The International Journal of Multi-Disciplinary Research
ISSN: 3471-7102

SPECIALISED ANTI-CORRUPTION COURTS: WHAT LESSONS FOR ZAMBIA

(Conference ID: CFP/326/2017)

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ABSTRACT

Zambia employs corruption investigations, prosecutions, prevention and education as measures to fight corruption. However, corruption has still remained very high, decaying state institutions and undermining political, economic and social development. Some jurisdictions have established specialized anti-corruption courts (AC Courts) as a measure to enhance the fight against corruption. This study explores lessons Zambia can learn from such jurisdictions paying attention to successes and challenges. A library and desktop collection and analysis of secondary data of the said courts was undertaken. This study finds that the courts expeditiously and efficiently resolve corruption cases. Further, it finds that operations of such courts are frustrated by concerns like political interference, administrative and financial incapacity. It was explored that the Constitution of Zambia allows for the establishment of specialised courts. The study adds specialized AC Courts to the growing body of future measures that Zambia can implement in the fight against corruption.

Key words: *Corruption, Specialised Anti-Corruption Courts, Jurisdiction, Constitution*

1.0 INTRODUCTION AND BACKGROUND

Corruption is a multifaceted phenomenon that has greatly troubled the nations of this world. It is commonly defined as "the abuse of public or corporate office for private gain,"[1] or the abuse of power for private benefit."[2] Its consequences have been and continue to be catastrophic especially in the developing countries. Corruption decays state institutions. State institutions operate with the influence and interference of the political decision makers. They serve only the interests of the people with power, status and money. Corruption impedes economic growth as national resources that are ordinarily supposed to be enjoyed by all the citizens are channeled to private bank accounts. Foreign direct investment is discouraged as investors shun countries marred with corruption. Political development is hampered as the poor cannot participate in the politics of the society they live in. The poor are not able to share the same social and political platform with the rich. Corruption precipitates inequality. The people with the power, status and money acquire quality higher education opportunities and well-paying jobs. They acquire loans to fund entrepreneurial activities. Corruption undermines governments. The national treasury is looted. Resources meant for national projects such as schools, clinics, hospitals and roads are misappropriated and misapplied. The poor are deprived of the very basic social amenities. Boris, explains that, "corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law. It leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and others to human security to flourish."[3]

The consequences of corruption have not spared Zambia as a country. Mbao, writes that, "in a country where more than 70% of the population lives in extreme poverty, below the World Bank benchmark of USD 1 per day, the political elites squandered scarce national resources with abandon, thus fundamentally distorting the trajectory of economic development by diverting funding aimed at the economic and social uplifting of the people."[4]

In its quest to fight and combat the scourge of corruption, Zambia in 1980 enacted the Corrupt Practices Act No 14 of 1980 that established the Anti-Corruption Commission (ACC) as a specialised institution with the mandate to investigate and prosecute corruption, prevent incidents of corruption via corruption exercises and conduct public education to sensitise the people of

[1] Vinay Bhargava, "The Cancer of Corruption" World Bank Global Seminar Series, October 2005, p1
[2]Vito Tanzi, "Corruption Around the World: Causes, Consequences, Scope and Cures" Working Paper, International Monetary Fund, Fiscal Affairs Department, 1998
[3] Boris Begovic, "Corruption: Concepts, Types, Causes, and Consequences" March 21 2005, Published by Center for International Private Enterprise
[4] MLM Mbao, "Prevention and Combating of Corruption in Zambia" The Comparative and International Law Journal of Southern Africa, Vol. 44, No. 2 (JULY 2011), pp. 255-274 Published by: Institute of Foreign and Comparative Law

Zambia on the ills of corruption. In 1996, the Corrupt Practices Act of 1980 was repealed and replaced with the Anti-Corruption Commission Act No 46 of 1996. The 1996 Act retained the measures employed to fight corruption in the 1980 Act. In 2010, the 1996 Act was repealed and replaced with Anti-Corruption Act No. 38 of 2010 which was also repealed and replaced in 2012 by the Anti-Corruption Act No. 3 of 2012. Like the 1980 and 1996 Acts, the 2010 and 2012 Acts also retained corruption investigation and prosecutions, corruption prevention and corruption education as measures employed to enhance the fight against corruption. Therefore, from 1980 to date, the ACC has used and continues to use corruption investigation and prosecutions, corruption education and corruption prevention as measures to enhance the fight against corruption.

Notwithstanding the existence of the ACC, and its respective establishing legislation, the scourge still remains rampant in the country. For instance, in 2011 the ACC received total number of 1404 reports, 356 of which were corruption related reports. In 2012 a total of 2388 reports were received and out of which 765 were corruption related reports. A total of 1987 reports were received in 2013 of which 724 were corruption related reports. In 2014, 2080 reports were received of which 703 were corruption related reports and in 2015, 1719 reports were received of which 516 were corruption related reports.[5] The high corruption related reports are a clear indication of corruption being rampant in Zambia. The reports are a source of worry for a country like Zambia that is looking to develop.

Whereas the country has used and continues to use the above-mentioned measures in its quest to enhance the fight against corruption, court specialisation remains an unexploited measure. Zambia is yet to establish specialised AC Courts as a measure to enhance the fight against corruption. In some jurisdictions, the said courts have been established. This study explores the lessons that Zambia can learn from jurisdiction that have established specialised AC Courts paying particular interest to the successes and the challenges of the courts. It adds specialised AC Courts to the growing body of measures that Zambia can implement. The study contributes to the future measures that Zambia can implement in the fight against corruption.

1.1 METHODOLOGY

This study employs qualitative methods of research.

A library and desktop research was used in reviewing secondary data from literature that is relevant to the study. The secondary data that was collected and reviewed included journal articles, working papers, conference and seminar papers, internet materials, books and Acts of Parliament of Zambia and the Constitution of Zambia. The libraries that were consulted include, the University of Zambia library, AAC library and Parliament library.

[5] Anti-Corruption Commission Annual Report, 2015

A content analysis of secondary data on Uganda, Burundi, the Philippines and Indonesia as some of the jurisdictions with established specialised AC Courts was undertaken in order to explore the successes and challenges of the courts. The Constitution of Zambia was analysed to determine the legal and constitutional basis for establishing the specialised AC Courts and the possible processes and procedures for the courts.

1.2 RESULTS

The study found that specialised AC Courts determine corruption cases speedily and efficiently and that the courts acquire expertise and deliver good quality judgments. The courts are challenged by concerns like political influence, resource and capacity limitations, backlogs and delays. There must exist systems and mechanisms so as to prevent the said concerns from frustrating the operations of the courts. The study concluded that the Constitution of Zambia provides for the legal and constitutional basis for establishing specialised Courts.

1.3 DISCUSSIONS

1.3.1 JURISDICTIONS THAT HAVE SPECIALISED ANTI-CORRUPTION COURTS

1.3.2 The Anti-Corruption Division of Uganda (ACD)

Uganda like most African countries suffers the ramifications of corruption. There is extreme poverty, high income inequality and significant disparity among the people of Uganda. State organs and institutions operate without transparency, accountability and the rule of law. Instead access to good quality public life is undermined by widespread corruption. Conducting business in Uganda has been made very problematic by corruption. Corruption precipitates a culture of impunity particularly with regards to the high-ranking officials.

Uganda suffers political corruption, grand corruption, bureaucratic or petty corruption among several other types of corruption. "The government's reliance on corruption to fund its expanding patronage network makes it difficult for it to punish members of the President's inner circle."[6] "There is also evidence of the existence of organised officials strategically placed within different government institutions who conspire to embezzle public funds while remaining unpunished."[7] "Illegal payments are so widespread that they often happen in full view, with public officers openly

[6] Maria Martini, "Uganda: Overview of Corruption and Anti-Corruption" U4 Brief April 2013, U4/CMI Anti-Corruption Resource Centre http://www.U4.no Accessed on 20-Dec-16
[7] Ibid

asking for bribes in exchange for services and citizens and companies openly paying without complaining."[8]

Uganda has not sat back as corruption decays its institutions and causes suffering and misery to its people. The government of Uganda has taken measures to enhance the fight against corruption and possibly end or reduce the suffering and misery of its people. Among other things, the government enacted the Anti-Corruption Act of 2009 and established the specialised AC Court.

"The principal judge of the Uganda High Court created the Anti-Corruption Division (ACD) as an administrative section of the High Court in 2008, pursuant to the Constitution (Amendment) Act 2005 and the recommendation of an interagency forum. The chief justice formally established the permanent ACD in 2009 by invoking article 133(1) (b) of the Constitution…"[9]

The hierarchy of Courts in Uganda has the Subordinate Court below the High Court after which comes the Court of Appeals. The Court of Appeals also sits as the Constitutional Court and lastly the Supreme Court. The specialised AC Court was established as a division in the High Court. The Court has unlimited original jurisdiction and exclusive appellant jurisdiction over all offences under the Anti-Corruption Act of 2009 and matters related to corruption under other statutes.

1.3.3 Successes of the ACD

Whereas the main purpose for creating the specialised AC Court was to speedily dispose of corruption and corruption related cases, the courts have yielded other benefits such as expertise and good quality judgments. Sofie, explains that "the main rationale for its establishment was the speedier resolution of corruption cases, and by that measure the ACD has been successful."[10] Sofie, also explains that "asked about the benefits of a specialised anti-corruption unit, the director of prosecutions explained, 'firstly, because of the number of cases, but secondly, of course the good thing is the expertise eventually'. Because if you are handling two corruption cases a year, you don't need a specialist there waiting for two cases, but when you have 100 cases of corruption a year, you definitively need a specialised team. While efficiency was the main motive for the establishment of the ACD, special expertise also promotes the speedy resolution of cases, and with specialisation comes more expertise over time."[11]

The ACD in Uganda has worked closely with stake holders such as specialised agencies, banks, investigators and prosecutors and other court users with a view of establishing common ground with regards the best possible ways of attending to corruption and corruption related matters of course subject to the law and rules of evidence. This close interaction has led to, for instance,

[8] Ibid
[9] Sofie Arjon Schutte, "Specialised Anit-Corruption Courts: Uganda" U4 Brief July 2016 No 5, U4/CMI Anti-Corruption Resource Centre http://www.U4.no Accessed on 20-Dec-16
[10] Ibid
[11] Ibid

investigators and prosecutors appreciating what is expected of them by the judges during the investigations and trials. Equally the judges appreciate the challenges that the investigators and prosecutors experience. The interaction is mostly via training and workshops. The result has been mutual understanding, good quality prosecutions and increased rate of convictions.

1.3.4 Challenges of the ACD

"The ACD's efforts to deter and punish corruption have been stymied by many of the same challenges as Uganda's other anti-corruption institutions, especially with regard to resource and capacity limitations and political interference. The court has been understaffed since its inception. The court has also been vulnerable to attack from and interference by political leaders including members of the judiciary."[12]

The Court of Appeals does not have a specialised division for corruption cases like the High Court. Thus, the speedier resolution of corruption cases achieved by the ACD is frustrated by the delays occasioned at the Court of Appeals. The delays have led to backlog thereby defeating the main rationale for creating the ACD. Proponents of the ACD advocate for specialisation to be extended to the superior courts.

"While the ACD is still a relatively young institution, its experiences to date suggest that while specialisation may provide certain benefits to courts and other anti-corruption agencies in the form of more efficient proceedings, it is not a panacea for improving the punishment of corruption offences. Moreover, anti-corruption courts that do not enjoy sufficient degrees of institutional, administrative and financial authority may find themselves caught by the same bureaucratic and political hurdles as other entities focused on preventing or combating corruption."[13]

It is therefore, not enough that specialised anti-corruption courts are established. Their establishment must be accompanied by institutional, administrative and financial mechanisms that shield them from political interference and allow the courts to operate independently if they are to meaningfully, enhance the fight against corruption.

1.3.5 The Anti-Corruption Court and Brigade in Burundi

Tired of the many years of civil wars and strife, ethnic violence, military rule, and corruption, the government of Burundi, following the 2005 elections committed to rule with transparency, accountability, democracy, and separation of powers and the rule of law. The government became responsive to ills suffered by the country as a result of the absence of, transparency, accountability, democracy, and separation of powers and the rule of law among others. One of the actions taken

[12] Matthew C. Stephenson, "Specialised Anti-Corruption Courts: A Comparative Mapping" U4 Brief December 2016, No.7, U4/CMI Anti-Corruption Resource Centre http://www.U4.no Accessed on 20-Dec-16
[13] Lindsey Carson, "Institutional Specialisation in the Battle against Corruption: Ugandan Anti-Corruption Court" The Public Sphere Journal, 2015 LSE Africa Summit Special Issue

was the enactment of the anti-corruption legislation, the creation of the anti-corruption court and the anti-corruption brigade with the aim of preventing and repressing corruption.

Aime, writes that, "in 2006, Burundi came up with a special law on the prevention and repression of corruption and related offences. It proposed to bring great remedy for the evils for which Burundi suffered, then, and still does today; corruption, establishing a new special mechanism, to prevent and punish corruption and corruption related offences. This special mechanism is composed of a trio of organs namely the anti-corruption court, the prosecutor general of the said court and the special Anti-Corruption Brigade."[14]

To aid the court and brigade operate smoothly, legislation provides for the management autonomy of the court and the prosecutor general. The court and the brigade have been allowed to have their own budget and a general secretariat.

1.3.6 Successes of the Anti-Corruption Court and Brigade

Aime, explains that, "in its first five years, the newly formed brigade and court have scored some impressive results. In the period from June 2007 until October 2011, the anti-corruption brigade investigated 605 cases of corruption and recovered more than four million US dollars in missing funds. In roughly the same time frame, the anti-corruption court ruled in 556 cases. The majority of these cases were brought against low and middle level civil servants charged with corruption, misappropriation, diversion and fraudulent management."[15]

1.3.7 Challenges of the Anti-Corruption Court and Brigade

Notwithstanding the successes scored by the AC Court and the brigade, the operations of these two institutions have not been without challenges. The court has been a subject of continuous political influence and interference. The court has failed to successfully prosecute and convict senior government officials even though guilty of corrupt activities because of their connection to the political decision makers. This has made its critics call it a court for the prosecution of small fish as the big fish is left to swim freely in corrupt activities.

Although, the AC Court and the brigade are allowed to have their own budget, the budget is extremely controlled by the Minister of Justice who easily exerts his influence and interference. The Minister directs what cases are to be investigated and subsequently tried.

The AC Court and the brigade is prone to executive influence and pressure such that they have been essentially reduced into institutions that fight petty or bureaucratic corruption only. Tony,

[14] Aime Parfait Niyonkuru, "Anti-Corruption Court of Burundi: When the Question of Jurisdiction Arises in Reverse Direction" African Law Study Library, Vol 16, p 35, Published by: Rule of Law Program for Sub-Saharan Africa

[15] Ibid

writes that, "to ensure impartial corruption investigation of cases, anti-corruption bodies must have complete independence from undue influence from other branches of the government."[16]

1.3.8 The Sandiganbayan of the Philippines

In the Philippines, the specialised AC Courts is called the Sandiganbayan. The Sandiganbayan is the oldest specialised AC Courts in the world. In 1973, the Constitution of the Philippines called for the creation of the Sandiganbayan. The AC Courts have existed to date having undergone several amendments. In judicial hierarchy, the Sandiganbayan stands at the same level as the Court of Appeals subordinate only to the Supreme Court. The Sandiganbayan has original jurisdiction to hear matters involving offences under the anti-corruption laws against both public officers and private persons, condition precedent that the public officers are sufficiently of senior ranking in the civil service and the amount of money allegedly involved is sufficiently large. For the corruption cases that do not satisfy the said condition precedent, original jurisdiction lies with the country's regional trial courts with the Sandiganbayan retaining appellant jurisdiction. Appeals from the Sandibayan lie to the Supreme Court.

Distressed with court delays, backlog and inefficiency, the country established the Sandiganbayan with the main rationale of expeditious disposition of corruption cases. Matthew, writes that the "problem of inefficiency and court delays is not specific to corruption cases but delays in corruption cases are perceived as particularly damaging in part because such delays undermine public confidence that the country's legal system is capable of holding corrupt public officials accountable. The hope was that the Sandiganbayan would put these high level corruption cases on fast track."[17]

1.3.9 Challenges of the Sandiganbayan

"Though established mainly to resolve corruption cases more expeditiously, the Sandiganbayan is plagued by delays and inefficiency. This concern prompted recent legislative reforms and has led to calls for other changes as well, including procedural reforms such as further narrowing its jurisdiction, limiting postponements, improving case management, and introducing "continuous trials" rather than scheduling a series of piecemeal hearings stretched out over a long period of time."[18] The Philippines has since amended the law and the original jurisdiction of the Sandiganbayan has been restricted to cases involving a specific threshold.

1.3.10 The Pengadilan Tindak Pindana Korupsi of Indonesia

[16] Tony Tate, "A Commitment to End Corruption or Criminalise Anti-Corruption Activits: A Case Study of Burundi" Human Rights Practice, Vol 5, No 3 November, 2013, Published by: Oxford University Press

[17] Matthew Stephenson, "Specialised Anti-Corruption Courts: Philippines" U4 Brief July 2016 No 3, U4/CMI Anti-Corruption Resource Centre http://www.U4.no Accessed on 20-Dec-16

[18] Ibid

Indonesia considers corruption an extra-ordinary crime. One that requires specific law and an enforcement mechanism to combat. As early as 2002, Indonesia realised the need for a specialised body with broad powers and independence to optimally, intensively, effectively, professionally and continuously fight corruption. Prior to 2002, the existing law enforcement agencies were neither effective nor efficient in addressing corruption, which had resulted in losses to the state budget, damaged the country's economy, and impeded national development. There was lack of trust in the existing judiciary to handle corruption cases impartially and effectively.[19] In 2002 the Court for Corruption Crimes (Pengadilan Tindak Pidana Korupsi, commonly known as Pengadilan Tipikor, or Tipikor court) was established by law as part of the general court system, and began operating in 2004 with the rationale being to combat corruption optimally, intensively, effectively, professionally and continuously.[20]

1.3.11 Successes of the Tipikor

The law of 2002 made provisions for time limit within which cases were to be concluded. It required that all trials before the Tipikor were to be concluded within three months. Two months was allocated for appeals and three months was allocated for cassation appeals to the Supreme Court. The essence of the time limit was to address concerns of delays and backlogs. Thus, for the period prior to 2010, this worked very well as court never had backlog. It is therefore, correct to state that statutory time limits helped the court hear and resolve corruption cases speedily and efficiently.

1.3.12 Challenges of the Tipikor

With the amendments in the time limits after 2010 from three months to four months for trials and also four months from three months for cassation appeals to the Supreme Court and most importantly the expanded jurisdiction of the Tipikor, the concerns of delays and backlogs have crept in.

Inefficiencies have not spared the Tipikor. The scheduling process of trials where a case whose parties is fully assembled first is heard first has caused unnecessary inefficiencies as other parties have to wait for long hours before they are heard.

Another concern relates to career judges having to hear other cases apart from corruption cases. By law, the judges are released from deciding other cases while handling corruption cases. However in practice, they continue to hear other cases. This has compounded delays and backlogs. Careers judges and ad hoc judges sit to hear the corruption cases at the Tipikor.

[19]Sofie Arjon Schutte, "Specialised Anti-Corruption Courts: Indonesia" U4 Brief July 2016 No 4, U4/cmi Anti-Corruption Resource Centre http://www.U4.no Accessed on 20-Dec-16
[20] Ibid

1.4 LESSONS FOR ZAMBIA

1.4.1 Legal and Constitutional Basis for Establishing Specialised AC Courts

The Ugandan ACD was established as an administrative section of the High Court by the Principle Judge invoking the relevant constitutional provision and Burundi enacted legislation and put in place a special mechanism for the establishment of the specialised AC Courts. Similarly, the 1973 Constitution of the Philippines called for the creation of the Saniganbayan and the legislation of 2002 created the Tipikor of Indonesia.

The Chief Justice of Zambia can invoke Article 133(3)[21] to establish the specialised anti-corruption courts. Article 133(3) empowers the Chief Justice to constitute by statutory instrument specialised courts of the High Court to hear specialised matters.[22] The Constitution and the statutory instrument is sufficient to provide the legal and constitutional basis of the court. The Chief Justice can prescribe the composition of the specialised anti-corruption courts as empowered in Article 133(4).[23] He can also prescribe the processes and procedures and jurisdiction, power and sittings of the specialised anti-corruption courts as empowered in Article 120(3) (a) and (b).[24] The specialised anti-corruption courts can be established in provincial capitals with already existing High Courts and subsequently spread out to provincial capitals and districts as envisaged by Article 120(4)[25].

The legal and constitutional basis for establishing specialised AC Courts is very important as without it, the court risks being challenged for want of legality and constitutionality. Thus to avoid unnecessary suits against the court that would thwart its operations, it is prudent that the legal and constitutional basis of the court is addressed prior to the establishment of the court.

The prescribed processes and procedures, jurisdiction, power and sitting would attend to concerns such as whether the courts would have exclusive original and unlimited jurisdiction to hear corruption and corruption related matters or simply appellant jurisdiction. Others would be the power the courts would exercise and when and where the courts would sit and the general case management. The extent of the jurisdiction must be clearly spelt out so as not to leave litigants to

[21] Constitution of Zambia (Amendment) Act, 2016, Published by: Government Printers, Lusaka
[22] Ibid
[23] Ibid
[24] Ibid
[25] Ibid

guess when to take matters before the court and what type of matters to take. Failure will result in the court wasting time dismissing matters for want of jurisdiction.

1.4.2 Speed, Efficiency, Expertise and Good Quality Judgments

The ACD Uganda has achieved expertise, good quality judgments, efficiency and speedier resolution of corruption matters because of the close interaction that the judges and stake holders have. Similarly, the Judiciary of Zambia in conjunction with stake holders involved in the fight against corruption such as the AAC, National Prosecutions Authority, the Public Protector and Drug Enforcement Commission among others, can from time to time organise workshops and trainings aimed at equipping participants with the necessary knowledge and skills for the efficient and speedier resolution of corruption and corruption related cases.

The knowledge and skills obtained from the workshops and trainings coupled with the continuous investigations and prosecutions eventually translate to expertise both on the part of the judges and investigators and prosecutions. Consequently, the judges deliver good quality judgments. Expertise and good quality judgments are relevant for a rich jurisprudence and precedents. They are also relevant for uniformity and future reference.

1.4.3 Delays and Backlogs

The Sandiganbayan although established to resolve corruption matters more expeditiously has been plagued with inefficiency and delays. In Zambia, the Statutory Instrument creating the specialised AC Courts can include in the prescribed processes and procedures, provisions pertaining to case management that limit postponement of cases and prescribe a limited time within which cases must be concluded from the date of filing to the day judgment is passed. The case of Indonesia prior to 2010 is a good example.

Failure to make provisions for a limit on postponement, for instance will lead to unnecessary adjournments that in turn will cause delays and backlogs. The same would apply if no time limit within which cases must be concluded is provided for. Issues of filing procedures and scheduling processes must all be clear.

1.4.4 Political Influence and Interference

Zambia must be weary of concerns such as political influence and interference from those with power, money and status. Mechanisms and systems that shield the specialised AC Courts from political influence and interference and instead enhance independence of the courts from the branches of government must be put in place. These include, administrative autonomy, financial autonomy and good staffing levels. Failure to put in place mechanisms and systems will clog the operations of the courts with concerns like, lack of funding, inadequate staffing levels and

administrative incapacity. With these problems, the courts will become susceptible to political influence and interference.

1.5 CONCLUSION

Lessons from jurisdictions that have established specialised AC Courts were explored. These include, Uganda, Burundi, the Philippines and Indonesia. The ACD of Uganda has yielded benefits such as expertise, good quality judgments, efficiency and speedier resolution of corruption cases. In Burundi, the specialised AC Courts and the brigade scored impressive results by concluding hundreds of corruption cases and millions of dollars in missing funds were recovered. In Indonesia, the statutory time limits addressed concerns of delays and backlogs. However, the operations of the specialised AC Courts have not been without challenges. The courts have been thwarted with political influence and interference, delays, backlogs, inefficiency, resource and capacity limitations, understaffing levels and lack of independence from the branches of government.

Zambia can invoke her constitutional provisions as a legal and constitutional basis for the establishment of the specialised AC Courts. The law can clearly spell the jurisdiction, power, sittings of the courts and the processes and procedures with regards concerns such as, time limit and case management. Mechanisms and systems shielding the courts from political influence and interference and ensuring independence of the courts from branches of government such as institutional and administrative capacity, financial autonomy and adequate staffing levels must be put in place.

1.5 ACKNOWLEDGMENTS

I thank God for the grace and strength to pursue the Master of Laws Degree. I also thank most sincerely my husband Gregory Tembo and my father Moses Kashala Makalashi for the immense encouragement and support all the way.

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