

CHAPTER 46:03
HIRE-PURCHASE
ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Interpretation and application
3. Requirements as to negotiations prior to making of agreement
4. Requirements as to form of agreement
5. What agreements must contain
6. Invalidity of certain provisions
7. Certain agreements invalid in certain circumstances
8. Inducement to enter into agreements
9. Buyer entitled to statement of account, etc., and seller to information as to whereabouts of goods
10. Cession or hypothecation of and authority to collect periodical income
11. Negotiable instruments
12. Limitation of seller's right to enforce certain provisions of agreement
13. Buyer's right to be re-instated after return of goods to seller
14. Buyer's right to terminate agreement and to pay instalments before due date
15. Buyer's rights upon termination, rescission or breach of agreement
16. Valuation of goods
17. Powers of court
18. Decrees of civil imprisonment and garnishee orders
19. Jurisdiction
20. Waiver of rights by buyer
21. Regulations

Proc. 25, 1961,
HMC Order 1, 1963,
L.N. 84, 1966.

An Act to make provision for the regulation of hire-purchase agreements and of instalment sales subject to resolute conditions and for matters incidental thereto.

[Date of Commencement: 26th April, 1961]

1. Short title

This Act may be cited as the Hire-Purchase Act.

2. Interpretation and application

(1) In this Act, unless the context otherwise requires-

"agreement" means a hire-purchase agreement or an instalment sale agreement;

"buyer" or **"seller"** means the person who, in terms of any agreement, is the buyer or the seller or the hirer or lessor, as the case may be;

"cash price", in relation to any goods, means the price stated in respect of those goods under section 5(1)(a);

"court" means a magistrate's court or the High Court, as the case may be, but does not include a customary court;

"hire-purchase agreement" means any agreement whereby goods are sold subject to the condition that the ownership in such goods shall not pass merely by the transfer of the possession of such goods, and the purchase price is to be paid in instalments, two or more of which are payable after such transfer; and includes any other agreement which has or agreements which together have the same import, whatever form such agreement or agreements may take:

Provided that any agreement which or agreements which together provide for the letting and hiring of goods-

- (i) with the right to purchase such goods only after two or after more than two instalments subsequent to such transfer have been paid in respect thereof; or
- (ii) with the right, after two or after more than two instalments subsequent to such transfer have been paid in respect thereof, to continue or renew from time to time such letting and hiring at a nominal rental, or to continue or renew from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal periodical or other amount,

shall, whether or not the agreement or agreements may at any time be terminated by either party or one of the parties, be deemed, for the purposes of this Act, to be of the said import;

"instalment sale agreement" means any agreement of purchase and sale whereby ownership in the goods sold passes upon delivery, and the purchase price is to be paid in instalments, two or more of which are payable after delivery, and under which the seller would be entitled to the return of the goods sold if the buyer should fail to comply with any one or more provisions thereof; and includes any other agreement which has or agreements which together have the same import, whatever form such agreement or agreements may take;

"purchase price" means the total sum payable under any agreement, to the seller by the buyer, exclusive of any sum payable in terms of the agreement as a penalty or as damages for the breach thereof or by way of interest upon instalments which are in arrear.

(2) If any seller has agreed that any part of the purchase price may be discharged otherwise than by the payment of money, any such discharge shall, subject to the provisions of section 7, be deemed to be a payment of that part of the purchase price.

(3) The provisions of this Act shall-

- (a) apply to agreements relating to movables, entered into after the commencement of this Act under which the purchase price does not exceed P4 000; and
- (b) not apply to any agreement under which the Government is the seller, or to any agreement in respect of the sale of a movable belonging to a class or group of prescribed movables.

(4) Sections 9, 12, 13 and 17 shall, subject to the provisions of subsection (3), apply in respect of agreements in force at and entered into before the commencement of this Act.

3. Requirements as to negotiations prior to making of agreement

(1) Before any agreement is entered into the prospective seller shall-

- (a) state in writing to the prospective buyer, otherwise than in any note or memorandum of the agreement, a price at which the goods to which the agreement relates may be purchased from such seller for a cash amount in money; and
- (b) submit to the prospective buyer, if the agreement is entered into otherwise than in English, a translation of such agreement in English, which is substantially correct:

Provided that paragraph (a) shall be deemed to have been sufficiently complied with-

- (i) if the buyer has inspected the goods or like goods and at the time of his inspection tickets or labels were attached to or displayed with the goods clearly stating the cash price, either of the goods as a whole or of all the different articles or sets of articles comprised therein; or
- (ii) if the buyer has selected the goods by reference to a catalogue, price-list or advertisement, which clearly stated the cash price either of the goods as a whole or of all the different articles or sets of articles comprised therein.

(2) Any person who fails to comply with the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding P50 or to imprisonment for a term not exceeding three months.

4. Requirements as to form of agreement

(1) No agreement shall be of any force or effect unless it is entered into in writing and signed personally by the buyer or his authorized agent and by or on behalf of all other parties to the agreement.

(2) The seller shall, within 14 days of the making of any agreement, send a copy thereof to the buyer by registered post.

(3) Any person who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable to a fine not exceeding P50 or to imprisonment for a term not exceeding three months.

5. What agreements must contain

(1) Every agreement shall contain-

- (a) a statement of the price at which the goods may be purchased by the buyer from the seller for a cash amount in money;
- (b) a statement of the purchase price of the goods, the amounts separately specified, which are payable in addition to the actual price of the goods, the amount paid by the buyer in money and the amount paid by him in goods in pursuance of the provisions of section 7, the amount of each of the instalments by which the purchase price is to be paid, and the date, or the mode of determining the date, upon which each instalment is payable;
- (c) a description of the goods sold under the agreement and of any goods delivered to the seller under section 7 sufficient to identify them; and
- (d) the terms as to the reservation and passing of ownership in the goods, or as to the seller's right to the return of the goods, as the case may be.

(2) If any such agreement does not comply with the provisions of subsection (1), other than paragraph (a), the goods shall be deemed to have been sold to the buyer without any reservation as to the ownership therein or without any stipulation as to the seller's right to the return thereof, as the case may be:

Provided that if in any action it is proved to the satisfaction of the court that the agreement substantially complies with the said provisions, and that any failure to comply with the said provisions has not prejudiced the buyer or any other person, the court may, subject to such conditions as it may deem fit to impose, give effect to such reservation or stipulation.

(3) If any such agreement does not comply with the provisions of subsection (1)(a), the goods shall be deemed to have been sold to the buyer at a price which is 25 percent less than the purchase price, and the amount of each instalment under such agreement shall be decreased accordingly.

6. Invalidity of certain provisions

(1) Any provision in any contract whereby-

- (a) any person undertakes to enter into an agreement;
- (b) any person acting on behalf of the seller in connection with the conclusion of any agreement or the negotiations which precede the conclusion of the agreement, is constituted or deemed to be the agent of the buyer;
- (c) the seller is relieved from liability for any act, omission or representation of any person acting on his behalf in the said connection;
- (d) the liability of the seller in pursuance of any guarantee or warranty which would, but for such provision be implied in any agreement, is excluded or restricted;
- (e) the acquisition of ownership by the buyer of the goods to which any agreement relates, on payment in full of all instalments payable in terms of such agreement, is debarred;
- (f) any goods to which any agreement under which one or more instalments have been paid relates, purport to be disposed of together with other goods to which any agreement superseding such agreement relates;
- (g) the seller or any person acting on his behalf is authorized to enter upon any premises for the purpose of taking possession of goods which have been sold under any

agreement, or is relieved from liability for any such entry; or
(h) the buyer chooses a *domicilium citandi* at a place not referred to in section 19, shall, subject to the provisions of subsection (2), be of no force and effect.

(2) Subsection (1)(a) shall not apply in respect of any contract relating to goods which are, in terms of the contract, to be imported into Botswana for sale to the prospective buyer.

7. Certain agreements invalid in certain circumstances

(1) No agreement in respect of the sale of a movable shall be of any force or effect unless-

(a) at least such portion of the purchase price as the President has, by order published in the *Gazette*, prescribed in respect of the sale of movables of the class or group to which that movable belongs, or if no such portion has been so prescribed, at least one-tenth of the purchase price, is paid in cash or in goods at the time the agreement is entered into; and

(b) the period within which the full purchase price is payable does not exceed the period which the President has, by order published in the *Gazette*, prescribed in respect of the sale of movables of the class or group to which that movable belongs.

(2) No payment in cash shall, to the extent to which it is made out of moneys borrowed directly or indirectly from or through the seller or any person whose business or part of whose business it is by arrangement with the seller to advance money for payments under agreements with the seller, and no payment in goods shall, to the extent to which the amount thereof exceeds a reasonable price for the goods, be deemed to be a payment for the purposes of subsection (1)(a).

(3) No agreement which was valid when it was concluded shall become invalid merely by reason of the promulgation of an order by the President in terms of subsection (1).

8. Inducement to enter into agreements

(1) Any employee, agent or representative of any prospective seller who, directly or indirectly, offers, gives or promises to any prospective buyer any benefit of whatever nature as an inducement to enter into any agreement shall, subject to the provisions of subsection (2), be guilty of an offence and liable upon conviction to a fine equal to double the value of the benefit which he has so offered, given or promised.

(2) Subsection (1) shall not apply with reference to any benefit offered or promised in the ordinary course of business and by way of a proposed term of the agreement.

9. Buyer entitled to statement of account, etc., and seller to information as to whereabouts of goods

(1) If the buyer makes a written request therefor to the seller and tenders to the seller 10 thebe for expenses, the seller shall, within seven days after the tender is received, supply to the buyer-

(a) a statement signed by or on behalf of the seller showing-

(i) the amount paid under the agreement by or on behalf of the buyer;

(ii) the amount due under the agreement and unpaid, the date upon which each unpaid instalment became due, and the amount of each such instalment; and

(iii) the amount which is to become payable under the agreement, the date or mode of determining the date upon which each future instalment is to become payable, and the amount of each such instalment; and

(b) a copy of the agreement.

(2) While the agreement is in force the seller shall, not later than the last day of a period of two months after the agreement is entered into, and thereafter not later than the last day of each succeeding period of two months, supply to the buyer a statement signed by or on behalf of the seller showing the total amount paid under the agreement and the amount which is still to become payable thereunder.

(3) If at any time before the ownership in the goods sold is to pass in terms of the

agreement, the buyer changes his address or removes or allows the removal of the goods or any part thereof from any premises for the purpose of keeping such goods at any other premises, he shall, not later than 14 days after such change or removal, notify the seller or his agent in writing of his new address or, as the case may be, of the premises to which such goods have been removed and of the name and address of the landlord (if any) or his agent of such last-mentioned premises.

(4) Any person who fails to comply with the provisions of subsection (1), (2) or (3) shall be guilty of an offence and liable to a fine not exceeding P50, or to imprisonment for a term not exceeding three months.

10. Cession or hypothecation of and authority to collect periodical income

(1) Any cession or hypothecation to secure any payment under any agreement of so much of any periodical amount payable under a contract of service or towards the maintenance of any person which, together with any other portion of the said amount which is subject to any prior cession or hypothecation to secure any payment under any other agreement, exceeds 25 percent of the periodical amount, shall to the extent of the excess be of no force or effect.

(2) Any authority given to any person for the purpose of securing any payment under any agreement, by the person entitled to any such periodical amount, to receive or collect the said amount or any part thereof, shall at all times be revocable.

11. Negotiable instruments

(1) Any person who takes any negotiable instrument (other than a cheque which is not a post-dated cheque) knowing that it is or was given or drawn in respect of any liability under an agreement, shall be guilty of an offence and liable to a fine not exceeding P100 or to imprisonment for a term not exceeding six months, or to both.

(2) The provisions of subsection (1) shall not affect the validity of any such instrument:

Provided that any person who has in respect of any such instrument committed an offence under the said subsection shall have no right of action on that instrument.

12. Limitation of seller's right to enforce certain provisions of agreement

No seller shall, by reason of any failure on the part of the buyer to carry out any obligation under any agreement, be entitled to enforce-

- (a) any provision in the agreement for the acceleration of the payment of any instalment, unless an instalment or any part thereof which is not less than one-tenth of the purchase price, or two or more instalments or parts of instalments which together are not less than one-twentieth of the purchase price, are due and unpaid; or
- (b) any provision in the agreement for the payment of any amount as damages, or for any forfeiture or penalty, or for the acceleration of the payment of any instalment, unless he has made written demand to the buyer to carry out the obligation in question within a period stated in such demand, not being less than 10 days, and the buyer has failed to comply with such demand.

13. Buyer's right to be re-instated after return of goods to seller

(1) If the seller has, as a result of the failure of the buyer to pay any instalment due under any agreement, recovered possession, otherwise than by an order of court, of any goods to which the agreement relates, the buyer shall, except where he has himself terminated the agreement, be entitled, if he pays all arrears due under the agreement within a period of 21 days after the seller recovered possession of the goods, to the return of the goods at the seller's place of business or, if he has no place of business, or if the buyer so requests, at the premises in which the goods are kept, and to be reinstated in his rights under the agreement.

(2) Any seller who fails to return any goods to a buyer in pursuance of an obligation under subsection (1) shall be guilty of an offence and liable to a fine not exceeding P100.

14. Buyer's right to terminate agreement and to pay instalments before due date

The buyer shall at all times be entitled-

- (a) subject to the provisions of section 15(1)(b) and provided that he tenders to the seller

the return of the goods, to terminate the agreement by giving written notice of termination to the seller;

- (b) to pay any instalments of the purchase price before it is due, and shall, if he pays the whole of the purchase price remaining unpaid (not being the last instalment of the purchase price) together with such interest as may have accrued up to the date upon which the payment is made, in one amount, be entitled to the reduction of each instalment not due at the said date by an amount calculated at the rate of five percent per annum on such instalment in respect of the period by which the payment of such instalment is accelerated.

15. Buyer's rights upon termination, rescission or breach of agreement

(1) If any agreement is-

- (a) terminated or rescinded the buyer shall, to the extent to which the seller would be placed in a better financial position than that in which he would have been if the agreement had expired after regular performance by the buyer of all his obligations thereunder, not be bound to make any payment or to perform any other act, and shall to the said extent not incur the forfeiture of any payment; and
- (b) terminated by the buyer under section 14(a) he shall, subject to any provision in the agreement for a lesser obligation be bound to place the seller in the financial position in which the seller would have been if the agreement had expired after regular performance by the buyer of all his obligations thereunder.

(2) If the buyer fails to carry out any obligation under any agreement or if any other contingency occurs upon the occurrence of which the seller is entitled, in terms of the agreement, to take any action against the buyer and the agreement is not terminated or rescinded, the buyer shall not be bound to make any payment or to perform any other act by which the seller would be placed in a better financial position than that in which his would have been if the buyer had carried out the obligation in question, or if such contingency had not occurred.

16. Valuation of goods

(1) If for the purposes of this Act or in connection with any agreement the value of any goods at any time after delivery or transfer of the possession thereof to the buyer is to be ascertained, the parties concerned may, in the absence of agreement, jointly nominate a sworn appraiser to determine the said value.

(2) If the parties concerned cannot agree as to the person to be so nominated, any of them may apply to the court for the appointment of a sworn appraiser for the said purpose, and if the application is made to a magistrate's court and no action relating to or arising out of the agreement is pending before a superior court, such magistrate's court shall, notwithstanding anything to the contrary in any law, but subject to the provisions of section 19, have jurisdiction to make such an appointment.

(3) The determination of a sworn appraiser nominated under subsection (1) or appointed under subsection (2) shall be final and binding upon all parties to the agreement.

(4) The provisions of this section shall not affect the powers of any court to determine the value of any such goods with reference to which no sworn appraiser has been nominated under subsection (1) or appointed under subsection (2).

17. Powers of court

(1) In any action by the seller for the return of any goods to which any agreement relates, the court may, without any prejudice to any other power-

- (a) make an order for the return of the goods to the seller, subject to repayment by the seller of so much of the purchase price received by him, as may be found by the court to be just;
- (b) make an order for the return of a part of the goods to the seller and in the case of an instalment sale agreement, for the retention by the buyer, or in the case of a

hire-purchase agreement for the transfer to the buyer, of the seller's title to the remainder of the goods;

- (c) make an order, in the case of an instalment sale agreement, for the retention by the buyer of part of the goods, or in the case of a hire-purchase agreement, for the transfer to the buyer of the seller's title to part of the goods, and an order referred to in paragraph (e) in respect of the remainder of the goods;
- (d) make an order referred to in paragraph (b), subject to-
 - (i) repayment by the seller of so much of the purchase price received by him; or
 - (ii) payment by the buyer of so much of the unpaid balance of the purchase price, as the court may deem just; or
- (e) make an order requiring the goods to be sold by public auction, by an auctioneer nominated by the court within a period stated in the order, or, if the parties so agree, by private treaty.

(2) No order shall be made in terms of subsection (1)(d)(ii) unless the buyer satisfies the court that the order will be carried out forthwith.

(3) Any order referred to in subsection (1)(e) shall state the total amount found by the court to be payable under the agreement, the total amount of payments so found to have been made thereunder and the party by whom the costs incidental to the sale shall be borne; and the court may, when making any such order, at the same time, order the buyer to pay to the seller the deficiency referred to in subsection (6), if any.

(4) If any goods are sold in pursuance of any order referred to in subsection (1)(e), the auctioneer or, in the case of a sale by private treaty, the seller, shall, after deducting any costs incidental to the sale awarded by the court against the buyer, any other costs so awarded and the total amount stated in the order to be payable under the agreement less the total amount of payments so stated to have been made thereunder, pay over the balance of the proceeds of the sale to the buyer.

(5) Any costs incidental to the sale, which have been so awarded, shall be a first charge upon the proceeds of the sale.

(6) If the net proceeds of the sale are insufficient to discharge the buyer's liability in respect of any costs referred to in subsections (4) and (5) and his liability under the agreement, the seller may recover the deficiency by action in a competent court.

(7) If damages have been awarded against the seller in the proceedings, the amount thereof, or so much of the said amount as the court may determine, shall be deemed to have been paid by the buyer in respect of the purchase price of the goods, and thereupon the damages shall accordingly be remitted either in whole or in part.

(8) On the institution of an action referred to in subsection (1) and pending the conclusion of the proceedings, the court shall, in addition to any other powers, have power, upon the application of the seller, to make such orders as the court may deem just for the purpose of protecting the goods from damage or depreciation, including orders restricting or prohibiting the use of the goods or giving directions as to their custody.

18. Decrees of civil imprisonment and garnishee orders

No decree of civil imprisonment or garnishee order for the purpose of enforcing payment by the buyer of any amount payable under an agreement or as a result of the termination or rescission thereof or as damages for any breach thereof, shall be made by any court.

19. Jurisdiction

No court other than the court within whose area of jurisdiction the place where the buyer is ordinarily resident or employed or ordinarily carries on any business, profession, trade or calling, is situate shall, except with the consent of the buyer given specifically with reference to the proceedings in such court, have jurisdiction in any civil matter relating to or arising out of any agreement:

Provided that the preceding provisions of this section shall not apply if there is no place

in Botswana where the buyer is so resident or employed, or does so carry on any business, profession, trade or calling.

20. Waiver of rights by buyer

No waiver by any buyer of any right under this Act shall be of any force or effect.

21. Regulations

The President may, by statutory instrument, make regulations for any matter required to be prescribed under this Act and generally for giving effect to the provisions of this Act.