"LEAVE TO APPEAL TO THE SUPREME COURT: WHEN IT SHOULD BE GRANTED"

A PAPER PRESENTED BY

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1. INTRODUCTION

The topic for my paper is ***"Leave to appeal to the Supreme Court: when it should be granted"***.

The Constitution of Zambia makes it mandatory for a litigant to obtain leave of the Court of Appeal before filing an appeal to the Supreme Court. In this regard, Article 131(2) of the Constitution specifically provides that-

> **131(2) "An appeal from a decision of the Court of Appeal shall be made to the Supreme Court with leave of the Court of Appeal."**

2. WHEN SHOULD LEAVE TO APPEAL TO THE SUPREME COURT BE GRANTED?

The question then is when should the Court of Appeal grant leave to appeal to the Supreme Court? Should leave to appeal to the Supreme Court be granted as a matter of course?

This requirement for a litigant to obtain leave to appeal to the Supreme Court is very cardinal and it should never be seen as a mere formality. This requirement means that there should be no automatic right to have an appeal from the Court of Appeal heard

by the Supreme Court. Only deserving cases should filter through the Court of Appeal to the Supreme Court. Indeed if the Constitution gave an automatic right of appeal from a decision of the Court of Appeal, it would defeat the very essence of establishing the Court of Appeal. In fact the establishment of the Court of Appeal would only work to lengthen the time that a matter takes to go through our Court System. This is so because for some litigants, no matter how frivolous their case may be, they will not stop litigating until they have reached the final Appellate Court. Sometimes even after reaching the final Appellate Court they will continue attempting to challenge the final decision by way of motions.

For the above reasons, the relevance of the Court of Appeal will only be appreciated if the Court does not simply operate as an ornamental addition to our Court structure through which all cases should routinely pass on their way to the Supreme Court. It is obvious from Article 131(2) of the Constitution that the drafters of the Constitution intended the Court of Appeal to act as a buffer against unmeritorious or frivolous appeals filtering to the Supreme Court. After all, the concerned litigant will have had an opportunity

to be heard by at least the High Court and, on appeal, the Court of Appeal. Of course the position may not be that simple if the matter involves a situation where Court of Appeal has set aside an acquittal. Questions in such cases may arise regarding whether, in the interest of justice, the Court of Appeal should invariably allow a further appeal to the Supreme Court.

It seems the rationale for the requirement for leave to appeal to the Supreme Court must be the same as the rationale for the requirement of applying for leave to move the High Court for judicial review. One may, therefore, plausibly argue that the purpose of the provision for leave to appeal to the Supreme Court is to eliminate any appeals which are frivolous, vexatious or hopeless. The requirement for leave should serve to prevent the time of the Supreme Court from being wasted by busybodies with misguided appeals.

But the question is- **"does the law provide guidelines on the considerations that the Court of Appeal should take into account when deciding whether to grant leave to appeal to the Supreme Court?"**.

Clearly, Article 131(2) of the Constitution does not state the factors that the Court should take into consideration when deciding whether to grant leave to appeal. Nevertheless, Section 13 of the **Court of Appeal Act** provides guidance on the factors that the Court should have in mind when considering an application for leave to appeal to the Supreme Court. It states that:

> **"13. (1) An appeal from a judgment of the Court shall lie to the Supreme Court with leave of the Court.**
>
> **(2) An application for leave to appeal, under subsection (1), shall be made within fourteen days of the judgment.**
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> **(3) The Court may grant leave to appeal where it considers that-**
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> **(a) the appeal raises a point of law of public importance;**
>
> **(b) it is desirable and in the public interest that an appeal by the person convicted should be determined by the Supreme Court;**
>
> **(c) the appeal would have a reasonable prospect of success; or**
>
> **(d) there is some other compelling reason for the appeal to be heard.**

(4) Leave to appeal shall not operate as a stay of execution of a judgment."

It is evident from section 13 of the **Court of Appeal Act** that the law provides very strict grounds upon which an appeal can be allowed to proceed to the Supreme Court. It is noteworthy, for instance, that leave to appeal will not be allowed purely on the basis that the appeal raises a point of law. Section 13(3)(a) requires that for leave to be granted the appeal must not only raise a point of law but that point of law must be of public importance. So an intended appeal may raise a point of law but if that point of law is not of public importance the Court of Appeal should not grant leave. Of course the Act does not define what **'a point of law of public importance'** means.

It is also important to note from section 13 that it is not all appeals by a convicted person which should be allowed to go to the Supreme Court. An appeal by a convicted person should only be allowed to proceed to the Supreme Court in exceptional cases where it is desirable and in the public interest that the convicted person should have their appeal determined by the Supreme Court.

Section 13 of the **Supreme Court (Amendment) Act No. 24 of 2016** provides that if leave to appeal is refused by the Court of Appeal, the application for leave may be made before a Judge of the Supreme Court.

The onus, therefore, is on the Court of Appeal and the Supreme Court to develop jurisprudence around these strict restrictions on the grant of leave to appeal to the Supreme Court.

3. A BRIEF COMPARATIVE CONSIDERATION OF PROVISIONS FOR LEAVE TO APPEAL FROM SELECTED JURISDICTIONS

Having looked at the requirements for leave to appeal from the Court of Appeal to the Supreme Court, one may wonder whether these kinds of requirements are only present in our legal system. A cursory look at other jurisdictions with court structures similar to ours reveals that there are a number of jurisdictions which put stringent conditions on the grant of leave to appeal to the apex Court. By way of illustration, I have picked out provisions from Kenya, Nigeria and Canada.

A. KENYA

Like Zambia, Kenya also has a Supreme Court, Court of Appeal and High Court. In Kenya, there is no automatic right of appeal to the Supreme Court except in cases involving the interpretation or application of the Constitution. Article 163(4) and (5) of the Constitution of Kenya provides that-

> **"163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-**
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> **(a) as of right in any case involving the interpretation or application of this Constitution; and**
>
> **(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).**
>
> **(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned."**

So in the case of Kenya, apart from issues of interpretation of the Constitution, which for us are reserved for the Constitutional Court, an appeal will only lie to the Supreme Court if the Supreme Court

or the Court of Appeal certifies that it involves a matter of general public importance.

As can be noted from Article 163(5) of the Constitution of Kenya, a certification by the Court of Appeal, that a matter is of general public importance, may be reviewed by the Supreme Court, and either affirmed, varied or overturned. Such a power does not exist under our law. So it seems the Supreme Court will have to hear all appeals for which leave is granted by the Court of Appeal.

B. NIGERIA

Although the **Supreme Court Act of the Federation of Nigeria** makes a provision for leave to appeal from the Court of Appeal, it does not outline the grounds upon which leave may be granted or refused. This is with the exception of where an appeal is filed by a convicted person. If the appeal is filed by a convicted person, the **Supreme Court Act of Nigeria** provides in Section 32 that-

> **"32. If it appears to the Registrar that any notice of an appeal against a conviction purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may**

refer the appeal to any Justice of the Supreme Court and such Justice may if he is of the same opinion, direct the Registrar to refer the appeal to the Supreme Court for summary determination, and, when the case is so referred, the Court may, if it considers that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the Government thereon."

C. CANADA

As you may be aware Canada has Courts of final resort at Provincial level as well as a Federal Court of Appeal. Appeals from the provincial Courts of final resort and appeals from the federal Court of Appeal lie to the Supreme Court of Canada. The Supreme Court of Canada is the final Court of Appeal. In terms of the requirement for leave to appeal from the two lower Courts, the **Supreme Court Act** of Canada contains a provision to the effect that an appeal to the Supreme Court will lie with leave of the highest court of final resort in a province or the Federal Court of Appeal, as the case may be, where, in the opinion of that court, **the question involved in**

the appeal is one that ought to be submitted to the Supreme Court for decision.

According to Section 40 (1) of the **Supreme Court Act** of Canada, an appeal from either of the two lower Courts may still go to the Supreme Court, whether or not leave to appeal to that Court has been refused by the lower Court, if the Supreme Court is of the opinion-

(a) that any question involved in the appeal is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court, or

(b) that any question involved in the appeal is, for any other reason, of such a nature or significance as to warrant a decision by it.

In the above two instances, the Supreme Court of Canada itself will grant leave to appeal.

There are cases, however, where leave to appeal to the Supreme Court of Canada is not required. In criminal cases, there is an

automatic right of appeal where an acquittal has been set aside in the provincial court of appeal or where one judge in the provincial court of appeal dissents on a question of law.

CONCLUSION

As can be seen from the above three jurisdictions, an application for leave to appeal from the Court of Appeal to the Supreme Court should not be allowed routinely. The **Court of Appeal Act** has provided broad guidelines for you to take into account when considering an application for leave but you will need to develop the jurisprudence in this regard to ensure consistency and predictability. For instance, we may need to consider whether a person whose acquittal is set aside by the Court of Appeal should invariably be allowed to appeal to the Supreme Court.