

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(CIVIL JURISDICTION)**



**IN THE MATTER OF: ORDER 88 OF THE RULES OF THE SUPREME COURT, 1999 EDITION, VOLUME 1**

**IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT RULES CHAPTER 27 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: A THIRD PARTY MORTGAGE CREATED OVER PLOT 01/B/LOOCK C/01/01, OFF ALICK NKHATA ROAD, MTENDERE, LUSAKA**

**IN THE MATTER OF: CORPORATE GUARANTEE BY THE 2<sup>ND</sup> RESPONDENT**

**AND**

**IN THE MATTER OF: FORECLOSURE OF PROPERTY PLOT 01/B/BLOCK C/01/01 OFF ALICK NKHATA ROAD, MTENDERE, LUSAKA PLEDGED AS SECURITY TO SECURE FINANCING FACILITIES HEREIN**

**BETWEEN:**

**BUSINESS PARTNERS INTERNATIONAL SME  
FUND ZAMBIA LIMKITED**

**APPLICANT**

**AND**

**KENNEDY MATAHI T/A KENNEDY MATASHI TRADING 1<sup>ST</sup> RESPONDENT**

**THE OK FOOD STORE LIMITED**

**2<sup>ND</sup> RESPONDENT**

**Before the Hon. Madam Justice Mrs. Irene Zeko Mbewe**

*For the Applicant:*

*Mr. L. Linyama of Messrs Eric Silwamba, Jalasi & Linyama Legal Practioners*

*For the Respondents:*

*N/A*

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## JUDGMENT

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The Applicant commenced legal proceedings by way of Originating Summons on 14<sup>th</sup> May 2018 claiming for the following:

1. The immediate payment of all monies due which as at 1<sup>st</sup> day of April, 2018 stood at Zambian Kwacha One Million, Seven Hundred and Ninety Thousand and Ninety Nine (ZMW1,790,099.70) interest thereon, costs and other charges due and owing to the Applicant from the 1<sup>st</sup> Respondent under Loan Agreement dated the 4<sup>th</sup> day of August 2016 secured by a First Ranking Mortgage executed by the 1<sup>st</sup> Respondent over Plot 01/B/Block C/01/01, off Alick Nkhata road, Mtendere, Lusaka in Lusaka district of the Lusaka Province of the Republic of Zambia;
2. An Order for foreclosure and sale of the mortgaged property by the Applicant or its duly authorised Agents;
3. An Order for delivery of vacant possession of the mortgaged property by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to the Applicant;

4. An Order that the 1<sup>st</sup> Respondent does pay the Applicant a royalty forthwith;
5. An Order that the 2<sup>nd</sup> Respondent do forthwith honour its guarantee to the Applicant;
6. Further or other relief; and
7. Costs and other charges incurred by the Applicant.

In the supporting affidavit filed into Court on 14<sup>th</sup> May 2018 and deposed to by Alison Lungu the Country Manager in the Applicant company, the salient facts are as follows: On 4<sup>th</sup> August 2016 the 1<sup>st</sup> Respondent was advanced a sum of ZMW1,214,000.00 (Exhibit “AL1”). On 4<sup>th</sup> August 2016, the 1<sup>st</sup> Respondent executed a Royalty Agreement and a Deed of Guarantee and Indemnity (Exhibit “AL2-3”) respectively. The security for the loan was a first ranking Mortgage over Plot 01/B/Block C/01/01 off Alick Nkhata Road, Mtendere, Lusaka (Exhibit “AL 4”).

According to the Applicant, the 1<sup>st</sup> Respondent loan as at 1<sup>st</sup> April 2018 is ZMW1,790,099.70 in respect of the outstanding balance on the account and ZMW525,183.45 in respect of arrears on the



account. That despite several reminders, these amounts remain unpaid to date.

The Applicant filed skeleton arguments dated 14<sup>th</sup> May 2018 which I have taken into consideration.

At the hearing on 27<sup>th</sup> August 2018, there was no appearance from Counsel for the Respondents. I proceeded to determine the matter as Counsel for the Respondents was present at the last sitting on 2<sup>nd</sup> August 2018, and was therefore aware of the hearing date. There was no explanation from Counsel for the Respondent for his non attendance.

I have considered the Applicant's affidavit evidence, skeleton arguments and list of authorities.

The Applicant's application is predicated on *Order 30 Rule 14 High Court Rules, Cap 27 of the Laws of Zambia* and *Order 88 Rules of the Supreme Court, 1999 Edition* which makes provisions for the recovery of monies secured by a mortgage, the order for foreclosure, delivery of possession, redemption, reconveyance and power of sale of secured property. Therefore, this Court is clothed with jurisdiction to determine the application.

The Respondent did not file any opposing affidavit challenging the claims and allegations made by the Applicant.

From the facts and material on record, I find that the Applicant and 1<sup>st</sup> Respondent executed a loan agreement wherein the Applicant agreed to advance amounts up to ZMW1,214,000.00 to the 1<sup>st</sup> Respondent. A Royalty Agreement was executed between the Applicant and 1<sup>st</sup> Respondent, and the 2<sup>nd</sup> Respondent executed a Deed of Guarantee and Indemnity. The loan facility was secured by a legal mortgage over Plot 01/B/Block C/01/01 Off Alick Nkhata Road, Mtendere Lusaka in favour of the Applicant. I find that monies remain unpaid and due to the Applicant.

The Applicant further seeks an order to enforce the guarantee against the 2<sup>nd</sup> Respondent. In the security document namely the Deed of Guarantee and Indemnity dated 4<sup>th</sup> August 2016, the 2<sup>nd</sup> Respondent gave a guarantee to repay the loan facility extended to the 1<sup>st</sup> Respondent. The obligation of a guarantor is clear in that it becomes liable upon default by the principal debtor, and to pay on demand the guaranteed sum.

Accordingly, the Applicant has proved its claim and the net result is as follows:

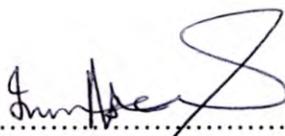
1. Judgment is entered in favour of the Applicant in the sum of ZMW1,790,099.70 and charges, and interest thereon at the short term deposit rate from date of the Originating Summons to date of Judgment and thereafter at the commercial lending rate until full payment. The 1<sup>st</sup> Respondent to settle this amount within ninety (90) days herein. In default, the Applicant shall be at liberty to foreclose I further Order that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent shall deliver vacant possession to the Applicant of the mortgaged property being Plot 01/B/Block C/01/01 off Alick Nkhata Road, Mtendere Lusaka. The Applicant shall be at liberty to exercise the power of sale of the mortgaged property without any further recourse to this Court.
2. The 1<sup>st</sup> Respondent is hereby ordered to pay the Applicant the Royalty Fee pursuant to the Royalty Agreement.
3. In the event that the monies released from the proceeds of the sale of the mortgaged property are not sufficient to expunge



the debt, the Applicant shall be at liberty to execute on the 2<sup>nd</sup> Respondent as guarantor pursuant to the Deed of Guarantee and Indemnity.

4. Costs to the Applicant to be taxed in default of agreement.

Delivered at Lusaka this 28<sup>th</sup> day of August 2018.



**HON. IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**