



**The Zambian Movable Property (Security Interest)
Act No. 3 of 2016: *A Step-by-Step Explanatory Guide
to the Act***

Compiled By:

**Mapani Christopher &
Lloyd Musonda**

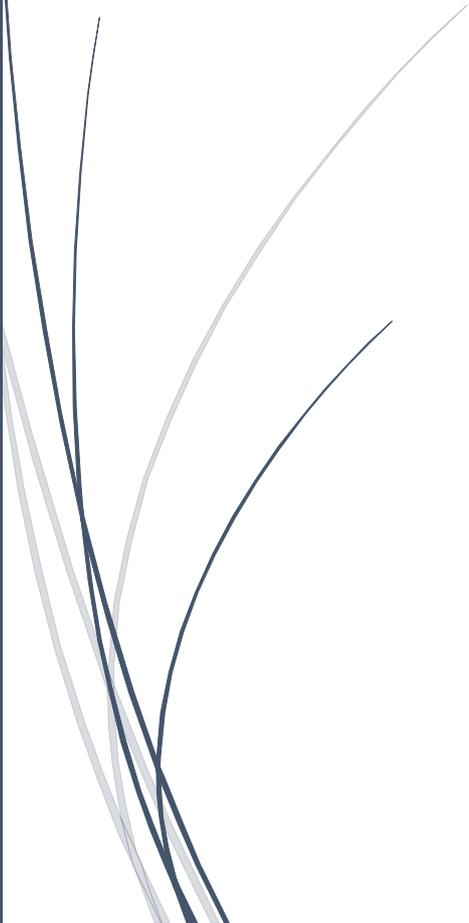


Table of Contents

Acknowledgements	iv
Preface	v
Glossary	vii
Chapter 1	1
The Need for a Secure Transaction Law	1
1.1 Background to the Movable Property (Security Interest) Act.....	1
1.2 Principles Underlying Secure Transaction Laws	2
1.3 Difference between Collateral Registry and Credit Reference Bureau.....	3
1.4 Objectives of the Movable Property (Security Interest) Act	3
1.5 Scope of the Movable Property (Security Interest) Act.....	4
1.6 Supremacy of Movable Property (Security Interest) Act	8
1.7 Freedom to Choose Applicable Law.....	9
1.8 Aspects of Secure Transactions Not Covered by the Act	9
Chapter 2	10
Collateral Registry and Registration of Financing Statements.....	10
2.1 Establishment of Collateral Registry.....	10
2.2 Nature and Accessibility of Collateral Registry	10
2.3 Who Can Transact with Collateral Registry	11
2.4 Registering a Financing Statement.....	12
2.5 When Should a Financing Statement be Registered.....	15
2.6 Information Required for Registration.....	16
2.7 Implications of Submitting Incomplete Information.....	18
2.8 Invalidity of Registration of a Financing Statement	18
2.9 Transfer, Amendment and Discharge of Financing Statement	20
Chapter 3	23
Creation of Security Interest	23
3.1 Security Agreements and Interests.....	23
3.2 Validity of Security Agreement.....	26

Chapter 4	28
Perfection of Security Interests	28
4.1 What is Perfection of a Security Interest	28
4.2 Importance of Perfecting Security Interest.....	28
4.3 Methods of Perfection	28
4.4 Perfection of Security Interests created in Other Jurisdictions.....	30
4.5 Continuity of Perfection.....	30
4.6 Perfection under Different Scenarios.....	31
Chapter 5	33
Priority of Security Interests.....	33
5.1 Priority of Security Interests	33
5.3 Priority not affected by Transfer	33
5.4 Priority the Same in Current and Future Obligations	34
5.5 Subordination of Priority.....	34
5.6 Priority in Purchase Money Security Interest	34
5.7 Priority Scenarios.....	35
5.8 Rights of Buyer or Lessee of Goods.....	38
Chapter 6	39
Enforcement.....	39
6.1 Enforcement With or Without Court Involvement.....	39
6.2 Enforcement Methods.....	39
6.3 Additional Remedies.....	42
6.4 Collateral to be Applied in Satisfaction of Obligation	42
6.5 Retention of Collateral.....	43
6.6 Redemption of Collateral	43
6.7 Reinstatement of Security Agreement.....	44
Chapter 7	45
General Provisions and Offences	45
7.1 Parties to Act in Good Faith and Consistent with Commercial Reasonableness.....	45
7.2 Entitlement to Damages.....	45

7.3	Debtor Entitled to be Kept Informed.....	45
7.4	Service of Documents	46
7.5	Offences	46
7.6	Power of Registrar to Impose Administrative Sanctions	48
7.7	General Penalties	48
7.8	Minister Empowered to Issue Regulations	48
7.9	Collateral Registry Reporting Entity under Finance Intelligence Center Act	49
7.10	Savings and Transitional Provisions	49

Acknowledgements

The assistance of all those that made this work possible is highly appreciated.

Preface

The Guide seeks to facilitate understanding of the Movable Property (Security Interest) Act No. 3 of 2016 of the Laws of Zambia and the Collateral Registry. It is targeted at all users of the Collateral Registry who include commercial banks and other financial institutions that seek to protect their rights (security interests) in movable property pledged as collateral as well as borrowers that may wish to ascertain whether a registered security interest has been discharged. The Guide may equally be of interest to members of the general public in verifying whether a particular movable asset is subject to a security interest.

Except where expressly mentioned or as circumstances may dictate, reference in the Guide to 'the Act' refers to the Movable Property (Security Interest) Act No. 3 of 2016 of the Laws of Zambia.

The salient provisions of the Act are discussed and background information provided, where necessary. The Guide deliberately cites the relevant provisions to also allow readers to interpret the Act for themselves. In so doing, the Guide also draws on Statutory Instrument No. 77 of 2016, *The Movable Property (Security Interest)(General) Regulations, 2016* and Statutory Instrument (SI) No. 73 of 2016, *The Movable Property (Security Interest)(Fees) Regulations, 2016*.

SI No. 77 prescribes forms and procedures relating to lodgment and processing of documents in the Collateral Registry while SI No. 73 stipulates the fees payable in the Registry.

The Guide is also informed by international best practice in secure transaction laws and stakeholders comments before and after the enactment of the Act. Text books, journals and other publications also constituted a vital source of information.

It must be noted, however, that the Movable Property (Security Interest) Act is not modeled after any particular law, but borrows from various jurisdictions including Canada and Australia. The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide also served as reference material in drafting the Act.

The Guide is divided into seven chapters, in accordance with the Act.

Chapter 1 discusses Part I of the Act. The chapter introduces the Guide and outlines the background to the enactment of the Movable Property (Security Interest) Act, its objectives and gives a synopsis of the Act. In that regard, the scope of the Act and related matters falling beyond the scope of the Act are discussed. Clarification is also provided on the difference between a Collateral Registry and other structures such as the Credit Reference Bureau.

Chapter 2 analyses the Collateral Registry Office and the Collateral Registry as provided for under Part II of the Act. The chapter discusses the Collateral Registry and functions of the Registrar and Registry staff. The chapter further looks at how financing statements are to be registered including information to be provided, circumstances under which registration of a financing statement may be rejected and output documents confirming that a financing statement has been registered. In addition, matters incidental to registration of financing statements such as duration of registration, transfer, amendment and discharge of financing statements, are discussed. The chapter concludes with how to access to the Collateral Registry and the Registrar's powers to appeal and to be heard in legal proceedings.

Chapter 3 is concerned with creation of security interests in accordance with Part III of the Act. The chapter looks at the meaning of security interests and how security interests are created. The chapter then delves into security interests created after a security agreement has been created, in so called '*after acquired property*' as well as security interests relating to negotiable instruments. The continuation of security interests in proceeds of the collateral and commingled goods, is also discussed. The chapter concludes by looking at transfer of security interests and validity of assignment clauses.

Chapter 4 deals with perfection of security interests as provided under Part IV of the Act. It explains what perfection entails and why perfection is important. In particular, the implications of failure to perfect an interest are discussed. The chapter then discusses the three methods by which a security interest may be perfected and continuity of perfection in proceeds of perfected collateral. The chapter thereafter discusses temporary perfection, perfection of goods with bailee and farming products and perfection in relation to security interests perfected in other jurisdictions, in negotiable documents, negotiable instruments and investment security **certificates**.

Chapter 5 is concerned with priority of perfected security interests in accordance with Part V of the Act. Priority under various scenarios is discussed. These include priority between perfected interests, between perfected and unperfected interests and priority in secured obligations and advances as well as perfection vis-à-vis 'purchase money security interests' and between 'purchase money security interests'.

Other scenarios discussed include priority of 'purchase money security interests' in fixtures, priority of security interests in goods prior to accession and in processed or commingled goods, perfection of funds in bank accounts and priority of security interests transferred by a debtor. The chapter concludes with a commentary on priority in relation to purchasers of negotiable instruments, investment security or negotiable instruments, priority of assignee of accounts receivables, priority of a lien over security interests and priority of a judgement creditor or lien holder over unperfected security interests.

Chapter 6 analyses enforcement of perfected security interests in line with Part VI of the Act. As such, the chapter looks at the circumstances under which a security interest may be enforced, enforcement methods and the procedure for enforcement. The chapter also discusses compliance requirements in enforcement and terms and conditions under which a creditor may retain collateral as opposed to disposing of it. Terms under which a security agreement may be reinstated, after instituting enforcement proceedings, are equally discussed.

Chapter 7 reviews Part VII of the Act which deals with matters of a general and administrative nature. Among others, the need for parties to act in good faith and with reasonable commercial standards, is discussed. Remedies against failure to uphold obligations stipulated under the Act, service of process and prescribed offences, are also discussed. The chapter concludes with administrative and criminal sanctions for violating the Act.

Glossary

'account receivable' means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument and to payment of money credited to a bank account;

'address' includes a physical address, post office box number and postal Code; village and district address; or an electronic address;

'after acquired property' refers to movable property that a debtor acquires after the conclusion of a security agreement;

'bank account' means an account, maintained by a bank or financial institution, to which monies for a customer are credited, and includes monies received by the bank but not yet credited into the customer's account;

'commercial consignment' means a consignment where a consignor has reserved an interest in goods that the consignor has delivered to the consignee for the purpose of sale, lease or other disposition and both the consignor and consignee deal in the ordinary course of business in goods of that description, excluding an agreement under which goods are delivered to an auctioneer for sale;

'consumer Goods' means goods that a debtor predominantly uses or intends to use for personal, family or household purposes;

'control agreement' means an agreement between a bank or financial institution with a debtor who is a customer of the bank or financial institution and a secured creditor, in which the bank or financial institution has agreed to follow instructions from the secured creditor without the further consent of the debtor;

'collateral' means movable property, whether tangible or intangible that is subject to a security interest;

'creditor' means a person in whose favour a security interest is created, and includes (a) financial lessor; (b) seller who reserved title to the goods sold; (c) chargee under any type of charge, chattel mortgagee or holder of any type of consensual lien; and (d) buyer of accounts receivable, commercial consignor and an operating lessor under an operating lease where the account receivable, goods provided under the commercial consignment or the leased object do not secure an obligation;

'debtor' means a person who creates a security interest to secure that person's obligation or that of another person and includes a (a) lessee under a financial lease; (b) buyer that acquires goods whose title is to be retained by the seller; (c) grantor of any charge, chattel mortgage, pledge or lien in movable property; (d) consignee who receives goods from another person under a commercial consignment; and (e) seller of accounts receivable and a lessee under an operating lease where the receivables or the object that is subject of the lease does not secure an obligation;

'equipment' means tangible asset used by a person in the operation of its business, and includes plant and machinery;

'farm products' include includes—

- (i) crops grown, growing or to be grown, harvested and their produce and fruit;
- (ii) timber, both standing and growing;
- (iii) fish stocks, livestock, bees and poultry and the produce and progeny thereof;
- (iv) seeds, fertilisers and manure; and
- (v) other supplies and equipment used or produced in a farming operation;

'financial lease' means a lease of a tangible asset, other than a negotiable instrument or negotiable document, that is the object of a lease agreement, and includes a hire purchase agreement, where—

- (a) the lessee automatically becomes the owner of the tangible asset;
- (b) the lessee may acquire ownership of the tangible asset by paying no more than a nominal price; or
- (c) the tangible asset has no more than a nominal residual value';

'immovable property' means land or other property that cannot be moved and includes an object so firmly attached to the land that it is regarded as part of the land¹ It includes fixtures which are defined as tangible asset that is physically attached to immovable property without losing its separate identity, excluding improvements;

'inventory' means tangible assets that are held for sale or lease in the ordinary course of business, raw materials or work-in-process;

'movable property' includes goods, intangibles, securities, money, negotiable instruments and negotiable documents². 'Thus, the Act applies to both tangible and intangible goods;

'negotiable document' means a document such as a warehouse receipt or a bill of lading, that embodies a right to delivery of tangible assets and satisfies the requirement for negotiability under the law governing the document;

'negotiable Instrument' means an instrument, such as a cheque, bill of exchange or promissory note, that embodies a right to payment and satisfies the requirements for negotiability under a law governing negotiable instruments;

'operating lease' means an agreement, that exceeds one year, relating to a transaction in which the leased asset has a useful life at the end of the lease term, the lessee does not; have an option to purchase the leased asset at the end of the term of the lease for a

¹ Section 2

² Section 3 of the Act

nominal price and title to the leased asset is not transferred to the lessee automatically at the end of the lease term'

'perfected security interest' means a security interest that has become effective against third parties by control, possession, registration or temporarily, as provided in the Movable Property (Security Interest) Act;

'possession' means possession of collateral by a secured creditor that is not in actual or apparent possession or control of a debtor or a debtor's agent;

'purchase money security interest' means—

- (a) a security interest in collateral taken or retained by a seller or financial lessor to secure all or part of the purchase price of the collateral;
- (b) a security interest taken by a person who provides credit to enable a debtor to acquire the collateral if such credit is in fact so used;
- (c) an interest of the lessor under an operating lease with a term that exceeds one year; or
- (d) an interest of a consignor who delivers goods to a consignee under a commercial consignment, excluding a transaction of sale and lease back to the seller;

'priority' means a right of a secured creditor to derive the economic benefit of a security interest in preference to the right of a competing claimant;

'security agreement' means an agreement between the debtor and secured creditor that creates;

'security interest' includes a lien, charge, financial lease, right under a hire purchase agreement, pledge, security trust deed, trust receipts, consignment, lease, assignment or other interest in movable property that secures payment or performance of an obligation, as well as judgements;

'secured obligation' means an obligation secured by a security interest;

'search' means an electronic examination of the records contained in the Collateral Registry – which can be official or unofficial;

'tangible asset' means every form of movable property, including inventory, equipment, consumer goods, accession, negotiable instruments, negotiable documents and money.

Chapter 1

The Need for a Secure Transaction Law

1.1 Background to the Movable Property (Security Interest) Act

The Movable Property (Security Interest) Act No. 3 of 2016 seeks to promote movable property based lending and thus ultimately increase access to credit by small scale businesses, in particular.³ Owing to a number of factors including the absence of a unified registry through which to verify whether a movable asset is subject to other third party interests (encumbered) and difficulties associated with enforcement, collateral in form of immovable or fixed assets has been preferred by banks and other creditors.

Unlike immovable or real property (houses and land) whose records have been kept at the Lands and Deeds Registry, no equivalent registry existed in relation to movable property. While a number of security interest registries for movable property existed prior to the enactment of the Movable Property (Security Interest) Act, no unified registry existed. These isolated registries included the register of charges and mortgages under the Companies Act, which was restricted to security interests created by companies and those established under the Trade Charges Act and the Agriculture Credits Act.

The Trade Charges Act provides for the creation of charges to secure loans advanced by financial service providers to persons licensed under the Act. The Act allows for small-scale entrepreneurs, who are usually unincorporated businesses, to access finance using their trading stock and other personal assets. However, the Office of the Registrar of Trades Charges, which falls under the Ministry of Commerce, has been none functional.

The Agricultural Charges Act equally provides for charges over agricultural equipment to be registered in the registry. These charges are mostly registered by unincorporated small scale farmers.

With the exception of agricultural charges, priority over registered securities is determined by the date of registration. An agricultural charge takes precedence over a fixed or floating charge granted by a borrower, including charges both granted and registered prior to the agricultural charge. As such, lenders could not be fully secure of their interests in collateral in form of agricultural equipment.

The above secure transaction registries were supplemented by registries that, despite providing for registration of security interests, had not been primarily established to protect security interests. A case in point is the motor vehicle register maintained by the Road Transport and Safety Agency (RATSA). The registration of third party interests in motor vehicles was merely incidental to its role of recording ownership of motor vehicles.

Accordingly, the security interest registration system in Zambia was fragmented across registries, depending on the nature of security interest (agricultural charges) or type of asset (vehicles), or the type of debtor (company). The lack of a unified registry meant that a lender could only be assured that an asset was free of any third party interest (encumbered) after searching all the registries. This was not only cumbersome but expensive.

³ The enactment of the Movable Property (Security Interest) and establishment of the Collateral Registry was made possible by the International Finance Corporation of the World Bank and the Bank of Zambia. The project was overseen by Ms. Elaine MacEachern, the Global Specialist - Secured Transactions & Collateral Registries) of the International Finance Corporation (IFC).

Further, the multiplicity of registries led to confusion as to priority ranking of security interests. Thus, in case of default, it was difficult to determine which of the several lenders was entitled to a priority claim over the asset pledged as collateral. The net result was reluctance to accept movable property as collateral and preference for immovable or fixed assets which have a relatively lower risk or to companies.

The implication was that none incorporated bodies and small businesses were practically excluded from using their movable assets as collateral. This included motor vehicles which are readily available. This was compounded by the lack of a cost effective enforcement mechanism.

The Movable Property (Security Interest) Act responds to the above challenges by providing for the establishment of a unified registry (the Collateral Registry) in which security interests in all types of movable property will be registered. The Act supersedes other statutes on security interests and provides for a simplified enforcement mechanism while elevating the Collateral registry above all existing registries for security interests⁴. Ultimately, the Act provides lenders with guarantees required to accept personal or movable property as collateral.⁵

In Australia, Canada and a few other jurisdictions, laws equivalent to the Movable Property (Security Interest) Act are generally referred to as 'Personal Property Security Interest' (PPSI) laws. The substitution of 'personal property' with 'movable property', in Zambia, was a deliberate attempt to ease understanding of the Act.⁶ Such laws are further categorised as Secure Transaction Laws as they secure payment or performance of an obligation. As the name of the Act suggests, the 'Zambian Act' like similar statutes elsewhere, is confined to movable property⁷.

1.2 Principles Underlying Secure Transaction Laws

Secure Transaction Laws and the Movable Property (Security Interest) Act are undergirded by the following principles: -

- (a) **Broad Scope of Rights that can be created in all types of Property:** Secure transaction laws seek to cover all interests in movable or personal property. These include possessory and non-possessory rights over the different types of movable property. Such assets could be present or future. An example could be offsprings of an animal or crops to be grown. These are generally referred to as 'after acquired property'. Further, the assets could range from raw materials to finished products.
- (b) **Well-Functioning Registry System and Access to Information:** Secure transaction laws provide for centralised web based registration systems capable of facilitating real time data while security interests are made public through a public registry.

⁴Refer to **section 6** of the Act

⁵ The enactment of the Movable Property (Security Interest) Act and the establishment of a Collateral Registry was an initiative of the Bank of Zambia under the Financial Sector Development Programme (FSDP) as part of measures aimed at fostering financial inclusion. The initiative is expected to ameliorate the challenge of access to finance by micro and small businesses.

⁶ In law, property is categorised into 'immovable' 'real' or 'fixed property' on one hand and 'movable' or 'personal property' on the other.

- (c) **Well Defined and Transparent Perfection Rules:** Secure transaction laws provide clear rules on how to settle competing claims in collateral. The ‘first-to-file’ principle applies under which priority is determined by the order of perfection of the security interest. Priority rules are key in the event of default and eventual realisation from the collateral. Secured creditors should be able to predict their priority against other creditors.
- (d) **Speedy, Inexpensive and Fair Enforcement System:** Secure transaction laws **espouse** easy enforcement of security interests against defaulters. As a general rule, the option of out of court settlement is given or a fast tracked court process. Self-help enforcement mechanisms are also provided. Secure transaction laws also provide appropriate rights of redemption and reinstatement for debtors.
- (e) **Conflict of Laws:** Secure transaction laws also take care of the eventuality where parties or the collateral may be subject to two or more jurisdictions. Thus, they provide for how to deal with conflict of laws situations.

1.3 Difference between Collateral Registry and Credit Reference Bureau

Whereas a Credit Reference Bureau keeps information relating to the credit worthiness of borrowers, a Collateral Registry is concerned with assets pledged as collateral - whether they are encumbered and who has a priority security interest. Thus, a Collateral Registry is concerned with third party interests in movable assets.

1.4 Objectives of the Movable Property (Security Interest) Act

The overall objective of the Movable Property (Security Interest) Act is to make it attractive for lenders to accept movable property as collateral and thereby diversify the nature of movable assets used as collateral, leading to increased lending. In essence, the Act seeks to make movable property a reliable form of collateral.

The Act provides a mechanism by which to determine whether a movable property is not subject to other third party interests; ensures certainty as to priority vis-à-vis competing claims over a movable asset pledged as collateral; and provides for a simplified enforcement mechanism in case of default.⁸ This is achieved through a unified Collateral Registry in which creditors register their security interests and conduct searches before lending against collateral; and providing for clear and predictable priority and enforcement rules.

⁸ The preamble to the Act provides as follows: ‘An Act to provide for the creation of security interests in movable property so as to contribute to economic development; harmonise secured transaction laws; provide for harmonisation of conflict of laws in order to promote the financing of international trade and make security interests effective against third parties; enhance the availability of low-cost secured credit to allow debtors to use the full value inherent in their assets to support credit; establish a Collateral Office and Collateral Registry for a single comprehensive registration regime for secured transactions in movable property; establish streamlined procedures for obtaining security interests and reducing transaction costs by minimizing formalities; ensure effectiveness of security agreements and enforceability of security agreements and interests; provide for perfection of security interests; to establish the determination of priority between security interests; and provide for matters connected with, or incidental to, the foregoing’.

1.5 Scope of the Movable Property (Security Interest) Act

Section 4(3)(1) provides: -

3. (1) Despite any other written law and subject to section four, this Act applies to all interests in movable property created by agreement that secures payment or other performance of an obligation regardless of the form of the transaction, type of movable property, status of the debtor or secured creditor or the nature of the secured obligation, including—

- (a) a security interest in intangible or tangible assets, a lien, charge, financial lease, right under a hire-purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, assignment or other interest in movable property that secures payment or performance of an obligation;
- (b) the creation, perfection and priority of a security interest in proceeds where this Act is applicable to the creation, perfection and priority of the security interest in the original collateral from which the proceeds arose; and
- (c) a security interest created by a consumer or acquired by a secured creditor without affecting the consumers rights as provided in the Competition and Consumer Protection Act, 2010.

(2) This Act also applies to security interests created by judgments of a court in accordance with the Civil Courts (Attachment of Debts) Act or the operation of any other written law.

Accordingly, security interests include a lien, charge, financial lease, right under a hire purchase agreement, pledge, security trust deed, trust receipts, consignment, lease, assignment or other interest in movable property that *secures payment or performance of an obligation*, as well as judgements. A secured obligation is defined as *an obligation secured by a security interest*⁹. It is nonetheless noteworthy that enforcement provisions do not apply to security interests created or providing for an outright transfer of an account receivable or operating lease. To this end, section 70(1) provides –

70. (1) This Part applies to security interests created in accordance, with this Act and does not apply to those security interests that are created or provided for by an outright transfer of an account receivable and operating lease.

Further, the Act requires that an operating lease be for a period longer than one year. Under section 2, an operating lease is defined in the following terms: -

“operating lease” means an agreement, that exceeds one year, relating to a transaction in which the leased asset has a useful life at the end of the lease term, the lessee does not have an option to purchase the leased asset at the end of the term of the lease for a nominal price and title to the leased asset is not transferred to the lessee automatically at the end of the lease term’

A financial lease, on the other hand, is defined as;

‘ ... a lease of a tangible asset, other than a negotiable instrument or negotiable document, that is the object of a lease agreement, and includes a hire purchase agreement, where—

- (c) the lessee automatically becomes the owner of the tangible asset;

⁹ Section 2 of the Act

- (d) the lessee may acquire ownership of the tangible asset by paying no more than a nominal price; or
- (e) the tangible asset has no more than a nominal residual value’.

The Act further defines a ‘commercial consignment’ as a *consignment where a consignor has reserved an interest in goods that the consignor has delivered to the consignee for the purpose of sale, lease or other disposition and both the consignor and consignee deal in the ordinary course of business in goods of that description, excluding an agreement under which goods are delivered to an auctioneer for sale.*

However, not all the key terms used in the Act have been defined. For instance, a lien, charge, consignment *per se*, pledge, security trust deed, lease and assignment, among others, have not been defined. It follows that they have to be given their natural or ordinary meaning. In this regard, section 6 (3) provides that *the principles of common law, equity and the law of merchants, except insofar as they are inconsistent with this Act, continue to apply with respect to security interests in movable property.*

Further to section 4, the Act covers creation, perfection and priority of security interests. Section 4 provides: -

- 4. (1) This Act applies to the creation, perfection and priority of a security interest where the—
 - (a) tangible asset is located in Zambia;
 - (b) debtor is located in Zambia where the collateral is an intangible asset;
 - (c) debtor is located in Zambia and the tangible asset is of a type ordinarily used in more than one country; or
 - (d) (bank account is maintained in a bank or financial institution that has a place of business in Zambia.

Subsections 3 to 5 further clarify as follows: -

- (3) For the purposes of this Act—
 - (a) a debtor is located in Zambia if the debtor has a place of business in Zambia;
 - (b) the habitual residence of the debtor shall apply if the debtor does not have a place of business in Zambia; and
 - (c) the location of the property or debtor shall be determined at the time of the creation of the security interest and for purposes of perfection and determining of the priority of the security interest, at the time the dispute arose.
- (4) If a security interest in collateral is created and perfected before a change in the location of the collateral or debtor, the location of the collateral or debtor is, with respect to perfection and priority, the location prior to the change in location.
- (5) If a security interest is perfected under the law of another State and this Act becomes applicable, the security interest remains perfected, in accordance with this Act, for ten working days after the change in location and, thereafter, only if perfection requirements of this Act are satisfied.

To all intents and purposes, the Act covers all forms of secure transactions relating to movable property. It applies to all transactions with a security function. These include loans, hire purchase and lease agreements and any other agreements securing payment or performance of an obligation in relating to movable property. To that end, the Act defines a debtor more broadly than commonly understood.

A debtor is defined as a person who creates a security interest to secure that person's obligation or that of another person and includes a (a) lessee under a financial lease; (b) buyer that acquires goods whose title is to be retained by the seller; (c) grantor of any charge, chattel mortgage, pledge or lien in movable property; (d) consignee who receives goods from another person under a commercial consignment; and (e) seller of accounts receivable and a lessee under an operating lease where the receivables or the object that is subject of the lease does not secure an obligation'.

Similarly, a secured creditor is defined as *a person in whose favour a security interest is created, and includes (a) financial lessor; (b) seller who reserved title to the goods sold; (c) chargee under any type of charge, chattel mortgagee or holder of any type of consensual lien; and (d) buyer of accounts receivable, commercial consignor and an operating lessor under an operating lease where the account receivable, goods provided under the commercial consignment or the leased object do not secure an obligation.*

1.5.1 Scope of Movable Property (Collateral)

Evidently, the intention of the Act is to cover all forms of movable assets. As such, movable property is defined in a non-exhaustive manner. Movable property is defined as *including goods, intangibles, securities, money, negotiable instruments and negotiable documents*¹⁰. Similarly, 'collateral,' is defined under section 2 to mean *movable property, whether tangible or intangible that is subject to a security interest*. Thus, the Act applies to both tangible and intangible goods.

The broad categories of movable property are: tangible assets, farm produce, inventory, consumer goods and accounts receivables and are defined as follows: -

- (a) Tangible Asset:** every form of movable property, including inventory, equipment, consumer goods, accession, negotiable instruments, negotiable documents and money;
- (b) Consumer Goods:** goods that a debtor predominantly uses or intends to use for personal, family or household purposes. However, the Act does not define 'goods' per se. Goods nonetheless constitute tangible assets and are generally sub-categorized into 'consumer goods', 'inventory' and 'equipment'.
- (c) Equipment:** tangible asset used by a person in the operation of its business, and includes plant and machinery.
- (d) Negotiable Document:** a document such as a warehouse receipt or a bill of lading, that embodies a right to delivery of tangible assets and satisfies the requirement for negotiability under the law governing the document.

¹⁰ Section 3 of the Act

- (e) **Negotiable Instrument:** an instrument, such as a cheque, bill of exchange or promissory note, that embodies a right to payment and satisfies the requirements for negotiability under a law governing negotiable instruments.
- (f) **Inventory:** tangible assets that are held for sale or lease in the ordinary course of business, raw materials or work-in-process.
- (g) **Account Receivable:** a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument and to payment of money credited to a bank account.
- (h) **Bank Account:** an account, maintained by a bank or financial institution, to which monies for a customer are credited, and includes monies received by the bank but not yet credited into the customer's account.
- (i) **Farm products:** includes—
 - (i) crops grown, growing or to be grown, harvested and their produce and fruit;
 - (ii) timber, both standing and growing;
 - (iii) fish stocks, livestock, bees and poultry and the produce and progeny thereof;
 - (iv) seeds, fertilizers and manure; and
 - (v) other supplies and equipment used or produced in a farming operation.

Under section 2(2), parties are required determine the categorization of the collateral, whether consumer goods, equipment, farm products or inventory, at the time they execute the security agreement.

1.5.2 Movable Property Excluded from the Act

Section 4(3) stipulates as follows in relation to security interests not covered by the Act: -

- (3) This Act shall not apply to—
 - (a) the creation or transfer of an interest in immovable property;
 - (b) a mortgage of a ship regulated by the Merchant Shipping Act and an interest in aircraft and aircraft engines as defined in the Civil Aviation Authority Act, 2012, Civil Aviation Act, 2016; or any other law regulating the aviation sector; and
 - (c) pledges of securities under any law regulating a central securities depository system'

Ships and aircrafts are excluded as they are subject to international treaties and thus regulated under specific pieces of legislation. Further, pledges of securities under any law regulating a Central Securities Depository system are excluded as they can be disposed of quite rapidly. Such securities could include Government securities or those of private entities.

However, securities *per se* fall within the scope of the Act and can therefore be used as collateral. It is noteworthy that the definition of movable property includes securities. Thus, if one issued a certificate such as paper bond, it would qualify as collateral under the Movable Property (Security Interest) Act. If, on the other hand, one is trading electronically in Government

Treasuries through a broker and wants to use them as collateral, this pledge will not be covered by the Act. It is also noteworthy that, as regards lending transactions, the Act only applies to secured lending.

1.5.2.1 Immovable Property

Immovable property is expressly excluded from the Act. Immovable property is defined as *land or other property that cannot be moved and includes an object so firmly attached to the land that it is regarded as part of the land¹¹. It includes fixtures which are defined as tangible asset that is physically attached to immovable property without losing its separate identity, excluding improvements.*

1.6 Supremacy of Movable Property (Security Interest) Act

Security interests may come into competition with other rights, interests and claims, including other security interests, rights of buyers, lessees and judgement creditor's. They may also be affected by bankruptcy or insolvency proceedings. Consistent with the need to create a unified and comprehensive registry for security interests in movable property, the Movable Property (Security Interest) Act supersedes any other law with regards to security interests in movable property. These include the Companies Act, the Agricultural Charges Act, the Trade Charges Act and the Hire Purchase Act. Security interests perfected under the Act take precedence over interests protected under any other statute.

Section 6 of the Act provides: -

6. (1) Subject to the Constitution, where there is any inconsistency between the provisions of this Act and the provisions of any other written law relating to security interests in movable property or the creation and maintenance of a registry for security interests in movable property, the provisions of this Act prevail to the extent of the inconsistency.
- (2) Despite the generality of subsection (1), this Act shall prevail over any other written law on security interests created by an agreement, including—
 - (a) an agreement to sell subject to retention of title;
 - (b) a hire-purchase agreement made in accordance with the Hire-Purchase Act;
 - (c) an outright transfer of accounts receivable;
 - (d) an operating lease;
 - (e) consignment that does not secure an obligation; and
 - (f) any other interest that secures an obligation.

Further, pursuant to section 5, the provisions of section 4, relating to creation, perfection and priority of security interests, prevail over insolvency and bankruptcy proceedings: -

5. (1) Subject to subsection (2), the commencement of bankruptcy or insolvency proceedings under a law relating to bankruptcy or insolvency shall not override the provisions of section four.

¹¹ Section 2

(2) Despite subsection (1), the law relating to bankruptcy or insolvency shall apply if the bankruptcy proceedings or insolvency proceedings, as the case may be, commenced under that law in relation to—

- (a) avoidance of security interest;
- (b) treatment of secured creditors;
- (c) ranking of claims; and
- (d) distribution of proceeds.

(3) For the avoidance of doubt, an unperfected security interest created by a debtor shall not be effective against a liquidator or receiver carrying out insolvency proceedings or official receiver in relation to the estate of the debtor.

1.7 Freedom to Choose Applicable Law

Parties retain the right to decide the law applicable to mutual rights and obligations emanating from a security agreement. To this end, section 4(2) stipulates: -

(2) The law applicable to the mutual rights and obligations of a debtor and secured creditor arising from a security agreement shall be the law chosen by the parties and, in the absence of a choice of law, by the law governing the security agreement.

1.8 Aspects of Secure Transactions Not Covered by the Act

Not all aspects of secure transactions or secured lending are covered by the Act. Rather, the Act is restricted to factors that have previously undermined the use of movable property as collateral. Similarly, the Act does not impose any obligation on lenders nor compel them to lend. In addition, lenders and borrowers retain the freedom to contract. The Act merely creates the enabling environment for such transactions.

Specifically, the following are not addressed;

- (a) **Interests Rates Payable:** The rate of interest charged on loans, for example, remains subject to agreement between the parties. However, it is hoped that by reducing the risk associated with asset based lending, the Act will lead to reduction in lending rates.
- (b) **Valuation of Assets:** The Act leaves it to the parties to decide how collateral is to be valued and secured.
- (c) **Insurance of Collateral:** Similarly, insurance of assets subject to security interests, including those that are pledged as collateral under loan agreements, are not within the scope of the Act but left to be decided by the parties.
- (d) **Enforcement:** Except for the simplified enforcement mechanism, the creditor is responsible for recovering the secured funds or performance of the secured obligation. Equally, the lender is responsible for monitoring and recovering payments.

Chapter 2

Collateral Registry and Registration of Financing Statements

The chapter discusses the Collateral Registry and registration of financing statements as well as matters incidental thereto in accordance with Part II of the Act. It reviews the nature of the Registry and its access, responsibility for accuracy of information lodged and the procedure for registering a financial statement. The chapter further looks at matters incidental to registration of financing statements including information required for registration, proof, effect and duration of registration, amendment and discharge of financing statements and how to conduct searches or request for a certificate of status.

2.1 Establishment of Collateral Registry

The Collateral Registry is established pursuant to section 11 of the Movable Property (Security Interest) Act No. 3 of 2016. The Registry is operated by the Collateral Registry Office within the Patents and Companies Registration Agency (PACRA).¹² The PACRA Registrar is the Registrar under the Collateral Registry. The Registrar is responsible for managing and facilitating access to the Registry. However, the duties of the Registrar do not include providing legal advice on matters of registration.¹³ None legal advice relating to registration and searches can nonetheless be provided.¹⁴

The Collateral Registry is a central database that records security interests in movable assets pledged as collateral. Thus, in essence, it is a registry for security interests. Particulars of security interests as submitted through a financing statement, during registration or upon amendment, shall be kept by the Registry.

2.2 Nature and Accessibility of Collateral Registry

The Collateral Registry is wholly electronic - there is no provision for physical lodgments. All transactions in the Registry, including payment for services, are made via PACRA's website www.pacra.org. Accordingly, the prescribed forms are also electronic. To that end, regulation 24 of SI No. 77 of 2016 provides: -

24. (1) The Forms set out in the First Schedule shall be electronically accessible to users of the Collateral Registry.

(2) The Forms referred to in subregulation (1) may provide for dynamic data capture of information for the purposes of ensuring accuracy of information.

As the Collateral Registry is electronic, it is accessible 24 hours a day, even outside official working hours. An application for registration can therefore be made any anytime, including weekends. The same applies to searches. However, the Registrar may occasionally suspend business for purposes of maintenance or where circumstances so require.¹⁵

2.2.1 Responsibility for Accuracy of Information Registered

¹² Section 7

¹³ Section 8(2)

¹⁴ Section 8(3)

¹⁵ Refer to section 11(1) and Regulation 14

The responsibility for accuracy of the information lodged into the Collateral Registry rests with the applicant. Under section 12 (5), the Registrar has no responsibility for scrutinizing such information. Section 12 is supplemented by regulation 23 of Statutory Instrument No. 77 of 2016 which provides: -

- 23 .(1) A person registering, amending or discharging a financing statement or submitting any other document shall ensure that the information is provided accurately in the fields designated for entering that information.
- (2) The Registrar is not responsible for-
- (a) the authenticity, legality or accuracy of any information received from a secured party;
 - (b) any inaccuracies or misrepresentations discovered in a search of the registry record by a user; or
 - (c) the validity of an agreement between the secured creditor and the debtor.
- (3) Subject to any written law, the Collateral Registry shall not, except where there is willful negligence, be responsible for loss or damage suffered by a person as a result of
- (a) erroneous or false entry of information from a financing statement into the Collateral Registry;
 - (b) reliance on an erroneous search result or certificate provided by the Collateral Registry;
 - (c) changes, omissions or corruption of electronically transmitted information; or
 - (d) inaccuracies or misrepresentations revealed in a search of the registry record.

Under sections 93 to 95, it is an offence to falsify lodgments in the Registry.

2.3 Who Can Transact with Collateral Registry

While creditors are the principle users of the Registry (as they register, discharge and make alterations to registered financing statements), the Collateral Registry is for both lenders and borrowers. Borrowers may interact with the Registry by conducting searches. No user account is required to conduct a search. Anyone can conduct a search on the Register. To register a statement, a lender should first open a user account. A search may seek to establish whether an asset is encumbered or verify whether a financing statement has been discharged following payment of a debt or performance of the secured obligation.

Natural persons, incorporated bodies and unincorporated bodies such as business names or entities registered under the Societies Act¹⁶ can transact with the Registry either as debtors or creditors. Incorporated bodies may be companies incorporated under the Companies Act, trusts registered under the Lands (Perpetual Succession) Act¹⁷ or cooperatives registered under the Cooperative Societies Act of 1998.

Under the Movable Property (Security Interest) Act, a lender need not be a formal, registered or licensed financial institution such as a commercial bank or micro finance institution. Any

¹⁶ Cap 119 of the Laws of Zambia

¹⁷ Cap 186 of the Laws of Zambia

lender, irrespective of the legal statutes, can protect their security interests by having them registered. The danger of failing or neglecting to register a security interest is that, should the same asset be used as collateral in another transaction and the subsequent lender registers its interest in the collateral, the first lender would be deprived of priority despite being the first to lend against the asset.

As such, it is critical that lenders not only register their interests but also conduct searches in the Collateral Registry before lending to establish whether the asset being put forth as collateral is not subject to other third party interests.

2.4 Registering a Financing Statement

Upon lending against movable property, a lender should register the interest in the collateral (the security interest) in the Collateral Registry. Registration is effected by filing a 'financing statement' - not a 'financial statement'. Once registered, the security interest is said to have been 'perfected'. As later discussed, there three alternatives to perfection, the primary one being registration.

A lender whose security interest has been perfected acquires a priority claim over the collateral. Thus, should more than one perfected interest exist in the collateral, priority will be determined by the order of perfection. The date and time of registration is therefore critical.

Details to be submitted on registration are stipulated under section 13 of the Act while section 14 outlines grounds upon which a financing statement may be denied registration. Information required includes adequate description of the collateral, the debtor and creditor, maximum amount for which the secured obligation may be enforced and a declaration that information provided is accurate and compliant with the Act. This information should be inputted in respective fields on the website.

Registration of a financing statement should be made by the creditor. Further to section 12(1), by entering into a security agreement, a debtor is deemed to automatically authorise a lender to register the security interest in the Collateral Registry. Section 12(3) provides nonetheless permits a creditor to register through an agent. However, a financing statement can only be registered before conclusion of the security agreement with the written consent of the debtor¹⁸.

The Collateral Registry is a notice as opposed to a document filing registry. Thus, unlike the register of charges and mortgages under the Companies Act, for example, where mortgage deeds have to be lodged, there is no requirement to submit security agreements. Only pertinent information required under section 13, should be submitted. However, provision has been made on the website for attaching key documents such a scanned copy of a motor vehicle white book, if so desired.

Further to section 12(2), a single financing statement could relate to more than one security agreement.

Registration may relate to newly created security interests or security interests that were created prior to the enactment of the Act - under other laws - or created in other jurisdiction. Security interests created prior to the Act had to be perfected within 6 months of the Act coming into

¹⁸ section 12(4)

force.¹⁹ Financial and other lenders were requested to provide this information. The information was in-turn migrated onto the Collateral Registry at no cost.

In addition, security interests that had been executed by companies over movable property and registered in the register of charges and mortgages, were automatically migrated. The 6 months period having lapsed, pre-existing security interests cannot longer enjoy the priority the law sought to grant them. They would therefore be treated like any new security interest.

2.4.1 Registration Procedure

As indicated, the first step to transacting in the Collateral Registry is to create a user account. A user account enables the creditor to access records relating to the registered financing statement, through a unique user name and password. When combined, the user name and password constitute the signature of the concerned user. Under regulation 15(2) of SI No. 77 of 2016, any document lodged or transaction made under a user name and password, is deemed to have been signed for by the person or entity allocated the user name and password. It follows that user words and passwords should be kept secret.

Payment can be made per transaction, through a visa enabled card, or through a virtue account, for bulk filers approved by the Agency.

2.4.2 Serial Numbered Goods

For serial number goods, it is a mandatory requirement, for registration of a financing statement, that the serial number be indicated.

2.4.3 Proof of Registration

An applicant for registration of a security interest is issued with a 'confirmation statement' as proof of registration. The confirmation statement is also issued electronically. The lender is in-turn required to furnish the debtor with a copy of the confirmation statement within fourteen (14) days of receipt. Section 16 provides: -

16. (1) The Registrar shall, on registration of a financing statement or an amendment to a registered financing statement in the Collateral Registry, provide a confirmation statement electronically to the person who registered the financing statement or amendment to the registered financing statement.
- (2) A secured creditor shall, not later than fourteen working days after the day on which the secured creditor received the verification statement, give a copy of the verification statement to the debtor.

2.4.4 Effect of Registration

Once registered, the security interest to which the financing statement relates is deemed to have been perfected. Perfection entails the security interest becoming binding on third parties i.e. parties that are not party to the security agreement. Perfection is effective from the date and time that the security agreement is registered in accordance with section 15. Section 15 provides: -

¹⁹ Refer to section 4 (2) of the Schedule to the Movable Property (Security Interest) Act.

15. The registration of a financing statement shall be effective from the date and time when the information in the financing statement is entered into the Collateral Registry and a registration number is assigned to it.

2.4.5 Duration of Registration

Further to section 19, the term of registration for a financing statement is five years. Where the loan or secured obligation exceeds 5 years, the secured creditor has the option of renewing the registration for further periods of five years. The renewal should be made before the expiration of the term, through an amendment.

19. (1) Despite the Law Reform (Limitation of Actions, etc.) Act, a registered financing statement shall remain valid—
- (a) for the term specified in the registered financing statement which shall not exceed five years;
 - (b) for a period of five years after the date of registration of the financing statement, commencing on the date of registration; or
 - (c) until the date of discharge and removal of the registered financing statement from the Collateral Registry.
- (2) The period of registration of a financing statement may be extended or renewed before expiry of the period of registration by the registration of an amendment to the registered financing statement that indicates a new period of validity which shall not exceed five years.

2.4.5 Certificate of Status

A certificate of status may be obtained as proof of the status of the concerned registration. While a search report and certificate of status contain identical information, a certificate of status may be preferred where a party intends to use it as evidence in a court of law as is it sealed. In addition, further to section 28, it constitutes conclusive evidence of the information it relates to.

28. (1) The Registrar may, upon request and payment of a prescribed fee, issue a certificate of status of a registered financing statement which conclusive evidence of the existence of the information in the Collateral Registry as of the date and time of the issuance of the certificate of status or a certified copy’.
- (2) The Registrar shall, on the payment of the prescribed fee, provide a secured creditor or any other person with a certified copy of any document, stored in the Collateral Registry, which the secured creditor or any other person seeks to obtain.

The procedure for requesting for a certificate of status is prescribed under regulations 18, thus:

18. (1) A request for a certificate of status under section 28 of the Act shall be in Form VI set out in the First Schedule.
- (2) The certificate of status shall be issued electronically in Form VII set out in the First Schedule.

A party seeking evidence for use in legal proceedings may also, under section 27, request the Registrar to certify a document issued by the Registry as a true copy thereof. Such certified

copy shall be admissible in evidence and constitute conclusive evidence of information stated therein.

2.4.6 Search

A search is defined as *an electronic examination of the records contained in the Collateral Registry*²⁰. Any person can conduct a search in the registry. Two types of searches are available, official and non-official search. A non-official search does not attract payment but only provides basic information. Conversely, an official search is more detailed. Section 26 provides, in relation to searches: -

26. The Collateral Registry office shall be open to the public at reasonable working hours and any person may search the Collateral Registry electronically and obtain a copy of the search results in accordance with this Act and regulations made by the Minister and upon payment of such fee as may be prescribed for the search.

Section 26 is complemented by regulation 17 of the Statutory Instrument No.77 of 2013, the Movable Property (Security Interest)(General) Regulations, 2016. Regulation 17 prescribes the procedure for conducting searches and imposes and places an obligation on the Collateral Registry to keep records of expired or discharged financing statements for six months. Thereafter, the records are not publicly searchable. As the registry is electronic, the Form VI by a search is made, has been embedded in the website.

It is also noteworthy that even where the search does not yield the desired result e.g. no registered financing statement is found, the search is still be deemed to have been conducted. Thus, the applicant for a search cannot use that as a basis for claiming refund of search fees. Regulation 17 provides: -

17. (1) A person may conduct a search of the Collateral Registry in Form VI set out in the First Schedule without providing reasons or justification for the search.
- (2) A search may be conducted by search criteria that allows the specific identification of a debtor, serial number, collateral, financing statement registration number or generation of statistical information.
- (3) The Collateral Registry shall maintain a record of financing statements that have expired and make them publicly searchable for six months from the date of the expiration of the financing statements.
- (4) Any records relating to expired or discharged financing statements shall not be publicly searchable after six months of the discharge or expiration of the financing statement and shall be archived.
- (5) A search shall be deemed to have been conducted irrespective of the outcome.

2.5 When Should a Financing Statement be Registered

A financing statement can be registered before or after execution of a security agreement. But as earlier observed, it can only be registered before execution of a security agreement where a creditor wishes to secure interest in the collateral with the consent of the debtor. The general rule is for a financing statement to be registered after execution of the security agreement.

²⁰ Section 2 of the Movable Property (Security Interest) Act

2.6 Information Required for Registration

Section 13 stipulates information required and provides: -

13. (1) A secured creditor who intends to register a financing statement in the Collateral Registry shall ensure that the financing statement contains the following information: -
- (a) in the case where the debtor is a natural person, the name, date of birth, identification number and address of the debtor;
 - (b) in the case where the debtor is a corporate or unincorporated body, as the case may be, the name, address, registration or incorporation number of the corporate or unincorporated body and the name or job title and contact details of the person acting on behalf of the corporate or unincorporated body;
 - (c) in the case of a natural person, the name, date of birth, identification number and address of the secured creditor;
 - (d) in the case of a corporate or unincorporated body, as the case may be, the name, address, registration or incorporation number of the corporate or unincorporated body and the name or job title and contact details of the person acting on behalf of the corporate or unincorporated body;
 - (e) a description of the collateral;
 - (f) the date of effectiveness, perfection or any prior registration under any other written law;
 - (g) the maximum amount for which the secured obligation may be enforced;
 - (h) the term of effectiveness of the registration which shall not exceed five years;
 - (i) a statutory declaration certifying that the information registered is true and complies with the Act; and
 - (j) any other appropriate information under this Act or as prescribed by regulations issued under this Act.
- (2) Collateral, other than that which is described by a serial number as prescribed, shall be described as contained in a security agreement provided for in section thirty-four.

2.6.1 Particulars for Joint Debtors or Creditors

Section 13 is supplemented by regulations 6 to 9 of SI 77 of 2016. Regulations 6 outlines particulars to be provided where there are joint debtors or secured creditors. It states: -

6. Where a financing statement involves more than one debtor or secured creditor, the particulars of each debtor or secured creditor shall be entered in separate designated fields on the financing statement.

2.6.2 Particulars where Debtor or Creditor is a Natural Person

Regulation 7 prescribed particulars to be provided where the debtor or creditor is a natural person. These include date of birth, address, national registration number or passport for foreign

nationals. Address is defined as including *a physical address, post office box number and postal Code; village and district address; or an electronic address.*²¹

Regulation 7 states: -

- 7.(l) The details for the identification of a natural person in a financing statement under section 13 of the Act shall include the debtor's or secured creditor's.
 - (a) full names as they appear on the relevant official identification documents;
 - (b) national registration card number in respect of Zambian citizens or residents and identification numbers for non- Zambian citizens as they appear on official identification documents;
 - (c) date of birth; and
 - (d) address.
- (2) For the purposes of this regulation, an official identification document includes a national registration card, passport or driver's licence.
- (3) Where a debtor or secured creditor is not a citizen or Zambian resident, the debtor's or secured creditor's official identification documents shall be the passport or other similar documents issued by a foreign government and approved by the relevant Zambian authority.

2.6.3 Particulars where Debtor or Creditor is a body Corporate

In the case of a body corporate, information required includes the name, job title and particulars of the person acting on behalf of the corporate body. Regulation 8 provides: -

8. Where a debtor or secured creditor is a body corporate, the financing statement shall include
 - (a) (the name of the body corporate and the registration number specified in a document constituting the entity under the relevant laws of Zambia or laws of another jurisdiction;
 - (b) the name, job title, capacity and other details of the person acting on behalf of the body corporate; and
 - (c) the physical address of the body corporate.

2.6.4 Particulars where Debtor or Creditor in an Unincorporated Body

In the case of a debtor or creditor that is an unincorporated body, information required is similar to that required for a body corporate. The only difference is the additional requirement to indicate the name, date of birth, identification number and address of the proprietor or the person with an interest in the unincorporated body. This is stipulated under regulation 9, thus: -

9. Where a debtor or secured creditor is an unincorporated body, the financing statement shall include the following information:
 - (a) the name of the unincorporated body and the registration number specified in a document constituting the entity under the laws of Zambia or laws of another jurisdiction;
 - (b) the name, job title, capacity and other details of the person acting on behalf of the unincorporated body;
 - (c) the name, date of birth, identification number and address of the person registered as proprietor or with an interest in the unincorporated body; and
 - (d) the physical address of the unincorporated body.

2.6.5 Details required for Security Interests Perfected in Other Jurisdictions

²¹ Regulation 2 of SI No. 77 of 2016

Regulation 10 of SI No. 77 stipulates as follows in relation to information required when re-perfecting security interests perfected in other jurisdictions: -

10. Where a financing statement relates to a security interest which was perfected or made effective against third parties under, another law before the commencement of the Act, the following information shall be provided in the financing statement:
 - (a) the date of creation of the prior security interest;
 - (b) the nature and type of the prior security interest, whether floating charge, fixed charge or similar interest;
 - (c) the date of perfection or prior registration of the security interest; and
 - (d) the law under which the security interest was perfected or made effective against third parties.

2.7 Implications of Submitting Incomplete Information

Failure to provide the information required under section 13, as read together with Statutory Instrument No 77 of 2016, disqualifies the financing statement from registration. A financing is also disqualified if not processed electronically or the prescribed fee has not been paid. Section 14 of the Act provides: -

14. A financing statement shall not be registered in the Collateral Registry if—
 - (a) it is not processed electronically in the prescribed manner or form;
 - (b) it does not contain the information specified in section thirteen; or
 - (c) the prescribed fee for a registration of the financing statement or an amendment to a registered financing statement has not been paid electronically.

2.8 Invalidity of Registration of a Financing Statement

2.8.1 Irregularities Rendering Registration Invalid

Section 17 outlines the errors or irregularities that render a registration of a financing statement invalid. These include errors relating to the name and identification number of the debtor or the serial number of the collateral. It should however be noted that under subsection 2, the invalidity only extends as far as the respective debtor or the collateral concerned. In addition, further to subsection 3, an error in the description of the name and identification of debtor does not nullify the registration if the serial number of the good is correct.

Further, under subsection 4, errors relating to the description of the collateral, other than the serial number, only apply if the error is seriously misleading while subsection 5 excludes errors relating to incorrect description of collateral which forms part of collateral that has is adequately described or particulars voluntarily entered by the secured creditor. Invalidity of a registration does not entitle the applicant to repayment.

Section 17 prescribes: -

17. (1) Notwithstanding section eighteen, and subject to subsection (2), the registration of a financing statement or amendment to the registered financing statement shall be invalid if the registered financing statement or amendment to the registered financing statement has a defect, irregularity, omission or error in the—
 - (a) name and identification number of the debtor; or
 - (b) serial number of the collateral, if the collateral is of a kind that is required to be described by a serial number.

- (2) A defect, an irregularity, omission or error in a registered financing statement or amendment to the registered financing statement relating to the—
- (a) name and identification number of a debtor shall render the registration invalid only with respect to that debtor; or
 - (b) serial number of the collateral shall render the registration invalid only with respect to the collateral identified by the serial number.
- (3) A registered financing statement or amendment to the registered financing statement that contains a defect, an irregularity, omission or error in the name and identification number of the debtor but correctly indicates the serial number of the collateral remains valid with respect to that collateral.
- (4) A defect, an irregularity, omission or error in a registered financing statement or amendment to the registered financing statement of the description of the collateral, other than the serial number, shall render the registration invalid with respect to that collateral if the error may seriously mislead a person.
- (5) The following shall not render invalid the registration of a financing statement or amendment to a registered financing statement:
- (a) an incorrect description of some collateral which is part of other collateral adequately described; or
 - (b) a defect, an irregularity, omission or error in—
 - (i) the name, identification number or address of the secured creditor;
 - (ii) the address of the debtor; or
 - (iii) any other information voluntarily entered by the secured creditor.
- (6) Despite any other provision of this Act or other written law, a fee paid for the registration of a financing statement or an amendment to a registered financing statement shall not be refunded if the registration is invalidated in accordance with this Act.

2.8.2 Irregularities Not Rendering Registration Invalid

Section 18 outlines additional circumstances under which irregularities in information submitted may not invalidate a registered financing statement. Under this section, the error must not be of a 'material nature' and 'seriously' misleading. It provides: -

18. (1) Subject to section seventeen, the validity of a registered financing statement is not affected by any defect, irregularity, omission or error in the financing statement, unless the defect, irregularity, omission or error is of a material nature and is seriously misleading as specified in section seventeen.
- (2) For the avoidance of doubt, in order to establish that a defect, irregularity, omission or error is of a material nature and is seriously misleading, it shall not be necessary to prove that a person was actually misled by it.
- (3) The failure to include a description of any item or kind of collateral in a financing statement or amendment to a registered financing statement or an inadequate description of the collateral shall not affect the validity of the registered financing statement in respect of the description of another collateral included in the registered financing statement or amendment to the registered financing statement.

2.8.3 Appeal Against Decisions of the Registrar

Any party aggrieved with the decision of the Registrar is at liberty to appeal against such decision within 30 days. The Act does not however specify the court to which the appeal lies. Accordingly, it may be either the subordinate court or the high court, depending on the amounts involved. Section 29 stipulates: -

29. A person aggrieved by a decision of the Registrar may appeal to a court against the decision, within thirty days after the date on which the person is notified of the decision, and

the court may confirm, reverse or vary the decision or make such order or give such directions in the matter as are appropriate.

2.9 Transfer, Amendment and Discharge of Financing Statement

2.9.1 Transfer of Financing Statement

A secured creditor may transfer a registered financing statement (perfected security interest) pursuant to section 20. The transfer should nonetheless be registered via an amendment to the financing statement not later than 14 days after such transfer. The registration should be made by the transferor. Section 20 states in this regard: -

20. (1) Where all or part of a security interest that is perfected by registration has been transferred, an amendment to the registered financing statement shall be registered by the transferor, within fourteen days of the transfer.
- (2) Where an amendment to a registered financing statement is effected, as specified in subsection (1), the amendment to the registered financing statement shall include a description of the collateral that has been transferred.
- (3) If a secured creditor, with a security interest that is not perfected by registration, transfers the security interest, a financing statement in which the transferee is disclosed as the secured creditor may be registered.
- (4) An amendment to a registered financing statement or a financing statement, relating to a transfer of a security interest, may be registered in the Collateral Registry before or after the transfer of the security interest.

2.9.2 Amendment and Discharge

A registered financing statement should be discharged once the secured obligation has been performed. A financing statement may equally be amended. The amendment may relate to the collateral, the debtor or the amount secured and may arise from changes in the collateral, debtor or the secured amount. Like registration of a financing statement, discharge is by the creditor.

Section 21 states as follows in relation to amendment and discharge of a financing statement: -

21. (1) A registered financing statement may be amended or discharged by the secured creditor by registering the amendment or discharge in the Collateral Registry at any time before expiration of its effectiveness.
- (2) An amendment to a registered financing statement, as provided in subsection (1), that—
 - (a) adds collateral;
 - (b) adds a new debtor; or
 - (c) increases the maximum amount of the secured obligation; shall be effective from the date the amendment to the registered financing statement is registered in the Collateral Registry.
- (3) Where the debtor's name and identification number changes in a manner that renders the registered financing statement no longer retrievable in a search, the security interest shall not be effective with respect to the collateral that the debtor acquired thirty days after the changed identification but the registration shall remain effective with respect to all pre-existing collateral and the collateral acquired by the debtor up to the thirty days after the changed identification.

2.9.3. Amendment of Financing Statement to Indicate Interests from Commercial Document

A secured creditor is at liberty to amend a financing statement to indicate an obligation or privilege arising from a commercial document relating to a secured interest or arising by operation of law. This applies even where there is a provision to the contrary, in the Act, and in case of dispute, the courts are required to take judicial notice of any obligation or privilege arising from a commercial document. This is in accordance with section 88 which provides: -

88. (1) Despite any other provision in this Act, a secured creditor may amend a registered financing statement to indicate an obligation or privilege arising from any other commercial document relating to a secured interest in collateral or arising from the operation of a written law.
- (2) For purposes of any dispute relating to a registered financing statement or amendment to a registered financing statement, a court, tribunal or Alternative Dispute Resolution proceedings shall take judicial notice of any obligation or privilege arising from a commercial document, as specified in subsection (1), indicated in a registered financing statement or amendment of a registered financing statement.

2.9.4 Discharge Relating to Consumer Goods

Discharge of security interests in consumer goods should be done not later than 14 days after the secured obligation has been performed. This is stipulated under section 22 as follows: -

22. (1) Where a registered financing statement relates exclusively to a security interest in consumer goods, a secured creditor shall discharge the registered financing statement within fourteen days after all obligations under the security agreement creating the security interest have been performed, unless the registration expires before that date.
- (2) An amendment to a registered financing statement which seeks to discharge the registered financing statement, as provided in subsection (1), shall be lodged in the Collateral Registry in the prescribed manner and form upon payment of the prescribed fee.

2.9.5 Demand by Debtor to Amend or Discharge Registration

Where a debtor settles the debt or otherwise performs the secured obligation but the lender does not discharge the registration, the debtor has a right under section 23 to demand for the discharge. The discharge should be made on Form IV in the First Schedule to SI No. 77 of 2016. Under section 23, the secured creditor is required to act on the demand not later than 14 days of receiving the demand. It states: -

23. (1) A debtor may send a demand, in writing, to the secured creditor that the secured creditor discharges or registers an amendment to the registered financing statement if—
- (a) the secured creditor has agreed to release part of the collateral described in the registered financing statement;
 - (b) the collateral described in the registered financing statement includes an item or kind of movable property that is not collateral under a security agreement;
 - (c) the obligations under the security agreement to which the registered financing statement relates have been performed and there is no commitment to make future advances;
 - (d) no security agreement exists between the parties; or
 - (e) the security interest is extinguished.
- (2) A secured creditor shall, upon receipt of a demand, made in accordance with subsection (1), and where the secured creditor has no objection, register the amendment to the

registered financing statement or the discharge of the registered financing statement, in the Collateral Registry, within fourteen days of the receipt of the demand'.

2.9.6 Amendment by Court Order

Where a demand under section 23 is ignored or otherwise not acted upon, the debtor may obtain a court order compelling the secured creditor to amend the financing statement and effect the discharge. This rights is tenable under section 24 thus: -

24. (1) If a secured creditor fails to comply with a demand made by a debtor, as specified in section twenty-three, the debtor may apply to a court for an order to amend the registered financing statement or discharge the registered financing statement.

(2) A court may issue an order to—

- (a) amend the registered financing statement;
- (b) discharge the registered financing statement; or
- (c) maintain the registered financing statement; and the secured creditor shall amend, discharge or maintain the registration of the registered financing statement and shall inform the debtor accordingly.

Chapter 3

Creation of Security Interest

This chapter deals with the creation of security interests as provided under Part III of the Act. It also discusses how security agreements are created and minimum requirements for a security agreement to be valid. In addition, security interests under different scenarios and in relation to different assets, are discussed.

3.1 Security Agreements and Interests

Secure transactions begin with the execution of a security agreement. The Act defines a security agreement as an agreement *between the debtor and secured creditor that creates or provides for a security interest*. It is under the security agreement that a creditor secures the payment of money or performance of the obligation. It creates a security interest. The party furnishing the security (the lender for example) creates the security interest in favour of the other party. Thus, in the case of the loan arrangement, the debtor or borrower creates the security interest in favour of the creditor or lender. A security interest is defined in the following terms: -

'a property right or interest in movable property that is created by agreement or a transaction that secures payment or other performance of an obligation, any type of charge over movable property, chattel mortgage and consensual lien, and includes a—

- (a) retention of a title in movable property;
- (b) right under a financial or operating lease;
- (c) right of a transferee of accounts receivable; and
- (d) right of the commercial consignor even if it does not secure payment or other performance of an obligation'.

Under section 33 of the Movable Property (Security Interest) Act, both natural and artificial persons, as well as unincorporated bodies such as partnerships or business names, can execute a security agreement. A security agreement may relate to present, future, determined, conditional, fixed or fluctuating obligations. Section 33 provides to this end: -

33. (1) Despite any other written law, a security interest may be created by a natural person, a body corporate or an unincorporated body in accordance with this Act.

(2) A security interest may secure any type of obligation, whether present, future, determined, determinable, conditional, unconditional, fixed or fluctuating.

(3) A security interest in movable property is created by a security agreement which shall be effective as between a debtor and secured creditor according to the terms of the security agreement.

(4) A security interest in movable property is created where—

(a) a debtor has rights or the power to create a security interest, at the time of the conclusion of a security agreement; and

(b) a debtor acquires rights or the power to create a security interest subsequent to the conclusion of a security agreement when the debtor acquires such rights or powers.

3.1.1 Model Security Agreement

In order to ease the drafting of security agreements, a model agreement has been provided under the Second Schedule to the Regulations (SI No. 77 of 2016). Further to regulation 25, parties have the option of adopting the model articles with modifications to suit the particular circumstances. The model security agreement could be equated to standard articles under the Companies Act, which companies may adopt to avoid the save costs in coming up with their

own. These modifications should however be consistent with sections 34 and 35 of the Movable property (Security Interest) Act. Regulation 25 provides: -

25. A debtor and secured creditor may adopt, with modifications if necessary, the provisions of the model or standard security agreement set out in the Second Schedule.

3.1.2 Security Interests in After Acquired Property

Additional collateral may be acquired after a security agreement has been created. Inventory, for example, is bound to fluctuate over the course of the security agreement. Another example could be off springs of livestock or crops to be grown. Such collateral is referred to as 'after acquired property'. The Act defines 'after acquired property' as *movable property that a debtor acquires after the conclusion of a security agreement*²². Section 37 clarifies that the debtor need not consent for a security interest to be created in after acquired property except for consumer goods. The provisions states: -

37 that 'A security interest in after-acquired movable property is created without written consent or any further act of a debtor, except that where the after-acquired movable property is a consumer good, the debtor shall provide written consent.

3.1.3 Effectiveness of Security Interests in After Acquired Assets

A security interest in after acquired property becomes effective as follows: -

41. (1) A security interest in after-acquired movable property becomes effective without specific appropriation by the debtor, except that—
 (a) consumer goods are not an accession or do not replace the collateral described in the security agreement; or
 (b) security interest in the consumer goods is not a purchase money security interest.
 (2) In case of an appropriation of after-acquired property that is consumer goods, an appropriation shall be consented to by the debtor.

3.1.4 Continuation of Security interests in Proceeds or Commingled Goods

A security interest in collateral automatically continues in the proceeds of the collateral. It follows that a debtor cannot undermine a security interest by disposing off the collateral. Section 38 states: -

38. (1) A security interest automatically continues in the proceeds of the collateral, whether or not the security agreement contains a description of the proceeds.
 (2) A security interest created in tangible property before being commingled property continues in the mass or product, except that such security interest is limited to the value of the collateral immediately before it became part of the commingled property.

3.1.5 Security Interest in a Document

Under section 43, a security interest extends to goods covered by the negotiable instrument. Section 43 stipulates that a *security interest created in a document of title extends to the goods covered by the negotiable document*.

²² Section 2

3.1.6 Security Interest in Farm Products

It is immaterial, for purposes of determining whether a security interest exists in farm products, that the farm product is stored, kept, growing or grown. Equally, a perfected security interest in farm products is not terminated or prejudiced by a subsequent sale, lease, mortgage or other third party interests on the land where it may be stored, kept, growing or grown. Section 51 provides: -

51. (1) For purposes of determining whether a security interest in a farm product exists, it does not matter whether the farm product is stored, kept, growing or grown, as the case may be, on any other land or premises.

(2) A perfected security interest in a farm product is not extinguished or prejudicially affected by a subsequent sale, lease, mortgage or other encumbrance of, or upon, the land on which the farm product is stored, kept, growing or grown, as the case may be.

3.1.7 Transfer of Debtor's Interest in Collateral

Section 40 provides for the transfer of a debtor's interest even when the security agreement forbids such transfer. Such transfer, according to section 40, could take the form of sale, creation of a security interest or transfer under judicial enforcement proceedings. This is per section 40 which states: -

40. (1) The rights of a debtor in collateral may be transferred despite a provision in the security agreement prohibiting such transfer or declaring the transfer to be a default.

(2) A transfer by the debtor does not prejudice the rights of a secured creditor under the security agreement, including the right to treat a prohibited transfer as an act of default.

(3) In this section, "transfer" includes a sale, the creation of a security interest or a transfer under judicial enforcement proceedings.

3.1.7 Rights of Debtor in Collateral

Section 39 outlines the rights of debtors in the collateral in the following terms: -

39. (1) For the purposes of this Act—

(a) for as long as a transferee's interest in accounts receivable remains unperfected, a debtor is considered to have rights and title to the accounts receivable; and

(b) the debtor is considered to have sufficient rights to create a security interest in the collateral even though the seller, financial lessor, operating lessor under an operating lease and other creditor claims ownership to the collateral.

(2) A security interest may be created in the rights that a debtor may have to the collateral.

3.1.8 Security Interest in Accounts Receivable Binding despite Agreement Limiting Transfer

A security interest in accounts receivables is binding on both the debtor and creditor notwithstanding any agreement limiting the debtor's rights to transfer the accounts receivables. This is in accordance with section 42 which provides: -

42. (1) A security interest in an accounts receivable shall be effective between a debtor and a secured creditor and against the account debtor, despite any agreement limiting in any way the rights of the debtor to transfer the accounts receivables, including the right to create a security interest.

(2) This section does not affect an obligation or liability of a debtor for breach of an agreement, referred to in subsection (1), but the secured creditor may not avoid the security agreement on the sole ground of breach of the agreement.

(3) A security interest in a bank account is effective, despite an agreement between the debtor and the bank or financial institution, except that the bank or financial institution shall not owe any duty to the secured creditor in the absence of the bank's or financial institution's consent.

3.1.9 Purchase Money Security Interest

A purchase money interest ('pmsi' for short) not only covers a credit sale secured by a security interest in the subject matter of the sale, but extends to other forms of security agreement, the object of which is to enable the debtor to acquire the very thing that is up as collateral²³. The Act does not define 'purchase' but defines a 'purchase money security interest' in the following terms:²⁴ -

" purchase money security interest " means—

- (a) a security interest in collateral taken or retained by a seller or financial lessor to secure all or part of the purchase price of the collateral;
- (b) a security interest taken by a person who provides credit to enable a debtor to acquire the collateral if such credit is in fact so used;
- (c) an interest of the lessor under an operating lease with a term that exceeds one year; or
- (d) an interest of a consignor who delivers goods to a consignee under a commercial consignment, excluding a transaction of sale and lease back to the seller.

3.2 Validity of Security Agreement

3.2.1 Minimum Requirements

The Act prescribes minimum requirements to be met by a security agreement for it is to be valid. A secured agreement should identify the parties, reflect the parties' intention to create a security agreement, describe the secured obligation, state the amount secured and describe the collateral in accordance with section 35. To this end, section 34 provides: -

34. (1) A security agreement shall—

- (a) reflect the intent of the parties to create a security interest;
- (b) identify the secured creditor and the debtor;
- (c) describe the secured obligation, including the maximum amount for which the security interest is enforceable; and
- (d) describe the collateral in a manner that reasonably allows its identification in accordance with section thirty-five.

(2) A security agreement may provide for the creation of a security interest in any type of movable property, parts of movable property or undivided rights in movable property.

(3) For purposes of this Act, a mode or standard security agreement may be presented.

3.2.2 Description of Collateral

²³ Catherine Walsh (1995) An Introduction to the New Brunswick Personal Property Security Act. Canada

²⁴ Section 2 of the Act

Section 35, referred to under section 34, prescribes details relating to the description of the collateral. Under this provision, a security agreement is only valid if there is adequate description of the collateral in accordance with subsection 2 thereof. For instance, describing collateral as consumer goods, without particulars of the consumer goods, renders the security agreement invalid.²⁵ The collateral should be described by item, kind, type or category. Section 35 provides:

-
- 35.** (1) A security interest created in respect of collateral is effective only if a security agreement contains adequate description of the collateral as specified under subsection (2).
- (2) For the purposes of a security agreement, a description of collateral is adequate if the collateral is described by—
- (a) item, kind, type or category; or
 - (b) a statement that a security interest is taken in the debtor's present and after acquired movable property, except for specified items or kinds of movable property as agreed by the parties.
- (3) A description of collateral is inadequate if it describes the collateral as consumer goods without specific description in accordance with paragraph (a) of subsection (2).

3.2.3 Requirements for a Security Agreement to be Effective

Aside minimum requirements relating to the contents of the security agreement as provided under section 35, a security agreement is only valid if, firstly, the debtor has rights in the collateral. The rationale is that a debtor cannot create a security interest over assets belonging to someone else without that person's consent. Secondly, the security agreement should be executed as agreed by the parties. Thirdly, there must have been value or consideration, as per the law of contract. Section 36 provides: -

- 36.** (1) A security interest is effective when—
- (a) the debtor has rights in the collateral;
 - (b) the security agreement is concluded on the dates agreed to by the parties; and
 - (c) value is given by the secured creditor.
- (2) Subsection (1) shall not apply if the parties to a security agreement have agreed that a security interest shall be effective at a later time, in which case the security interest shall be effective at the time specified in the security agreement.

²⁵ Refer to subsection 3 of section 36

Chapter 4

Perfection of Security Interests

This chapter discusses perfection of security interests in movable property as provided for under Part IV of the Act.

4.1 What is Perfection of a Security Interest

Perfecting a security interest entails action that ensures that a security interest is binding on third parties. A perfected security interest is defined as a *security interest that has become effective against third parties by control, possession, registration or temporarily, as provided in this Act*²⁶. This is on account of the fact that a security agreement, being contractual in nature, is further to the doctrine of privity of contract, only binding on the parties to the agreement. Under this doctrine, only parties to an agreement acquire rights and obligations under the agreement. Third parties are not privy to the agreement and are therefore not bound by it. As such, the security interest should be perfected for it to bind third parties.

4.2 Importance of Perfecting Security Interest

Failure to perfect a security interest deprives the interest holder of the ability to enforce his rights against third parties. The corollary is that any competing perfected interest in the collateral would take precedence. A perfected security interest has priority over an unperfected interest while perfected interest rank according to the order of perfection. Thus, not only should a security interest be perfected but it should **be perfected soon after** execution of the security agreement.

4.3 Methods of Perfection

Three methods of perfecting a security interest are provided under the Act, namely, registration, possession and control. Section 44 provides: -

- 44.(1) A security interest is perfected when—
- (a) the security interest has been created; and
 - (b) either
 - (i) a financing statement has been registered in respect of the security interest;
 - (ii) the secured creditor, or another person acting on behalf of the secured creditor has possession of the collateral; or
 - (iii) the secured creditor or another person acting on behalf of the secured creditor has control of the collateral that is a bank account.
- (2) Subsection (1), applies regardless of the order in which the steps referred to in paragraph (b) of subsection (1) have occurred.

It is important to note that the 3 modes of perfection are not mutually exclusive. Thus, it is theoretically possible for the same collateral to be the subject of 2 or more types of perfection. The first to perfected rule nonetheless remains applicable. Thus, priority will depend on order perfected as per section 52(b) of the Act which provides thus: -

- (b) as between two or more perfected security interests, priority shall be determined by the order of the following actions, whichever first occurs:
- (i) the registration of a financing statement;

²⁶ Section 2

- (ii) the secured creditor, or another person acting on the secured creditor's behalf, taking possession of the collateral; or
- (iii) the secured creditor, or another person acting on the secured creditor's behalf, acquires control of the collateral;.

4.3.1 Perfection by Registration

A security interest is perfected by registration when it is registered in the Collateral Registry. A registered financing statement has been defined as a *financing statement that has been registered in the Collateral Registry in accordance with section twelve of the Act*. Perfection by registration is the principle mode by which security interest are perfected.

In terms of section 15 of the Movable Property (Security Interest) Act, perfection by registration occurs the moment the financing statement is lodged and a registration number issued. Section 15 stipulates '*The registration of a financing statement shall be effective from the date and time when the information in the financing statement is entered into the Collateral Registry and a registration number is assigned to it*'.

4.3.2 Perfection by Possession

Possession is defined as possession of collateral by a secured creditor that is not in actual or apparent possession or control of a debtor or a debtor's agent²⁷. Perfection by possession applies where a secured creditor takes possession of the collateral immediately after execution of the security agreement - as part of the security arrangement - and not when the security interest falls due for enforcement. The disadvantage with perfection by possession is that the debtor is deprived if the use of the collateral.

Section 44(4) thus provides: -

- (4) For the purposes of this section, a secured creditor is not in possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

4.3.3 Perfection by Control

Section 44(3) provides as follows in relation to perfection by control: -

- '(3) Control exists, with respect to a bank account—
 - (a) automatically upon the creation of a security interest if a bank or financial institution that maintains the bank account is the secured creditor; or
 - (b) upon conclusion of a control agreement'.

The Act does not define 'control' but defines 'control agreement' as *an agreement between a bank or financial institution with a debtor who is a customer of the bank or financial institution and a secured creditor, in which the bank or financial institution has agreed to follow instructions from the secured creditor without the further consent of the debtor*'.²⁸

²⁷ Section 2 of the Act

²⁸ Section 2

Control is restricted to commercial banks. It applies to funds kept in a bank account. Bank has been assigned the meaning under the Banking and Financial Services Act. Under the Banking and Financial Services Act, a 'bank' is defined as *a company conducting banking business while 'banking business' is defined as (a) the business of receiving deposits from the public including chequing account and current account deposits and the use of such deposits, either in whole or in part, for the account of and at the risk of the person carrying on the business, to make loans, advances or investments; (b) financial services; and (c) any custom, practice or activity prescribed by the Bank of Zambia as banking business'.*

Meanwhile, a bank account is defined under section of the Movable Property (Security Interest) Act as *an account, maintained by a bank or financial institution, to which monies for a customer are credited, and includes monies received by the bank but not yet credited into the customer's account.* It follows from the above two provisions that a bank could be any deposit taking institution. Accordingly, a bank account could be any deposit account.

Under section 44 (3), a perfected security interest exists automatically the moment a bank account is created. Accordingly, a bank acquires an automatic perfected interest in funds in an account. Alternatively, control may arise from a control agreement. A control agreement is defined as *an agreement between a bank or financial institution with a debtor who is a customer of the bank or financial institution and a secured creditor, in which the bank or financial institution has agreed to follow instructions from the secured creditor without the further consent of the debtor.*

As later discussed under Chapter 5, a security interest in a bank account perfected by control has priority over other competing perfected interests.

4.4 Perfection of Security Interests created in Other Jurisdictions

Security interests perfected in other jurisdictions enjoy temporal protection of 10 working days. They have to be re-perfected under the Movable Property (Security Interest) Act, failure to which they lose priority. Section 4(5) of states, *'If a security interest is perfected under the law of another State and this Act becomes applicable, the security interest remains perfected, in accordance with this Act, for ten working days after the change in location and, thereafter, only if perfection requirements of this Act are satisfied'.*

Regulation 10 of Statutory Instrument No. 77 of 2016, provides as follows in relation to information to be submitted to re-perfect interests perfected in other jurisdictions: -

10. Where a financing statement relates to a security interest which was perfected or made effective against third parties under ,another law before the commencement of the Act, the following information shall be provided in the financing statement:
 - (a) the date of creation of the prior security interest;
 - (b) the nature and type of the prior security interest, whether floating charge, fixed charge or similar interest;
 - (c) the date of perfection or prior registration of the security interest; and
 - (d) the law under which the security interest was perfected or made effective against third parties.

4.5 Continuity of Perfection

4.5.1 Continuity of Perfection Unless Intervened

Under section 45, perfection continues unless terminated. Section 45 provides: -

45. A security interest is continuously perfected if —
- (a) the security interest is perfected in accordance with this Act; and
 - (b) there is no intervening period during which the security interest is unperfected.

Termination could be on account of expiration of the period of registration or abrogation of the security agreement.

4.5.2 Continuity of Perfection in Proceeds

Further, perfection is not terminated by reason of disposal or otherwise, but continues in the proceeds of the collateral. This is accordance with section 47 which states: -

46. A security interest remains continuously perfected in proceeds if—
- (a) the security interest in the original collateral is perfected by registration of a financing statement that contains a description of the proceeds; or
 - (b) the proceeds are cash proceeds that consist of money, accounts receivable, negotiable instruments, investment securities or funds credited to a bank account.

Proceeds are defined as *identifiable or traceable movable property received in respect of a collateral, and includes what is received as a result of a sale, other disposition, collection, lease or license of the collateral, including proceeds, natural fruits, revenues, dividends, distributions, insurance proceeds and claims arising from defects in, damage to, or loss of, the collateral or other disposition of the collateral.*²⁹

However, perfection in proceeds, with the exception of cash or collateral expressly mentioned in a security agreement, is temporary - for a period of 21 days. The secured creditor should, within this period, perfect the interest, failing which the perfection is lost. This is stipulated in section 47 as follows: -

47. (1) If proceeds of a security interest are not cash proceeds and are not within the description of the collateral included in the registered financing statement, a security interest in the proceeds shall be temporarily perfected until the expiration of twenty-one days from when the proceeds arose.
- (2) If a secured creditor fails to perfect a security interest within twenty one days after the proceeds arose, the secured creditor's security interest in the proceeds becomes unperfected.

4.5.3 Continuity Perfection in Transferred Collateral

Under section 48, a perfected interest is not affected by transfer, sale, lease or license except with the consent of the secured creditor. Section 48 states that *a security interest does not become unperfected only because the collateral described in the registered financing statement is sold or otherwise transferred, leased or licensed, unless the secured creditor has authorised such transfer, lease or licence.*

4.6 Perfection under Different Scenarios

The Act stipulates perfection rules under different scenarios.

²⁹ Section 2

4.6.1 Perfection of Negotiable Instruments and Investment Security Certificates

Under section 49, a negotiable instrument or investment security certificate may be perfected either by registration or possession. Further, the perfected interest in a negotiable instrument extends to goods to which the negotiable instrument relates. Section 49(1) states that *a security interest in a negotiable document, negotiable instrument or investment security may be perfected by the registration of a financing statement or through possession by the secured creditor.*

4.6.2 Perfection Where in Goods with Bailee

This is concerned with situations where the collateral is in the possession of a third party. In terms of section 50, a security interest in goods with a bailee is perfected when either the security interest in the goods is registered or the negotiable instrument relating to the goods has been delivered to the secured creditor or the bailee, if not the debtor and the bailee has issued a negotiable instrument in the name of the secured creditor or keeps the goods on behalf of the secured creditor. This is in accordance with section 50 which states: -

50. A security interest in goods in the possession of a bailee is perfected when the security interest has been created and—
- (a) a financing statement relating to the goods is registered;
 - (b) the security interest in the negotiable document to the goods has been delivered to the secured creditor; or
 - (c) the bailee, who is not the debtor
 - (i) has issued a negotiable document in the name of the secured creditor; or
 - (ii) holds the goods on behalf of the secured creditor’.

4.6.3 Perfection of *Privileges*

The Act envisages the registration of a privilege relating to a secured interest in collateral or arising by operation of law. Section 88(1) provides that *despite any other provision in this Act, a secured creditor may amend a registered financing statement to indicate an obligation or privilege arising from any other commercial document relating to a secured interest in collateral or arising from the operation of a written law’.*

Chapter 5

Priority of Security Interests

This chapter deals with priority of security interests. Under section 2, priority is defined as the right of a secured creditor to derive the economic benefit of a security interest in preference to the right of a competing claimant. Priority becomes an issue where a collateral is the subject of more than one security interest. This may apply in syndicated loans where multiple lenders rely on a single asset as collateral. The chapter discusses the order of priority under different scenarios as set out in Part V of the Act.

5.1 Priority of Security Interests

Priority is dependent on whether the security interest has been perfected or not and if so, when it was perfected. A perfected interest has priority over an unperfected interest while an earlier perfected interest has priority over an interest perfected later. Therefore, in the case of interests perfected by registration, the prior registered interest enjoys priority. Section 52 provides: -

52. Priority between security interests is determined as follows:

- (a) a perfected security interest shall have priority over an unperfected security interest;
- (b) as between two or more perfected security interests, priority shall be determined by the order of the following actions, whichever first occurs:
 - (i) the registration of a financing statement;
 - (ii) the secured creditor, or another person acting on the secured creditor's behalf, taking possession of the collateral; or
 - (iii) the secured creditor, or another person acting on the secured creditor's behalf, acquires control of the collateral; and
- (d) between unperfected security interests in the same collateral, priority shall be determined by the order in the date of creation of the security interest.

It noteworthy that further to section 3 of the Schedule to the Act, the Movable Property (Security Interest) Act applies to priorities of competing security interests irrespective of the law they are perfected under. In essence, recourse in cases of conflicts in priority, should be to the Act. The Act provides: -

- 3. (1) This Act applies to priorities of competing security interests whether perfected under this Act or under any other law.
- (2) The priority of a prior security interest is calculated from the date that it was perfected or made effective against third parties under any other law.

5.2 Priority in Original Collateral and Proceeds the Same

Priority ranking in proceeds is the same as in the original collateral. Thus, if the security interest was second in ranking, the security interest in the proceeds will equally rank second. This is in accordance with 53 which provides: -

53. The priority of a security interest in original collateral is the same priority that shall be accorded to its proceeds.

5.3 Priority not affected by Transfer

Under section 54, transfer of a security interest does not affect priority. Section 54 provides: -

54. A security interest that is transferred has the same priority as it had at the time of the transfer.

5.4 Priority the Same in Current and Future Obligations

Section 56 clarifies that a security interest has the same priority in both current and future obligations and advances. An example may be collateral acquired after execution of a security agreement (after acquired property). Section 56 provides: -

56. A security interest has the same priority in respect of all secured obligations and advances, whether existing or future.

5.5 Subordination of Priority

A secured creditor may subordinate a prior perfected security interest to a later competing interest. The subordination is effected by registering an amendment to the registered financing statement. Only a party consenting to the subordination is affected by the subordination.

5.6 Priority in Purchase Money Security Interest

A purchase money security interest is defined in the following terms³⁰: -

- '(a) a security interest in collateral taken or retained by a seller or financial lessor to secure all or part of the purchase price of the collateral;
- (b) a security interest taken by a person who provides credit to enable a debtor to acquire the collateral if such credit is in fact so used;
- (c) an interest of the lessor under an operating lease with a term that exceeds one year; or
- (d) an interest of a consignor who delivers goods to a consignee under a commercial consignment, excluding a transaction of sale and lease back to the seller'.

A purchase money security interest (pmsi) and its proceeds have priority over a non-purchase security interest created by the same debtor where the purchase money security interest is perfected when the debtor receives the collateral. As for a purchase money security interest in inventory, it enjoys priority only if perfected before the debtor takes possession of the inventory and the secured creditor has notified other parties with interests perfected by registration, of the intention to take a purchase money security interest. Section 57 provides: -

- 57. (1) A purchase money security interest in collateral and its proceeds have priority over a non-purchase money security interest in the same collateral created by the same debtor if the purchase money security interest is perfected when the debtor receives the collateral.
- (2) A purchase money security interest in inventory and their proceeds has priority over any other security interest in the same collateral given by the same debtor to a secured creditor only if the purchase money security interest is perfected before the debtor receives possession of the inventory and the secured creditor notifies any other secured creditor with a registered financing statement against inventory of its intention to take a purchase money security interest.

³⁰ Section 2

5.6.1 Priority between Purchase Money Security Interests

A purchase money security interest in goods, in favour of a seller lessor or consignor, has priority over other purchase money security interests in the same collateral not given to any seller, lessor, or consignor of the collateral. This is per section 58 which provides: -

58. A purchase money security interest in goods or their proceeds taken by a seller, lessor or consignor of the collateral, has priority over any other purchase money security interest in the same collateral given by the same debtor to a secured creditor that is not a seller, lessor or consignor of that collateral.

5.6.2 Priority of Purchase Money Security Interests in Fixtures

A purchase money security interest in fixtures enjoys priority over existing rights in fixed assets (immovable property) as long as the security interest is perfected by registration before another party acquires rights in the property. Section 59 in that regard provides: -

59. A purchase money security interest in fixtures has priority as against a third party which has existing rights in the immovable property provided that the financing statement is registered in the Collateral Registry before the third party acquires rights in the immovable property.

5.7 Priority Scenarios

The Act provides guidance with respect to priority vis-à-vis goods prior to accession, processed or commingled goods, bank accounts, transferred assets, payments, purchase of negotiable instruments, investment security and negotiable documents, assignment of accounts receivables, liens in goods and judgements.

5.7.1 Priority Interests in Goods Prior to Accession

A security interest perfected before accession has priority over later interests made in respect of the asset embodying the accession. Accession is defined as goods that are physically attached to other goods without losing the identity of each group of goods which maintain their original identity. Section 60 to this end provides: -

60. A security interest in goods that is created and perfected before the goods become an accession has priority over a claim to the goods as an accession made by a person with an interest in the whole.

5.7.2 Priority of Security interest in Processed or Commingled Goods

Commingled goods are goods are mixed with goods of the same kind to become part of a product or mass so as to have lost their original identity in the product or mass³¹. A perfected interest is not lost on account of the goods being commingled with other goods. Where more than one perfected interest exists in commingled goods, the security interests rank equally in proportion to the value of goods at the time they became part of the product or mass. Section 61 states: -

³¹ Section 2

61.(1) A perfected security interest in goods that subsequently become part of a product or mass continues as a perfected security interest 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) If more than one security interest is perfected in the goods before they become part of a product or mass, the security interests rank equally in proportion to the value of the goods at the time they became part of the product or mass.

5.7.3 Priority of Security Interest in Bank Account

A security interest in a bank account perfected by control has priority over other competing interests perfected by registration even if the perfection by registration was earlier. Section 62 provides: -

62. (1) A security interest in a bank account perfected by control has priority as against a competing security interest perfected by registration, irrespective of the time when control was acquired.

(2) If a bank or financial institution perfected its security interest by acquiring control automatically, such security interest has priority as against any other security interest in the bank account.

5.7.4 Priority of Security Interest Transferred to Debtor

A perfected security interest in collateral that is transferred while subject to the perfected interest enjoys priority over any other interest created by the transferee. This is as provided under section 63 thus: -

63. If a debtor transfers an interest in collateral which, at the time of the transfer is subject to a perfected security interest, that security interest has priority over any other security interest created by the transferee.

5.7.5 Priority of Creditor who Receives Payment

A recipient of funds from a bank receives the money free of any security interest provided there is no collusion with the debtor against the rights of the secured creditor. Section 64 thus stipulates: -

64. A recipient of money or funds from a bank account shall receive such money or funds free of a security interest, unless the recipient acts in collusion with a debtor in violating the rights of a secured creditor.

5.7.6 Priority of Negotiable Instrument, Investment Security or Negotiable Document

An investment security is defined a security *as defined in the Securities Act and includes an instrument issued in bearer or registered form as a type commonly recognised as a medium for investment and a share or other interest in the property or enterprise of the issuer.* A negotiable document, on the other hand, is a *document such as a warehouse receipt or a bill of lading, that embodies a right to delivery of tangible assets and satisfies the requirement for negotiability under the law governing the document* while a negotiable instrument is *an instrument such as a cheque, bill of exchange or promissory note, that embodies a right to payment and satisfies the requirements for negotiability under a law governing negotiable instruments.* A purchaser of

any of these 3 instruments has priority if they are purchased for value, without knowledge of any breach of the security agreement and takes possession of the instrument.

Section 65 accordingly provides: -

65. A purchaser of a negotiable instrument, investment security or negotiable document has priority over a perfected security interest in the negotiable instrument, investment security or negotiable document if the purchaser—

- (a) gives value;
- (b) acquires the negotiable instrument, investment security or the negotiable document without knowledge that the transaction is a breach of the security agreement to which the security interest relates; and
- (c) takes possession of the negotiable instrument, investment security or the negotiable document.

5.7.7 Priority of Assignee of Accounts Receivables

Rights of an assignee of accounts receivables are subject to the terms of the contract between the accounts debtor and the assignor and any claim or defense arising from the contract or of the account debtor, including a right to set off. Section 66 provides: -

66. (1) The rights of an assignee of an accounts receivable are subject to—

- (a) the terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract; and
- (b) any other defence or claim of the account debtor against the assignor, including a defence by way of a right of set-off that accrues before the account debtor receives notification of the assignment.

(2) Subsection (1) does not apply if the account debtor has made an enforceable agreement not to assert defences to claims arising out of the contract.

5.7.8 Priority of Lien over Security Interest

A possessory lien over goods sold in the ordinary course of business has priority over competing security interests but only to the extent of the value of materials or services rendered. A lien has not been defined and should therefore be given its natural, common law definition. Section 66 provides: -

68. A possessory lien arising out of materials or services provided in the ordinary course of business in respect of goods that are subject to a security interest, has priority over the security interest but only up to the reasonable value of the materials or the services rendered'.

5.7.9 Priority of Judgement Creditor and Lien Holder over Unperfected Security Interest

A judgement creditor or creditor whose lien arises by operation of law has priority over interests that are not perfected at the time of execution. The time of execution may be when the asset is seized, if liable to seizure, or when the financing statement relating to a judgement or lien is registered or when the person holding the property is served with a court order.

The priority extends to credit disbursed by a secured creditor before expiration of 30 days of the judgement creditor or creditor whose lien arose by operation of law, being notified or pursuant to an irrevocable commitment to extend credit where the commitment was made before the

judgement creditor or creditor took steps to execute the judgement in accordance with section 69(2). As for priority of competing security interests, they are to be determined in accordance with section 52.

Section 69 provides: -

69. (1) The interest of a judgement creditor, including a creditor whose lien arises by operation of law in any collateral has priority over any security interest in the same collateral if the security interest is unperfected at the time of execution.

(2) In this section, "time of execution" means—

(a) if the collateral is seized by or on behalf of an execution creditor, at the time of seizure;

(b) when the financing statement that relates to a judgment lien or lien arising by operation of the law is registered; or

(c) in any other case, the time when a court order is served on the person holding property for, or on behalf of, the debtor.

(3) The priority of an interest determined, in accordance with subsection (1), as against perfected security interests, is determined according to section fifty-two, and the time of execution is deemed to be the time of perfection.

(4) The priority of a security interest extends to credit disbursed by a secured creditor—

(a) before the expiry of thirty days after the judgement creditor or a creditor whose lien arose by operation of law has notified the secured creditor that it had taken the steps referred to in subsection (2); or

(b) pursuant to an irrevocable commitment to extend credit, if the commitment was made before the judgement creditor or a creditor whose lien arose by operation of law notified the secured creditor that it had taken the steps referred to in subsection (2).

5.8 Rights of Buyer or Lessee of Goods

A purchaser of goods for value, acquires them free of any unperfected interest while a buyer of goods sold in the ordinary course of business of the seller and a lease of goods in the ordinary course of business, takes them free of a security unless the buyer or lessee know that the sale or lease constitutes a breach of the security agreement under which the security interest was created. Section 67 provides: -

67. (1) A buyer or lessee who acquires goods for value and receives their possession, takes the goods free of an unperfected security interest.

(2) A buyer of goods sold in the ordinary course of business of the seller, and a lessee of goods leased in the ordinary course of business of the lessor, takes the goods free of a security interest created by the seller or lessor unless the buyer or lessee knows that the sale or the lease constitutes a breach of a security agreement under which the security interest was created.

Chapter 6

Enforcement

This chapter is concerned with enforcement of rights under a security agreement and matters connected and incidental thereto such as distribution of proceeds, as provided under Part VI of the Act. Enforcement is triggered by default. Default is defined as *the occurrence of an event that, under a security agreement, gives a secured creditor the right to enforce a security interest*³². Equally, a secured debtor can enforce a security interest where the collateral is at risk. Section 70(2) provides: -

‘(2) For purposes of subsection (1), collateral is at risk if the secured creditor has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold or otherwise disposed of contrary to the security agreement’.

Further to section 70, enforcement does not extend to security interests created by an outright transfer of an accounts receivable or an operating lease.

6.1 Enforcement With or Without Court Involvement

Under section 72(3), parties have the option of agreeing, at the time they execute the security agreement, to enforce either through or outside the courts of law. The option to enforce outside the court system is intended to facilitate speedy enforcement. However, the Act does not prescribe the court with jurisdiction. As such, either the high court or the subordinate court could theoretically adjudicate matters under the Act. Needless to add, however, that the subordinate court has limitations on awards. Thus, such actions are more likely to be commenced in the high court, particularly in commercial division of the high court.

The question of enforcing a security interest without involving the courts was considered in the case of ***Edward Mwenda and Emanuel Mwewa v Pulse Financial Services 2013/HP/0810***. The debtor challenged the seizure of a motor vehicle he had pledged as collateral, without leave of court. Relying on a clause in the loan agreement that provided for the lender to ‘seize the vehicle, the collateral or institute legal proceedings,’ the high court held the seizure to have been lawful. The action nonetheless underscores the importance of the law making it clear that enforcement without a court order is legal. Had the Movable Property (Security Interest) Act existed at the time, the challenge would probably not even have been contemplated.

6.2 Enforcement Methods

The Act stipulates the following enforcement methods, namely, taking possession, rendering the collateral unusable, removing the collateral or disposing it. Section 72 states: -

72. (1) A secured creditor may take possession, or without rendering the collateral unusable, remove the collateral or dispose of the collateral when the debtor is in default or the collateral is at risk.

(2) For purposes of subsection (1), collateral is at risk if the secured creditor has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold or otherwise disposed of contrary to the security agreement.

³² Section 2

- (3) A secured creditor may proceed under this section—
 - (a) pursuant to a judicial process; or
 - (b) without judicial process, if the debtor consented, in the security agreement, to relinquish possession without a court order.
- (4) A secured creditor may require a debtor to assemble the collateral and make it available at a designated place.
- (5) A prior notice to a debtor is not required for the secured creditor to repossess or render the collateral unusable under this section.

Further to section 77, the power to dispose the collateral extends to negotiable instruments and goods to which the instrument relates. Section 77 reads: -

77. If the collateral is a negotiable document, the power to dispose provided by section seventy-two shall apply to the negotiable document and to the goods to which it relates.

6.2.1 Rendering the Collateral Unusable

Further to section 73, collateral may be rendered unusable where it is of a kind that cannot easily be removed from the debtor's premises. The Act nonetheless requires that care is taken to avoid collateral damage or causing the person in possession of the collateral more inconvenience than is reasonable. Section 73 states: -

- 73. (1) A secured creditor may render collateral unusable if the collateral is of a kind that cannot be readily moved from the debtor's premises or is of a kind where adequate storage facilities are not readily available.
- (2) A secured creditor may dispose of collateral on the debtor's premises, except that it shall not cause the person in possession of the premises, if the person is not the debtor, any more inconvenience than is necessary.

6.2.2 Disposal of Collateral

Disposal of collateral may, in accordance with section 78, be by sale, lease, auction, public tender or any other method stipulated in the security agreement. In terms of section 75, collateral may be disposed of in its current state or following reasonable preparation or processing. Section 75 stipulates: -

75. A secured creditor may dispose of collateral in its present condition or following a reasonable preparation or processing.

6.2.2.1 Collateral to be Disposed of at Reasonable Price

A secured creditor is obligated to obtain the best price reasonably possible when disposing off the collateral. This may be achieved by selling the collateral on the open market or through the most transparent mode possible. Section 76 provides: -

76. A secured creditor shall obtain a reasonable price obtainable at the time of sale or other disposal of the collateral.

6.2.2.2 Notice of Disposal to be Given to Other Interested Parties

The debtor, debtors with perfected interests in the collateral and any other persons that may have notified the secured creditor of having interest in the collateral, should be notified of the pending

disposal at least 14 days before such disposal. However, this does not apply where the collateral could perish or is likely to substantially reduce in value by the end of the 14 days or it is too costly to care and store the assets. Section 79 provides: -

79. (1) A secured creditor shall, not less than fourteen days before disposal of the collateral, give notice in a prescribed form to the following persons:
- (a) the debtor;
 - (b) any other person who has registered a financing statement in respect of the collateral that became effective before the secured creditor repossessed the collateral; and
 - (c) any other person that has given the secured creditor notice of an interest in the collateral.
- (2) Subsection (1) does not apply if—
- (a) the collateral may perish within fourteen days of the repossession;
 - (b) the secured creditor reasonably believes that the collateral shall decline substantially in value if it is not disposed of immediately;
 - (c) the cost of care and storage of the collateral is disproportionately large in relation to its value; or
 - (d) the collateral consists of inventory or farm products.
- (3) If a security interest relates to collateral, specified in subsection (2), the secured creditor may dispose of the collateral but shall comply with subsection (1) with respect to the other collateral.

In terms of regulation 20 of SI No. 77 of 2016, the notice of disposal should be made electronically on Form IX.

6.2.2.3 Extinguishment of Interests after Disposal

Once collateral has been disposed of, subordinate interests in the collateral are extinguished. The extinguishment of such interests should nonetheless be registered in the Collateral Registry. Section 80 provides: -

80. (1) If collateral has been disposed of in accordance with this Part, all security interests in the collateral and its proceeds and other rights in the collateral that are subordinate to the security interest of the secured creditor, who disposed of the collateral, are extinguished on the disposal of the collateral.
- (2) Where a collateral has been disposed of in accordance with subsection (1) and the security interest becomes extinguished, the secured creditor shall register the extinguishment in the prescribed form.

Further to regulation 22, the extinguishment should be registered on Form XI. This registration is equally electronic.

6.2.2.4 Secured Creditor to Render Account after Disposal

Within 21 days after disposal of the collateral, the secured creditor should render a statement of account to the debtor, those with perfected interests in the collateral or that have notified the secured creditor of an interest in the collateral. The statement should indicate the gross proceeds of the sale, costs incurred and expenses incurred in enforcement and the balance due to the debtor, if any. Section 81, in this regard, provides as follows: -

81. A secured creditor shall, within twenty-one days after the disposal of the collateral, provide a statement of account, in writing, to the persons listed in subsection (1) of section seventy-nine, indicating

- (a) the amount of the gross proceeds of the disposal;
- (b) the amount of the costs and expenses of enforcement; and
- (c) the balance owing by the secured creditor to the debtor, or by the debtor to the secured creditor, as the case may be.

6.2.2.5 Distributions of Disposal Proceeds

The proceeds of disposal of the collateral, after deducting costs associated with enforcing against the control, should go towards settling the secured amount or obligation. Any surplus should be paid to the debtor in accordance with section 82 which provides: -

82. (1) A secured creditor who has disposed of the collateral shall apply the net proceeds of the disposal towards the satisfaction of the secured obligation.

(2) For purposes of subsection (1), "net proceeds" means the proceeds of the disposal after deducting the reasonable costs and expenses of the secured creditor which are incidental to taking possession, holding, storing, repairing, maintaining, valuing or preparing the collateral for disposal.

(3) If a secured creditor has disposed of or retained collateral in satisfaction of a debt or otherwise disposed of the collateral, the secured creditor shall pay the following persons the amount of any surplus in the following order:

- (a) any secured creditors or competing claimants subject to this Act, who have a subordinate security interest or claim in the order of their priority as provided in this Act; and
- (b) the debtor.

(4) For the purposes of this Act, there is surplus when the net proceeds recovered after disposal of the collateral exceed the amount owed by the debtor to the secured creditor.

(5) A secured creditor may pay the surplus into court if there is a question as to who is entitled to receive payment.

(6) A debtor remains liable for any deficiency.

6.3 Additional Remedies

Over and above the remedies provided under the Act, a lender may, pursuant to section 70(2), appoint a receiver, receiver and manager or official in accordance with the Companies Act, Bankruptcy Act or any other law.

6.4 Collateral to be Applied in Satisfaction of Obligation

Section 74 empowers a secured creditor to apply accounts receivables, money or negotiable instruments, in satisfaction of the secured obligation. Similarly, a bank or financial institution with a perfected interest in funds in its custody may apply it towards the satisfaction of the secured obligation. Section 74 thus provides: -

74. (1) A secured creditor may collect and apply accounts receivable, money or a negotiable instrument taken as collateral to the satisfaction of the secured obligation if the debtor is in default.

(2) A secured creditor may notify the account debtor and collect payment, prior to default, if the parties so agree.

(3) If a bank or financial institution holds a security interest, in a bank account perfected automatically by control, it may apply the balance of the bank account to the secured obligation.

(4) If a secured creditor holds a security interest, held in a bank account which is perfected by a control agreement, the secured creditor may instruct the bank or financial institution to pay the balance of the bank account to the secured creditor.

6.5 Retention of Collateral

A secured creditor may retain the collateral instead of disposing of it. This, however, does not apply to consumer goods.³³

6.5.1 Proposal to Retain Collateral

A secured creditor can only retain collateral subject to agreement by the debtor. A request to retain collateral should be made to the debtor, those with registered interests in the collateral and persons that have given notice that they have an interest in the collateral. This is provided for under section 83 thus: -

83. (1) A secured creditor may propose, after default, to retain collateral, other than consumer goods, in full satisfaction of the secured obligation.

(2) A secured creditor shall give notice of the proposal, to retain collateral, to the persons who are entitled to receive a notice of sale of the collateral, as specified in section seventy-nine.

Further to regulation 21, the notice to retain the collateral should be made on Form X. The form may be to suit the circumstances of the case. The form is not filed with the Collateral Registry but sent directly to the debtor. Thus, it can be made manually.

6.5.2 Objection to Retention

Parties notified of the intention to retain the collateral have the right to object, in writing, within 14 days of the notification. They are deemed to have consented to the retention of the collateral if they do not respond within the period. Once the collateral is retained, all other interests in the collateral are extinguished as is the case with disposal. Where the retention is opposed, however, the secured creditor has no option but to dispose of the collateral. Section 84 states: -

84. (1) A person who is entitled to receive a notice of retention and whose interest in the collateral would be adversely affected by a secured creditor's retention of the collateral shall, within fourteen days after the notification was received, serve a written notice of objection to the secured creditor and the secured creditor shall, upon receipt of the notice of objection, dispose of the collateral.

(2) If no notice of objection is received, the secured creditor shall, at the expiration of fourteen days, be considered to have elected to take the collateral in full satisfaction of the secured obligation.

(3) Upon retention of the collateral by the secured creditor, all subordinate security interests and claims in the collateral are extinguished.

(4) Where a secured creditor refuses to dispose of collateral, after receiving a notice of objection, a person entitled to receive a notice of retention may petition the court requesting that the collateral be disposed of in accordance with section seventy-two.

6.6 Redemption of Collateral

³³ Refer to section 83(1).

A debtor has the right to redeem the collateral any time before disposal by performing the secured obligation and paying any expenses incurred in enforcement. Section 85 provides:

-

85. (1) At any time, before a secured creditor disposes of the collateral or takes the collateral in satisfaction of the secured obligation, a debtor or other secured creditor may redeem the collateral by—

(a) fulfilling all of the obligations secured by the collateral; and
(b) paying any other reasonable expenses incurred by the secured creditor in relation to the collateral.

(2) A debtor's right to redeem the collateral has priority over any other person's right to redeem the collateral.

6.7 Reinstatement of Security Agreement

A security agreement can be reinstated before retention or disposal of the collateral by paying the sum owing or otherwise remedying any default including expenses incurred in the enforcement of the security agreement. This is per section 86 which provides: -

86. Subject to agreement with a secured creditor, a debtor may, at any time before the secured creditor disposes of or retains the collateral in satisfaction of the secured obligation, reinstate the security agreement by—

(a) paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement;

(b) remedying any other default; and

(c) paying a sum equal to the reasonable expenses incurred by the secured creditor in seizing, repossessing, holding, repairing, processing or preparing the collateral for disposal, if those expenses have actually been incurred by the secured creditor, and any other reasonable expenses incurred in enforcing the security interest'.

Chapter 7

General Provisions and Offences

This chapter discusses general provisions of the Act and offences as provided under Part VII.

7.1 Parties to Act in Good Faith and Consistent with Commercial Reasonableness

Rights, duties and obligations are expected to be exercised or performed, as the case may be, in good faith and consistent with what is commercially reasonable. This is stipulated under section 87 thus: -

87. (1) All rights, duties or obligations that arise under a security agreement or this Act shall be exercised and discharged in good faith and in accordance with reasonable commercial standards.

(2) For the avoidance of doubt, a person is not considered to have acted in bad faith merely because the person acted with the knowledge that another person has rights in the collateral.

7.2 Entitlement to Damages

The Act makes provision for a party suffering loss to be compensated by way of damages for the loss. Section 89 provides: -

89. (1) If a person fails to discharge any duty or obligation imposed by this Act, the person to whom the duty or obligation is owed, and any other person who can reasonably be expected to rely on performance of the duty or obligation, has a right to recover damages for any loss or damage that was reasonably foreseeable or likely to occur as a result of the failure.

(2) This section does not limit or affect any liability that a person may incur under any other law.

However, a party is not liable to compensate another party for loss arising from an act done or omitted to be done, unless the person acted in bad faith or failed to exercise reasonable care. Section 90 provides: -

90. A person is not liable for any action in damages for anything done or omitted to be done by any person in the exercise or performance of any power or function conferred or imposed on the person by or under this Act, unless the act or omission was in bad faith or was due to want of reasonable care or diligence.

7.3 Debtor Entitled to be Kept Informed

A debtor is entitled to be kept informed about matters pertaining to the collateral and has the right to demand for information relating to a security agreement, amount still outstanding and any other matters relating to the registered financing statement. A secured debtor should provide the information within 14 days of receiving the request. A secured creditor may nonetheless charge the debtor reasonable costs relating to the provision of the information. However, the debtor is entitled to a free copy at least once a quarter.

91. (1) A debtor may request a secured creditor to send or make available to any specified person, at an address specified by the debtor, any of the following:

- (a) a summary of a security agreement that creates or provides for a security interest held by the secured creditor in the movable property of the debtor;
 - (b) a statement in writing of the amount of the current indebtedness of the debtor and the terms of payment of the indebtedness;
 - (c) a written approval or correction of an itemised list of movable property indicating which items are collateral, unless the security interest is over all of the movable property of the debtor; or
 - (d) a statement of account indicating the pay-off amount needed to fully satisfy the secured obligation.
- (2) Where a secured creditor no longer has a security interest in the collateral, the secured creditor shall disclose the name and address of—
- (a) the immediate successor in interest or transferee; or
 - (b) the latest successor in interest or transferee, if known.
- (3) A secured creditor shall comply with the request within fourteen days of its receipt.
- (4) A secured creditor who responds to a request, made in accordance with subsection (1), may charge the debtor only the reasonable costs for providing the information and the debtor shall be entitled to one response free of charge every three months.

7.4 Service of Documents

The Act prescribes the manner by which documents should be served for them to be deemed to have been served. Under section 92, proper service is either service on the person, at the person or his agent's last known address, by post - to the person or his agent or by facsimile, electronic mail or similar communication. A court may nonetheless make an order as to the appropriate mode of service under the circumstances. This is provided for under section 92 which provides: -

- 92(1) A document or notice to be served in accordance with this Act is considered sufficiently served if—
- (a) it is delivered to a person or the person's authorised agent as designated in a security agreement;
 - (b) it is left at that person or that person's agent's usual or last known place of abode or business or at an address specified for that purpose in a security agreement;
 - (c) it is posted in a letter addressed to the person or the person's agent by name at that place of abode, business or address; or
 - (d) it is delivered by facsimile, electronic mail or other similar means of communication.
- (2) Where service in accordance with subsection (1) is not possible or if the parties have agreed otherwise, a document or notice may be served through registered mail.
- (3) This section does not affect any provisions in this Act relating to the service of a document or notice or detract from the power of any court to direct how the service of any document or notice relating to legal proceedings before the court is done.

7.5 Offences

The following acts and omissions are criminalized under the Act.

7.5.1 Fraudulent Lodgment of Financing Statements

It is an offence under section 93 to fraudulently lodge a financing statement. The offence carries a penalty of a fine not exceeding 200, 000 penalty units or imprisonment for a term not exceeding 2 years, or both. This is provided for under section 93 as follows: -

93. A person who fraudulently lodges a financing statement commits an offence and is liable, on conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

7.5.2 Submission of Frivolous and Malicious Financing Statement

The Act further criminalizes the lodging of a financing statement that is frivolous or malicious or for a criminal purpose. This amounts to an offence and is punishable by a fine not exceeding 200, 000 penalty units. Section 94 provides: -

94. A person who lodges a financing statement for registration with a frivolous, malicious or criminal purpose or intent commits an offence and is liable, on conviction, to a fine not exceeding two hundred thousand penalty units.

7.5.3 Falsification of Entries in the Register

It is equally an offence to knowingly or willfully make false entries in the register. Falsification of entries is criminalized under section 95. The penalty, if found guilty, is a fine not exceeding 200, 000 penalty units or imprisonment for a term not exceeding 2 years, or both. This is in accordance with section 95 which provides: -

95. A person who—

- (a) makes or causes to be made a false entry in the Collateral Registry;
- (b) issues a false writing purporting such writing to be a copy of an entry in the Collateral Registry;
- (c) produces, tenders or causes to be produced or tendered in evidence any false entry or writing, knowing the entry or writing to be false; commits an offence and shall be liable, on conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

7.5.3 Altering Documents Issued by Collateral Registry

Alteration of a document issued by the Registrar amounts to an offence punishable by a fine not exceeding 200, 000 penalty units or imprisonment for a term not exceeding 2 years, or both. In the case of alteration of a document, there is a presumption that the offender did so willfully or knowingly. As such, there is no need to prove intention. Section 96 provides: -

96. A person who—

- (a) alters or defaces;
- (b) makes any additions to or partly removes; or
- (c) erases or obliterates; any document issued by the Registrar commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or imprisonment for a term not exceeding two years, or to both.

7.5.4 Deceiving or Influencing Registrar or Officers in Collateral Registry

It is an offence to submit to the Registrar or Officers of the Collateral Registry, information intended to either deceive or influence the doing of a wrong thing; or submitting information, whether orally or in writing, which is known to be false. Further to section 97, this offence attracts a fine not exceeding 200, 000 penalty units or imprisonment for a term not exceeding 2 years, or both. Section 97 stipulates: -

97. (1) A person who—

- (a) for the purpose of deceiving the Registrar or any other officer in the execution of this Act;
- (b) for the purpose of procuring or influencing the doing or omission of anything in relation to this Act or any matter thereunder; or
- (c) makes or submits a false statement or representation, whether orally or in writing, knowing the same to be false; commits an offence and is liable, on conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years or to both.

(2) Any person who, having innocently made a false statement or representation, whether orally or in writing, for the purpose of procuring or influencing the doing or omitting to do anything in relation to this Act or any matter thereunder and who, on becoming aware that such statement or representation was false, fails to advise the Registrar forthwith of such falsity commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

7.6 Power of Registrar to Impose Administrative Sanctions

The Registrar is empowered, under section 98, to impose sanctions not exceeding the amount prescribed by the Minister. Section 98 provides: -

98. (1) The Registrar may impose an administrative penalty on a person for a failure to comply with this Act.

(2) An administrative penalty referred to in subsection (1) may not exceed the amount prescribed by the Minister for each day during which such failure continues.

(3) An administrative penalty imposed under subsection (1) shall be paid to the Agency within the period specified by the Registrar.

(4) If any person fails to pay an administrative penalty, within the specified period under subsection (2), the Registrar may, by way of civil action in a competent court, recover the amount of the administrative penalty from such person as an amount due and owing to the Agency.

Statutory Instruments that have been issued (SI 73 and 77 of 2016) do not however prescribe the limits referred to under section 98.

7.7 General Penalties

For any offence without a corresponding penalty, the Act prescribes a general penalty of a fine not exceeding 200, 000 penalty units or imprisonment for a term not exceeding 2 years, or both. This is accordance with section 99 which states: -

99. Except as provided in this Act, a person who commits an offence under this Act is, on conviction, liable to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding two years, or to both.

7.8 Minister Empowered to Issue Regulations

Under section 100, the Minister is empowered to issue regulations for the implementation of the Act. These include forms to be used, fees payable and procedures for lodging and processing documents in the Collateral Registry. Section 100 reads: -

100. The Minister may, by statutory instrument, make regulations for -

- (a) anything required to be prescribed under this Act;
- (b) for various fees relating to the registration and search processes stipulated in this Act; and
- (c) the better carrying out of the purposes of this Act.

As discussed, two statutory instruments, namely, Statutory Instrument No. 73 of 2016, the Movable Property (Security Interest)(Fees) Regulations, 2016, which stipulates fees payable in the Collateral Registry and Statutory Instrument No. 77 of 2016, the Movable Property (Security Interest) regulations, 2016 which provides registration details and applicable forms, have been issued pursuant to section 100.

7.9 Collateral Registry Reporting Entity under Finance Intelligence Center Act

Consistent with the need to curb money laundering and vices such as financing of terrorism, the Collateral Registry is a reporting entity under the Financial Intelligence Center Act, 2010. Thus, any suspicious transactions may be reported to the Financial Intelligence Center in accordance with section 101 which provides: -

101. The collateral Registry Office is a reporting entity for the purposes of the Financial Intelligence Centre Act, 2010.

7.10 Savings and Transitional Provisions

Section 102 deals with matters of a transitional nature and provides: -

102. The savings and transitional provisions in the Schedule apply for purposes of this Act.

As earlier discussed, further to section 2 of the Schedule to the Act as read together with section 102, security interests that had been perfected prior to the Act had 6 months within which to be migrated to the Collateral Registry. As further discussed earlier, this was done and failure to do so meant losing priority. Section 1 of the Schedule nonetheless excluded matters that were in court, subject alternative dispute resolution mechanisms, or administrative procedures.

Sections 1 and 2 of the Schedule provide: -

1. This Act does not apply to a matter that is the subject of court, administrative or alternative dispute resolution proceedings that were commenced before its effective date.
2. (1) A prior security interest that was perfected or made effective against third parties under any other law shall, after the commencement of this Act, remain perfected under this Act, in accordance with subsection (2).
 - (2) A prior security interest shall remain perfected or effective against a third party and shall be deemed to be perfected under this Act until—
 - (a) the time it would have ceased to be perfected or effective against third parties under any other law; or
 - (b) the expiration of a period of six months after the effective date of this Act.
 - (3) If a secured creditor satisfies the requirements of this Act for perfection of security interests before the perfection or its effect against third parties would have ceased in accordance with subsection (2), the perfection shall be deemed to be continuous.
 - (4) A prior security interest that is not perfected under this Act within the period specified in subsection (2), shall be deemed to be an unperfected security interest thereafter.