IN THE SUPREME COURT OF ZAMBIA **Appeal No. 56/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

BIDVEST FOOD ZAMBIA LIMITED	**1ST APPLICANT**
CHIPKINS BAKERY SUPPLIES (PTY) LIMITED	**2ND APPLICANT**
CROWN NATIONAL (PTY) LIMITED	**3RD APPLICANT**
BIDFOOD INGREDIENTS (PTY) LIMITED	**4TH APPLICANT**
BIDVEST GROUP LIMITED	**5TH APPLICANT**

AND

CAA IMPORT AND EXPORT LIMITED **RESPONDENT**

Coram: **Musonda DCJ, Malila and Kabuka JJS on 4th February, 2020 and 11th June, 2020**

For the Applicants: Mr. Rodwyn Dean-Jay Petersen and Mr. J. Ngisi of Messrs Chibesakunda & Company

For the Respondent: Mr. Sydney Chisenga and Mr. J. Kawana of Messrs Corpus Legal Practitioners

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J U D G M E N T

Malila, JS delivered the judgment of the court.

Cases referred to:

1. *Zambia National Holdings Ltd and National Independence Party (UNIP) v. Attorney General (SCZ Judgment No. 3 of 1994)*
2. *Anderson Kambela Mazoka & Others v. Levy Patrick Mwanawasa (2005) ZR 138*
3. *Matilda Mutale v. Emmanuel Munaile (2007) ZR 118*
4. *Winch v. Jones & Another (1985) 3 ALL ER 97*
5. *Mother Care Limited v. Robson Brook Ltd (1979) FSR 466*
6. *Fratelli Locci Sr. Estraxion Minesal v. Road Development Agency (SCZ Application No. 8/06/2019)*
7. *R v. Secretary of State for Trade and Industry Exp. Eastaway (2001) 1ALL ER 27*
8. *Savenda Management Services Limited. v. Stanbic Bank (Z) Limited. (Selected Judgment No. 10 of 2018)*
9. *Tanfern Ltd v. Cameron MackDonald (200) 1WLR 13V*
10. *Hermanus Philipus Steyn v. Giovnanni Grecchi Ruscone (Appeal o. 4 of 2012)*
11. *Town Council of Awendo v. Nelson Odour Onyango & 13 Others (2015) EKLR*
12. *Kenya Plantation and Agricultural Workers Union v. Kenya Export Floriculture, Horticulture and Allied Workers Union (2018) CKLR (Civil Application No. Sup. 5 of 2017)*
13. *National Commercial Bank Jamaica Ltd. v. The Industrial Disputes Tribunal and Peter Jennings (2016) JMCA Appeal 27*
14. *Vick Chemical Company v. Cecil De-Cordova & Others (1948) 5 JLR 106*
15. *Khan Chinna v. Markanda and Another (Supreme Court Civil Appeal No. 70/2015)*
16. *Kekelwa Samuel Kongwa and Meamui Georgina Kongwa (SCZ/8/05/2019)*
17. *Zambia Consolidated Copper Mines v. Matale (1995/1997) ZR 144*
18. *Swain v. Hillman (1999) CPLR 779*
19. *IRC v. Muller's Co. Margarine Limited (1901) AC 217*

Legislation and Other Books referred to:

1. *Court of Appeal Act, No. 7 of 2016*
2. *Court of Appeal Rules, Statutory Instrument No. 65 of 2016*
3. *Supreme Court Act, Chapter 25 of the Laws of Zambia*
4. *Supreme Court Rules, Chapter 25 of the Laws of Zambia*
5. *Supreme Court Amendment Act, No. 24 of 2016*

6. *Constitution of Jamaica*
7. *Jamaica (Procedure in Appeals to Privy Council) Order-in-Council 1962*
8. *Constitution of Zambia (Amendment) Act No. 2 of 2016*
9. *Constitutional Reform Act of England and Wales 2005*
10. *Civil Procedure Rules of England and Wales 2008*
11. *Halsbury's Laws of England 5th ed.*
12. *A. Zuckerman on Civil Procedure; Principles of Practice, 3rd ed. (Sweet & Maxwell, 2013)*

This judgment is on a somewhat unusual point in a motion taken out by the movant, CAA Import and Export Limited, which is reflected in the main appeal proceedings, now pending, as the respondent. We shall, in this judgment, refer to the movant as the applicant and to the appellants in the pending appeal proceedings as the respondents.

More pointedly, the motion is about the limitation of access to the Supreme Court for purposes of appeal reviews of Court of Appeal judgments, following the creation of the Court of Appeal by the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the consequential change in the role of the Supreme Court relative to appeals.

We say the point in the motion is unusual because the applicant was in fact the successful party in the main matter in the Court of Appeal. The respondents, who lost the appeal in that court, sought to appeal the judgment to this court. In obedience to the law as set out in section 13 of the Court of Appeal Act, No. 7 of 2016, the respondents applied to that court for leave to appeal. The Court of Appeal, however, declined the application. The respondents then approached a single judge of this court by way of renewal of the application for leave to appeal. This was in accordance with Order XI rule 1(4) of the Court of Appeal Rules as read with Order 48 of the Supreme Court Rules, chapter 25 of the Laws of Zambia since the application is on an interlocutory point not involving the determination of the appeal.

The intended grounds of appeal as reproduced in the affidavit in support of the renewed application for leave produced before the single judge of this court were that:

(a) **the court below erred in law and in fact when it awarded the respondent compensation for goodwill on the basis that the respondent exclusively marketed and sold the appellants' products in Zambia notwithstanding that the appellants were**

registered trademark owners of the goods distributed by the respondent;

(b) the court below erred in law and in fact when it found that the Honourable Judge of the High Court had considered the evidence in totality in rendering her judgment when the record shows that the judgment of the High Court was an exact replica of the respondent's submissions and that the trial judge failed to consider the totality of the evidence;

(c) the court below erred in law and in fact when it held that the 4th defendant induced a breach of contract when the record showed that the 4th appellant was the authorized agent of the 2nd and 3rd appellant (sic) who dealt with the respondent on behalf of the 2nd and 3rd appellants; and

(d) the court below erred in law and in fact when it held that the 2nd and 3rd appellants breach their contract with the respondent when the said contract had been lawfully terminated.

Mutuna JS, sitting as a single judge, granted the application, opining that the appeal raised, albeit in a limited way, a point of law of public importance fit for determination by this court. That point of law is whether it was legally appropriate for a distributor of goods, whose trademark is owned by a third party, to be compensated for goodwill in the goods subject of the trademark.

The second ground is that the permission to appeal granted by the single judge does not limit or restrict the proposed appeal to only one ground which raises the question of law on, or regarding goodwill compensation. The proposed grounds of appeal include grounds that do not satisfy the threshold set out in section 13 of the Court of Appeal Act.

In the third ground, it is contended that the appeal has no prospects of success. Finally, that it is not necessary to request the Supreme Court to give any ruling on the other grounds of appeal as the court's existing jurisprudence already provides sufficient guidance on the issues they raise.

The affidavit in support of the motion was sworn by one Rodwyn Dean-Jay Peterson, learned counsel for the applicants. He there avers, among other things, that although the decision by the single judge was that the question of goodwill compensation is worthy of determination by the Supreme Court on the supposed basis that it raises a point of law of public importance, a perusal of the intended grounds of appeal reveal that only the first ground of appeal relates to, or covers the issue of compensation for goodwill to a non-copyright

owner. This means, in effect, that leave to appeal should have been granted only in respect of the ground raising goodwill compensation and not the other three grounds. Furthermore, that the intended appeal does not emanate from the judgment of the Court of Appeal but that of the High Court. A ground of appeal raising a point of law of public importance must, in counsel's averment made in the affidavit in support of the motion on behalf of the applicant, emanate from a judgment of the Court of Appeal.

Heads of argument were filed in support of the motion. In those heads of argument, the applicant's learned counsel, by way of giving the background to the present motion, recounted how the single judge of this court gave his *ex tempore* ruling on the respondent's application for leave to appeal. According to counsel, the single judge quite categorically stated that the appeal raised a novel point of law which he located in the realm of public importance. Following that ruling, the learned advocates for the respondent prepared a draft order for the court's settlement. The single judge signed the order which, in effect, granted blanket leave to appeal. On the strength of that leave order, the respondent filed four grounds of appeal three of

which had nothing to do with the basis upon which leave was granted. Having given this preface, the learned counsel for the applicant proceeded to deal with the four grounds of the motion.

Grounds one and three of the motion were argued together. The first issue taken by the applicant under this set of grounds is that the decision being assailed in ground one of the appeal is not a decision of the Court of Appeal; rather it is one made by the High Court. Mr. Petersen referred us to the ruling of the single judge and identified the question that was phrased for determination by the learned single judge and submitted, rather spiritedly, that the question arises from the judgment of the High Court, not that of the Court of appeal. Counsel quoted section 23 of the Supreme Court Act, Chapter 25 of the Laws of Zambia (as amended by Act No. 24 of 2016). So far as it relates to the jurisdiction of this court, the section provides that:

> **Subject to the exceptions and restrictions contained in section twenty-four, an appeal in any civil cause or matter shall lie to the court from any judgment of the Court of Appeal.**

After referring to the definition of the word 'jurisdiction' in the way we explained it in *Zambia National Holdings Ltd and National*

Independence Party (UNIP) v. Attorney General[1], counsel argued that the jurisdiction of the Supreme Court in as far as appeals are concerned, is limited to decisions of the Court of Appeal. Consequently, an appeal premised on a decision of the High Court would fall outside the appellate jurisdictional ambit of the Supreme Court. Counsel reiterated that a proper review of the first ground of appeal should reveal that the grievance being raised in that ground emanates from the judgment of the High Court. He prayed that the first ground of the motion be upheld.

Despite the initial intimation that ground three would be argued together with ground one, that ground regarding prospects of success, was not at this stage specifically debated in the heads of argument.

Counsel argued grounds two and four together. Here, the substance of the challenge is that although the decision of the single judge to grant leave to appeal was premised on the fact that the question of goodwill compensation was novel to the Zambian jurisdiction and was thus possibly one of public importance, the

order granting leave, which the single judge subsequently signed, does not limit the appeal to the issue of goodwill compensation.

Counsel contended that other than the one ground that raised the question of goodwill compensation, the other grounds of appeal did not move or influence the single judge in any way and were not indeed commented upon by the single judge in his *ex tempore* ruling. Counsel further submitted that there is a multitude of court decisions that have determined the issues raised by the grounds of appeal (other than that raising goodwill compensation) and those grounds are consequently not fit for determination by the Supreme Court on appeal.

At the hearing of the appeal, Mr. Petersen orally augmented the heads of argument. He rehashed the point that an appraisal of the reasoning of the single judge on granting leave, as against the proposed grounds of appeal, should reveal that only a single ground passed the qualifying test for the grant of leave. This being the case the Supreme Court has no legitimate basis to consider the other grounds of appeal. This position can only be vindicated if this court varies the scope of the single judge's ruling and the resultant order.

In regard to the argument that the relevant ground of appeal emanates not from the judgment of the Court of Appeal, but that of the High Court, Mr. Petersen referred us to the record of appeal to show that the claim in the High Court included goodwill compensation.

We were thus urged to uphold the motion and reverse or vary the decision of the single judge of this court.

The respondents (appellants in the appeal) filed an affidavit in opposition. That affidavit was sworn by the learned counsel for the respondents, Mr. Sydney Chisenga. In that affidavit, it was averred that the record of proceedings produced in the applicants' affidavit in support of this motion is incomplete and did not reflect the proceedings of the 16th July, 2018 before the single judge. The deponent of that affidavit did not, however, elaborate in what respects the proceedings were incomplete, nor did he produce the missing parts of the proceedings, let alone particularise their substance.

It was also asserted, more generally, in the opposing affidavit that the granting of leave to appeal did not limit the appeal to one ground only; that the respondents seek to challenge the decision of

the Court of Appeal, not that of the High Court and to this end ground one of the appeal as framed in the memorandum of appeal, is only a summary of the respondents' dissatisfaction with the Court of Appeal's decision on goodwill compensation and that this will be expatiated at the hearing of the appeal.

In his heads of argument in support of the appeal, the learned counsel for the respondents to the motion suggested that two issues fell to be determined. The first is whether the present motion is properly before this court in view of the applicant (respondent in the appeal) having filed a list of authorities and heads of argument in response to the appeal. The second, and perhaps the more pertinent one, is whether the notice of motion has any merit.

As regards the question whether the motion was properly before us given the steps taken by the parties, particularly the applicant as respondent in the appeal, counsel submitted, with verve, that the fact of the applicant's having responded comprehensively to the grounds of appeal has the effect of defeating the present motion. This is particularly in view of the fact that there was no obligation on the

applicant's part to file heads of argument in opposition to the appeal, especially after the present motion had been launched.

Counsel observed that rule 58(11) of the Supreme Court Rules, Chapter 25 of the Laws of Zambia, obliges a respondent to an appeal to file heads of argument at least 7 days before the hearing of the appeal. In the present situation, the applicant, as respondent in the appeal, oddly prepared and filed a substantial response to the grounds of appeal whose propriety it is challenging. It is for this reason that counsel submitted that the applicant's motion had been overtaken by events and the applicant thus ought to have withdrawn the motion so as not to abuse the process of this court.

Counsel also submitted that although there can be no waiver of statute, the applicant here did, in effect, waive its right to invoke rule 48(4) of the Supreme Court Rules. In counsel's view, the filing of a response to the appeal means, in effect, that the applicant had accepted the single judge's order granting leave.

Turning to the question whether or not the motion has merit, counsel for the respondent was cocksure it was destitute of merit for a number of reasons. First, the order granting leave was, according

to counsel, unconditional, and did not limit the leave granted to one ground only. In developing that argument, the learned counsel submitted that the proposed grounds of appeal were in fact brought to the attention of the single judge at the hearing of the renewed application for leave to appeal. The single judge thus had occasion to consider the proposed grounds of appeal. It follows that the single judge's order for leave to appeal can only be understood to have been granted on the basis of all the proposed grounds of appeal as presented to him.

The learned counsel also quoted a statement by the learned single judge in his ruling on the application for leave, namely that:

> **I make no consideration of the issue raised on judgment writing as it is rendered otiose by my earlier determination.**

Counsel submitted that the only inference to be drawn from this statement is that it became unnecessary for the judge to delve into the issue raised by the respondent in ground two since ground one had already satisfied a requirement for the grant of leave, i.e. it had raised a point of law of public importance.

Second, counsel contended that it is not a requirement under section13(3)(a) of the Court of Appeal Act to scrutinise each and every proposed ground of appeal at the time of granting leave. Leave to appeal the whole judgment is deemed to be granted upon the court's satisfaction that the appeal raises a point of law of public importance. Counsel further submitted that the provisions of section 13(3)(a) of the Court of Appeal Act are unambiguous and the words it employs should thus be assigned their natural and ordinary meaning. He cited the cases of *Anderson Kambela Mazoka & Others v. Levy Patrick Mwanawasa*[2] and *Matilda Mutale v. Emmanuel Munaile*[3] as authorities for his submission.

Third, as regards the argument premised on the contention that a ground of appeal which raises a point of law of public importance must emanate from the Court of Appeal judgment rather than the High Court judgment, counsel for the respondent argued that it is improper for the applicant to delve into whether indeed the ground of appeal emanates from the judgment of the Court of Appeal at this stage as this can only properly be determined at the hearing of the appeal, and not at leave stage. In this regard, counsel observed that

the applicant has in fact properly raised that issue in its heads of argument in opposition to the appeal itself. In any case, the grounds of appeal as filed challenge not the judgment of the High Court but that of the Court of Appeal and are quite specific as to what aspects of that judgment they seek to impugn.

Mr. Chisenga also submitted that the applicant appears to have misunderstood the grounds of appeal possibly because they do not contain explanations and arguments as these are, by rule 58(2) of the Supreme Court Rules, not allowed to be included in a ground of appeal. The single judge considering the application for leave to appeal could not thus have been expected to consider the merits of those grounds.

Fourth, the learned counsel for the respondent, reiterated that the appeal has reasonable prospects of success. He relied in this connection on the English case of *Winch v. Jones & Another*[4] in which the case of *Mother Care Limited v. Robson Brook Ltd*[5] was cited with approval. In the latter case it was stated, *inter alia,* that:

> **A serious question to be tried connotes a real prospect of succeeding rather than a claim which was not quite so shadowy that it could be regarded as frivolous and vexatious.**

In his oral supplementation, Mr. Chisenga insisted that the application for leave to appeal before the single judge was not a segmented application, and indeed section 13 of the Court of Appeal Act did not contain any provision, express or otherwise, suggesting that in making an application for leave to appeal an applicant should segregate the proposed grounds of appeal on the basis of the criteria for granting leave to appeal as set out in the different subsections of that section. As long as there is a qualifying reason for the grant of leave under the Act, the leave ought, as in the present case, to be given unconditionally.

We were, on the basis of these submissions, urged to dismiss the motion.

In his brief rejoinder, Mr. Petersen stressed that the filing of the heads of argument did not take away the right of the applicant to apply by way of motion, as the applicant in fact did, and that in any case the heads of argument were filed after the motion had been launched. He also maintained that the filing of the heads of argument in opposition did not waive the right to take out a motion as contended by the respondent.

We are grateful to counsel for both parties for the arguments so ably debated before us. An appropriate starting point, in our view, is to address the question whether the act, by the applicant, of having filed its heads of argument in opposition to the pending appeal undermines or negates its right to launch the present challenge. Mr. Chisenga's argument that by filing the heads of argument against all the grounds of appeal, the respondent had fatally shot down its opportunity to challenge those grounds, no doubt has *prima facie* attraction.

We, however, agree at once with Mr. Petersen that the filing of the heads of argument in the appeal did not take away the applicant's right to impugn the grounds of appeal on any lawful basis as the applicant saw fit. Our understanding is that in legal proceedings in an adversarial system such as we have in this country, even if there is no expressly reserved liberty to apply, any party to proceedings in court does have *in gremio* liberty to, at any appropriate time, apply to court on any legal point as is supported by the law, unless such right is expressly lost or circumscribed by procedural rules or by common law principles.

We surmise that the only reason Mr. Chisenga did not point to any authority in support of his submission that the applicant lost the liberty to apply is because there is in fact none. We thus cannot accept the argument of waiver that the learned counsel for the respondent made.

In dealing with the merits of the motion before us, we should at the outset acknowledge, as did a single judge of this court in *Fratelli Locci Sr. Estraxion Minesal v. Road Development Agency*[6] that:

> **Appeals to the Supreme Court are now no longer a matter of right. Leave must be sought from the Court of Appeal, and if not granted by that court, from a single judge of this court.**

This is all because section 13 of the Court of Appeal Act provides that:

> **(1) An appeal from the judgment of the Court shall lie to the Supreme Court with leave of the court.**
>
> **(2) An application for leave to appeal under sub-section (1) shall be made within fourteen days of the judgment.**
>
> **(3) The court may grant leave to appeal where it considers that –**
>
> **(a) The appeal raises a point of law of public importance;**
>
> **(b) It is desirable and in 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.

The reason for restricting the granting of leave to appeal to the limited circumstances set out in section 13 is founded on the same basis as the Supreme Court of England and Wales employs to restrict or limit appeals to that court. In that jurisdiction, Lord Bingham explained in *R v. Secretary of State for Trade and Industry Exp. Eastaway*[7] in relation to the House of Lords (but which position applies as much to the Supreme Court) that:

> **the House [of Lords] must necessarily concentrate its attention on a relatively small number of cases recognized as raising legal questions of general importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.**

The learned authors of *Zuckerman on Civil Procedure; Principles of Practice*, (3rd ed. Sweet & Maxwell, 2013 at page 1114 para 24.7) articulate the philosophy for the restriction of appeals to the Supreme Court in the following passage:

> **The policy of restricting appeals to a review of the lower court's decision is founded not only on the need to economise the use of resources. It is also founded on the belief that lower courts should bear the main responsibility for the conduct of litigation and its outcome. Appeal courts must defer to lower courts' decisions, unless a decision is clearly wrong, in the sense that it is contrary to**

established principles or that no reasonable judge could have reached the conclusion in question.

In relation to our jurisdiction, we did allude to part of the rationale for the limitation of appeals coming to the Supreme Court in *Savenda Management Services Limited v. Stanbic Bank (Z) Limited*[8] when [at paragraph 217] we stated as follows:

> **The resources of the courts are overstretched and if it were otherwise the doors of justice would be open to busy bodies whose only aim is to delay the inevitable execution of a judgment...**

When considered in context, therefore, the creation of the Court of Appeal by the Constitution of Zambia (Amendment) Act No. 2 of 2016, was not intended merely to add another layer in the structure of the courts or the appellate process. Rather, the Constitution elevated the Supreme Court to a level above an ordinary appellate court. Its original role of hearing appeals from the High Court and other quasi-judicial bodies having effectively been assumed by the newly created Court of Appeal, means that its role in the appellate structure has necessarily changed. In our view, even without the benefit of learning from the experience of other jurisdictions with court structures such as our country has now adopted following the

enactment of the amended constitution, it would not have been the intention of the framers of the amended Constitution that the Court of Appeal and the Supreme Court should be performing the same or even a similar function.

Our view is that the role of the Supreme Court is now informed by the restriction of appeals it will hear in the manner and for the reasons that courts at the equivalent level in jurisdictions such as the United Kingdom do. These restrictions were eloquently articulated by Lord Bigham in the case of *R v. Secretary of State for Trade and Industry Exp. Eastaway*[7] as we have quoted him earlier, as well as in the passage of *Zuckeran on Civil Procedure* which we have also freely quoted earlier on.

It is in that spirit that section 13 of the Court of Appeal Act, restricting access to the Supreme Court by deferring to the apex court only weighty issues in the most deserving of cases, should be understood.

We note with much interest that the application before us raises recondite points of law relating to leave to appeal as contemplated in section 13 of the Court of Appeal Act as we have quoted it above.

They are issues that we, as a full court, now have the maiden opportunity to reflect upon without losing sight of the specific grounds of the motion before us. In the process we shall, as we ought to, give a rounded account of the import of section 13 of the Court of Appeal Act beyond what we ventilated in *Savenda Management Services Limited v. Stanbic Bank (Z) Limited*[8]. We stated in that case that the appeal raised a point of law of public importance not only because members of the public were keen to know the fate of their credit data once they obtained loans from financial institutions, but also because this was the first time that matters concerning credit referencing had arisen in our courts.

We surmise, in this regard, that several questions demand to be addressed. Of course, all such questions will be of no consequence if we do not, as a starting point, describe the meaning to be ascribed to the phrase 'a point of law of public importance' as envisioned by section 13(3)(a) of the Court of Appeal Act. Second, there is need to identify the pith of each of the items making up the qualifying criteria for the grant of leave to appeal as inventoried in section 13 of the Court of Appeal Act. Are the individual factors listed in the different

paragraphs of section 13, considered separately, sufficient to ground the granting of leave, or are they to be considered cumulatively or in combination?

Third, when several proposed grounds of appeal are raised by a party that seeks leave to appeal, only one of which raises a point of law of public importance, does the grant of leave open the whole appeal to hearing by this court, or should the appeal only be confined to the one ground that satisfies the threshold envisaged in section13(3)(a) of the Court of Appeal Act? And this question applies as much to the other criteria set out in section 13(3).

Fourth is the largely peripheral issue of novelty – whether every novel point in the sense of being one that has never been adjudicated upon in this jurisdiction, is sufficient for the purpose of satisfying the threshold test of raising a point of law of public importance within the intendment of section 13(3)(a). As we shall demonstrate, answers to these issues have a direct bearing on the four grounds of motion enlisted by the applicant in this motion.

We have already stated that in the case of *Savenda Management Services Limited v. Stanbic Bank (Z) Limited*[8], we had the first opportunity to consider what a 'point of law of public importance' was. Although, in that case, we offered some useful explanation as to the form which such issue may take, and suggested that a novel point could, in appropriate cases, satisfy the criteria, we came short of offering definitive meaning and clarity as to the full import of section 13(3)(a) of the Court of Appeal Act, not least because then, unlike in the present motion, the issue was not as extensively and specifically debated.

Granted that we have to assign clear meaning to the term 'point of law of public importance' for the first time as a full court, guiding reference to jurisdictions that have employed identical or similar terminology in considering the grant of permission to appeal, seems to us inevitable. In this regard, we advert to comparative jurisprudence from three common law jurisdictions which offer consistent positions: England and Wales, Kenya and Jamaica. While the terminology and procedure involved in the process of appeals to the higher courts in those jurisdictions may differ slightly, there are

striking similarities from which useful interpretive guidance may be drawn.

In England and Wales, like in this country, the Supreme Court is the final court of appeal in relation to all civil disputes. An appeal to that court lies from an order or judgment of the Court of Appeal in terms of section 40(2) of the English Constitutional Reform Act of 2005. By section 40(6) of the same Act, an appeal from the Court Appeal only lies with the permission of the Court of Appeal or the Supreme Court; the procedure governing such appeals being set out in the Supreme Court Rules 2009, and in various practice directions.

Unlike the case in this country where our existing legislation, namely the Court of Appeal Act, makes no distinction in regard to the basis for the grant of leave between first and second appeals, in England and Wales considerations for permission to appeal is distinguished depending on whether what is involved is a first appeal or a second appeal. In respect of first appeals permission is granted where (a) the appeal has real prospects of success or (b) there is some other compelling reason why the appeal should be heard.

In *Tanfern Ltd v. Cameron MacDonald*[9] the test in the Court of Appeal was set out by Brooke LJ, as follows:

> **Permission to appeal will only be given where the court considers that an appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard (CPR 52.3(6)) Lord Woolf MR has explained that the use of the word 'real' means that the prospect of success must be realistic rather than fanciful.**

In regard to second appeals a somewhat different test is applied. The Court of Appeal will not grant leave unless there is:

(a) an arguable point of law of public importance; or
(b) there are some other compelling reasons for the appeal to be heard.

Thus, in England and Wales permission to appeal to the Supreme Court is normally granted by the Court of Appeal where the Appeals Panel is of the opinion that the matter raises an arguable point of law of 'general public importance,' or where some other compelling reason can be shown to exist.

Likewise, in the Kenyan situation, an appeal would only be entertained by the Supreme Court if it raises an issue of 'general public importance.' The Constitution of Kenya, 2010 provides in article 163(4)(b) that appeals shall lie from the Court of Appeal to the Supreme Court -

> **(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).**

Similarly, section 110(2)(a) of the Constitution of Jamaica, which provides that an appeal shall lie to the Privy Council from decisions of the Court of Appeal in any civil proceedings with the leave of the Court of Appeal, states as follows:

> **Where in the opinion of the [court] the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council...**

It is noteworthy that the wording of the relevant provisions and practice rules in the three jurisdictions differs slightly from that employed in section 13(3)(a) of our Court of Appeal Act. In the latter, there is a notable omission of the words 'great' and 'general' before the words 'public importance.' It stands to reason whether that omission should imply any significant difference in interpretation of otherwise similarly worded provisions.

In the Kenyan case of *Hermanus Philipus Steyn v. Giovnanni Grecchi Ruscone*[10] the Supreme Court of that country gave a useful elucidation of the meaning to be assigned to the term 'a matter of general public importance' as follows:

(1) The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance;

(2) Where the matter involves a point of law, the applicant demonstrates that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable courts to administer that law, not only the case at hand, but other cases in the future;

(iii) it is not enough to show that a difficult question of law arose, it must be an important question of law;

(iv) a question of general importance is a question which takes into account the wellbeing of a society in first proportion...

The decision in the *Hermanus*[10] case was reaffirmed in *Town Council of Awendo v. Nelson Odour Onyango & 13 Others*[11] where the Supreme Court of Kenya stated [at para 21] that:

(i) for an intended appeal to be certified as one involving a matter of general public importance, the intending appellant is to satisfy the court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii) such question or questions of law is/are to have arisen below, and must have been subject to judicial determination;

(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) mere misapprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court or courts below, and must have been the subject of judicial determination;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of 'general public importance' which he or she attributes to the matter for which certification is sought.

(vii) determination of facts in contest between the parties are not, by and of themselves, a basis for granting certification for an appeal before the Supreme Court;

(viii) issues of law of repeated occurrence in the general course of litigation may, in proper context, become 'matters of general public importance' so as to be a basis of certification for appeal to the Supreme Court.

(ix) questions of law that are as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become 'matters of general public importance' justifying certification for final appeal in the Supreme Court;

(x) questions of law that are destined to continually engage the workings of the judicial organs, may become 'matters of general importance' justifying certification for final appeal in the Supreme Court;

(xi) questions with a bearing on the proper conduct of the administration of justice, may become 'matters of general public importance' justifying certification for final appeal in the Supreme Court.

We think that this holding, like the others we have and shall allude to shortly, provides useful insights as to what the parameters should be in determining 'a point of law of public importance.'

In *Kenya Plantation and Agricultural Workers Union v. Kenya Export Floriculture, Horticulture and Allied Workers Union*[12] the Kenyan Court of Appeal held that a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that its impact and consequences were substantial, broad-based, transcending the litigation interest of the parties and bearing upon the public interest. As the classes of public interest are not closed, the burden falls on the intended appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.

Moving to Jamaica, the Court of Appeal (highest court in that jurisdiction) in the case of *National Commercial Bank Jamaica Ltd v. The Industrial Disputes Tribunal and Peter Jennings*[13], dealt with an application for conditional leave to appeal to Her Majesty in Council (Privy Council) pursuant to section 4(a) of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, from a decision of the Court of Appeal. The applicant bank in that case had dismissed Mr. Jennings. The Industrial Disputes Tribunal gave an award in favour of Mr. Jennings. The applicant bank invoked section 110(2)(a) of the Constitution of Jamaica, the relevant part of which we have quoted earlier in this judgment.

The application was opposed on the basis that the proposed appeal involved no question of 'great general or public importance.' In dealing with the issue whether the criterion of 'great general or public importance or otherwise' had been met, the Jamaican Court of Appeal (Morrison P) stated as follows [at page 33]:

> **....in order to be considered one of great general or public importance, the question involved must, first, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond rights of the particular litigants and**

> **is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspects of the practice, procedure or administration of the law and the public interest.**

The court dismissed the application.

In *Vick Chemical Company v. Cecil De-Cordova & Others*[14] in which the Jamaican Court of Appeal was concerned with applying a provision of an Order-in-Council, identical to section 110(1)(a) of the Jamaican Constitution, McGregor J, speaking for the court stated as follows:

> **The principles which should guide the court have been set out in a number of cases, the latest of which is *Khan Chinna v. Markanda and Another*[15] [in which] Lord Buckmaster delivering the judgement of the Board said:**
>
> > **It was not enough that a difficult question of law arose, it must be an important question of law. Further, the question must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations.**

Viewed against the backdrop of section 13(3)(a) of the Court of Appeal Act, we find these non-binding interpretive statements given in relation to similarly worded provisions in England and Wales, Kenyan and Jamaican quite instructive. The wording of the provisions

relating to the basis for the grant of leave to appeal are almost identical beside the use in the relevant provisions of those jurisdictions of surplus words like 'general' and 'great general' which our section 13(3)(a) does not employ. Our interpretation of section 13(3)(a) of the Court of Appeal Act can thus not be expected to significantly depart from the interpretation employed in those jurisdictions.

In *Kekelwa Samuel Kongwa and Meamui Georgina Kongwa*[16] a single judge of this court observed, and in our view correctly, that for a legal question to be treated as a point of law of public importance, it must have a public or general character rather than one that merely affects the private rights or interest of the parties to a particular dispute. The legal point in issue should relate to a widespread concern in the body politic the determination of which should naturally have effect beyond the private interests of the parties to the appeal.

Our considered view is that in considering whether or not to grant leave to appeal, the Court of Appeal, and indeed this court where a renewed application is launched, must always be guided by

the altered appellate role of the Supreme Court in the evolution and development of the law over private rights and interest of the parties to a dispute.

The purpose of the whole section 13 of the Court of Appeal Act, is to enable the Court of Appeal to filter or winnow out those cases that are undeserving of the attention of the Supreme Court. Many cases of a purely private nature including many in contract and tort are unlikely to raise points of law of public importance since they quite often are designed to resolving the dispute to the satisfaction only of one or the limited parties to a particular dispute. This, however, is not in any way to suggest that such dispute would never transcend or snowball into the public arena or arouse or engage broader public interest or concern. To be certain, where there is a discernable public interest or public policy concern in the anticipated elucidation by the Supreme Court of a point of law in what is otherwise litigation between private parties, there is a definite possibility that such point of law would be one of public importance notwithstanding its private genesis.

As we have pointed out elsewhere in this judgment, categories of cases of public importance are clearly never closed. Points of law of public importance can, in our view, be harnessed more easily in appeals where it is demonstrably for the public or general good of the polity for the Supreme Court, as the final court, to review the legality of extraordinary questions and new legal provisions informing actions by public authorities, or where a significant part of the public stands to be informed and guided by the court's interpretation, so that in that sense there is a public interest in the outcome of an appeal. Such an appeal is more likely to raise a point of law of public importance.

We perceive, for example, that much of public law litigation seeking interpretation and future administration of statutory provisions relating to the protection of fundamental rights (under the present Bill of Rights); interpretation of the law regarding administration of environmental protection issues as well as electoral and democratic governance issues, not involving matters reserved for the Constitutional Court, do generate public interest questions in a way that would readily render the points of law they

give rise to, ones of public importance fit for determination by this court. Granting leave to appeal in such circumstances is a desideratum.

Two final points on section 13(3)(a). First, it is always critical to bear in mind that under section 13(3)(a), the three different facets of the qualifying criteria for leave to be granted must be satisfied. These are: (i) a point of law; (ii) of public importance; and (iii) raised in the appeal.

It should be clear that an appeal that is anchored on findings of fact alone, even if it can be demonstrated that those findings were perverse or not borne out of the evidence, does not qualify as raising a 'point of law' in the first instance unless it can be shown that the specific finding of fact had also become a question law as we articulated the position in *Zambia Consolidated Copper Mines v. Matale*[17]. An ordinary find of fact *ipso facto* fails the test on that account alone. Yet this can naturally apply only where a point of law and a point of fact are distinguishable and separable, but will not where a hybrid situation of some law and some facts are intrinsically interwoven.

Second, as regards the issue whether every novel point should be viewed as raising a point of law of public importance and thus satisfying the threshold for the grant of leave to appeal, we must state that novelty of a matter does not in itself and of itself alone turn a matter into one that raises a point of law of public importance within the intendment of section 13(3)(a) of the Act. In *Savenda Management Services Limited. v. Stanbic Bank (Z) Limited*[8] we held that a novel issue which engaged wider public interest was fit for determination by this court.

Indeed, there are many new legal points frequently raised in the Court of Appeal which do not necessarily translate into points of law of public importance by their sheer novelty. Undeniably, a completely new point of law may arise in the Court of Appeal which may be insignificant and arousing no public curiosity or interest.

We turn now to considering the related question whether the different facets of the criteria for the grant of leave to appeal as set out in section 13 of the Court of Appeal Act should be satisfied together or individually if leave is to be granted. Should a person seeking leave to appeal demonstrate that the proposed appeal

satisfies one only or all the individual factors listed in section 13(3)(a), (b), (c) and (d)? Or should some of these factors be proved one in combination with another or others? In other words, is the list of factors justifying the grant of leave as set out in section 13 of the Act conjunctive, that is to say, does each of the conditions in the list require to be satisfied? Are the factors disjunctive, meaning that satisfying one of the conditions in the list suffices?

We have already alluded to the fact that in England and Wales there is a distinction in the criteria used for the grant of leave between a first appeal and a second appeal. The position in our case is that the criteria used for determining whether leave to appeal should or should not be granted is all set out in section 13 of the Court of Appeal Act and combines what would otherwise be exclusively applicable to first or second appeals in the case of England and Wales. That clearly means that our interpretation and application of the test for leave should differ slightly.

In *Savenda Management Services Limited v. Stanbic Bank (Z) Limited*[8] we suggested that the list of factors to be considered as to whether or not to grant leave to appeal as they are set out in

section13 of the Court of Appeal Act should be read disjunctively. We stated [at para 215] that:

> **The Court of Appeal must wait for a party to move it after it has delivered judgment, seeking leave to appeal, and if it is satisfied that one of the grounds for granting leave has been satisfied, it must grant leave. If not, it must refuse leave.**

We stand by that position. We, however, find it necessary to offer further explanation.

It will be noted that each of the items (a) to (c) in section 13 of the Court of Appeal Act are separated by semicolons while item (d) is separated by the word 'or'. Our understanding of the use of the semicolon punctuation mark in that section is that it is intended to separate the individual requirements in the list. We are of the firm view that, as used in section 13, the items in the list (a) to (c) are separated as major sentence elements. In strict legal theory, the net effect of that formulation is that an intended appellant who shows that the proposed appeal raises a point of law of public importance under section 13(3)(a) need not also show that it is desirable and in public interest that the appeal by the convicted person should be determined by the Supreme Court under section 13(3)(b), nor indeed need the prospective appellant also show that the appeal would have

a reasonable prospect of success under section 13(3)(c). In the latter case, however, it may well be that even if an appeal raises a question of law of public importance, the appeal taken as a whole may, in fact, have no prospects of success. On balance, however, once it is demonstrated that an appeal raises a point of law of public importance, it quite often follows that it is arguable and may have prospects of success.

We equally believe that, in its present formulation, section 13(3)(b) namely, that 'it is desirable and in public interest that an appeal by the person convicted should be determined by the Supreme Court,' puts it beyond question that the qualifying criteria set out in section 13 are meant to be considered disjunctively. Section 13(3)(b) is clearly intended to apply only in criminal appeals where there has been a conviction of the intending appellant. The court must be satisfied that it is in public interest that such appeal be heard. The subsection thus has no application in civil appeals.

Turning to section13(3)(c) of the Court of Appeal Act, we must make the point that as regards the requirement for prospect of success the wording employed by that section is not very different

from that used in the Civil Procedure Rules (CPR) 52.7(1)(a) of England and Wales. In that jurisdiction, permission to appeal is granted only where the appeal has a real, as opposed to a fanciful, prospect of success as explained by Lord Woolf MR in *Swain v. Hillman*[18].

Given what we have earlier stated regarding what we consider to be the altered role of the Supreme Court following the establishment of the Court of Appeal, and given also the combination in the Zambian situation of the criteria for grant of leave at first appeal and that applicable at second appeal, the power to grant leave to appeal premised on prospects of success must be used warily. The whole philosophy behind restricting appeals to the Supreme Court as we have earlier in this judgment explained it, as well as the purpose and spirit of section 13 of the Court of Appeal Act are in a way undermined by subsection 13(3)(c). As is the case in other jurisdictions such as the United Kingdom and the United States, it is not and cannot be the proper role of the Supreme Court to routinely correct errors made by lower courts. Section 13(3)(c) could have this contradicting effect. It is in this sense that the relevant arms of

government are called upon to reconsider section 13(3)(c) of the Court of Appeal Act with a view to realigning the section to the overall purpose and spirit of the Act.

Our view, therefore, is that while section13(3)(c) provides a standalone basis for granting leave to appeal against a judgment of the Court of Appeal, it should be resorted to very sparingly. If used liberally, the purpose of the restriction of appeals contemplated in section 13 of the Court of Appeal Act would be grossly undermined.

A judgment of the lower court may well raise some doubt as to its rationalization, application of legal principles, or some aspects of it. Those misapprehensions or misapplications or lingering doubts as to its correctness may, however, not be sufficiently weighty to justify an appeal. Indeed, there are many appeals that are arguable and have reasonably good prospects of success merely because the Court of Appeal missed a point, or made a wrong conclusion or applied a wrong principle, or where the court clearly did not direct itself to all the evidence bearing on an issue, and yet, the proposed appeal may not enjoy sufficient prospects of real, eventual success to justify the intervention of this court.

It may well be that there may be niggling doubts about the correctness of some aspects of the Court of Appeal judgment. The refusal of leave to appeal against a judgment of the Court of Appeal should not be regarded as an endorsement of the judgment complained of and all its alleged imperfections, nor should it be viewed as giving judicial imprimatur to otherwise wrong decisions. Yet, it is not this court's role to correct each and every such error. We reiterate Lord Bingham's earlier quoted statement in the case of *R v. Secretary of State for Trade and Industry Exp. Eastaway*[7]. When infallibility of the human mind, even at the highest level of adjudication, is weighed against the benefits of finality of litigation, the latter should assume the first position.

Section 13(3)(d) of the Court of Appeal Act creates a French window that could be used in circumstances other than those envisioned in the other subsections of section 13(3).

What seems clear to us is that the disjunctive 'or' used immediately preceding section 13(3)(d) means that the provision of 13(3)(d) could be used as a standalone alternative to any of the criteria in (a), (b) and (c) of section 13(3).

Our considered view is that this subsection contemplates an appeal which may not necessarily raise a point of law of public importance or one contemplated in subsections (3)(b), (c) and (d). It could be exploited for other judicial exigencies as dictated by the interests of justice, having regard to all the circumstances of the case such as the manner in which the case was conducted, for example, where the hearing was demonstrably tainted by some procedural irregularity or was done in disregard of the tenets of due process. Yet the provision may also be used in aid of the need for the development of jurisprudence as envisioned in article 125(3) of the Constitution of Zambia as amended by Act No. 2 of 2016.

We think this provision could also provide a pathway for the court to depart from existing precedents owing to changed circumstances; to settle contradictory positions, or to clarify the law where this becomes necessary. Indeed, there could be compelling reasons to allow an appeal to be heard even when prospects of success are not very high.

When the hearing of an appeal would be in public interest under that subsection, it is probable that the appeal would also raise a point of law of public importance.

Having given a bird's eye-view of section 13 of the Court of Appeal Act, we now turn to the specific grounds of the motion.

As regards ground one of the motion, the contention by the appellant is that, a point of law of public importance must arise from the judgment of the lower court, that is to say, the Court of Appeal. We agree with that submission but not without qualification. The wording of section13 of the Court of Appeal Act is very clear, and we have spent a considerable amount of time explaining whence a point of law of public importance should arise. Such point of law should arise from an intended *appeal* against a judgment of the Court of Appeal. A judgment of the Court of Appeal may in itself not raise a point of law of public importance. It is the intended appeal against such judgment which should. It is thus absolutely important that an intending appellant should frame the point of law of public importance arising from the judgment of the Court of Appeal if leave to appeal is to be given. That point of law must be on an issue upon

which that court has adjudicated. And this is the point that we understand Mr. Petersen, learned counsel for the applicant, to have raised in his submission in support of ground one of the motion. He argued that ground one of the proposed grounds of appeal did not raise issue with the holding of the Court of Appeal; rather it challenged the holding of the High Court.

As we understand Mr. Petersen's argument, it is this; that the issue of goodwill compensation to a third party non-owner of a trademark is an issue that emanated from the judgment of the High Court, not that of the Court of Appeal and, therefore, cannot be the subject of appeal to the Supreme Court.

Regrettably, the judgment of the High Court was not produced in the record of motion. However, the reliefs sought in the High Court, the decision of that court in relation to the reliefs sought; the grounds of appeal to the Court of Appeal, as well as the basis of the decision of the Court of Appeal, are sufficiently captured in the judgment of the Court of Appeal produced in the record of motion. All these give us a fair understanding of the nature of the claim around goodwill compensation. In this regard, and at the risk of

repetition, it is important to trace the claim around the issue of goodwill compensation as that issue did the rounds in the two lower courts.

As we can decipher from the judgment of the Court of Appeal, the applicant (which was the plaintiff in the High Court) commenced proceedings against the respondents seeking, among other reliefs,

> **compensation for the transfer of the benefits of the goodwill from the plaintiff to the 1st Defendant.**

Among the issues that the learned High Court judge determined was:

> **whether the goodwill was transferred from the plaintiff to the defendants and whether the defendants should pay for the goodwill.**

In its summation of what transpired in the High Court, the Court of Appeal stated in its judgment that:

> **After considering the case of *IRC v. Muller's Co. Margarine Limited*[19] the learned judge was of the view that there was goodwill which was generated by the plaintiff which goodwill was transferred to the defendants. At the end of the day, the court made a carte blanche award. This is what the court said:**
>
> > **With all the above in view, I am satisfied that the plaintiff is entitled to the reliefs as endorsed on the writ of summons.**

The respondents appealed against the High Court judgment on several grounds. One of those grounds was that:

> **The learned trial judge erred in law and fact when she held that there was transfer of goodwill from the respondent to the appellants in circumstances where it had been established that the appellants were the registered trademark owns of the goods that were distributed by the respondent and where the respondent did not lead any evidence to illustrate the creation of goodwill in the products of the 2nd and 3rd appellants and where the respondent bought (in south Africa) and imported and sold products produced and manufactured by the 2nd and 3rd appellants.**

On appeal to the Court of Appeal, the court agreed with the High Court judgment and explained its decision [at page 33 of the judgment] as follows:

> **It goes without saying that the plaintiff as an exclusive distributor, having established its business as a distributor of the defendant's products had generated a goodwill. In our view, this is not a case of the use of a registered trademark or passing off of a mark.**

The court then referred to Halsbury's Laws of England 5th ed. Vol 8 para 807 before making the following remarks:

> **It can clearly be ascertained from the aforestated definition that good will is not restricted to products.**
>
> **Indeed, the court below did recognize that the goodwill did exist in the products, but it also identified the plaintiff's goodwill as distributor by stating that the element of the goodwill of the plaintiff extended beyond the goodwill of the products distributed... We find no basis on which the fault to court below...**

It is clear from this narration that the issue of compensation for goodwill was part of the initial claim of the applicant in the High Court. It was pronounced upon by that court and hence became one of the issues on appeal before the Court of Appeal. The Court of Appeal made its own determination, endorsing the High Court decision.

We pause here to reflect on the question whether in the circumstances we have just projected above, it can be said that the point of law raised by the issue we have identified emanated from the High Court and not the Court Appeal.

Our view is that once a judgment of a lower court is endorsed by a higher court, the judgment which should properly be appealable is one of the higher court. The lower court judgment is subsumed in the higher court's judgment which hence forth becomes the only subject of appeal. The position would, of course, be different if the higher court is called upon to determine an issue arising from a lower court's judgment and the former fails, refuses or neglects to do so. The lower court judgment remains, to the extent necessary, a subject on appeal. That does not appear to be the case here.

In a situation such as the one before us, the Court of Appeal dealt with an issue of goodwill compensation which formed the plaintiff's original claim in the High Court. By accepting the position taken by the High Court on the issue, the Court of Appeal placed itself as the new reference point in as far as the judicial decision on goodwill compensation is concerned. We cannot, therefore, accept Mr. Petersen's argument on this point. Ground one of the appeal must accordingly fail.

In relation to ground two of the motion, counsel for the applicant has argued that in granting leave, the single judge expressed his reason for doing so with regard to one aspect only touching on compensation for goodwill. Therefore, according to counsel, the appeal should be confined only to the ground containing that aspect. We think that this argument is not only ingenious; it is a decent one too.

The question that arises is whether once leave to appeal is given because one proposed ground of appeal raises a point of law of public importance, such leave opens the door to the hearing of the appeal

on issues which, in themselves, do not raise any point of law of public importance.

Conversely, should all the proposed grounds of appeal raise a point, or even points, of law of general public importance for leave to appeal to be granted on the basis of section 13(3)(a)? This, in our view, is a fundamental question deserving a fundamental answer.

As we understand the applicant in this motion, and taking for the time being the reason given for the grant of leave by the single judge *pro veritate*, it is only the first ground of appeal relating to compensation to a third party for goodwill attaching to goods of a non-trademark owner which satisfies the precondition for the grant of leave.

When section 13(3)(a) of the Court of Appeal Act provides, as it does, that for permission to appeal to be granted to an intended appellant, the proposed appeal should raise *a point of law of public importance*, it does in truth speak in singular logic rather than plural. It would appear from the wording of section 13(3)(a) that what is required to be raised is only *a point of law, rather than points of law.* Had the intention of the Legislature been that leave to appeal should

only be given where several – or at least more than one point of law is raised - it would no doubt have stated so in express terms.

Another point to note is that the section speaks of an appeal raising a point of law of public importance. It is *the appeal* rather than the proposed grounds of appeal only that should raise a point of law of public importance. Taking the term 'appeal' to mean a legal proceeding by which a case is brought before a higher court for review of the decision of the lower court, it is obvious that the term denotes both the process and the substance. It cannot, therefore, be confined to the grounds of appeal alone. Thus, a point of law of public importance could arise from procedural aspects surrounding the appeal and not necessarily from any of the proposed grounds, although such point will ordinarily arise in the grounds of appeal.

Section 13(3)(a) suggests that an appeal taken as a whole - both the process and the substance - could raise such point of law of public importance. When leave to appeal is granted, therefore, it attaches to the whole appeal. Yet that does not imply that in all instances every aspect of the appeal will be considered.

The position can illustratively be equated to a hungry horse in a stable that a farmer desires to give a treat of a watermelon. Is there a case for opening the whole stable door so that the horse walks out of the stable to enjoy the treat as well as the benefits ancillary or incidental to its liberty from confinement? Or should only the upper part of the stable door be opened for the limited purpose of the horse accessing the treat?

Mr. Chisenga's argument implied that leave to appeal should open the door to hearing the whole appeal even on grounds that do not relate to the basis for the grant of leave – in this case raising a point of law of public importance.

Our view is that grounds of appeal may be formulated in a manner that makes them stand separate and independent of each other. When this is the case it may be easy to identify the ground in which a point of law of public importance is contained. Yet grounds of appeal need not be so drafted. And it may be that grounds raising points of law of public importance and those not raising any such points are inseparable. In fact, often issues in an appeal present like a mixed grill on a lunch table. While the point is conceded that

grounds of appeal are the fountain head of an appeal and are often interwoven so that they are interrelated, it is often possible to distinctly isolate the issues they raise.

Where leave to appeal is granted on the basis that the appeal raises a point of law of public importance and it is possible to isolate such point of law of public importance in the proposed appeal, this court will confine itself to considering only such point in dealing with the appeal. As along as the other issues in an appeal do not satisfy the threshold of raising a point of law of public importance, they do not qualify for individual separate consideration by the Supreme Court. To hold otherwise would be to negate the well- intentioned purpose served by the grant of leave as set out in section13(3)(a) of the Court of Appeal Act. Our hypothetical horse should, where possible, be allowed to access the watermelon without opening the whole stable door for it to exit the stable.

We hold, therefore, that where leave to appeal is granted on the basis that the appeal raises a point of law of public importance under section 13(3)(a) only a ground of appeal raising such point will be covered by such leave. Any other proposed ground of appeal which

does not satisfy that threshold will not be eligible for consideration on appeal. It is thus important for the court granting leave to appeal to identify clearly the ground encompassing such a point.

We, therefore, agree with Mr. Petersen that to the extent that the decision of the single judge and the order that he signed implied allowing the appeal on all proposed grounds, it misrepresents or distorts the intendment of section 13(3)(a) of the Court of Appeal Act and must be varied. Ground two of the motion has merit and it is allowed accordingly.

In ground three of the motion, the appellant contends that the appeal has no prospects of success because the issue of goodwill compensation does not arise from a decision of the Court of Appeal but that of the High Court.

We have, in ground one, fully addressed the issue touching on the court that decided the judgment appealed against and we do not intend to repeat our observations. Given what we have stated, the applicants' argument has no legal basis. Ground three accordingly fails.

The fourth and final ground of the motion, is that this court has already given adequate guidance on the issues raised in the other grounds of appeal other than the one raising a point of law of public importance.

We have earlier in this judgment reproduced the other grounds of appeal as filed by the respondent. Apart from ground one in which the point of law of public importance arose, the other grounds present fairly ordinary questions. To be clear, the second ground impeaches the lower court's judgment on its treatment of the evidence before it. The next ground questions whether, given the available evidence, it was right to hold that the fourth appellant in the appeal induced a breach of contract. The final ground again relates to whether there was a breach of contract.

We agree with Mr. Petersen mainly for the reasons we have given in regard to ground two that these grounds do not raise any point of law of public importance which is the basis upon which the single judge granted leave to appeal. They raise plain questions in respect of which interpretive guidance has been given in numerous case

authorities of this court. This ground of motion has merit and we uphold it.

The net result is that this motion succeeds on grounds two and four but fails on grounds one and three. For the avoidance of doubt, the order of the single judge is varied so that in its import and effect it is limited and confined only to the issue raising a point of law of public importance. The upshot is that this appeal substantially succeeds. We order that grounds two, three and four of the appeal, which do not raise any point of law of public importance, should be severed from the memorandum of appeal. Costs shall follow the outcome of the appeal.

.....
M. C. Musonda
DEPUTY CHIEF JUSTICE

.....
M. Malila
SUPREME COURT JUDGE

.....
J. K. Kabuka
SUPREME COURT JUDGE