods” means goods that are used or acquired for use primarily for personal, family or household purposes, but excludes a motor vehicle;

“Court” means a Court of competent jurisdiction in Lesotho;

“crops” means crops, produced or to be produced by a debtor or collateral provider whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, and includes trees only if they are -

- (a) being grown as nursery stock; or
- (b) being grown for uses other than the production of lumber and wood products; or
- (c) intended to be replanted in another location for the purpose of reforestation;

“debtor” means a person who owns or has rights in the collateral, other than a security interest, whether or not that person is obligated to perform an obligation secured by collateral, and includes a seller of accounts receivable, and a lessee or consignee of goods;

“Deeds Registry” has the meaning ascribed to it by the Deeds Registry Act, 1967;

“default” means the failure of a debtor or any other person to perform an obligation under a security agreement;

“deposit account” means an interest-bearing or noninterest bearing deposit account;

“document” means a document of title, or a receipt such as a bill of lading, or warehouse receipt, issued by a person in the business of transporting or storing goods;

“equipment” means goods other than crops, livestock, inventory and consumer goods;

“financial instruments” means -

- (a) stocks, shares, debentures and bonds;
- (b) negotiable instruments;
- (c) other securities including -
  - (i) rights or options in securities;
  - (ii) certificates of interest or participation in a profit sharing agreement;
  - (iii) collateral trust certificates; and
  - (iv) futures contracts -

“fixture” means goods that are affixed or are intended to become affixed to immovable property in a manner that causes a real property right to extend to the goods, but does not include building materials and readily removable factory machines, office machines and domestic appliances;

“goods” means all things that are movable when a security interest attaches, and includes tangible movable property, equipment, fixtures, crops

and the unborn young of animals, but does not include accounts receivable, documents of title, financial instruments or money;

"intangible" means personal property that is not goods, a document, a financial instrument, or money, but includes an account, a deposit account, intellectual property and a licence;

"inventory" means -

- (a) goods held for sale, lease or to be furnished under a service contract;
- (b) raw materials and work in progress; and
- (c) materials used or consumed in the operation of a business;

"lien" means a right created in movable property by operation of law, an order of a court or other legal authority, as security for payment of a debt, including, but not limited to a tax and judgment lien, but not a right of retention;

"money" means any item used as a medium of exchange, including checks on demand deposit checks, money orders, or other credit arrangements;

"movable property" means any asset that is not immovable property, including goods, documents, financial instruments, accounts receivable and intellectual property and other kinds of intangibles;

"negotiable instruments" means writings that evidence a right to payment of money, that are not a security agreement or lease, and that in the ordinary course of business may be transferred by delivery with endorsement or assignment;

"notice" means a notice of the possible existence of a security interest registered with the Registry;

"payment intangible" means a right to receive payment of a monetary obligation, other than an account receivable;

"perfection" means optimisation of the rights of security holder in coll-



ateral against third parties which includes, among others, buyers, other security holders, lien holders and an insolvency administrator;

“person” means an individual or juridical entity;

“proceeds” means whatever consideration that is acquired upon the sale, lease, or other disposition of collateral, or whatever is collected on or distributed with respect to collateral, and includes, cash, money, property exchanged for the original collateral; or property acquired with proceeds; a deposit account into which proceeds are deposited; and a right to insurance payment or other compensation for loss or damage of the collateral;

“real property identification number” means a number that identifies real property sufficiently to register a mortgage in the real property under the Deeds Registry Act, 1967;

“Registrar” means the Registrar of security interest provided for under section 31(1);

“registry” means the electronic registry in which notices of security interests are registered as set out in Part VIII;

“secured sales contract” means a contract for the sale of goods on credit that includes a security agreement creating a security interest in the sold goods;

“security agreement” means an agreement that creates a security interest in movable property;

“security holder” means a person in whose favor a security interest is created by contract or law; for the purposes of publicity and priority, and includes a lessor of goods for more than one year, a buyer of accounts receivable, and a consignor of goods;

“security interest” means a right in collateral that secures performance of one or more obligations and, for the purpose of perfection and priority only, it includes the interests of a buyer of accounts receivable, a consigner of goods, and a lessor of goods for more than one year;

“serial number” means the vehicle identification number assigned to a ve-

hicle by its manufacturer under standards adopted by the International Organization for Standardization; and

“value” means any consideration that is sufficient to support a contract and includes an antecedent debt or liability.

### **Scope of this Act**

3. (1) This Act applies to all transactions that secure an obligation with collateral, regardless of the form of the agreement or the terminology used, and whether the collateral is owned by the security holder or the debtor.

(2) Without limiting the generality of subsection (1), this Act applies to -

- (a) to any transaction nominally called a hire-purchase, pledge, conditional sale, debenture secured by movable property, mortgage of movable property, and other forms of similar transactions that in substance amount to security agreements;
- (b) the sale of movable property with the title retained by the seller until full payment and performance by the buyer has been made, including but not limited to an installment sale contract;
- (c) the sale and buy-back or sale and lease-back of goods; and;
- (d) any other legal interest in movable assets that is created in favor of a security holder to secure performance of any obligation of a debtor or a third party.

(3) For purposes of priority determination and registration of notice, this Act also applies to -

- (a) the sale of accounts receivable;
- (b) a financial lease as defined in the Financial Lease Regulations 2013<sup>2</sup>;
- (c) the right of a consignor of goods to a consignee who is in the

business of selling on consignment;

- (d) the right of a holder of a lien in movable property.
- (4) This Act shall not apply to the following transactions -
- (a) the outright sale of accounts receivables or secured sales contracts sold as part of the sale of an operating business, out of which they arose;
  - (b) the assignment of rights for the purpose of collecting debt;
  - (c) the creation or transfer of an interest in immovable property, including a mortgage, or lease of immovable property, except as provided with respect to crops, timber to be cut, or minerals to be extracted.
  - (d) the transfer of a claim for present or future compensation, whether wages or salary, of an employee;
  - (e) any other interest or rights that are specifically excluded from being used as collateral in any other law.
- (5) A security interest may not be created in consumer goods except for an acquisition finance security interest.

## PART II - CREATION OF SECURITY INTERESTS

### Security agreement

4. (1) A security interest shall be created by a security agreement.
- (2) A security agreement shall be a written contract, signed by the security holder and the debtor, and when the collateral is provided by a person other than the debtor, the collateral provider.
- (3) A security interest may secure one or more obligations, which may be described specifically or generally, monetary or non-monetary, pre-existing, present or future, fixed or floating, or a line of credit.

(4) The requirement that a security agreement shall be in writing may be satisfied by printable electronic records, and may consist of one or more writings or electronic records that taken together, establish the intent of the parties.

(5) Upon its creation, a security interest is effective as between the security holder and the debtor, without the need for registration under this or any other law.

### **Description of collateral**

5. (1) A description of a collateral in a security agreement or notice is sufficient, whether it is specific or general, if it -

- (a) reasonably identifies the collateral by item or kind in a manner that enables the collateral to be identified;
- (b) consists of a statement that a security interest is taken in all of the debtor's present and after-acquired property; or
- (c) consists of a statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

(2) If the security agreement relates to consumer goods, the collateral shall be described specifically.

(3) A collateral description may provide the serial number of a serial numbered vehicle, where applicable, in a field prescribed by the Registrar.

(4) A notice to referred to in subsection (1) may provide the relevant real property identification number if the notice covers fixtures, timber to be cut, or as-extracted collateral, in a field prescribed by the Registrar.

### **Conditions and enforceability of security interest between the parties**

6. (1) A security interest becomes effective against the debtor and, if applicable, the following conditions are met -

- (a) the collateral provider has signed a security agreement that sufficiently describes the collateral;
  - (b) the security holder has given or made a binding commitment to give value to the debtor; and
  - (c) the debtor or, if applicable, the collateral provider, has rights in or power to transfer rights in the collateral.
- (2) Subsection (1) does not apply if the parties to a security agreement have agreed that a security interest attaches at a later time, in which case the security interest attaches at the time specified in the agreement.
- (3) A security interest becomes effective as between the debtor and any collateral provider and the security holder without the need for registration under this Act or any other law.
- (4) If the description of collateral in a security agreement includes property that is to be acquired or to come into existence in the future, the security interest shall become enforceable when the debtor or collateral provider acquires rights to that property or the power to transfer rights in the property.
- (5) A security interest continues in collateral notwithstanding the sale, lease, license, exchange or other disposition of the collateral unless otherwise agreed to by the security holder.
- (6) Unless otherwise agreed in writing, a security interest attaches to proceeds.
- (7) Notwithstanding any law to the contrary, when collateral consists of present or future accounts receivables or payment intangibles, notice to the account debtors or payment obligors is not required as a condition to attachment, perfection or enforcement of the security interest.

### PART III - PERFECTION OF A SECURITY INTEREST

#### Perfection of security interest

7. (1) A security interest is perfected and enforceable against third parties when it has become enforceable against the debtor pursuant to section 6(1) and

a means of perfection is accomplished.

(2) The means of perfection is through registration of a notice in the Registry, as provided by this Act, if -

- (a) a security interest in goods, financial instruments, documents and negotiable instruments may be perfected by the security holder taking possession;
- (b) the collateral is a deposit account, the security interest may be perfected only by the security holder acquiring control of the deposit account;
- (c) the collateral consists of money, other than cash proceeds, the security interest may be perfected only by the security holder taking possession of the money;
- (d) an acquisition finance security interest in consumer goods is automatically perfected without registration of notice.

(3) A security interest that is perfected under this Act shall remain perfected despite a change in the method for achieving perfection, provided that there is no time when the security interest is not perfected.

(4) A security holder has control of a deposit account if -

- (a) the security holder is the financial institution with which the deposit account is maintained, even if the debtor retains the right to direct the disposition of funds from the deposit account;
- (b) the debtor, security holder, and financial institution have agreed in a signed writing that the financial institution will comply with instructions originated by the security holder directing disposition of the funds in the deposit account without further consent by the debtor; or
- (c) the security holder becomes the customer of the financial institution with respect to the deposit account.

**Proceeds**

8. (1) With regard to proceeds -
- (a) upon disposition of collateral, a security interest attaches to proceeds of the collateral and remains perfected if the security interest in the collateral was perfected unless otherwise agreed in writing; and
  - (b) the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.

(2) A security interest in proceeds, which is identifiable cash proceeds or described in the registered notice, continues to be perfected without any further action of the debtor or the security holder.

(3) A security interest in proceeds other than that mentioned in subsection (2) becomes unperfected 15 days after the debtor receives the proceeds.

**Limitations on notice requirement**

9. (1) If a security holder assigns a perfected security interest, a notice need not be registered under this law to continue perfection of the security interest.

(2) Notice to an account debtor is not required as a condition of assignment, transfer, enforcement, attachment or perfection of the security interest.

**PART IV - PREFERENCE OF SECURITY INTEREST IN COLLATERAL****Priority of claims**

10. (1) A security interest, lien or any other interest perfected under this Act shall have priority over an unperfected security interest or lien in the same collateral.

(2) In the event that there are several -

- (a) perfected security interests, liens or any other interests in the

same collateral, their priority shall be determined according to the date and time of registration of a notice, or the date and time of perfection by other means, except as may otherwise be provided by this Act;

- (b) unperfected security interests, liens or any other interests in the same collateral, their priority shall be determined according to the date and time when such security interests, liens or other interest became enforceable against the debtor.

### **Fixtures**

11. (1) Notwithstanding any contrary provision in the law relating to land or any other law, a security interest may be created in goods that are fixtures, and a security interest may continue in goods that become fixtures.

(2) Notwithstanding subsection (1), a security interest in ordinary building materials shall be unenforceable when the building materials are incorporated into real property.

(3) This section shall not determine priority of security interest in readily removable factory machines, office machines, and domestic appliances.

(4) A security interest in fixtures shall be subordinate to all other real rights in real property, except as provided in this section.

(5) A perfected security interest in fixtures shall have priority over the interest of the owner of real property or a mortgagee, notwithstanding any provision in the mortgage, if a notice is registered before the interest of the owner or the mortgagee is registered.

(6) Subsection (5) shall not apply if the owner of the real property or a mortgagee is also the debtor.

(7) A perfected security interest in fixtures shall have priority over the interest of a lien holder if a notice is registered before the filing of a notice of the interest of the lien holder as required by this Act or before the lien holder has taken physical control of the fixtures.

(8) A perfected security interest in fixtures shall have priority over the



interest of the owner of real property, a lien holder, or a mortgagee, notwithstanding any provision in the mortgage, if the security interest is an acquisition finance security interest given by the debtor before the goods become fixtures, and a notice is registered before the goods become fixtures or within five days thereafter.

(9) A security holder who has the right under this Act to remove goods from land shall exercise the right of removal in a manner that causes no greater damage or injury to the land and to other property situated on the land than is reasonably necessary or that puts the occupier of the land to greater inconvenience than is necessarily incidental to the removal of the goods.

(10) The security holder who has the right under this Act to remove fixtures from the real property shall give a notice of the security holder's intention to remove the fixtures to each person who -

- (a) is known by the security holder to have an interest in the real property; or
- (b) has registered a notice under this Act identifying the debtor and covering the fixtures in that notice.

(11) A notice mentioned in subsection (7) shall be given, at least, 10 days before removal of the fixture and shall contain -

- (a) the name and address of the security holder;
- (b) a description of the fixtures to be removed;
- (c) the amount required to satisfy the obligations secured by the security interest;
- (d) the estimated market value of the fixtures;
- (e) a description of real property upon which the fixtures are located; and
- (f) a statement of intention to remove the fixtures on or before a specified day that is not less than 10 days after the notice is given.

(12) A person, other than the debtor, who has an interest in the land at the time when the goods subject to the security interest are affixed to the land and become fixtures is entitled to reimbursement for any damages to the interest of the person in the land caused during the removal of the goods, but is not entitled to reimbursement for reduction in the value of the land caused by the absence of the goods removed or by the necessity of replacement.

(13) A person, other than the debtor, who has an interest in the land that is subordinate to a security interest in a fixture as provided in this section may, before the fixture has been removed from the land, retain the fixture on payment to the security holder of the lesser of the -

- (a) amount secured by the security interest entitled to remove the fixture; or
- (b) market value of the fixture if the fixture were removed from the land.

#### **Acquisition finance security interest**

12. (1) An acquisition finance security interest in equipment has priority over a conflicting security interest in the same equipment, if a notice relating to the equipment is registered prior to the debtor taking possession of the equipment or within 5 days of taking possession.

(2) An acquisition finance security interest in goods other than equipment or their proceeds that is perfected not later than 5 days from the date the debtor obtains possession of the goods has priority over the rights of a buyer, lessee or lien holder which arise between the time the security interest attaches and the time the notice is registered.

(3) A perfected acquisition finance security interest in inventory has priority over a conflicting perfected acquisition finance security interest in the same inventory if the security interest is perfected when the grantor receives possession of the inventory, and if, not later than 10 days after the grantor receives possession, before the acquisition finance security interest holder gives written notice to the holder of the conflicting perfected security interest in the same types of inventory.

**Rules applicable in livestock**

13. In the event that there is more than one security interest or right in livestock for which a notice was registered, the following rules shall apply -
- (a) a perfected acquisition finance security interest in livestock has priority over a conflicting perfected security interest in the same livestock if the acquisition finance security interest is perfected when the debtor receives possession of the livestock; and
  - (b) a perfected security interest in livestock given for value to enable the debtor to obtain food or medicine for the livestock has priority over any other security interest or right in the livestock, and without the need for written notice to the holders of conflicting security interests or rights.

**Crops**

14. (1) Notwithstanding any law to the contrary, a perfected security interest in crops is a security interest in the crops to be grown, while growing and afterwards when cut or separated from the soil.
- (2) For the purpose of determining whether a security interest in crops cut or separated from the soil exists, it does not matter whether the crops are stored on the real property where the crops were grown or on any other land or premises.
- (3) A perfected security interest in crops is not extinguished or prejudicially affected by a subsequent sale, lease, mortgage, or other encumbrance of or upon the land on which the crops are growing.
- (4) A perfected security interest in crops growing on land has priority over a conflicting interest of a title holder, mortgagee or other person with an interest in the real property if the debtor has a registered interest in or is in possession of the land.

**Right to retain possession of property**

15. The right of a person who provides services or materials to maintain or

enhance the value of movable property to retain possession until paid for the services or materials has priority over a perfected security interest if it arises in the ordinary course of business of the person who provides the services or materials

### Accessions

16. (1) In this section, unless the context otherwise requires-

- (a) "other goods" means goods to which an accession is installed or affixed;
- (b) "the whole" means an accession and the goods to which the accession is installed or affixed.

(2) A security interest continues in collateral that becomes an accession.

(3) If a security interest is -

- (a) perfected when the collateral becomes an accession; or
- (b) otherwise perfected in accordance with section 7,

the security interest remains perfected in the accession and has priority over a person with an interest in the other goods or the whole.

(4) A security holder who, pursuant to this Act, has the right to remove an accession shall exercise this right of removal in a manner that -

- (a) causes no greater damage or injury to the whole or other goods; or
- (b) does not put the person in possession of the whole to greater inconvenience,

than is necessarily incidental to the removal of the accession.

(5) A person, other than the debtor, who has an interest in the other goods at the time when the goods subject to the security interest become an accession, is entitled to reimbursement for any damages to the interest of the person

in the whole that is caused during the removal of the accession, but is not entitled to reimbursement for reduction in the value of the whole that is caused by the absence of the accession or by the necessity of replacement.

(6) A person who has an interest in the whole that is subordinate to a security interest in an accession as provided in this section may, before the accession has been removed from the whole by the security holder, retain the accession on payment to the security holder of the lesser of the -

- (a) amount secured by the security interest entitled to priority;  
or
- (b) market value of the accession if the accession were removed from the other goods.

(7) The security holder who has a right to remove the accession from the whole shall give a notice of the security holder's intention to remove the accession to each person who -

- (a) is known by the security holder to have an interest in the whole; or
- (b) has registered a notice -
  - (i) identifying the debtor and covering the other goods; or
  - (ii) according to the unique number of the other goods if they have a unique identification number.

### **Commingled goods**

17. (1) A security interest may not be created in commingled goods after they become commingled in a mass or product, but a perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

(2) The priority of the security interest in the product or mass is determined from the time of perfection of the security interest in the collateral that become commingled goods, except as limited by subsection (3).

(3) If more than one security interest exists in the product or mass, the following rules apply to determine priority -

- (a) a security interest that is perfected, has priority over a security interest that is unperfected at the time the collateral become commingled goods;
- (b) the first security interest to become enforceable in the product or mass against the debtor has priority among unperfected security interests; and
- (c) if more than one security interest is perfected, the perfected security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

#### **Rights of transferees, buyers and custodians**

18. (1) A transferee takes collateral free of a security interest if the transferee gives value and takes delivery of the collateral without knowledge of the security interest and before a notice is registered or the security interest is otherwise perfected.

(2) A buyer or lessee of goods from a seller or lessor that regularly deals in the kind of goods sold or leased takes the goods free of a security interest, even if the existing security interest is perfected and the buyer or lessee knows of its existence.

(3) A buyer takes the goods free of a perfected security interest if the security holder consents to the sale by the debtor in writing.

(4) A person who receives cash for value takes it free of a perfected security interest in the cash.

(5) A holder of a lien who takes control of collateral or causes collateral to be seized before a security interest is perfected takes the collateral free of the security interest.

(6) A buyer or lessee of a serial numbered vehicle takes it free of a security interest perfected by registration if the buyer or lessee does not know of the security interest due to the fact that the serial number was not described or

was incorrectly described, in a field as may be prescribed by the Registrar in relation to the collection of serial numbers, on the notice of security interest.

(7) A court or trustee in sequestration or liquidation that takes physical custody of assets that are subject to a security interest before the security interest is perfected takes it free of the security interest.

#### **Subordination of security interest**

19. (1) A security holder may, in a security agreement or otherwise, subordinate its security interest to any other interest, and the subordination is effective according to its terms between the parties and may be enforced by a third party if the third party is the person or one of a class of persons for whose benefit the subordination was intended.

(2) Notice of the subordination of the security interest does not need to be registered.

### **PART V - ENFORCEMENT OF SECURITY INTERESTS**

#### **Rights of a security holder**

20. (1) If the debtor defaults or upon the occurrence of another event of default set out in the security agreement, the security holder may enforce its rights and remedies under this Part.

(2) Notwithstanding any other law to the contrary, upon default, the security holder shall have -

- (a) the rights and remedies set forth in the security agreement;
- (b) the right to possession or control of the collateral, even if the security agreement is silent about possession or control;
- (c) the right to dispose of the collateral; and
- (d) other rights or remedies provided in this Act or any other law.

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**Special rules regarding accounts receivable, documents and deposit accounts**

21. (1) Upon default, a security holder with a security interest -
- (a) in an account receivable may instruct the account debtor to make payment to the security holder, who shall apply such payment in satisfaction of the obligation secured by the security interest after deducting the security holder's reasonable expenses;
  - (b) that is perfected by possession of a document may proceed as to the document or the goods covered by the document.
- (2) If so agreed between the parties and in any event after default -
- (a) a financial institution with a perfected security interest in a deposit account that it maintains may apply the balance of the deposit account to the secured obligation;
  - (b) in other cases, a security holder that has a security interest in a deposit account perfected by control may instruct the financial institution to pay the balance of the deposit account to the security holder.

**Taking possession of collateral**

22. (1) In this section, breach of the peace includes -
- (a) entering the premises of the debtor without permission;
  - (b) resorting to physical violence or intimidation; or
  - (c) being accompanied by a law enforcement officer when taking possession or confronting the debtor.
- (2) The security holder may take possession or control of collateral and dispose of it without legal process if -
- (a) the security agreement so provides; or



(b) if the debtor has agreed, in writing, after default,

and such possession or control can be taken without a breach of the peace.

(3) If, upon default, the security holder was unable to take possession or control of the collateral, then the security holder may file an application with the Court for an order granting the security holder possession of the collateral for the purpose of disposition.

(4) A copy of the security agreement shall be attached to the application.

(5) The application shall include -

(a) the name, status and capacity of the security holder;

(b) the name, status and capacity of the debtor; and

(c) at least one event of default under the security agreement.

(6) The security holder shall be entitled to an urgent hearing upon application and, if the Court, after examination of the application and security agreement, finds that a default has occurred under the security agreement, and that the security holder has a right to take possession of the collateral, the Court shall enter an order granting the security holder possession or control of the collateral and, if the collateral is a fixture, its removal from the immovable property to which it is affixed.

(7) The Court order may -

(a) direct the debtor and, if the collateral is a fixture, the owner of the immovable property to take such action as the Court considers necessary and appropriate so that the security holder may take possession and control of the collateral;

(b) provide that enforcement may commence immediately according to the terms of this Act whether or not the debtor opposes the enforcement action, as provided for in this section.

(8) If the Court enters an order under section 22(6), granting the security holder possession or control of the collateral, the Court shall, upon application

by the security holder, enter an order permitting the sale or other disposition of the collateral under section 29 unless the collateral is rare or unique, or otherwise of such a nature that it is unlikely to be replaceable, in which case sale of other disposition shall be deferred until the enforcement order becomes final.

(9) An officer of the Court shall deliver a copy of the notification order to the debtor and, if the collateral is a fixture, the owner and mortgagee of the immovable property, within 5 days after the order is entered by the Court.

(10) The notification of the order shall include a copy of the application submitted to the Court.

(11) The delivery of a copy of notification order under subsection (9) shall be made in accordance with the Court rules.

(12) If the notification through the regular means failed, and in the opinion of the Court reasonable measures were taken by the officer of the Court to locate and serve the debtor, the Court may dispense with notification by exceptional means, and implementation of the order may continue.

(13) If the Court considers that the officer of the court did not take reasonable measures to notify the persons mentioned above, then the Court may require the officer of the Court to notify such persons by exceptional means in accordance with the court rules.

(14) The debtor shall have 5 days from the date of delivery of the order to file an opposition to the enforcement action with the competent Court.

(15) The filing of the notice of intention to oppose shall not stay the enforcement of the order.

(16) If the debtor fails to file an opposition to the enforcement action within 5 days after service of the order on them or if the Court finds that service by ordinary means has failed and that exceptional means are not warranted, the order shall become final, and the debtor shall be barred from raising any further defense against the enforcement action.

(17) If the debtor files an opposition to the enforcement action within the 5 day period, a hearing shall be scheduled on the opposition at the earliest available time, but not later than 7 days after the filing of the opposition.

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(9) An officer of the Court shall deliver a copy of the notification order to the debtor and, if the collateral is a fixture, the owner and mortgagee of the immovable property, within 5 days after the order is entered by the Court.

(10) The notification of the order shall include a copy of the application submitted to the Court.

(11) The delivery of a copy of notification order under subsection (9) shall be made in accordance with the Court rules.

(12) If the notification through the regular means failed, and in the opinion of the Court reasonable measures were taken by the officer of the Court to locate and serve the debtor, the Court may dispense with notification by exceptional means, and implementation of the order may continue.

(13) If the Court considers that the officer of the court did not take reasonable measures to notify the persons mentioned above, then the Court may require the officer of the Court to notify such persons by exceptional means in accordance with the court rules.

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(16) If the debtor fails to file an opposition to the enforcement action within 5 days after service of the order on them or if the Court finds that service by ordinary means has failed and that exceptional means are not warranted, the order shall become final, and the debtor shall be barred from raising any further defense against the enforcement action.

(17) If the debtor files an opposition to the enforcement action within the 5 day period, a hearing shall be scheduled on the opposition at the earliest available time, but not later than 7 days after the filing of the opposition.

(18) The filing of a notice of intention to oppose shall not stay the sale or other disposition of the collateral, but, the Court may, in its discretion, at any time during the opposition proceeding and before disposition of collateral, upon the request of the debtor order that the proceeds of disposition be held by the Court pending the order on the opposition.

(19) The filing of a notice of intention to oppose under subsection (14) shall be the debtor's exclusive recourse against the enforcement action.

(20) A security holder may alternatively elect to enforce pursuant to the provisions of the Court Rules applicable to enforcement on movable assets.

#### **Duty of security holder to care for collateral**

23. (1) A security holder shall use reasonable care in the custody and preservation of collateral in the possession of the security holder.

(2) Unless the parties agree otherwise, in the case of a financial instrument, reasonable care includes taking necessary steps to preserve rights against other persons.

(3) Unless the parties agree otherwise, where collateral is in the security holder's possession -

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral, are chargeable to the debtor and are secured by the collateral; and

(b) the risk of loss or damage, except where caused by the negligence of the security holder, is on the debtor to the extent of any deficiency in any insurance coverage.

(4) Unless the parties agree otherwise, the security holder -

(a) may hold as additional security any increase or profits received from the collateral; and

(b) shall either apply money or other funds received from the collateral to reduce the secured obligation or remit such money

or other funds to the debtor; and

- (c) shall keep the collateral identifiable, but fungible collateral may be commingled.
- (5) Subject to subsection (1), a security holder may use the collateral -
- (a) in the manner and to the extent provided in the security agreement; or
  - (b) for the purpose of preserving the collateral or its value; or
  - (c) under an order of the court.

#### PART VI - DISPOSITION OF COLLATERAL

##### Disposition or retention of control

24. (1) A security holder may -
- (a) sell, lease, license or otherwise dispose of the collateral after default;
  - (b) buy the collateral at any public sale;
  - (c) dispose of the collateral in its existing condition or after repair, processing or preparation for disposal.
- (2) In disposing of the collateral, the security holder shall act in a commercially reasonable manner.
- (3) A disposition is commercially reasonable if the security holder disposes of the collateral in conformity with commercial practices among dealers in that type of property.
- (4) A disposition does not fail to be commercially reasonable solely because a higher price could have been obtained by a disposition at a different time or by a different method from that used by the security holder.
- (5) If a method of disposition of collateral has been approved in any

legal proceeding, it is conclusively deemed to be commercially reasonable, but no such approval is required by this law.

### Notice of disposition

25. (1) A security holder shall, no later than 5 days before the disposition of the collateral, give notice to the address in the relevant registered notice or to the address provided by a person in a notice of claim to -

- (a) the debtor;
- (b) any other security holder or lien holder who, 5 days before the date the notice was sent to, held an interest in the collateral that was publicised by registration under section 7; and
- (c) any other person from whom the security holder received notice of a claim of an interest in the collateral if the notice was received before the security holder sent notice of the proposed disposition.

(2) The debtor may waive the right to be notified.

(3) The requirement of notice described in section 25(1) does not apply if -

- (a) the collateral is perishable;
- (b) the security holder believes on reasonable grounds that the collateral will decline speedily in value if not disposed of as soon as practicable;
- (c) the cost of care and storage of the collateral is disproportionately large in relation to its value;
- (d) the collateral is of a type that is customarily sold on a recognised market; or
- (e) after default, each person entitled to have notice of disposition sent to them consents in writing to the disposition.

- (4) A notice of disposition is sufficient if the notice -
- (a) identifies the debtor and the security holder;
  - (b) describes the collateral to be disposed of;
  - (c) states the intended method of disposition; and
  - (d) states the time and place of a public sale, or the place to which closed tenders may be delivered and the day after which closed tenders will not be accepted, or the day or time after which any other private disposition of the collateral is to be made.

#### **Retention of collateral by security holder**

26. (1) After taking possession of the collateral after default, a security holder may propose to the debtor that the security holder take ownership of all or part of the collateral in satisfaction of all or part of the debtor's obligation, and shall give notice of the proposal to -

- (a) the debtor;
- (b) any other security or lien holder who, 5 days before the notice is sent to the debtor and collateral provider, has perfected its security interest or lien by registration; and
- (c) any other person with an interest in the collateral who has given a written notice to the security holder before the notice referred to in this paragraph is given to the debtor.

(2) If, within 20 days after the notice was sent, the security holder receives an objection in writing from a person entitled to receive notice under section 25(4), the security holder shall dispose of the collateral as otherwise provided for in this Act.

(3) If no objection is received within the 20 day period, the security holder may retain the collateral in satisfaction of the debtor's obligation in accordance with the proposal.

**Distribution of proceeds**

27. (1) A security holder shall distribute the proceeds of disposition if the -
- (a) debtor and, where applicable, the collateral provider have not registered a notice of intention to oppose the order of possession within 5 days after the notice of the order by the security holder; or
  - (b) competent court has found for the security holder in the final determination of the opposition.
- (2) A security holder may request proof of the interest or lien before distribution is made.
- (3) At any time prior to the actual distribution of proceeds, the debtor or any person who presented a claim pursuant to subsection (1), may file a motion with the Court to suspend the distribution process and to change the proposed distribution schedule.
- (4) The Court shall schedule a hearing on the motion for not later than 21 days after the filing of the motion.
- (5) The Court may, after hearing arguments on the action, either confirm or amend the proposed distribution schedule.
- (6) The proceeds accrued from disposition of collateral shall be applied in the following order -
- (a) the actual expenses of retaking, holding, repairing, preparing for disposition, and the disposing of the collateral, including judicial fees and attorney's fees awarded and taxed;
  - (b) the satisfaction of the obligation secured by the security interest or lien of the -
    - (i) higher priority, if any;
    - (ii) enforcing security holder;



- (c) the satisfaction of -
  - (i) obligations secured by any subordinate security interest or liens on the collateral if a written demand and proof of the interest are received before distribution of the proceeds is completed;
  - (ii) valid obligations due to persons from whom written demand and proof of interest are received before distribution of the proceeds is completed.

(7) If the security interest secures a debt, the security holder shall pay the debtor any amount collected in excess of the sum of the secured debt and expenses of collection, and unless otherwise agreed, the debtor is liable for any deficiency, which continues as an unsecured debt.

#### **Rights of acquiring party**

28. Where a security holder disposes of the collateral to a purchaser for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from -

- (a) the interest of the debtor and, if applicable, any collateral provider;
- (b) an interest subordinate to that of the debtor; and
- (c) subject to section 27(6)(b), an interest subordinate to that of the security holder whether or not the requirements of this Part have been complied with by the security holder.

### **PART VII - RIGHTS OF DEBTOR**

#### **Rights of redemption**

29. (1) In this section, "to redeem collateral" refers to the exercise of the redeeming party's rights in collateral by paying the obligation of the debtor to the security holder who is seeking to enforce a security interest, payments made to security holders with higher priorities in the collateral.

- (2) A person who is entitled to receive a notice of disposition may re-

deem the collateral, if the -

- (a) person has not, after default, waived the right to redeem in writing;
  - (b) security holder has not yet disposed of, or contracted for the disposal of the collateral; or
  - (c) security holder has not irrevocably elected to retain the collateral.
- (3) To redeem the collateral, a -
- (a) person shall tender performance of the obligations secured by the collateral, and pay the actual expenses that were incurred by the security holder, including the costs of seizure, holding, repair and preparation of the collateral for disposition;
  - (b) junior security holder or creditor shall pay the obligation to the enforcing security holder and all other senior security by paying the amounts owed to them and paying the actual expenses that were incurred by the security holder who enforced the security interest.

## PART VIII - THE REGISTRY

### Registry operation

30. (1) There is established an electronic registry for the purposes of -
- (a) publicising the possible existence of security interests and liens in movable property governed by this Act; and
  - (b) perfecting security interests in collateral against third parties in accordance with this Act.
- (2) The conditions and procedures for registering notices, the indexing of registering notices, the filing fee amounts to be paid, the methods for payment of fees, identification of persons submitting filings to the registry, and the overall management of the registry shall be set out in the regulations made under this

Act.

(3) Information contained in a registered notice is a public record and any person may inspect notices in the registry.

(4) The electronic records of the registry are official records, and the extracts certified by the Registrar shall be considered conclusive evidence of the existence of the registered notice, as well as the date and time of its registration.

(5) No person shall have a claim against the registry for errors in registry records committed by a person who registers a notice, or for failure to provide registry services for reasons beyond the control of the registry.

(6) Registration of a notice in the registry does not constitute constructive notice or impute knowledge of its existence or contents to any person.

#### **Designation, powers and duties of the Registrar**

31. (1) There shall be a Registrar, who shall be responsible for the management and maintenance of registry and designated as such by the Commissioner.

(2) The duties of the Registrar are administrative and -

(a) by registering a notice or refusing to register a notice, the Registrar does not determine the sufficiency, correctness, authenticity, or validity of the notice or any information contained in the notice; and

(b) the registering of a notice does not create a security interest in collateral and does not provide evidence that a security interest in collateral exists.

(3) The Registrar shall -

(a) accept any notice that meets the conditions and procedures set out in this Act and the regulations

(b) refuse to register a notice if, less than the full registration fee is tendered, or no other arrangement has been made for the payment of the fee or , in the case of -

- (i) an initial notice, the notice does not identify a debtor; or
  - (ii) an amendment, does not provide the registration number of the initial notice, does not identify the authorising secured holder, does not identify the debtor to which it applies, if any, or the amendment identifies an initial notice whose effectiveness has lapsed; or
  - (iii) a continuation statement, the continuation statement does not provide the registration number of the initial notice, does not identify the authorising secured holder, or was not submitted within the required six-month time period; or
  - (iv) a termination statement, the termination statement does not provide the registration number of the initial notice, does not identify the authorising secured holder, or the termination statement relates to an initial notice that has lapsed with respect to each security holder on the notice.
- (3) If the Registrar refuses to accept a notice for registration, the Registrar shall promptly communicate the fact of non-acceptance and reasons for its refusal to the person that submitted the notice.
- (4) The Registrar shall, for each notice registered -
- (a) assign a unique registration number in the case of an initial notice;
  - (b) assign a unique number to notices other than the initial notice;
  - (c) create a record that bears the registration number and the date and time of registration;
  - (d) relate each subsequent notice to a record identified by the number assigned to the initial notice, and the record will indicate the date and time of registration of the initial notice and each subsequent registration related to the notice;
  - (e) maintain registered notices for public inspection.

(5) The Registrar shall maintain the capability to retrieve registry records by the -

- (a) debtor;
- (b) registration number of the initial notice, in a manner that associates the initial notice with all related amendments, continuation statements, and termination statements;
- (c) serial number of a serial numbered vehicle, if a serial number was provided on the notice in a field prescribed by the Registrar.

(6) The Registrar shall communicate the following information to any person who requests it -

- (a) whether there exist in the registry any notices that allocates a particular registration number, debtor or serial number;
- (b) the registration number, and the date and time of filing of each notice; and
- (c) the identification of each debtor and the name and address of each security holder shown on each notice.

#### **Notice of registration of security holders**

32. (1) A debtor shall authorise the registration of an initial notice by signing a security agreement or a separate agreement, and the debtor's authorisation need not be contained in the notice nor disclosed to the Registrar, and may be given after registration.

(2) A notice is effective only to the extent authorised by the debtor.

(3) A signature may be any tangible indication of the debtor's intent to enter into the agreement.

(4) By signing the security agreement, the debtor consents to the registration of an initial notice covering the collateral described in the security agreement and the proceeds of the collateral whether or not the security agreement

expressly covers proceeds, and to the public disclosure of the information included in the notice.

(5) A notice is effective when it can be found by a search of the Registry under the criteria set out in section 35(1).

(6) A notice may be registered before a security agreement is concluded and prior to or after the security interest becomes enforceable against the debtor.

#### **Notice of registration of lien holders**

33. A notice of lien may be registered without consent of the lien debtor by -

- (a) the state, any official authority, public entity or any beneficiary of the lien;
- (b) by the competent court in the case of issuance of an order for conservatory seizure of movable property;
- (c) by the enforcement officer in case of issuance of a decision to place an enforcement attachment on movable property.

#### **Contents of initial notice**

34. (1) An initial notice is sufficient if it -

- (a) identifies a debtor and provides a physical address;
- (b) identifies the security holder or an agent of the security holder and provides a physical address; and
- (c) describes the collateral covered by the notice.

(2) For the purpose of subsection (1) (c), a notice which covers fixtures shall include the lease number of the land where the fixtures are located.

(3) A notice of the interest of a lien holder shall include -

- (a) identification of the lien holder;

- (b) identification of the person owing payment or performance to the lien holder; and
- (c) a description of property against which the lien holder claims or may claim a right in the same manner as provided in this Act for registering a notice of a security interest.

#### **Identification of debtor**

35. (1) A person who or an entity which is a debtor is sufficiently identified in a notice for the purposes of the Act and the regulations under this Act if, in the case of an individual who is -

- (a) a citizen of Lesotho, the notice states the national identification number of the individual;
- (b) not a citizen of Lesotho, the notice states the passport number of the individual;
- (c) an entity organised or authorised to do business under the Companies Act, 2011 or formed and existing under any other Act in which documents of organisation are subject to registration with the Government of Lesotho, the unique identification number of the entity as it appears on the certificate issued by the companies registry or other applicable registry;
- (d) a legal entity which is not registered under the Companies Act, 2011 or other Act in which documents of organisation are subject to registration, the name of the entity as it appears on the document creating the entity; or
- (e) a foreign registered entity not authorised to do business under the law of Lesotho, the notice provides the name of the debtor as shown on the appropriate registry in the country where the foreign entity is organised.

(2) A notice which sufficiently identifies a person or entity under subsection (1) is not rendered ineffective by the presence or absence of a trade name or other name of that person or entity.

(3) A notice which provides the trade name of a person or entity but does not comply with subsection (1), does not sufficiently identify that person or entity.

#### **Sufficiency of notice**

36. (1) The validity of the registration of a notice is not affected by any defect, irregularity, omission or error in the notice unless the defect, irregularity, omission or error is seriously misleading.

(2) A notice which insufficiently identifies the debtor is seriously misleading.

(3) Failure to include a description of any item or kind of collateral in a notice does not affect the validity of the registration in respect of the description.

(4) In order to establish that a defect, irregularity, omission, or error is seriously misleading, it is not necessary to prove that any person was actually misled by it.

#### **Amendment of notice**

37. (1) An initial notice may be amended.

(2) An amended notice shall -

(a) identify the initial notice by its unique registration number;

(b) identify each security holder who authorises the amendment;  
and

(c) provide all of the information required for an initial notice.

(3) An amended notice which adds collateral or adds a debtor shall be authorised by the debtor by signing the security agreement or other written agreement.

(4) An amended notice is effective only as to each security holder who authorises it.



(5) An amended notice that adds collateral other than proceeds or a debtor is effective as to the added collateral or debtor from the date of registration of the amended notice.

(6) By signing a security agreement, a debtor authorises the registration of an amendment, covering the collateral described in the security agreement, and proceeds of the collateral, whether or not the security agreement expressly covers proceeds.

(7) The registration of an amendment does not extend the period of effectiveness of a notice.

#### **Continuation of notice**

38. (1) The period of effectiveness of a notice may be continued by registering a continuation notice that identifies -

- (a) the initial notice by its unique registration number; and
- (b) each security holder who authorises the continuation notice.

(2) A continuation notice may be registered only within six months before the expiration of the effective period of the notice.

(3) Upon timely registration of a continuation notice, the effectiveness of the initial notice is continued for 5 years commencing on the day on which the notice would have become ineffective in the absence of the registration.

(4) The effectiveness of a notice is continued only with respect to the security holder who authorised the registration of the continuation statement.

(5) Upon the expiration of the new five-year period, the notice lapses with respect to the security holder unless, before the lapse, another continuation statement authorised by that security holder is registered and succeeding continuation statements may be registered in the same manner to continue the effectiveness of the notice.

#### **Term of effectiveness, termination and lapse**

39. (1) A notice continues to be effective until the lapse date specified in

the notice, unless its effectiveness is extended by the registration of a notice of continuation before the lapse of such period.

(2) When a notice lapses, the underlying security interest ceases to be perfected by registration, and the security interest that was perfected by registration becomes unperfected unless it is perfected by another means.

(3) If the security interest is extinguished prior to the lapse of the notice, and if there is no outstanding secured obligation, no further commitment to make an advance, incur an obligation or otherwise give value, the security holder shall terminate the notice within 15 days after the extinguishment of the security interest.

(4) If the security holder fails to terminate the notice within 5 days of a demand by the debtor, the debtor shall be entitled to compensation for actual damages or an amount as specified in the regulations for each day of delay after the notice should have been terminated, whichever is greater.

(5) If there are several security holders identified in the same notice, and the security interest is extinguished with respect to some of them, the termination notice shall only be effective with respect to the security holder authorising the termination in writing.

#### PART IX - APPLICATION OF LAW

##### Perfection when goods are moved to Lesotho

40. (1) A security interest in goods that is perfected under the law of the jurisdiction in which the goods are situated when the security interest attached and before the goods are brought into Lesotho continues to be perfected in Lesotho if it is perfected in Lesotho by the earliest of the following, not later than -

(a) 15 days after the day on which the goods are brought into Lesotho; or

(b) 3 days after the day on which the security holder has knowledge that the goods have been brought into Lesotho.

(2) A security interest that is not perfected as provided in subsection

- (1) may be otherwise perfected in Lesotho under this Act.

#### **Application to certain collateral across multiple jurisdictions**

41. The validity, perfection, and effect of perfection or non-perfection of a security interest is governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located when the security interest attaches, if the security interest is in -

- (a) goods that are of a kind that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others; or
- (b) a payment intangible.

#### **Location of the debtor**

42. For the purposes of sections 40 and 41, a debtor that is -

- (a) a corporate body is located in the country of incorporation; and
- (b) not a corporate body is located at -
  - (i) the debtor's place of business; or
  - (ii) the debtor's principal place of business if the debtor has more than one place of business; or
  - (iii) the debtor's principal residence if the debtor has no place of business.

### **PART X - MISCELLANEOUS**

#### **Transition and administrative matters**

43. (1) This section applies to rights in movable property in existence prior to the commencement of this Act (in this section referred to as "prior interests") that would otherwise be subject to this Act, if it had been in effect at the time the rights were created or arose.

(2) The validity and effect of a prior transaction which was concluded before the commencement date of this Act shall be determined by reference to the law in effect when the agreement was concluded, except as provided otherwise under this section.

(3) A security holder or a lien holder with a prior interest may register a notice of the prior interest or lien in the same manner as provided for security interests under this Act within 90 days after the commencement of this law. The authorization of the debtor is not required to register a notice of prior interest.

(4) If the holder of a prior interest registers a notice or otherwise perfects its interest in accordance with this Act within 90 days after commencement of this law, its priority shall be determined as provided by the law governing the prior interest.

(5) If a prior interest is perfected by registration or otherwise after the time period set out in subsection (3), its priority shall be determined by the date of registration or other perfection under this Act.

(6) Priority between a security interest or lien perfected under this Act and a prior interest for which a notice has not been registered, or otherwise perfected under this Act, shall be determined under this Act.

(7) For the purpose of subsection (6), an interest created under the prior transaction is, for that purpose, deemed to be an unperfected security interest.

### **Regulations**

44. The Commissioner may make regulations for the carrying into effect the provisions of this Act.

### **NOTE**

1. Act No. 12 of 1967
2. L.N. No. 39 of 2013

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**GOVERNMENT NOTICE NO. 27 OF 2020****The Parliament of Lesotho****Statement of Objects and Reasons of The Security Interest  
in Movable Property Act, 2020****(Circulated by the Authority of the Minister of Finance,  
Dr. Moeketsi Majoro)**

The object of the Bill is to provide for the creation of security interest in movable property, prioritisation of competing interests in the collateral, establishment and operation of an electronic public registry for notices of security interests.

The Bill proposes the establishment of a Collateral Registry for the purposes of -

- (a) publicising existing security interest and liens in movable property; and
- (b) perfecting security interests in collateral against third parties.

The introduction of this Bill will therefore make it easier for borrowers and lenders to use personal property as collateral and hence increase the level of credit whilst on the other hand decreasing the cost of credit. It will also enable borrowers to pledge their rights in personal property to lenders as security for loans more easily and inexpensively. Ultimately, this Bill will result in improving access to credit, particularly for Small Micro and Medium Enterprises (SMMEs).

The Bill grants the Central Bank of Lesotho with necessary powers to appoint a Registrar of Security Interests. The Registrar shall register movable property, maintain the collateral registry system and settle issues arising out of the registration. The role of the Registrar shall be to secure the movable property and make it have value before the law, thus making it easier to get credit. This means that a person who registered movable property will have a right to secure an existing or future debt; thus once an individual has been granted a loan, no one else can do anything on the property as long as it is still registered as collateral in the registry.

The Bill is aligned with the existing legal framework in Lesotho including but not limited to the Hire Purchase Act of 1974 as amended, The Financial leasing Regulations of 2013, the Deeds Registry Act of 1967 and the Insolvency Proclamation of 1957.