

**CHAPTER 46:05**  
**HYPOTHECATION**  
ARRANGEMENT OF SECTIONS

SECTION

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Act 40, 1977,  
Act 40, 1978.

**An Act to provide for the securing of loans, advances and debts by hypothec granted over movable property.**

[Date of Commencement: 29th September, 1977]

**1. Short title**

This Act may be cited as the Hypothecation Act.

**2. Interpretation**

In this Act, unless the context otherwise requires-

**"agricultural produce"** means crops or agricultural produce, whether future, growing or severed from the land, and after severance whether subjected to any treatment or manufacture or not; livestock and the produce and progeny thereof; and other agricultural or horticultural produce whether subjected to any treatment or manufacture or not;

**"authorized creditor"** means a person authorized by regulations to be a person empowered to take security by way of hypothec under the provisions of this Act;

**"buyer"** means a person to whom or through whom agricultural produce is required to be sold in accordance with the provisions of section 6;

**"livestock"** includes-

- (a) any bovine animal, horse, ass, mule, sheep, goat or pig;
- (b) any fowl, goose, duck or turkey kept for commercial purposes;

**"loan"** includes the contracts known in Setswana as "go fisa", and any similar contract.

**3. Loans and advances secured by hypothec**

(1) Subject to this section (and subject to any limitation which the Minister may prescribe), an authorized creditor may secure any loan, advance, debt and possible future debt by hypothec of crops or other agricultural or natural produce, whether attached to the soil or not, felled timber, animals, fodder, industrial and fishing materials, rolling stock, boats, fishing tackle or nets, raw materials, equipment, machinery, stock-in-trade, goods, and generally all produce of labour and things necessarily used in connection with production, or other movable property of whatsoever kind or description, of which the hypothecator is the owner, and in respect which he has the right of use and disposal, whether or not on the date of such hypothecation the property or thing offered as security is in existence or has been acquired by the hypothecator.

- (2) A document evidencing a hypothecation entered into under this section shall-
- (a) include-
    - (i) a statement that the authorized creditor has either himself, or through his servant or agent, explained to the hypothecator the effect of making such deed and that the hypothecator understands the explanation; and
    - (ii) such other matters as may be prescribed; and
  - (b) be lodged by the authorized creditor, together with the prescribed fee, with the Registrar of Deeds within 30 days of its execution and shall be registered by him.

(3) A hypothecation entered into under this section shall be of no effect unless the document referred to in subsection (2) contains a statement of the matters referred to in subsection (2)(a) and until it has been registered in accordance with subsection (2)(b).

(4) With effect from the date of registration of a deed of hypothecation, all property thereby hypothecated and all progeny and produce thereof shall be deemed to be pledged in favour of the authorized creditor for the amount owing in respect of the loan or advance or the amount of the debt or possible future debt, together with interest and costs, as fully and effectually as if it had been pledged by delivery to such authorized creditor and were retained in the authorized creditor's possession, and any disposal thereof by or on behalf of the hypothecator without the consent in writing of such authorized creditor shall be null and void.

(5) An authorized creditor may at any time, upon such conditions as he deems fit, grant permission in writing to the hypothecator to dispose of the property hypothecated in terms of this section or to substitute any other property of the same description therefor, and any property so substituted shall be deemed to have been validly hypothecated in terms of this section with effect from the date of registration of an amending hypothecation.

(6) Movable property subject to an existing hypothec shall not be further hypothecated under this section except with the consent in writing of the holder of such hypothec, which consent shall not be unreasonably withheld.

(7) Any hypothecator who, without the written authority of the authorized creditor, disposes of, destroys or consumes any property hypothecated under this section, or removes any property from the land where it is, by agreement with the authorized creditor, to be kept, shall be guilty of an offence and liable to a fine not exceeding P1 000 or to imprisonment for a term not exceeding one year, or to both.

(8) If, at any trial in respect of a contravention of subsection (7), it is proved that the accused person failed, on the demand of any person designated in writing by the authorized creditor for such purpose, to produce the property hypothecated or any part thereof, the accused person shall be presumed to have disposed of, destroyed, consumed or removed the property in question, as the case may be according to the charge, unless the contrary is proved.

(9) Upon recovery or repayment of all loans, advances or debts secured by a deed of hypothecation together with interest thereon to the date of such repayment and any costs which may have been incurred in connection with such loan, advance or debt and recoverable in terms thereof or of any written law, the authorized creditor shall forthwith issue a receipt for such moneys and shall, within 30 days, notify in writing the Registrar of Deeds who shall, on receipt of such notification, cancel the entry in the register of deeds.

#### **4. Loans and advances secured by cession of hire-purchase contract**

If a loan or advance is granted by an authorized creditor for the purchase of machinery, equipment, vehicles, implements, rolling stock, boats, fishing tackle or nets, or any other like property, such authorized creditor may, instead of or in addition to securing the loan or advance by hypothec, take cession from the seller of his interest, right and title to a hire-purchase contract with the hypothecator in respect of such property as security for the loan or advance.

#### **5. Marking of hypothecated property**

(1) A deed of hypothecation may provide that property hypothecated thereunder be marked by the hypothecator if called upon to do so by the authorized creditor in a manner

prescribed by the deed and that, where livestock are required to be so marked, their progeny shall be similarly marked.

(2) Any person who fails to mark hypothecated property when called upon to do so under subsection (1) and any person who, without cause or excuse, tampers with or defaces any mark made in terms of this section shall be guilty of an offence and liable to a fine not exceeding P500 or to imprisonment for a term not exceeding six months, or to both.

## **6. Sale of produce or goods to or through a buyer**

(1) A deed of hypothecation may provide that any produce or goods of the hypothecator of a class stipulated in the deed shall not be sold except to or through a person nominated in the hypothec.

(2) Where a deed of hypothecation contains a provision under subsection (1) such deed may also provide that the proceeds of sale of any produce or goods of the class stipulated therein sold to or through a buyer, less any commission or expenses reasonably incurred in connection with the marketing of such produce and due either to himself or to some other person, be remitted to the authorized creditor and not paid to the hypothecator.

(3) Where a buyer is nominated in a deed of hypothecation a notice in the prescribed form shall be served by the authorized creditor on the buyer within one month of the signature of such deed.

(4) An authorized creditor may authorize the hypothecator to sell any or all of his produce or goods of the class stipulated in the deed of hypothecation to or through a person other than the buyer nominated therein.

(5) Where an authorized creditor determines that the person to or through whom a hypothecator is authorized to sell produce or goods under subsection (4) shall be a buyer, he shall serve notice in such form as may be prescribed on that person and on the Registrar of Deeds stating that that person shall henceforth be a buyer and, upon the serving of such notice upon him, that person shall be a buyer.

(6) Any hypothecator who, without the consent in writing of the authorized creditor, sells produce or goods of a class stipulated in a deed of hypothecation to a person other than the buyer to or through whom he is authorized to sell such produce or goods shall be guilty of an offence and liable to a fine not exceeding P1 000 or to imprisonment for a term not exceeding one year, or to both.

## **7. Payment by a buyer to an authorized creditor**

(1) Where any moneys owed by a hypothecator under a deed of hypothecation containing a provision under section 6(1) becomes due and payable and is not paid by the hypothecator within such time as may be stipulated in the deed of hypothecation he authorized creditor may, by notice in such form as may be prescribed served on the buyer, notify him that moneys are owed to the authorized creditor and that he invokes the provisions of this section.

(2) On receiving notice in terms of subsection (1) the buyer shall pay to the authorized creditor any moneys which may then be owed or which may from time to time thereafter be owed by him to the hypothecator by reason of the sale of produce or goods of the class stipulated in the deed of hypothecation:

Provided that, where a buyer acts as agent for the hypothecator or for the purchaser of such produce or goods, he shall be entitled to retain any expenses reasonably incurred in marketing the produce or goods as well as such reasonable commission as is payable to him by the hypothecator for services rendered in respect of such sale.

(3) The buyer shall make payment to the authorized creditor in accordance with the provisions of subsection (2) until the authorized creditor notifies him that the debt owed to him by the hypothecator is satisfied or that he no longer wishes to enforce his rights under this section:

Provided that an authorized creditor may at any time require a buyer liable to make payment in terms of this section to pay part only of the proceeds of any produce or goods or to

make payment of a stated sum only.

(4) A buyer shall pay to an authorized creditor any moneys due under the provisions of this section within 30 days-

- (a) of the sale, where the buyer is himself the purchaser of such produce or goods;
- (b) of receiving the purchase price of the produce or goods, where the buyer acts as agent.

(5) An authorized creditor may recover from a buyer any moneys which should have been paid in accordance with the provisions of this section if such moneys are not paid within the time prescribed in subsection (4), and it shall be no defence to any action brought by an authorized creditor against a buyer that the buyer has made payment to the hypothecator or to any other person in contravention of the provisions of this section:

Provided that a buyer shall have an action against a hypothecator or such other person for the recovery of the amount paid where he has made payment to an authorized creditor.

#### **8. Special provision where buyer is a co-operative**

(1) Notwithstanding anything to the contrary, whether contained in any written law or otherwise of legal force or effect, a co-operative society registered under section 7 of the Co-operative Societies Act may be nominated as a buyer and shall possess the rights and be subject to the obligations of a buyer under section 7 of this Act.

(2) Notwithstanding the provisions of section 7(2), a co-operative society may retain moneys owing to a hypothecator which it may lawfully appropriate in settlement of a debt owed to it by the hypothecator and which arose prior to the giving of notice by an authorized creditor in accordance with section 7(1).

#### **9. Foreclosure of hypothec and hire-purchase contract**

(1) Upon the breach of any provision specified in a hypothec entered into under section 3, or a hire-purchase contract, the right, title or interest to which has been ceded to an authorized creditor under section 4, an officer of the authorized creditor, duly authorized thereto, may file with the clerk or registrar of a court of competent jurisdiction a statement, certified by him on oath as correct, setting forth the said breach and describing the property liable to seizure and annexing thereto a copy of the relevant hypothec or hire-purchase contract and deed of cession in respect thereof.

(2) A copy of the statement referred to in subsection (1) shall be sent by registered post by the authorized creditor to the hypothecator simultaneously with it being filed with the clerk or registrar of the court.

(3) A statement referred to in subsection (1) shall, on being filed in terms of that subsection, have all the effects of, and, subject to subsection (4), any proceedings may be taken thereon as if it were, a civil judgment lawfully given by the court in favour of the authorized creditor authorizing the issue of a writ of execution authorizing the seizure of such property.

(4) No writ of execution shall be issued against any person pursuant to subsection (3) until 14 days after service on him by the court of a notice informing him that a writ of execution is to be issued by the court authorizing the seizure and sale of the hypothecated property unless, before the expiration of that period of 14 days, he produces proof that the breach did not take place.

(5) After giving the authorized creditor opportunity to be heard-

- (a) in the event of proof that the breach did not take place being produced with which the court is satisfied, the writ of execution shall not be issued;
- (b) in the event of no such proof being produced with which the court is satisfied, the writ of execution shall be issued and execution thereon shall proceed forthwith.

#### **10. Sale of property**

Property sold in execution to satisfy a debt to an authorized creditor under a hypothec, or hire-purchase contract, the right, title or interest to which has been ceded to an authorized creditor, shall be sold in accordance with the rules of the court or in such other manner as the

court may direct.

#### **11. Allocation of proceeds of sale**

(1) The proceeds of the sale of any property seized under section 10 shall be applied, firstly, towards any costs or expenses incidental to the taking of possession and sale of such property, and, secondly, to the discharge of the loan or advance or balance thereof outstanding secured by hypothec and any interest thereon to the date of sale, and thereafter any surplus remaining shall be paid to the hypothecator or to his successors-in-title or to his assigns, as the case may be.

(2) For the purposes of this section "successors-in-title" includes a *curator bonis* and any executor, administrator or liquidator of his estate.

#### **12. Documents to be prepared by authorized creditor**

(1) Every document evidencing a hypothecation and every document evidencing the discharge of any hypothecation shall be prepared by the authorized creditor in such form as may be prescribed and the hypothecator shall pay the charges in connection therewith in accordance with such scale as may be prescribed.

(2) Notwithstanding the provisions of any other written law, documents prepared by an authorized creditor in accordance with subsection (1) and which are registered in the Deeds Registry shall be registrable without it being necessary for any person to appear before the Registrar of Deeds.

#### **13. This Act in addition to Agricultural Charges Act**

(1) This Act shall be in addition to and not in derogation of the provisions of the Agricultural Charges Act.

(2) A certificate of indebtedness entered into in accordance with the provisions of the Agricultural Charges Act and registered in accordance with that Act shall be deemed to be a hypothec entered into and registered under the provisions of this Act.

#### **14. Regulations**

The Minister may by statutory instrument make regulations for any matter required to be made by regulation under this Act or prescribing any matter or thing which under this Act is to be or may be prescribed and generally for the better carrying out of the objects and purposes of this Act.