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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. MARKUS **...APPELLANT**

V.

ZURU GOVERNMENT **...RESPONDENT**

WRITTEN SUBMISSION ON BEHALF OF THE APPELLANT

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B. TREATISES, BOOKS, REPORTS AND DIGESTS

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1.	American Jurisprudence 322 (2nd ed., Vol. 29, Thomson Reuters 2011).
2.	Andrew Ashworth, Principles of Criminal Law,(5th Edition,Oxford University Press ,2006)
3.	Barbara Mescher and Bryan Howieson, Corporate Governance Law Review 98(vol. 1:1, 2005)
4.	Buzzard, John, May, Richard, Howard, M.N., Phipson on Evidence, 12th Edn, Sweet & Maxwell, London, 682
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7.	G. F. Arnold, Psychology applied to Legal Evidence , 401 1906
8.	Glanville Williams, Text Book Of Criminal Law,(2nd Edition,Universal Law Publishing,1999)
9.	Halsbury"s Laws of England 1374 (5th ed., Vol. 11.3, LexisNexis Butterworths 2010).
10.	Henry Campbell Black, Black's Law dictionary 17(6th ed)

11.	International Covenant for Protection of Civil and Political Rights
12.	J. F. B., *The American Law Register (1852-1891)* , Vol. 16, No. 12, New Series Volume 7 (Oct. - Nov., 1868), pp. 705-713
13.	John Henry Wighmore, Evidence in Trials at Common Law 193 (Vol. VII, Wolters Kluver (India) Pvt. Ltd. 2008).
14.	K.D.Raju, Company Directors 106(Eastern Law House, 2013)
15.	Leonard Jaffee 'Of Probativity and Probability' (1985) 46 University of Pittsburgh Law Review 924, 934.
16.	Murphy and Glover,Murphy On Evidence,389(Twelfth Edition, Oxford University Press,2011)
17.	Stephen Girvin, Sandra Frisby and Alastair Hudson, Charlesworth's Company Law 104(18th ed, Thomson Reuters, 2010)
18.	The Digest 17 (1st ed., Vol 14 (2), London Butterworths & Co. Ltd. 1993).
19.	Universal Declaration of Human Rights
20.	Wighmore, John H., The Principles Of Judicial Proof.
21.	Wigmore, John H., The Principles of Judicial Proof: As given by Logic, Psychology and General Experience and Illustrated in Judicial Trials, 426, (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
2. www.manupatra.com
3. 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 holds 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 the 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's application for summoning Mr. Joeph 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 Appellant 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 NOT GUILTY OF THE OFFENCES OF CHEATING AND CRIMINAL CONSPIRACY

[I.]THE EVIDENCE ON RECORD IS INSUFFICIENT 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 insufficient and inconclusive evidence to show that Mr. Markas (hereinafter *'the accused')* is indeed guilty of the aforementioned offences and an appeal has been filed for the review of evidence *de novo.*

[I.1]MR JOSEPH'S TESTIMONY CANNOT BE RELIED UPON

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 Appellant submits that the testimony of Mr. Joseph is erroneous and lacks the requisite probative value.

[I.1.i]THE TESTIMONY IS BASED ON CONJECTURES AND SPECULATIONS: In his statement before the court, Mr. Joseph testified that Mr. Abraham was acting on the instructions of Mr. Markas. In his cross examination, Mr. Joseph stated that he has never seen Mr. Abraham taking instructions from Mr. Markas, he has only seen them interacting on various occasions. As observed by *Wighmore* in The Principles of Judicial Proof[1] that *" amidst the multitude of persons who have formed impressions and think that they "know" something about the subject in hand, practical experience shows that many or most have formed their beliefs without any basis of perception safe enough to be worth considering in a court of justice. A belief-basis adequate enough for the casual affairs of life may be too slender for settling the*

[1]Wigmore, John H., The Principles of Judicial Proof: As given by Logic, Psychology and General Experience and Illustrated in Judicial Trials, 426, (Little, Brown and Company, 1913)

facts of rights and wrongs in court. Hence, a Court may well insist on requiring some minimum of adequate basis for belief; or at least may insist ventilating thoroughly whatever basis there is, so that the weight of it may be gauged." It is humbly submitted that the testimony which is based on speculations & conjectures of witness is inadmissible.[2]

[I.1.ii]THE TESTIMONY IS POSITIONED ON MERE OPINION AND NOT ON KNOWLEDGE: The general rule of Common Law was that the opinions, beliefs and inferences of a witness were inadmissible to prove the truth of the matters believed or inferred if such matters were in issue or relevant facts in issue in the case.[3] It has long be accepted that, witnesses should only testify as to facts within their own personal knowledge and not give an opinion on the disputed issues , for the determination of the issues is the preserve of the tribunal of fact.[4] As the Canadian Supreme Court explained in *USA* v *Dynar*[5] , in the Western legal tradition, knowledge is defined as true belief: 'The word "know" refers exclusively to true knowledge, we are not said to know something that is not so'. The House of Lords in *Montila*[6] "A person cannot know that something is A when in fact it is B. The proposition that a person knows that something is A is based on the premise that it is true that it is A. The fact that the property is A provides the starting point. Then there is no question whether the person knows that the property is A." Further, *Halsbury's Laws of England sustains that a testimony which is mere guess, opinion or belief of one which produces speculative inference is irrelevant and should be excluded.*[7] In the present case, Mr. Joseph had no knowledge of the on goings of the meetings between the accused and Mr. Abraham. It was his opinion that the accused had instructed Mr. Abraham to sign the permit quota clause. Hence, it is contended by the Appellant that Joseph's testimony was purely based on presumptive forces and hence cannot be deemed reliable.

[I.1.iii]THE TESTIMONY IS INCONSISTENT 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 improved upon his testimony by deposing 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

[2]American Jurisprudence 322 (2nd ed., Vol. 29, Thomson Reuters 2011).
[3]Murphy and Glover,Murphy On Evidence,389(Twelfth Edition, Oxford University Press,2011)
[4]*Bushell's* case(1670*) Vaugh* 135(CCP) p. 142
[5][1997] 2 SCR 462
[6][2004] 1WLR 3141
[7]Halsbury"s Laws of England 1374 (5th ed., Vol. 11.3, LexisNexis Butterworths 2010).

Mr. Markas. It is contended that this omission amounts to a contradiction thereby narrowing down the credibility of the testimony. As G. F. Arnold observes in his book 'Psychology applied to Legal Evidence', "A person may equally persistently adhere to falsehood once uttered, if there be a motive for it." It has always seemed that for this reason a statement does gain value by repetition, if the second statement is substantially in accord with the original, and especially if it has stood the test of cross-examination.[8] It is contended that the testimony in question fails to be in accord with the previous statement made by the witness. Mr. Joseph omitted a very significant part of his testimony from his deposition before the ZID. The contradictions and omissions in the previous statements are the best material to impeach the testimony of the witness.[9] The Wigmorean[10] conclusion states that it maybe *some undefined capacity to err; it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality.* It has been held in a plethora of Indian Cases[11] that omissions which amount to contradictions in material particulars, i.e materially affect the trial or the core of the prosecution's case, the testimony of such a witness is liable to be discredited.

It is thus humbly submitted that the testimony of Mr. Joseph stands unreliable as it suffers from the defect of contradiction by the way of omission.

[I.1.iv]THE TESTIMONY WAS IN LIEU OF SELF PRESERVATION: On the basis of Mr. Corum's testimony, the accused had moved an application to summon Mr. Joseph as an accused. The testimony of Mr. Joseph upon which the Trial Court has mainly relied was recorded even as so the said Application was pending. The decision of the Trial Court would have directly affected Mr. Joseph and such a testimony is bound to be prejudiced in nature. It is submitted, that a witnesses' evidence may be tainted by improper motive[12] and the witness be deemed unreliable if his interests are served by deflecting suspicion away from himself to the accused.[13]

[I.1.v]THE TESTIMONY LACKS THE ESSENTIAL PROBATIVE FORCE: In the instant matter, the Prosecution has presented the C.E.O of Zipper, Mr. Joseph to establish that the accused has indulged in a criminal conduct. As previously prescribed by the Appellant that the testimony

[8]G. F. Arnold, Psychology applied to Legal Evidence , 401 1906
[9]*Venkateswara Rao* v *State of Andhra Pradesh*, 2000 CrLJ 448 (461) (AP-DB)
[10]Supra, FN 2, Pg. 632
[11]*State Represented by Inspector of Police* v *Saravanan& Anr.* AIR 2009 SC 152; *Mahendra Pratap Singh* v *State of Uttar Pradesh*,(2009) 11 SCC 334; *State of UP* v *Naresh & others* , (20011) 4 SCC 324*; Brahm Swaroop and Anr.* V *State Of U.P*, AIR 2011 SC 280
[12]*R* v *Beck*[1982] 1 WLR 461, Ackner LJ
[13]*R* v *Hempton* (2000) Unreported(99/3835/X2) (CA); *R* v *Porter* [2001] EWCA Crim 2699

in question is based on mere opinion and speculation, it is self contradictory with his previous statement and furthermore the witness is an interested party.

As Wighmore puts in "*The probative value of all honestly given testimony depends, naturally, first, upon the witness's original capacity to observe ; second, upon the extent to which his memory may have played him false ; and third, upon how far he really means exactly what he says."*

§. 1633 of Phipson on Evidence[14] states that where a witness in a criminal case may be regarded as having some purpose in the case at hand, the judge would be unjustified in accepting such a statement without corroboration. Further, the Judge is incumbent to take special care before convicting on the uncorroborated evidence of a witness, whether a co – accused or a witness for the prosecution, who may have some purpose of his own to serve in giving evidence against the accused, although the witness may not be an accomplice in the strict sense.[15]In dealing with the admissibility of uncorroborated evidence to establish the guilt of the accused, the court has held that such evidence is admissible but on the qualification that it must possess the probative value to conclude as to what the appellant had done.[16]

To demonstrate the same reliance has been placed the *State of Minnesota vs. Thomas Royal Renney*.[17] The issue in this case was the judgment passed by the Becker County District Court convicting the defendant for a controlled substances crime. The defendant came in appeal to the Court of Appeals Minnesota challenging the judgment on grounds of insufficiency of evidence. The defendant argues that the evidence was insufficient to sustain a conviction because the State did not present sufficient corroborating evidence for the informant's testimony. The witness failed to evidence about the defendant indulging in similar activities in the past or *the commissioning of the actual act*. Although none of this is essential to prove the criminal activity but it diminishes the credibility of the informant. The Court of Appeals held in favor of the defendant reversing the order of the Becker County District Court. The rationale provided by the court was that the testimony provided by an *informant or an accomplice (emphasis supplied)* must be corroborated to establish its probative weight, and

[14]Buzzard, John, May, Richard, Howard, M.N., Phipson on Evidence, 12th Edn, Sweet & Maxwell, London, 682.
[15]*R.* v. *Prater* [1960] 2 Q.B. 464
[16] *Director of Public Prosecution* v. *Kilbourne*.[1973] A.C. 729
[17] 2003 Minn. App. LEXIS 1261

cannot sustain a conviction on its own.[18] The testimony of an accomplice or an informant or an interested Party must necessarily be corroborated to prove the case beyond reasonable doubt.

[I.2]THE CIRCUMSTANTIAL EVIDENCE IS INCONCLUSIVE IN NATURE

As Jaffee says '*Propositions are true or false; they are not "probable"*'.[19] 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.[20] In the present case, the plausibility of the hypothesis put forward by the Prosecution at the trial stage is inconclusive in nature. The circumstances encompassing situation at hand fail to prove the *factum probandum*[21]. 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.[22]

[I.2.i]ABSENCE OF A MATERIAL PROPOSITION INCRIMINATING MR. MARKAS: In the instant matter, the Trial Court held Zipper, four Permit Holder Companies of The Group, Mr. Abraham and Mr. Markas guilty of the offences of Cheating and Criminal Conspiracy.[23] The offences, if committed at all, have been committed by the Permit Holder Companies. To convict Mr. Markas it becomes essential to prove that the offences have been committed with the *consent, connivance of, or is attributable* to the accused. Further the accused is necessarily to be an officer of the company.[24] It is submitted that none of the existing circumstances are concrete enough to prove the *factum probandum.* To convict Mr. Marakas of the offences in question it is has to be proved that he was the Controlling Officer. As held in the leading case of *Tesco Supermarket Ltd.* v *Natrass*[25], *"*a person is a controlling officer if the person is in actual control of the company or part of them and who is not responsible to

[18] At this point the court placed reliance upon the upon § 634.04 of the Minnesota Criminal Procedure which reads as follows: A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
[19]Leonard Jaffee 'Of Probativity and Probability' (1985) 46 University of Pittsburgh Law Review 924, 934.
[20]Supra, FN 2,Page 15
[21]The fact in issue
[22]J. F. B., *The American Law Register (1852-1891)* , Vol. 16, No. 12, New Series Volume 7 (Oct. - Nov., 1868), pp. 705-713
[23]Moot Proposition, Page 7
[24]§320 of the Zuru Criminal Code, 1975
[25][1972] AC 153

another person in a company for the manner in which he discharges his duties in the sense of being under his orders." Thus the available chain of circumstances fails to prove the proposed hypothesis and at the same time fails to exclude any other possible hypothesis. As observed by the Supreme Court of India in *Bakhshish Singh* v *State of Punjab*[26], "in a case resting on circumstantial evidence, the circumstances put forward must be satisfactorily proved and those circumstances should be consistent *only* with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."

[I.2.ii]THE ALLEGATIONS IN THE CONCLUSION REPORT FAIL TO IMPLICATE MR. MARKAS: In the instant matter a Conclusion Report was filed by the Zuru Investigation Department as mandated by §79 of the Zuru Investigation Department and Criminal Evidence Act, 1975.[27] The Conclusion Report alleged that Zipper was merely a front of the four Permit Holder Companies and was incorporated to circumvent the permit quota clause. It further alleged that the paid up share capital of Zipper was provided by one of the Permit holder companies in the form of an unsecured loan. It is submitted that these allegations, even if deemed to be true, are irrelevant to suggest the accused's guilt. *Wigmore*[28] *says, anything which is neither directly or indirectly relevant & has no connection with the principal transaction is ought to be put aside."* The impugned allegations have no connection with the charges on the accused. Even if considered, they are too farfetched and conjectural in proving the accused's guilt. It is respectfully submitted that too remote fact furnishing fanciful analogy[29] or conjectural inference[30]should be rejected.

[I.2.iii]THE CIRCUMSTANTIAL CHAIN IS INCOMPLETE AND LEAVES A REASONABLE DOUBT: There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, the evidence produced by the prosecution should be of such nature that it makes the conviction of the accused sustainable.[31] In the present case, the connection of the accused with Mr. Abraham, the formation of

[26] AIR 1971 SC 2016:1971 CriLJ 1452:(1971) 3 SCC 182
[27] Moot Proposition, Pg 5
[28] John Henry Wigmore, Evidence in Trials At Common Law 193 (Vol. VII, Wolters Kluver (India) Pvt. Ltd. 2008).
[29] Supra, FN 26
[30] *Jetharam* v. *State of Rajasthan*, AIR 1979 SC 22.
[31] *State of Uttar Pradesh* v *Satish*, (2005) 3 SCC 114:AIR 2005 SC 1000*; Krishnan* v *State represented by Inspector of Police*,(2008) 15S SCC 430; *Ramesh Bhai and Anr*. V *State of Rajasthan*,(2009) 12 SCC 603;Air 2009SC (Supp) 1482;*Subramaniam* v *State of Tamil Nadu and anr*., (2009) 14 SCC 415:AIR 2009 SC(supp) 1493 and *Babu* v *State of Kerala*, JT 2010 (8) SC 560:2007 AIR SCW 5105

Zipper, the fact that the Benja block was extremely crucial and the previous control of the Group over the Iron Ore mining business, at best, prove the motive. It does not exclude any other possible hypothesis nor is the chain concrete enough to prove the guilt of the accused beyond reasonable doubt. On the contrary, the facts so established are very well explainable on any other hypothesis except that the accused is guilty.

It is therefore most respectfully submitted that the Evidence presented is insufficient to sustain a conviction.

[I.3]THE PROSECUTION IS UNABLE TO PROVE 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 admissibility of evidence.[32]The abovementioned arguments do prove that there lies a reasonable doubt in all the charges framed against the accused. Thus, the conviction should be set aside.

[II.]THE CONVICTION IS FALLACIOUS AS MENS REA AND ACTUS REUS IS ABSENT

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.[33] In other words in every case the two elements of crime; *actus reus* and *mens rea* have to be proved.

[II.1]ABSENCE OF REQUISITE MENS REA

A criminal act generally requires some element of wrongful intent or other fault.[34] This is known as *mens rea* or guilty mind.[35] In the instant matter, the accused has been convicted of the offences of Cheating and Criminal Conspiracy. It is submitted that the *mens rea* for either of the crimes is absent in the instant matter.

[32]Halsbury"s Laws of England 1374 (5th ed., Vol. 11.3, LexisNexis Butterworths 2010).
[33]David Ormerod, Smith and Hogan's Criminal Law,(13th Edition,Oxford University Press,2011)
[34]Glanville Williams, Text Book Of Criminal Law,(2nd Edition,Universal Law Publishing,1999)
[35]The Digest 17 (1st ed., Vol 14 (2), London Butterworths & Co. Ltd. 1993).

[II.1.i]THERE HAS BEEN NO 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 deceive is to induce a man to believe that a thing is true which is false.'[36] The offence of cheating can only be fortified if Zipper is proved to be a companion entity of the four permit holder companies of the Group. It may be pertinent to note that no definition of companion entity has been provided in the Iron Ore Mining Policy, 2003. At the Trial stage, the court relied upon the definition of companion entity provided in the Financial Norms 26. It is most respectfully submitted that the definition provided in the Financial Norms 26 cannot be relied upon. The objective of the Norms is disclosure of related party relationships and transactions between a reporting enterprise and its related parties. The purpose of these norms is purely commercial in nature and in turn cannot be used for criminal purposes.

Arguendo, even if the said definition is relied upon it cannot be proved that Zipper is a companion entity of the Group. Companion Entity has been defined as 'an enterprise in which an investing reporting party has significant influence and which is neither a subsidiary nor a joint venture of that party.' This definition makes it mandatory for the reporting party to make an investment, in the instant matter there has been no such investment by the Group in Zipper. The allegations in the Conclusion report[37], if considered true, that Zinga Group provided loans to Zipper are covered § 4(c) (i) of the Financial Norms 26.

Hence, it is most respectfully submitted that Zinga Group is a mere provider of finance and is not a companion entity. Therefore, there is no fraudulent representation and hence no offence of cheating.

[I1.1.ii]INTENTION TO DEFRAUD IS ABSENT: The most basic ingredient of the offence of cheating under § 230 of the Zuru Criminal Code is intent to defraud. Intention forms the gist of the offence. Intention literally means *a conscious movement with knowledge of the circumstances.*[38] In the present matter, the ZID has alleged that the permit was obtained by Zipper on the basis of a fraudulent representation. To entrap the accused it is necessary to prove that he had the intention or knowledge that the act in question was fraudulent in nature. The Prosecution has presented no such evidence so as to ascertain that there existed such an intention.

[36] *Per* Buckley J, in *Re London* and *Globe Finance Corporation Limited* [1903] 1 Ch 728, at 732
[37] Moot Proposition, Pg. 5, Refer Point c and Point d
[38] Supra, FN 34

[II.1.iii]NO MENS REA AS TO CIRCUMSTANCES: The evidentiary burden in the instant matter, lies with the Prosecution. A guilty state of mind of the accused has to be established. The Prosecution at best can prove the blameworthy mind of the Group. The accused, in the instant matter, had no intention to commit the offences. As Glanville Williams[39] observed that the proof of a man's intention can be probed by determining '*whether there is a any reasonable interpretation of his actions other than the hypothesis that he intended the consequences'*.

It is contended that there exists no *mens rea* in the present case.

[II.2]THERE IS NO ACTUS REUS ON THE PART OF THE ACCUSED

The physical element of a crime or behaviour connected to the crime is called the actus reus.[40] A person must participate in all the acts necessary to constitute a particular crime in order to be guilty thereof.[41] In the present case, there has been no establishment that the accused was responsible for the alleged fraudulent representation or that he conspired to do the same.

[II.2.i]THE ALLEGED FRAUDULENT REPRESENTATION CANNOT BE ATTRIBUTED TO MR. MARKAS: 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.[42] For the accused to be convicted it has to be substantiated that the fraudulent representation was caused by his own actions. In the instant matter, the evidence offered fails to ascertain the same. The permit quota clause was signed by Mr. Corum on the instructions of Mr. Joseph whose credibility as a witness is in question. Further, the accused is not an officer of the company within § 320 of the Zuru Criminal Code, 1965. Thus, it is submitted that the permit quota clause was not signed under the instructions of the accused. Furthermore, without prejudice to the above submissions, albeit the Prosecution proves that Zipper is a companion entity and there exists mens rea; it is contended *that though mens rea may exist without an actus reus. If there is no actus reus, there is no mens rea.*[43]

[II.2.ii]THERE IS NO AGREEMENT TO DO AN ILLEGAL ACT: As Ashworth[44] maintains the essence of conspiracy is an agreement between two or more persons to commit a criminal

[39] Supra, FN 34
[40] Supra, FN 33
[41] *Scott* v. *Com.*, Ky. 353, 197 S.W. 2d 774 (1946).
[42] Supra, FN 33
[43] Supra, FN 33
[44] Andrew Ashworth, Principles of Criminal Law,(5th Edition,Oxford University Press ,2006)

offence. Thus the actus reus of conspiracy is an agreement. Although a mere agreement to do an illegal act or a legal act by illegal means is of itself a conspiracy, the conspiracy is not concluded directly, the agreement is made in sense that the offence is once and for all constituted. A criminal conspiracy may persist as long as the persons constituting it continue to act in accord in furtherance of the objects.[45] In the present case, there is no proof of an agreement. The meetings between Mr. Markas and Mr. Joseph cannot be said to be the point of agreement between the two parties. The offence must involve spoken or written words or other overt acts. Further, it is not upon the Appellant to prove that there is no actus reus. If there is a reasonable possibility that shows that the accused has not committed a crime, there can be no conviction. There should be acquittal even if the court is not satisfied with the hypothesis of the accused. It should be proved beyond a reasonable doubt that it is not true.[46] Thus, there has been no such agreement to do an illegal act in which the accused was a party. Hence, there is no offence of criminal conspiracy committed.

[II.3]NO COINCIDENCE BETWEEN ACTUS REUS AND MENS REA:

The only concept known to law is crime; and the crime exists only when actus reus and mens rea coincide.[47] It is established *that if there were two acts and the first act, though accompanied by the mens rea did not lead to the commission of the crime, whereas the second act, not accompanied by the mens rea caused the injury, the accused must be acquitted.*[48] In the present case there is no coincidence between the two and hence no crime has been committed.

In light of the contentions made by the Appellants it is most humbly contended that the elements of crime are absent.

[III.]MR. MARKAS IS NOT LIABLE FOR THE ACTIONS OF THE GROUP

[III.1.]MR. MARKAS IS NOT LIABLE IN THE CAPACITY AS A PROMOTER

It is a known fact that Mr. Markas is the promoter of Zinga Group.[49] It is also a known fact that Mr. Markas holds no other position in the 4 companies of Zinga Group which are into the

[45]*Abdul Rehman* (1935) 62 Cal 749
[46]*Woolmington* v *DPP* [1935] AC 462
[47]Supra, FN 31
[48]*R* v. *Khandu*, (1890) ILR 15 Bom 195; *R* v. *Shorty*, [1950] SR 280.
[49]Moot Proposition, Page 3, Paragraph 1

business of iron ore mining and neither is he on the board of these companies.[50] Therefore it is necessary to define his role in the formation and working of the company as a promoter. A promoter is defined to be *"one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose."*[51]A promoter is not an agent for the company which he is forming because a company cannot have an agent before it comes into existence.[52]In the instant matter it is well established from the facts that Mr. Markas has explicitly acted only in the capacity of a promoter and fulfilled his obligations in that manner. Thus it is sufficient to state that the promoter's role ends once the company is incorporated and this is what is portrayed by Mr. Markas actions that by not holding an office in any of the 4 companies ceased to be in any capacity to act for the companies. A promoter stands in a fiduciary position towards the company[53] and that being the position of a promoter in law it would be patently wrong to convict a promoter for the offences of the companies because his liability extends only to his role and the capacity in his work. The fiduciary position therefore seems to be that disclosure must be made to the company either by making it to an entirely independent board or to the existing and potential members as a whole. If the first method is employed the promoter will be under no further liability to the company.[54] Since the first method is applicable in the instant matter there is no further liability of Mr. Markas.

[III.2.]DIRECTORS ARE LIABLE FOR THE ACTS OF THE COMPANY

A company is an artificial person and it can work only through its directors.[55]A director is an agent of the company for the conduct of business of the company. The director's major role is to approve the commercial roles and strategies of the company with a view to make profit.[56] Mr. Markas was neither a director nor did he hold a position of power in any of the 4 companies of which he was the promoter.[57]The Directors carry out the company's management functions and they speak as a company.[58]In UK, the Cadbury Report on Corporate Governance defines the independence as "Apart from their Directors' fees and

[50]Supra FN 49
[51]*Twycross* v *Grant* (1877) 2 C.P.D 469, CA, at 541 per *Cockburn C.J*
[52]*Kelner* v *Baxter* (1866) L.R. 2 C.P. 174, para.6-001 below.
[53] Stephen Girvin, Sandra Frisby and Alastair Hudson, Charlesworth's Company Law 104(18th ed, Thomson Reuters, 2010)
[54]Supra FN 53
[55] *Ferguson* v *Wilson* [1866] LR 2 Ch App 77
[56] Barbara Mescher and Bryan Howieson, Corporate Governance Law Review 98(vol. 1:1, 2005)
[57] Moot Proposition, Page 3, Paragraph 1
[58] *Tesco supermarkets Ltd.* v *Nattrass* [1972] AC 153; *Hamilton* v *Whitehead* [1988] 166 CLR 121

shareholdings, they should be independent of management and free from any business or other relationship which could materially interfere with the exercise of their independent judgment.[59] The Directors are to exercise their powers *bona fide* in the interest of the company. The powers of directors cannot be overridden even by the company in a general meeting and they cannot interfere with the decision of the directors.[60] The Supreme Court of India in *Smt. Laxmi Devi Newar* v *East India Company*[61] laid down three tests to examine whether the Board of Directors have exercised their discretionary powers properly or not they are: (i) whether the discretionary powers have been exercised in the interest of the company; (ii) whether they exercised on the wrong principle; (iii) whether there were exercised mala fide or for a oblique motive or for a collateral motive. Herein the company has been charged with the crimes of criminal conspiracy and cheating. However when a company is charged with any such crimes the charges are to be attributed to the directors of the company and not the promoters, it is not a matter of law but a matter of fact. Those who are involved in day to day affairs of the company exercising such functions which only they could exercise by the virtue of being in a position of power can be held responsible for the actions of the company as they are the ones controlling the reins. As in the matter which the Honorable Court is dealing with, the ZID Conclusion Report's finding[62] which says unsecured loan provided by Mr. Markas' companies to Zipper group substantiates the point that in all possibilities the directors of the companies should be charged with the crimes of criminal conspiracy and cheating because the power to give loans is a discretionary power of the directors of a company. The companies being charged herein and as it has already been brought to attention of this Honorable Court that the directors being the heart of a company's working and also this heart having the power to exercise such functions as providing loans to other companies, there remains no fact and no law calling for Mr. Markas as the accused. Furthermore section 291 of the Zuru Companies Act, 1956 confirms such powers with the directors of the company.

The findings of the report are not what is being challenged but the conclusion of these findings are being challenged because the existing findings are erroneous in law.

It is humbly submitted that in the instant matter Mr. Markas is not liable for the acts of the Group neither does he stand in a position of power. It is contended that the investigation is

[59] www.independentdirector.co.uk
[60] K.D.Raju, Company Directors 106(Eastern Law House, 2013)
[61] (2007)137 Comp Cas 617 (CLB)
[62] Moot Proposition, Page 5.

coloured since conclusion report nowhere implicate the directors who are considered to be face of the company and it is sufficient to state that there is more than what meets the eye.

2. THE TRIAL COURT ORDER DISMISSING THE APPLICATION FOR ARRAIGNING MR. JOSEPH AS AN ACCUSED IS 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. In the instant matter, it is humbly submitted that Mr. Joseph is an interested party, to the extent that he is an accomplice to the crimes committed. Hence, in the instant matter, Mr. Joseph should be summoned as an accused.

[I]MR. JOSEPH IS AN ACCOMPLICE TO THE CRIMES OF CHEATING AND CRIMINAL CONSPIRACY

[I.1]THE DEFINITION OF THE TERM 'ACCOMPLICE'

It is humbly submitted 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.*'[63] 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 satisfies all the three aforementioned conditions. The other definitions given in the Black's Law dictionary are as follows, *'One who is in some way concerned or associated in commission of a crime'*[64]. And finally, '*One who is equally concerned in commission of a crime'*[65] . It is put before this court that Mr. Joseph satisfies all these definitions.

[I.2]THE TESTIMONY OF MR. CORUM

[63]Henry Campbell Black, Black's Law dictionary 17(6th ed); *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.
[64]Henry Campbell Black, Black's Law dictionary 17(6th ed); *McLendon* v.*U.S.*,C.C.A.Mo.,19 F.2d p465,p466.
[65]Henry Campbell Black, Black's Law dictionary 17(6th ed); *Fryman* v. *Commonwealth*, 289 Ky. 540, 159 S.W.2d p426, p429.

In his testimony, Mr. Corum clearly states that he signed the Permit Quota Certificate only and only under the instructions of Mr. Joseph. He further testified that he did not examine whether Zipper was compliant with the Permit Quota Clause as Mr. Joseph assured him that Zipper was compliant with the terms and conditions mentioned in the permit Quota Clause.[66] Mr. Corum re-iterated the same testimony again during his deposition in the court.[67]

It is humbly submitted that Mr. Corum's testimony was neither contradicted nor challenged at any point in time throughout the trial and hence it can be relied upon to ascertain related facts. Through this testimony, primarily, it has been proved that *prima facie*, it was Mr. Joseph who ensured the signing of the Permit Quota Certificate. Thus as per the second and third afore mentioned definitions, Mr. Joseph is directly associated with the commission of the crime because *prima facie*, it was none other than Mr. Joseph who ensured that Mr. Corum signed the Permit Quota Certificate. It is humbly submitted that this was the first step in the actual commission of the crime. Had Mr. Joseph not have instructed Mr. Corum to sign the Certificate, no crime would have taken place at all. It can also be ascertained that Mr. Joseph had the requisite *knowledge* about the Certificate, its incompetence and illegality to be precise. As a result, he made sure that Mr. Corum signed the certificate without any cross-checking.

[I.3]THE TESTIMONY OF MR. JOSEPH

Wighmore maintains that '*The phrase "testimonial" evidence must not be understood as applicable exclusively to assertions made on the witness stand. Any assertion, taken as the basis of an inference to the existence of the matter asserted, is testimony, whether made in court or not.*'[68] Thus it would be safe to say that the statement given by Mr. Joseph to the ZID should be considered as a part of his testimony. That being said, if this Hon'ble court were to consider the plethora of self-evident contradictions in the various stages of Mr. Joseph's testimony. The most striking piece is the sudden recollection of the fact that he himself instructed Mr. Corum to sign the Permit Quota Clause[69].

It is humbly submitted to this Hon'ble court that the cause for this revelation was not a bona fide recollection but the fear stemming from the realization of facing grave serious criminal charges. It should be noted that before Mr. Corum deposed in court, Mr. Joseph did not even remember of asking Mr. Corum to sign the Permit Quota Certificate and as soon as Mr. Corum deposed in court, Mr. Joseph conveniently recollected not just instructing Mr. Corum

[66] Moot proposition Page 6, Paragraph 2
[67] Moot proposition Page 6, Paragraph 8
[68] Wighmore, John H., The Principles Of Judicial Proof.
[69] Moot Proposition, Page 6 – 7.

but also the fact that he himself was acting under instructions. Furthermore, it is also submitted that the aforementioned abnormality is clear cut proof of the fact that Mr. Joseph was aiding 'Zipper' gain a permit by unlawful means and practices by his *own free will*. He volunteered to be a part of this scam. However, it was only until he felt the clutches of law categorically closing down on him .i.e. when he heard the deposition of Mr. Corum, that he decided to manufacture new evidence.

Thus Mr. Joseph satisfies all the conditions mentioned in all of the definitions of the word 'accomplice' and hence it is humbly put forward to this court that Mr. Joseph is indeed an accomplice to the crimes of cheating and criminal conspiracy.

[II] MR. JOSEPH'S TESTIMONY SHOULD BE SUPPRESSED AND STRUCK OFF THE RECORD.

[II.1.] TESTIMONY OF AN ACCOMPLICE WHICH IS UNCORROBORATED MUST NOT BE CONSIDERED.

It has already been proved before this Hon'ble court that Mr. Joseph was indeed an accomplice to the crimes of cheating and criminal conspiracy. Wighmore has mentioned in his book Principles of judicial proof, *'Schiel says "One man overlooks half because he is inattentive or is looking at the wrong place; another substitutes his own inferences for objects, while another tends to observe the quality of objects, and neglects their quantity; and still another divides what is to be united, and unites what is to be separated".*[70] Thus it is humbly submitted to this Hon'ble court that there are many fallacies possible in the testimony of any witness at any given point of time of their examination. Add to that the personal bias of an accomplice who fears self- indictment and justice surely would be served.

Keeping this is in view, it was upheld by common law courts in various cases that, "*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."*[71]

As it has already been proved in the previous issue that Mr. Joseph's testimony has no corroborative value or probative force of any manner whatsoever, Mr. Joseph's testimony

[70] Supra, FN 68

[71] *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).

should be struck down and suppressed. Moreover, it is also humbly submitted to this Hon'ble court that any and all judgments made relying on the basis of Mr. Joseph's testimony should be over-ruled with instant effect in the lights of justice, equality and liberty.

[II.2.]UPHOLDING SUCH TESTIMONY IS A VIOLATION OF MR. MARKAS' RIGHT TO A FAIR TRIAL.

The Universal Declaration of Human Rights provides for "full equality to a fair and public hearing by an independent and impartial tribunal."[72] The European Convention on Human Rights[73] and International Covenant for Protection of Civil and Political Rights[74] also provides for the same. Furthermore, Sub section (3) of Section 35, of the Bill of Rights of the constitution of Zuru provides that, "Every accused person has a right to a fair trial."[75]

It is humbly submitted to this Hon'ble court that if the testimony of Mr. Joseph is allowed to stand, then it would not only be an infringement on the very principles of common law, but also an infringement on Mr. Markas' rights as a citizen of Zuru[76] and hence abridge his right to have a fair trial.

[72] Article 10
[73] Article 15
[74] Article 6
[75] Annexure A, Moot proposition, Page 16.
[76] Annexure A, Section 35(3) read with § 37 of the Bill of Rights, Moot proposition, Page 16 - 17.

PRAYER FOR RELIEF

WHEREFORE, in light of the issues raised, arguments advanced and authorities cited it is most humbly and respectfully requested that this Hon'ble Court to adjudge and declare that :

1. Mr. Markas is not guilty of the crimes of cheating and criminal conspiracy.
2. The Trial court's conviction order of Mr. Markas should be reversed.
3. Mr. Joseph should be summoned as an accused.

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

Sd/-

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(Counsel for the "Appellant")