

**CHAPTER 04:01
COURT OF APPEAL**

ARRANGEMENT OF SECTIONS

SECTIONS

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Act 44, 1972,
S.I. 35, 1973,
S.I. 36, 1975,
Act 12, 1976,
Act 39, 1980,
Act 14, 2005.

An Act to prescribe the jurisdiction and powers of the Court of Appeal, and for matters incidental thereto or connected therewith.

[Date of Commencement: 1st May, 1973]

1. Short title

This Act may be cited as the Court of Appeal Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"Court of Appeal" shall, where permissible under this Act, include a single member of that Court;

"judgment" includes decree, order, conviction, sentence or decision;

"President" means the President of the Court of Appeal.

3. Seal of the Court of Appeal

(1) The Court of Appeal shall have, and use as occasion may require, a seal having the device and impression of the Arms of Botswana surrounded by the inscription "The Court of Appeal of Botswana".

(2) The seal shall be kept in the custody of the Registrar of the Court of Appeal.

4. Composition of the Court of Appeal

The Court of Appeal shall, in addition to the judges provided for it under the Constitution, consist of such number of Justices of Appeal as the President of Botswana may consider necessary to appoint.

5. Rank and precedence

(1) The Chief Justice shall rank and take precedence next to the President of the Court of Appeal.

(2) The Justices of Appeal appointed in accordance with section 4 shall rank and take precedence next to the Chief Justice in order of their first appointment to the Court of Appeal.

(3) The judges of the High Court shall rank and take precedence next to the Justices of Appeal in order of their first appointment to the High Court.

6. Process and execution

The process of the Court shall run throughout Botswana and any judgment of the Court shall be executed and enforced in like manner as if it were a judgment of the High Court.

7. Powers of Court of Appeal

For all purposes of and incidental to the hearing and determination of any appeal, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act or the Constitution, the power, authority and jurisdiction vested in the High Court.

8. Judges not to sit on appeals from their own decisions

It shall not be competent for any judge to sit as a judge of the Court of Appeal or take part in any proceedings on appeal-

- (a) from any judgment given by himself, or any judgment given by any court of which he was sitting as a member;
- (b) against a conviction or sentence if he was the judge by or before whom the appellant was convicted.

9. Quorum of the Court of Appeal

Subject as may be otherwise specifically provided by or under this Act, when determining any matter, the Court of Appeal shall be duly constituted if it consists of any three members, selected by the President, or of such other number of members, being not less than three, as the President may determine.

(2) When hearing an appeal from a judgment of the High Court given under section 18 of the Constitution, or an appeal brought under powers conferred by section 106 of the Constitution, the Court of Appeal shall be duly constituted if it consists of any five members selected by the President.

(3) The determination of any question before the Court of Appeal shall be according to the opinion of the majority of the members of that Court hearing the case.

(4) In interlocutory matters a single judge of the Court of Appeal may exercise such powers of that Court as may be prescribed in rules made under section 16.

10. Appeals as of right

In addition to appeals specifically provided for in the Constitution an appeal shall lie to the Court of Appeal as of right-

- (a) from any final decision in any proceedings before the High Court sitting at first instance;
- (b) from any decision of the High Court in the exercise of its powers or duties under section 18 of the Constitution;
- (c) by a convicted person from any order of the High Court in the exercise of its revisional jurisdiction altering a conviction or sentence;
- (d) in any case where express provision for such appeal is made under any written law.

11. Appeals by leave

Subject to section 10, an appeal shall lie from any decision of the High Court to the Court of Appeal with the leave of the High Court, or, if such leave has been refused, with the leave of the Court of Appeal, in the following cases-

- (a) from any interlocutory order;
- (b) from any order relating to costs only;
- (c) from any order made with the consent of the parties;
- (d) from any decision in any civil or criminal proceedings given on appeal from any other court to the High Court;

(e) in any case where express provision for such appeal is made in any written law.

12. Appeals by prosecution in criminal cases

(1) The Director of Public Prosecutions or, in the case of a private prosecution, the prosecutor, may appeal to the Court of Appeal against any final judgment of the High Court made in its appellate, revisional or original jurisdiction in a criminal case, with leave of the High Court, or where such leave has been refused, with leave of the Court of Appeal, on any question of law.

(2) For the purposes of this section any question as to whether there was any evidence upon which the Court could have come to the conclusion to which it did come, or as to whether it could have come to the conclusion to which it did come on the evidence before it, or as to the adequacy or inadequacy of any sentence passed, shall be deemed to be a question of fact and not of law.

(3) Except as provided in subsection (1), the Director of Public Prosecutions, and in the case of a private prosecution, the prosecutor, shall have no right of appeal against any judgment, order or decision of the High Court in any criminal proceedings.

(4) On an appeal brought by the Director of Public Prosecutions, or by a private prosecutor under this section, the Court of Appeal may, if it decides the appeal in favour of the appellant-

- (a) give such decision, or take such action as the High Court ought, in the opinion of the Court of Appeal, to have given or taken;
- (b) order a retrial; or
- (c) give such directions as the Court of Appeal thinks just in all the circumstances.

(5) Where an appeal by the Director of Public Prosecutions or a private prosecutor is dismissed, the Court of Appeal may make such order as to the payment of costs, taxed according to the scale applicable in civil appeals, as the Court thinks just.

13. Powers of Court of Appeal in criminal cases

(1) On an appeal against conviction the Court of Appeal may allow the appeal-

- (a) if it considers that the conviction should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence given at the trial;
- (b) if it considers that there was a miscarriage of justice; or
- (c) on the ground that there had been a wrong decision on a question of law.

(2) Where the Court of Appeal allows an appeal against conviction it shall quash the conviction and direct a judgment of acquittal to be entered in favour of the appellant.

(3) Where the Court of Appeal, in an appeal against conviction, considers that,

notwithstanding the fact that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, there has been no substantial miscarriage of justice, it may dismiss the appeal.

(4) Where the Court of Appeal, in a criminal appeal, is of the opinion that the proceedings in the trial court were a nullity through want of jurisdiction or for any other cause, it may order a retrial by a court of competent jurisdiction.

(5) On an appeal against sentence, the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed in the lower court and substitute such other sentence, whether greater or lesser or of a different character than the original sentence, as it thinks ought to have been passed.

(6) On an appeal against conviction, the Court of Appeal may, if the facts proved at the trial so warrant, alter the conviction to a conviction for a different offence of which the appellant could have been convicted by the trial court, and where the Court of Appeal so alters a conviction it may substitute for the sentence passed such sentence as it considers appropriate.

(7) On an appeal against conviction, the Court of Appeal may, if it comes to the conclusion that the appellant when he committed the act which constituted the offence was not responsible for his action by reason of insanity or other mental defect, make an order under Part XII of the Criminal Procedure and Evidence Act.

14. Bail and stay of execution pending appeal

(1) A single judge of the High Court or of the Court of Appeal may, on the application of the appellant, and pending the determination of the appeal-

- (a) admit the appellant to bail;
- (b) postpone the payment of any fine imposed on him; or
- (c) in a civil case, order a stay of execution of the judgment appealed against.

(2) The time during which an appellant is admitted to bail under this section shall not count as part of any term of imprisonment to which he has been or may be sentenced.

15. Reservation of question of law for Court of Appeal

A judge of the High Court may reserve for consideration by the Court of Appeal any question of law which may arise during any civil or criminal proceedings before him.

16. Rules of Court of Appeal

The President of the Court of Appeal may make rules of court regulating the practice and procedure of the Court of Appeal, and without derogating from the generality of the foregoing such rules may be made for prescribing or regulating the following-

- (a) all matters relating to or connected with pleadings, including forms to be used, the

fees payable, and the method and time of payment;

- (b) the expenses of parties and witnesses and the method and time of payment thereof;
- (c) the fees and costs of legal practitioners, and the taxation and recovery thereof;
- (d) the duties and powers of the several officers of the Court of Appeal;
- (e) the times and places of the sittings of the Court of Appeal and the selection of judges for any purpose;
- (f) the right of audience in the Court of Appeal, and the representation of persons concerned with appeals;
- (g) cases in which and conditions upon which appellants in criminal appeals shall be entitled to be present at the hearing of appeals;
- (h) the summary determination of any appeal which appears to the Court of Appeal to be frivolous or vexatious or to be brought for the purpose of delay;
- (i) the procedure in connection with interlocutory applications;
- (j) the taking of evidence before the Court of Appeal;
- (k) a tariff of costs and expenses;
- (l) the time within which any requirement of the rules is required to be complied with;
- (m) the circumstances in which an appeal shall be deemed to be abandoned;
- (n) any matter in respect of which the President of the Court of Appeal considers it is necessary or desirable to make provision in order to facilitate the proper despatch and conduct of the business of the Court of Appeal.