

---

IN THE HON'BLE HIGH COURT OF ZURU

---

THE APPEAL FILED UNDER SECTION 186(B) OF ZURU  
INVESTIGATION DEPARTMENT AND CRIMINAL EVIDENCE ACT, 1975.

IN CRIMINAL APPEAL No: \_\_\_\_/2014

---

IN THE MATTER OF

MR. MARKAS

...APPELLANT

V.

ZURU GOVERNMENT

...RESPONDENT

---

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

---

**TABLE OF CONTENTS**

---

**INDEX OF AUTHORITIES**.....3

**STATEMENT OF JURISDICTION**.....6

**STATEMENT OF FACTS**.....7

**STATEMENT OF ISSUES**.....8

**WRITTEN PLEADINGS**.....9

1. MR MARKAS IS GUILTY OF THE OFFENCES OF CHEATING AND CRIMINAL CONSPIRACY

    [I.]THE EVIDENCE ON RECORD IS SUFFICIENT TO PROVE THE OFFENCES OF WHICH MR. MARKAS HAS BEEN CONVICTED.....

    [II]THE CONVICTION IS REASONABLE AS MENS REA AND ACTUS REUS PRESENT.....

    [III]MR. MARKAS IS LIABLE FOR THE ACTIONS OF THE GROUP.....

2. THE TRIAL COURT ORDER DISMISSING THE APPLICATION FOR ARRAIGNING MR. JOSEPH AS AN ACCUSED IS NOT ERRONEOUS IN LAW.....

    [I]MR. JOSEPH IS NOT AN ACCOMPLICE TO THE CRIMES OF CHEATING AND CRIMINAL CONSPIRACY.....

    [II]MR. JOSEPH’S TESTIMONY PLAYED A CRUCIAL ROLE IN THE CONVICTION OF MR. MARKAS.....

    [III] THE TESTIMONY OF MR. CORUM.....

**PRAYER FOR RELIEF**.....25

INDEX OF AUTHORITIES

A. TABLE OF CASES

SR. NO.	NAME OF CASE AND CITATION
1.	<i>Ashish Batham v State of Madhya Pradesh</i> , Air 2002 SC 3206
2.	<i>Bolton</i> (1991) 94 Cr. App R 74 at 80
3.	<i>Chenga Reddy and Ors. v State of A.P.</i> , 1996 CriLJ 3461
4.	<i>Conner v. State</i> , 531; S.W.2d 119 (Tenn. Crim. App. 1975)
5.	<i>Director of Public Prosecution v Doot</i> , (1973) 1 All ER 940
6.	<i>DPP v Kilbourne</i> [1973] 2 WLR 254 (HL) pp. 276-77
7.	<i>Dysart Peerage</i> (1881) 6 App. Cas. 489
8.	<i>Glorsia Rathuba Hanuba v State Of Gujarat</i>
9.	<i>Garton v. State</i> ,206 Tenn. 79, 332 S.W.2d 169 (1960)
10.	<i>Hawkins v. State</i> , 4 Tenn. Crim. App. 121, 469 S.W.2d 515 (1971)
11.	<i>Hicks v. State</i> , 126 Tenn. 359, 149 S.W. 1055 (1912)
12.	<i>Hydrodam (corby) ltd.Re</i> 1994] 2 B.C.L.C 180
13.	<i>Lennard's Carrying co. ltd v Asiatic Petroleum Co. Ltd.</i> [1915] AC 8 713
14.	<i>Miller v Minister of Pensions</i> [1947] 2 All ER 372,373
15.	<i>Monts v. State</i> , 214 Tenn. 171, 379 S.W.2d 34 (1964)
16.	<i>Munna v State of Rajasthan</i> (2001)

**THE K. K. LUTHRA MEMORIAL MOOT COURT, 2014**

17.	<i>R v Exall</i> (1866) 4 F & F 922 Pollock CB, p. 929
18.	<i>R v Sharp</i> [1988] 1 All ER 65, HL; [1988] 1 WLR 7 at 11
19.	<i>Ratten v R</i> [1972] AC 378;
20.	<i>Re London and Globe Finance Corporation Limited</i> [1903] 1 Ch 728, at 732
21.	<i>Reg. v Hodge</i> (1838) 2 Lew 227
22.	<i>Roberts v DPP</i> [1994] Crim LR 926
23.	<i>Scott v. Com.</i> , Ky. 353, 197 S.W. 2d 774 (1946)
24.	<i>Smith v. State</i> ,Tenn.Cr.App,525 S.W.2d p674,676
25.	<i>State Of Rajasthan v N.K</i> AIR 2000 SCW 1407
26.	<i>State of U.P v Ashok Kumar Shrivastava</i> [1992] 1 SCR 37
27.	<i>State v. Fowler</i> , 213 Tenn. 239, 373 S.W.2d 460 (1963)
28.	<i>Vithal Eknath Adlinge v State of Maharashtra</i> , (2009) 11 SCC 637
29.	<i>Woodhouse v Hall</i> (1981) 72 Cr App R 39; cf.

**B. TREATISES, BOOKS, REPORTS AND DIGESTS**

Sr. No.	Name of the Book, Treatise or Report with the Author or Publisher
1.	Buzzard, John, May, Richard, Howard, M.N., Phipson on Evidence, 63, (12th Edn, Sweet & Maxwell, London
2.	David Ormerod, Smith and Hogan’s Criminal Law,(13th Edition,Oxford University Press,2011)
3.	Halsbury’s Laws of England 1374 (5th ed., Vol. 11.3, LexisNexis Butterworths 2010).
4.	Henry Campbell Black, Black’s Law dictionary (Sixth edition)

5.	J. F. B., The American Law Register (1852-1891) , Vol. 16, No. 12, New Series Volume 7 (Oct. - Nov., 1868), pp. 705-713
6.	Jo Shaw, Jo Hunt & Chloe Wallace, Evidence Raymond Emson, p. 15, 4th Edition,(Palgrave Macmillan, 2006)
7.	John H., Rule of Evidence in Trials at Law, 50, (Little, Brown and Company, Boston, 1910)
8.	Murphy and Glover,Murphy On Evidence,252(Twelfth Edition, Oxford University Press,2011)
9.	The Digest 17 (1st ed., Vol 14 (2), London Butterworths & Co. Ltd. 1993)
10.	Wigmore, John H., The Principles of Judicial Proof: As given by Logic, Psychology and General Experience and Illustrated in Judicial Trials, 632, (Little, Brown and Company, 1913

**C. IMPORTANT DEFINITIONS**

1. Appellant for the purposes of this memorandum shall stand for ‘Mr. Markas’
2. Respondent for the purposes of this memorandum stands for ‘Zuru Government’

**D. DYNAMIC LINKS**

1. [www.indiankanoon.org](http://www.indiankanoon.org)
2. [www.manupatra.com](http://www.manupatra.com)
3. [www.westlawindia.com](http://www.westlawindia.com)

**STATEMENT OF JURISDICTION**

---

The Hon'ble High Court of Zuru has the inherent jurisdiction to try, entertain and dispose off the present case by virtue of Section 186(b) of Zuru Investigation Department and Criminal Evidence Act, 1975.

STATEMENT OF FACTS

---

1. Iron ore was the single largest natural resource of the country Zuru and its mining was largely unorganised till the late 90's.
2. Zinga one of the most powerful groups of the country controlled 70% of the iron ore mining in the country through its web of companies. Mr. Markas, who came from a very modest background built the entire conglomerate. He was the Promoter of the Group.
3. Subsequently to de-monopolize the sector the Government passed an Executive Order i.e. the Iron ore mining policy 2003.
4. According to this policy, the Iron Ore reserves were divided into 15 blocks with a maximum of 20 permits per entity. To ensure that there was no monopolization in the sector, a clause was incorporated which read as "No single entity can either directly or through its companion entities hold more than 2 permits in the same block and a total of more than 20 permits in all the blocks".
5. Zinga Group obtained its full quota of 20 permits through 4 companies of the Group. Mr. Markas was the promoter and hold 20% shares in each of those 4 companies.
6. In May, 2004 the permit holder of Benja Block surrendered its permits and fresh applications were invited. This block was extremely crucial for the successful commissioning of the Group's new steel plant which was closely located.
7. A company named Zipper was granted the permit for Benja Block. The Promoter-Director of Zipper was Mr. Abraham was was an ex employee of Mr. Markas. The General Manager of the company was Mr. Corum and the CEO was one Mr. Joseph
8. The High Court of Zuru on hearing the application by two unsuccessful; applicants of Benja Block quashed the permit and also directed the ZID to conduct a criminal investigation. In the Conclusion Report given by the ZID, Mr. Markas, Mr. Abraham, Zipper and the 4 companies of the Group were formally indicted for thye offences of cheating and criminal conspiracy.
9. On the basis of the depositions of Mr. Joseph and Mr. Corum, Mr. Markas was convicted for the offences of Cheating and Criminal conspiracy.
10. Also, Mr. Markas' application for summoning Mr. Joseph as an accused was dismissed by the Trial Court. The Appeals against both the decisions of the Trial Court now lie before the Hon'ble High Court of Zuru.

**STATEMENT OF ISSUES**

---

The Respondent impugns 2 issues for consideration,

1. Whether Mr. Markas is guilty of the offences of cheating and criminal conspiracy?
2. Whether the Trial Court order dismissing the application of summoning Mr. Joseph as an Accused is erroneous in law?

WRITTEN PLEADINGS

---

It is humbly submitted that,

---

**1. MR. MARKAS IS GUILTY OF THE OFFENCES OF CHEATING AND CRIMINAL CONSPIRACY**

---

**[I.] THE EVIDENCE ON RECORD IS SUFFICIENT TO PROVE THE OFFENCES OF WHICH MR. MARKAS HAS BEEN CONVICTED**

In the instant matter, the trial court has convicted Mr. Markas of the offences of cheating and criminal conspiracy under § 230 and § 105 B of the Zuru Criminal Code, 1965 respectively. With the evidence presented at the trial stage, there is sufficient and conclusive evidence to show that Mr. Markas (hereinafter '*the accused*') is indeed guilty of the aforementioned offences. An appeal has been filed for the review of evidence *de novo*, however it may be noted at the outset that 'it is a very well settled principle that in a criminal appeal the court has to consider the evidence on record and the conclusion of the trial court. It is not for the court to go into facts or alter the facts. The court can reevaluate the evidence but the findings of the trial court with respect to the facts are not to be set aside.'<sup>1</sup>

**[I.1] MR JOSEPH'S TESTIMONY IS RELIABLE EVIDENCE**

During the course of trial, 75 witnesses were examined *in toto*. *The trial court arrived at its conclusion mainly relying on the deposition of Mr. Joseph and Mr. Corum.* The Respondent humbly submits that the testimony of Mr. Joseph is admissible as well as reliable enough to convict the accused.

[I.1.i]THE TESTIMONY IS A RELEVANT PIECE OF EVIDENCE: To be admissible, any item of evidence must be relevant to a fact in issue or contribute towards an explanation of the background to the case.<sup>2</sup> As held in the English case of *DPP v Kilbourne*<sup>3</sup>, 'evidence is relevant if it makes the matter which requires proof more or less probable.' Similar

---

<sup>1</sup> *State Of Rajasthan v N.K AIR 2000 SCW 1407;R v Sharp*[1988] 1 All ER 65, HL; [1988] 1 WLR 7 at 11;

<sup>2</sup>Jo Shaw, Jo Hunt & Chloe Wallace, Evidence Raymond Emson, p. 15, 4th Edition,(Palgrave Macmillan, 2006)

<sup>3</sup>[1973] 2 WLR 254 (HL) pp. 276-77

requirements are envisaged in the Australian<sup>4</sup>, New Zealand<sup>5</sup> and American<sup>6</sup> jurisdictions. In the instant matter, the testimony of Mr. Joseph suffices this test of relevancy. The testimony taken within the context of the existing circumstances implicates the accused of the offences of cheating and criminal conspiracy. It makes the fact in issue, that is the involvement of the accused in the offences committed, more probable. Hence, it is submitted that the testimony is admissible and is relevant to the case at hand.

[I.1.ii]THE TESTIMONY IS CONSISTENT WITH THE PRIOR STATEMENT OF THE WITNESS: In his deposition under § 51 of the Zuru Investigation Department and Evidence Act, 1975, Mr. Joseph had stated *that he does not recall* instructing Mr. Corum to sign the Undertaking as mandated by the Iron Ore Mining Policy, 2003. On his examination before the Court, he deposed that he had instructed Mr. Corum to sign the undertaking on the instructions of Mr. Abraham who in turn was acting *on the directives of Mr. Markas*. It is submitted that these statements are not inconsistent with each other. A simple test to determine the same is whether the two statements can stand together. To prove contradiction, as *Wigmore*<sup>7</sup> observes, *'the witness must have given a contrary version on a prior occasion, we place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously'*. Illustrating a general tendency in applied logic, Aristotle's law of non-contradiction states that "One cannot say of something that it is and that it is not in the same respect and at the same time."<sup>8</sup> It is submitted that this requirement is not met with in the instant matter. The two statements can very well stand together. It is therefore contended that the deposition of Mr. Joseph is not erroneous and is consistent with his prior statement. Furthermore, after his cross examination, Mr. Joseph was asked by the Court that why he failed to tell the ZID about the facts stated before the court to which Mr. Joseph replied *that he was not questioned on these facts by the ZID*. It is most respectfully submitted that 'if the specific question is not asked, it cannot be disregarded.'<sup>9</sup> Hence, the testimony of Mr. Joseph cannot be disregarded on these grounds.

---

<sup>4</sup> s.55 of the Australian Evidence Act, 1995

<sup>5</sup> s.7(3) of the New Zealand Evidence Act, 2006

<sup>6</sup> r.401 of the United States Federal Rules of Evidence

<sup>7</sup> Wigmore, John H., *The Principles of Judicial Proof: As given by Logic, Psychology and General Experience and Illustrated in Judicial Trials*, 632, (Little, Brown and Company, 1913)

<sup>8</sup> Irving Marmer Copi, Carl Cohen; *An Introduction To Logic*, (Prentice Hall of India Pvt Limited, 1998 )

<sup>9</sup> *Munna v State of Rajasthan* (2001)

[I.1.iii]THE TESTIMONY IS A CIRCUMSTANTIAL EVIDENCE OF FACTS: It the present case, the testimony of Mr. Joseph can be heeded as circumstantial evidence of a fact. In many cases<sup>10</sup>, the courts have admitted statements as circumstantial evidence of facts. The purpose of adducing the evidence is to invite an inference as to a matter thought to be implied in the statement.<sup>11</sup> Because the purpose of evidence is to establish the probability of the facts upon which the success of a party's case depends in law.<sup>12</sup> It is submitted that the testimony in question plays a very pertinent role in implicating the accused. The testimony aided by the circumstantial chain of events makes the role of the accused more probable in signing the permit quota clause and the conspiring of the entire episode. Hence, it is most humbly contended that Mr. Joseph's testimony evidences the criminal activities of the accused *inter alia* in a circumstantial manner.

[I.1.iv]ARGUENDO, THE TESTIMONY FORMS A PART OF THE SURROUNDING CIRCUMSTANCES: §. 168 of Phipson on Evidence explains the rule of Res Gestae stating that acts, declarations, and incidents, which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party.<sup>13</sup> Further §.185 explains the principle of Accompanying Facts within the framework of Res Gestae. These include incidences, which may not constitute the facts in issue, may yet be regarded as forming a part of it, in the sense that they accompany, and tend to explain, the main fact. Not only may considering its attendant circumstances test the probability of an occurrence<sup>14</sup>, but also these undersigned incidents are often essential to elucidate its true character, to reveal the motives of the parties or to establish their connection with the main fact.<sup>15</sup> Mr. Joseph stated that he had seen Mr. Markas and Mr. Abraham interacting on several occasions. It is submitted, without prejudice to the above contentions, that even if the testimony fails to implicate Mr. Markas on a direct basis, it is admissible and carries the requisite probative force under the res gestae rule. The testimony provides concrete evidence that several meetings between the accused and Mr. Abraham were held during the course of events which led to the indictments. The principle is that the events should be seen in the context of their surrounding circumstances and

---

<sup>10</sup>*Ratten v R* [1972] AC 378; *Woodhouse v Hall* (1981) 72 Cr App R 39; cf. *Roberts v DPP* [1994] Crim LR 926

<sup>11</sup>Murphy and Glover, *Murphy On Evidence*, 252 (Twelfth Edition, Oxford University Press, 2011)

<sup>12</sup>Supra

<sup>13</sup>Buzzard, John, May, Richard, Howard, M.N., *Phipson on Evidence*, 63, (12th Edn, Sweet & Maxwell, London)

<sup>14</sup>*Dysart Peerage* (1881) 6 App. Cas. 489

<sup>15</sup>Supra, FN 13. P. 72

antecedents, and not in a factual vacuum.<sup>16</sup> These facts along with the circumstances, aid in proving the accused's guilt beyond a reasonable doubt.

[I.1.v]THE TESTIMONY HAS THE ESSENTIAL PROBATIVE FORCE: To prove the *factum probandum* it is necessary that the evidence presented be cogent. The probative value of an item of relevant evidence is the extent to which the evidence affects the probability of the existence of a fact in issue.<sup>17</sup> The Trial Court befittingly relied upon the testimonies of Mr. Corum and Mr. Joseph to convict the accused. The testimonies carry the essential probative force with them. The inference derived from the testimonies discourse a significant impact in proving the guilt of the accused. *Where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the existence of a bygone fact can be ascertained : First, By information derived either immediately or mediately from those who had actual knowledge of the fact ; or, secondly, by means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established.*<sup>18</sup> Assertions of human beings are regarded as the basis of inference to the propositions asserted by them.<sup>19</sup> Hence, it is submitted that the testimony of Mr. Joseph amplifies the probability of the facts towards which it is directed and is cogent and has the weight necessary for the conviction of the accused.

**[I.2]THE CIRCUMSTANTIAL EVIDENCE IS CONCLUSIVE IN NATURE**

An item of circumstantial evidence is an evidentiary fact from which an *inference may be drawn rendering the existence of a fact in issue more probable.*<sup>20</sup> In court as elsewhere, the data cannot 'speak for itself'. It has to be interpreted in the light of the competing hypotheses put forward and against a background of knowledge and experience about the world.<sup>21</sup> In the present case, the plausibility of the hypothesis is conclusive in nature and leaves no reasonable doubt about the existence of any other hypothesis. The proposition to be proved in the instant matter is that the accused conspired to cheat and indeed committed the offence of cheating by fraudulently representing an untrue fact to be true. The testimony of Mr. Corum and Mr. Joseph essentially *corroborated* by the circumstances encompassing situation at hand successfully prove the *factum probandum*.

---

<sup>16</sup>Supra, FN 11, p. 271

<sup>17</sup>Supra, FN 2

<sup>18</sup>Supra, FN 7, p. 7

<sup>19</sup>Supra

<sup>20</sup>Supra, FN 2, p. 9

<sup>21</sup>Supra, FN 7, p. 15

[I.2.i]THERE EXISTS A MATERIAL PROPOSITION IMPLICATING THE ACCUSED: In the present case, as evident from the facts, the accused was instrumental in the commission of the offences for which he was indicted. There was *motive, there was generation of an opportunity and it was within the capacity of the accused to commit the acts in question.* All the circumstances taken together corroborate the same. In *R v Exall*<sup>22</sup> it was notably held that “*One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence-there may be a combination of circumstances, when taken as a whole may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.*”

[I.2.i.a]THE EXISTING FRAMEWORK BEFORE THE IRON ORE MINING POLICY: Zinga Group, one of the most powerful business groups of the country controlled nearly 70% of the entire Iron Ore mining which was the single largest natural resource. The entire conglomerate was built by the accused who was the Promoter of the group. The Policy created an end to the Group’s substantial control over the group.

[I.2.i.b]THE ACQUIRING OF PERMITS: Four companies of the group made 30 applications and acquired the full quota of 20 permits in all the applications the accused was shown as the promoter and he held 20% shares in each of the four companies and the rest of the shares were held by other entities of the promoter group.

[I.2.i.c]GENERATION OF AN OPPORTUNITY: In May 2004, the permit holder of Benja block was given up. The Benja block was the richest iron ore block both in terms of quantity and quality. The block was extremely crucial for the Group as it was closely located to one of its new steel plants. Getting Benja block would have hiked up the profit margins of the Group.

[I.2.i.d]THE SUBSEQUENT ACTIONS: A company Zipper was formed by an ex-employee, Mr. Abraham of the accused. The Paid up share capital was provided by the Group, the Group also stood as a guarantor for other loans. A number of employees working in Zinga now worked for Zipper. There were frequent meetings between the accused and Mr. Abraham.

It is submitted that these facts point towards one and only one proposition. The crimes of criminal conspiracy and cheating were committed with the connivance of the accused. Hence the accused is liable under § 320 of the Zuru Investigation Department and Evidence Act, 1975.

---

<sup>22</sup> (1866) 4 F & F 922 Pollock CB, p. 929

[I.2.ii] THE CIRCUMSTANTIAL CHAIN IS COMPLETE AND LEAVES NO REASONABLE DOUBT: The rules as laid down by Wills on Circumstantial Evidence, other writers on the subject have repeated, and are as follows:-(1.) The circumstances alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*. (2.) The *onus probandi* is on the party who asserts the existence of any fact which infers legal accountability.<sup>23</sup> The same has been reiterated in a plethora of Cases<sup>24</sup> and by Wigmore<sup>25</sup> and Phispon<sup>26</sup>. In the present case, the hypothesis put forth by the Prosecution gives the *evidence of a design or a plan, evidence of intent, the commissioning of the actual act, the disposition of the accused*. The cumulative effect of the circumstances leads to the conclusion that the *facts probans* point towards the *factum probandum*, in other words the only reasonable conclusion is that the crimes can be accredited to the accused.

It is therefore most respectfully submitted that the Evidence presented is sufficient and carries with it the Probative force to sustain a conviction.

## **[II.] THE CONVICTION IS REASONABLE AS MENS REA AND ACTUS REUS IS PRESENT**

It is a fundamental principle of criminal law that a person may not be convicted of a crime unless the prosecution proves beyond a reasonable doubt both (a) that responsibility is attributed to the accused for a certain behaviour or the existence of a certain state of affairs, in circumstances forbidden by criminal law and that the accused has caused the prescribed event and (b) that the accused had a defined state of mind in relation to the behaviour, existence of a state of affairs or causing of the event.<sup>27</sup> In other words *if the two elements of crime, actus reus and mens rea are proved beyond a reasonable doubt, the conviction is resolute*.

### **[II.1] PRESENCE OF REQUISITE MENS REA**

A criminal act generally requires some element of wrongful intent or other fault.<sup>28</sup> This is known as *mens rea* or guilty mind.<sup>29</sup> In the instant matter, the accused has been convicted of

---

<sup>23</sup> J. F. B., The American Law Register (1852-1891), Vol. 16, No. 12, New Series Volume 7 (Oct. - Nov., 1868), pp. 705-713

<sup>24</sup> *Reg. v Hodge* (1838) 2 Lew 227; *Vithal Eknath Adlinge v State of Maharashtra*, (2009) 11 SCC 637; *Chenga Reddy and Ors. v State of A.P.*, 1996 CriLJ 3461; *State of U.P v Ashok Kumar Shrivastava* [1992] 1 SCR 37; *Ashish Batham v State of Madhya Pradesh*, Air 2002 SC 3206

<sup>25</sup> *Supra*, FN 7

<sup>26</sup> *Supra*, FN 13

<sup>27</sup> David Ormerod, Smith and Hogan's Criminal Law, (13th Edition, Oxford University Press, 2011)

<sup>28</sup> Glanville Williams, Text Book Of Criminal Law, (2nd Edition, Universal Law Publishing, 1999)

<sup>29</sup> The Digest 17 (1st ed., Vol 14 (2), London Butterworths & Co. Ltd. 1993)

the offences of Cheating and Criminal Conspiracy. It is submitted that the *mens rea* for both the crimes is present in the instant matter.

[II.1.i] THE EXISTENCE OF A MOTIVE: The motive of the accused to set up Zipper was to obtain the permit for the Benja Block which was extremely beneficial and profitable for its new steel plant. The obtaining of this plant would have hiked up the profits of the accused in a consequential manner. It is contended as evidence, motive is always relevant.<sup>30</sup> Motive may be relevant to proof, the prosecution may prove the motive for a crime if it helps them to establish their case, as a matter of circumstantial evidence.<sup>31</sup>

[II.1.ii] THERE IS EVIDENCE OF A DESIGN OR A PLAN: John H. Wigmore, Rule of Evidence in Trials at Law<sup>32</sup>, §. 266 Rule 59 states the General Principle when dealing with Evidence to Prove a Design or Plan. It states that whenever a person's design or plan to do an act is in issue, it may be evidenced circumstantially – (a) by his conduct or utterances indicating the design or plan, (b) Or, by the prior or subsequent existence of the design or plan.

In Principles of Judicial Proof<sup>33</sup> it has further been explained that for establishing the existence of a design or plan two ingredients must be circumstantially explained. The first ingredient to be demonstrated before the court is the process of active deliberation by the accused. In this stage, the accused duly weighs the good and the evil, which may result from any action and consciously choose or decide upon a particular course with its attendant result. The second ingredient to be proved by the prosecution is resolution on part of the accused towards an action, which is seen to lead to a desired end. Resolution on its psychical side is equivalent to a complete process of volition. It may be added that resolution enters into all action, so far as this becomes complex, in the sense a prolonged activity, or a series of combined movements. Resolution implied maintenance of the idea an end that has been selected in furtherance of an opportunity.<sup>34</sup> Hence, it is submitted that two ingredients are being explained by the circumstantial hypothesis put forth by the Prosecution.

[II.1.iii] THE EXISTENCE OF THE REQUIRED INTENTION: In furtherance of the opportunity the accused has resolved towards an action, which is seen to lead to a desired end. The most basic ingredient of the offence of cheating under § 230 of the Zuru Criminal Code is intent to

---

<sup>30</sup> Williams (1986) 84Cr AppR 299,CA

<sup>31</sup> Supra, FN 28, p. 75

<sup>32</sup> Wigmore, John H., Rule of Evidence in Trials at Law, 50, (Little, Brown and Company, Boston, 1910)

<sup>33</sup> Supra FN 7, 245 – 247

<sup>34</sup> Supra, FN 7 .,See also Sully, James, The Human Mind, 1892, Vol II, 255

defraud. Intention forms the gist of the offence. Intention literally means *a conscious movement with knowledge of the circumstances*.<sup>35</sup> The mental element should require proof that the accused has personal awareness and has himself perceived the relevant circumstances and consequences comprising of the *actus reus* of the offence.<sup>36</sup> It is submitted that the accused had the knowledge as to the falsity of the Undertaking submitted under the Iron Ore Mining Policy. The accused was the acting mind of the Group, his intention are clearly prevalent from the evidence on record. As Viscount Haldane LC, “A corporation is an abstraction. It has no mind of its own anymore than it has a body of its own; its active and directing will must consequently be sought in the person of somebody *who for some purposes* maybe called an agent , but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.”<sup>37</sup> Everyone agrees that a person intends to cause a result if he acts with the purpose of doing so.<sup>38</sup>

## **[II.2] THERE IS ACTUS REUS ON THE PART OF THE ACCUSED**

The physical element of a crime or behavior connected to the crime is called the *actus reus*.<sup>39</sup> A person must participate in all the acts necessary to constitute a particular crime in order to be guilty thereof.<sup>40</sup> In the present case, the accused was responsible for the alleged fraudulent representation and he conspired to do the same.

### **[II.2.i] THERE HAS BEEN FRAUDULENT REPRESENTATION :**

The Permit was obtained by Zipper on the basis of a fraudulent representation that it was compliant with permit quota clause, therefore the offence of cheating. Making a false representation is the *actus reus* of fraud, but the element of falsity requires knowledge that the accused knew it was untrue or misleading<sup>41</sup>, which is the case in the instant matter. Moreover, it is not always possible to separate precisely *actus reus* from *mens rea*.<sup>42</sup>

[II.2.i.a] THERE HAS BEEN DECEPTION: Deceiving means causing to believe what is false, or misleading as to matter of fact, or leading into error. The classic definition here is that ‘to

---

<sup>35</sup> Supra, FN 28

<sup>36</sup> Supra, FN 27, p. 104

<sup>37</sup> *Lennard’s Carrying co. Ltd v Asiatic Petroleum Co. Ltd.* [1915] AC 8 713

<sup>38</sup> Supra, FN 27, p. 106.

<sup>39</sup> Supra, FN 27

<sup>40</sup> *Scott v. Com.*, Ky. 353, 197 S.W. 2d 774 (1946).

<sup>41</sup> Supra, FN 28, p. 48

<sup>42</sup> ACE Lynch, *The Mental Element in the Actus Reus*, (1982) 98 LQR 109

deceive is to induce a man to believe that a thing is true which is false.<sup>43</sup> The offence of cheating is fortified since Zipper is proved to be a companion entity of the four permit holder companies of the Group.

[II.2.i.b] THE FRAUDULENT REPRESENTATION IS ATTRIBUTABLE TO THE ACCUSED: It is a widely accepted principle of common law that the prosecution must prove that the accused *by his own act caused* the relevant result and it should be an intended causation.<sup>44</sup> § 320 of the ZID and Criminal Evidence Act, 1975 read with § 5 (e) of the Zuru Companies Act, 1956 renders that the accused is indeed responsible of the offences and the causation of the same can be attributed to him.

[II.2.ii] ACTUS REUS INCLUDES CIRCUMSTANCES: The *actus reus* of a crime might be relatively minimal, and may even seem innocuous as in conspiracy where the *actus reus* comprises of an agreement. Further, the *actus reus* may include a set of circumstances or ‘state of affairs’, not including any conduct or action by the accused at all.<sup>45</sup> In the instant matter, though it may be difficult to prove by direct evidence that there was an agreement to do an illegal act, the surrounding state of affairs which includes the testimony of Mr. Joseph prove that there had been a conspiracy to defraud.

[II.2.iii] THERE IS COINCIDENCE BETWEEN ACTUS REUS AND MENS REA: Conspiracy is a crime where it is more difficult than usual to distinguish between *actus reus* and *mens rea*. The *actus reus* is said to be an agreement; but agreement is essentially a mental operation, though it may be manifested by or inferred from acts of some kind.<sup>46</sup> It is a continuing offence. It is committed not only when the agreement is first reached but continues as long as the agreement to effect the unlawful object continues.<sup>47</sup> Hence, there is a concurrence of the two elements in the instant case.

[II.3] **THE PROSECUTION HAS PROVED THE GUILT BEYOND REASONABLE DOUBT:**

It is submitted that as per the Law of Zuru, the burden of proof lies on the prosecution to establish the guilt of the accused beyond reasonable doubt. Halsbury’s Laws of England maintains that prosecution should prove to full criminal standards any fact essential to

---

<sup>43</sup> Per Buckley J, in *Re London and Globe Finance Corporation Limited* [1903] 1 Ch 728, at 732

<sup>44</sup> *Supra*, FN 27

<sup>45</sup> *Supra*, FN 28, p. 49, 63

<sup>46</sup> *Bolton* (1991) 94 Cr. App R 74 at 80, per Wood LJ

<sup>47</sup> *Director of Public Prosecution v Doot*, (1973) 1 All ER 940

admissibility of evidence.<sup>48</sup> This principle is best explained in the words of Lord Denning who in *Miller v Minister of Pensions*<sup>49</sup> maintained that, “*It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice.*”

The abovementioned arguments do prove that there lies no reasonable doubt in all the charges framed against the accused. Thus, the conviction should be upheld.

### **[III.] MR. MARKAS IS LIABLE FOR THE ACTIONS OF THE GROUP**

It is a known fact that Zinga Group is one of the most powerful business groups of the country and Mr. Markas has worked very hard to build this conglomerate.<sup>50</sup> Thus, it is safe to state that Mr. Markas can be considered as the face of the company. It is also a known fact that one cannot be a successful businessman without the support and favours of the Zuru Government.<sup>51</sup> It is safe to infer that it would have been not possible for Mr. Markas to set up the Empire without the support and favours of the government and thus can be considered to be a very influential person. Since the major business of the group was to manufacture high quality steel<sup>52</sup>, it is presumed that Mr. Markas had the knowledge with regards to the iron ore required for the same and the same cannot be challenged with the amount of experience Mr. Markas possessed in this particular field. It is submitted that Mr. Markas is liable for the acts of the Group in as a he very well falls within the definition of ‘officer in default’ as provided in section 5(e)<sup>53</sup> of the Zuru Companies Act, 1955 read with section 320 of The Zuru Investigation Department and Criminal Evidence Act, 1975. Mr Markas falls is an officer in default in capacity of a shadow director. The term ‘shadow director’ was first used in *Hydrodam (corby) ltd.Re*<sup>54</sup> where it was held that for a person to be a shadow director, four things must be shown: first, the identity of the formally appointed directors and the de facto directors of the company. In the instant matter Mr. Markas in the capacity of a member<sup>55</sup> is aware of the identity of directors. Second, that the person in question directed those formally-

---

<sup>48</sup> Halsbury’s Laws of England 1374 (5th ed., Vol. 11.3, LexisNexis Butterworths 2010)

<sup>49</sup> [1947] 2 All ER 372,373.

<sup>50</sup> Moot Proposition Page 1 Paragraph 1

<sup>51</sup> Moot Proposition Page 1 Paragraph 2

<sup>52</sup> Moot Proposition Page 1 Paragraph 3

<sup>53</sup> “any person in accordance with whose directions or instructions the board of directors were accustomed to act”

<sup>54</sup> [1994] 2 B.C.L.C 180.

<sup>55</sup> In case of a company with share capital, members are known as shareholders

appointed and de facto directors as to how to act in relation to the company. Third, that those directors acted in accordance with that person's directions. It has been established that Mr. Markas is an influential person and Mr. Markas was aware of the fact that Benja Block is the richest iron ore block,<sup>56</sup> considering the amount of experience Mr. Markas possesses. It is also a known fact that the same Block was extremely crucial for the successful commissioning of the Group's new plant under construction.<sup>57</sup> It is also safe to state that Mr. Markas in the capacity of a promoter as well as shareholder was aware of the fact that the company has exhausted its permits for iron ore blocks however still the Group had a new plant under construction which was next to the Benja Block and the Block was indeed extremely crucial for the commissioning of the Plant and it is submitted that it was planned by Mr. Markas that he would with the help of Mr. Abraham through Zipper acquire the same block. The grant of the permit which required a certain amount of equity share capital to be raised by Zipper was granted in the form of an unsecured loan at a rate of 7% which was considerably lesser than the prevailing bank rate, as per the finding 'c' of the Zuru Investigation Department Conclusion Report.<sup>58</sup> It is further contented that the Permit fee was paid through a Bank loan of which Mr. Markas was the sole guarantor. It is also established that Mr. Joseph had seen Mr. Abraham interacting with Mr. Markas on various occasions. It is now safe to infer that such a corporate transaction would not have been possible without the influence of Mr. Markas and the directors in their capacity approved the loan under the influence of Mr. Markas. It is established the Directors acted in accordance with the instructions of Mr Markas. Fourth, that the directors were accustomed to act in that manner. It is submitted that Mr. Markas had a 20% shareholding in the Permit Holder companies and the rest was with the entities of the group of which Mr. Markas is a promoter.<sup>59</sup> It is established that Mr. Markas is an influential person and since he held a large stake in the permit holder companies and the rest was with companies of his own group it is sufficient to state that Mr. Markas was in a position of power to direct the directors and thus these directors were accustomed to act in that manner in which Mr. Markas wanted. Thus it satisfies the all the condition which held Mr. Markas liable as an officer in default. It was further stated in *Lennard's Carrying Company ltd v Asiatic Petroleum Co Ltd*<sup>60</sup> Lord Haldane based identification on a person "who is really the directing mind and will of the

---

<sup>56</sup> Moot Proposition, Page 3 Paragraph 2

<sup>57</sup> Moot Proposition, Page 3 Paragraph 3

<sup>58</sup> Moot Proposition, Page 5 Finding 'c'

<sup>59</sup> Moot Proposition Page 3 Paragraph 1

<sup>60</sup> [1915] AAC 705(HL)

corporation, the very ego and center of the personality of the corporation”. In the instant matter, it has been established that Mr. Markas is the face of the Group, he is the directing mind, the will of the corporation and thus is liable for the acts of the company in the capacity of the shadow director.

It is humbly submitted that Mr Markas is an officer in default under clause (e) section 5 of the Zuru Companies Act, 1955 read with section 320 of the Zuru Investigation Department and Evidence act, 1975 is liable for the acts of the company in the capacity of a shadow director as well as the directing mind and will of the corporation.

**2. THE TRIAL COURT ORDER DISMISSING THE APPLICATION FOR  
ARRAIGNING MR. JOSEPH AS AN ACCUSED IS NOT  
ERRONEOUS IN LAW**

---

The Trial Court relied majorly on the testimonies of Mr. Corum and Mr. Joseph to arrive at the conviction of Mr. Markas and the other accused.<sup>61</sup> In the instant matter, it is humbly submitted that summoning Mr. Joseph as an accused is merely a brilliantly veiled subterfuge of the appellants in order to suppress Mr. Joseph's testimony in its entirety.

**[I] MR. JOSEPH IS NOT AN ACCOMPLICE TO THE CRIMES OF CHEATING AND CRIMINAL CONSPIRACY**

It is humbly submitted before this Honorable court that the only way possible to summon Mr. Joseph as an accused would be to brand him as an 'accomplice' to the crime. This can be substantiated by the fact that Mr. Joseph is a mere C.E.O of the company and as such has no exclusive power or authority vested in him to pull off a crime of this scale as a principal offender. It is humbly submitted that any such theory would be no better than an intriguing story.

It is humbly submitted before this Hon'ble bench that the term 'accomplice' has been defined in the Black's Law dictionary as '*An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender unites with him or her in the commission of the crime*'.<sup>62</sup> Thus, it can be observed from the definition that the person under consideration should satisfy three tests viz. knowing, acting voluntarily and finally sharing the same intent as that of the main accused. In the instant matter, it is humbly submitted that Mr. Joseph does not satisfy any of the three tests mentioned. Mr. Joseph has clearly mentioned in his testimony that he was acting on the instructions of Mr. Abraham who was superior to him. Thus it is put before this court that Mr. Joseph for simply following orders from his superior and did not '*know*' per se what was actually happening. Since it has already been established that Mr. Joseph was not aware of any crime happening in the first place, the question of his actions being '*voluntary*' do not rise at all. Arguendo, Mr. Joseph was merely doing his job by following his orders and hence it cannot be said he was acting '*voluntarily*'. It is humbly

---

<sup>61</sup> Moot Proposition Page 7

<sup>62</sup> Henry Campbell Black, Black's Law dictionary (Sixth edition) page 17, *Monts v. State*, 214 Tenn. 171, 379 S.W.2d 34 (1964); *Conner v. State*, 531; S.W.2d 119 (Tenn. Crim. App. 1975); *Smith v. State*, Tenn.Cr.App,525 S.W.2d p674,676

submitted that if a person does not ‘*know*’ that a crime is being committed and he is not acting voluntarily, there is absolutely no scope of the person sharing the same intent as that of the principal offender. It is thus humbly put before this court that Mr. Joseph does not satisfy the definition.

**[I.1] THE TESTIMONY OF AN ACCOMPLICE**

Without prejudice to the above argument, it is humbly submitted that it is a well-known principle in common law that the testimony of an ‘accomplice’ must be corroborated. *“If a witness was an accomplice in the crime, then his or her testimony must be corroborated. Corroborating evidence is that evidence, entirely independent of the accomplice’s testimony, which, taken by itself, leads to the inference not only that a crime has been committed but also that the defendant was implicated in it. This independent corroborative testimony must include some fact or circumstance that affects the defendant’s identity.”*<sup>63</sup> In the instant matter, even though Mr. Joseph’s testimony is an essential piece of evidence having a strong probative force along with corroboration. However, it may be argued by opposing counsel that the testimony is not corroborated. This is the exact reason why an innocent man namely Mr. Joseph is being trapped and being made a victim of his own honesty. It would be the most perfect deception, however, there is only one piece missing, the most important one. Mr. Joseph is *not* an accomplice in the instant matter.

**[II] MR. JOSEPH’S TESTIMONY PLAYED A CRUCIAL ROLE IN THE CONVICTION OF MR. MARKAS**

It is a well established fact that the Trial Court relied majorly on the testimonies of Mr. Corum and Mr. Joseph. Mr. Joseph’s testimony, however, was the final nail in the coffin. Mr. Joseph’s testimony substantiated various facts which complete the circumstantial chain of evidence produced before this Hon’ble court which conclusively guaranteed a conviction for Mr. Markas. Mr. Joseph’s testimony provided the following evidence:-<sup>64</sup>

1. Mr. Joseph was acting under the instructions of Mr. Abraham.
2. Mr. Joseph also mentioned that he had seen Mr. Markas and Mr. Abraham interact on several occasions.

**[II.1] MR. JOSEPH’S TESTIMONY READ WITH OTHER EVIDENCE ON RECORD**

---

<sup>63</sup> *State v. Fowler*, 213 Tenn. 239, 373 S.W.2d 460 (1963); *Garton v. State*, 206 Tenn. 79, 332 S.W.2d 169 (1960); *Hicks v. State*, 126 Tenn. 359, 149 S.W. 1055 (1912); *Hawkins v. State*, 4 Tenn. Crim. App. 121, 469 S.W.2d 515 (1971).

<sup>64</sup> *Supra*

The following are well known facts mentioned in the moot proposition, that Mr. Abraham was an ex-employee of Mr. Markas for a period of ten years. Mr. Abraham then formed his own proprietary firm in the iron ore sector itself and thus was a 'competitor' to the Zinga group as per the economic terminology. However, Mr. Markas provided for a loan below the existing bank rate to Mr. Abraham which was co-incidentally the exact amount required to qualify under the Permit Quota Certificate. Another important fact is that within two months of the incorporation of Zipper, employees from Zinga resign and join Zipper. Moreover, Mr. Markas is continuously having interactions with Mr. Abraham. All of these facts cannot be branded as mere co-incidences as there is more than what meets the eye.

Thus it is humbly submitted before this Hon'ble court that Mr. Joseph's testimony did play a pivotal role in the conviction of Mr. Markas and the defendants feared this very fact. Thus, they went to the extent of filing appeals to summon Mr. Joseph as an accused solely to negate the entire testimony and to mislead the court.

[III] THE TESTIMONY OF MR. CORUM.

Mr. Corum, in his testimony deposed that he signed the Permit Quota Certificate on the instructions of Mr. Joseph who assured him that Zipper was compliant with the terms and conditions mentioned in the Permit Quota Certificate. Mr. Joseph in his testimony clearly mentioned that he was acting upon the instructions of Mr. Abraham. Now it was after Mr. Corum deposed that all the four main accused filed for separate appeals to summon Mr. Joseph as an accused. At this point in time, it should be noted that Mr. Corum's testimony was as uncorroborated as the one Mr. Joseph later deposed in court. If this were to be a bona fide appeal and, in actuality if Mr. Joseph was liable for the offenses of cheating and criminal conspiracy then such an appeal would have been filed much before Mr. Corum deposed in court.

Without prejudice at any stage in the ZID investigation did any connection or relation between Mr. Joseph and any of the accused came forward. More so none of the 75 witnesses, as mentioned above could show any relation between Mr. Joseph and any of the other accused. Mr. Joseph had a right to remain silent enshrined upon him by the constitution of

Zuru.<sup>65</sup> However he chose to depose in court when he realized that he was being set up as an accused.

---

<sup>65</sup> Annexure A, Section 35(3)(h), The Bill of Rights of The Constitution of Zuru, Moot Proposition Page 15-16.

**PRAYER**

---

In light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully submitted that this Honorable Court may adjudge and declare that:

1. Both Appeals should be dismissed.
2. The Trial Court order of conviction should be upheld.

The court may also be pleased to pass any other order, which this Honorable Court may deem fit in light of justice, equity and good conscience.

Sd/-

.....  
(Counsel for the "Respondent")