

COURT ONLINE COVER PAGE

IN THE HIGH COURT OF SOUTH AFRICA
Gauteng Division, Pretoria

CASE NO: **2025-096565**

In the matter between:

**GOVERNMENT OF THE REPUBLIC OF
ZAMBIA**

Plaintiff / Applicant / Appellant

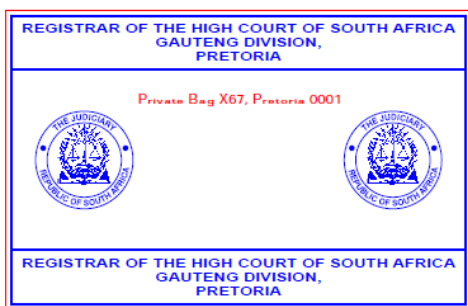
and

**ESTHER LUNGU ,BERTHA LUNGU
,TASILA LUNGU ,DALIESO LUNGU
,CHIYESO LUNGU ,CHARLES PHIRI
,MAKEBI ZULU ,TWO MOUNTAINS**

Defendant / Respondent

Heads of Argument

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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No.: 2025-096565

In the matter between

ESTHER LUNGU

First Applicant

BERTHA LUNGU

Second Applicant

TASILA LUNGU

Third Applicant

DALIESO LUNGU

Fourth Applicant

CHIYESO LUNGU

Fifth Applicant

CHARLES PHIRI

Sixth Applicant

MAKEBI ZULU

Seventh Applicant

and

GOVERNMENT OF THE REPUBLIC OF ZAMBIA

First Respondent

TWO MOUNTAINS BURIAL SERVICES (PTY) LTD

Second Respondent

**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

Third Respondent

In re:

GOVERNMENT OF THE REPUBLIC OF ZAMBIA

Applicant



and

ESTHER LUNGU

First Respondent

BERTHA LUNGU

Second Respondent

TASILA LUNGU

Third Respondent

DALIESO LUNGU

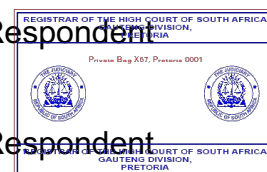
Fourth Respondent

CHIYESO LUNGU

Fifth Respondent

CHARLES PHIRI

Sixth Respondent



MAKEBI ZULU

Seventh Respondent

TWO MOUNTAINS BURIAL SERVICES (PTY) LTD

Eighth Respondent

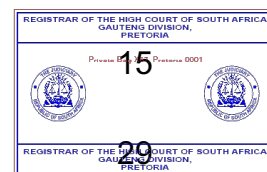
**MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

Ninth Respondent

HEADS OF ARGUMENT: LEAVE TO APPEAL

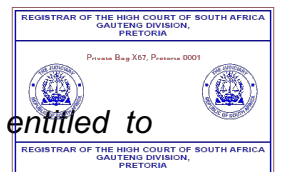
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INTRODUCTION

- 1 The applicants seek leave to appeal against the whole judgment and order of this Honourable Court in this matter, handed down on 8 August 2025 (per Ledwaba AJP, Potterill J and Mudau J).
- 2 The Court granted an application by the Government of the Republic of Zambia, which is the first respondent in this application for leave to appeal. It granted, *inter alia*, the following relief:
 - 2.1 Declaratory relief declaring that the Government of Zambia “*is entitled to repatriate the body of the Late President Edgar Lungu (‘the late President Lungu’) for a state funeral and burial thereafter in Embassy Park, Lusaka, Republic of Zambia*” (para 4 of the Court’s order); and
 - 2.2 Mandatory relief compelling the mortuary to “*immediately surrender the body of the late President Lungu to a representative or representatives of the Zambia High Commission to enable the [Government of Zambia] to repatriate the body to Zambia for the purposes stated in paragraph 4 above*” (para 5 of the Court’s order).
- 3 It is trite that the Government of Zambia, being an applicant in motion proceedings for final relief, was required to establish a clear right to the relief it sought before this Court could grant the relief it did. In making its decision, this Court relied on two sources of the right of the Government of Zambia to the relief which the Court granted:



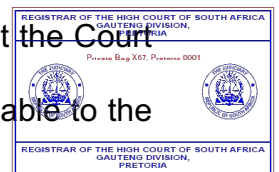
- 3.1 First, the Court relied on a document annexed to the supplementary founding affidavit marked “FAA7”, which the Court found to constitute an agreement. The Court held that “FAA7” “*can only be interpreted as an agreement between the parties*”, which agreement entailed “*first and foremost, repatriation to Zambia for burial purposes*” (para 25 of the judgment); and
- 3.2 Second, the Court held that there was a conflict of laws and on the application of the SCA decision in *Society of Lloyd's*,¹ Zambian law applied. According to the Court, “*in terms of Zambian law, public policy requires that the wishes of a late President or his/her Family yield before the requirement that deceased heads of state be afforded a state funeral and burial at Embassy Park*”. Thus, “*even if it was a personal wish of the late President not to be accorded a state funeral, such a wish must be overridden by the public interest*” (para 27 of the judgement).
- 4 We respectfully submit that leave to appeal should be granted on the basis of both legs of section 17(1)(a) of the Superior Courts Act, 2013. The matter raises important constitutional issues and novel points of law on which the Supreme Court of Appeal and, in due course, the Constitutional Court, would have a say.
- 5 There are also reasonable prospects of a court on appeal finding that this Honourable Court erred on both sources from which it sourced a right of the Government of Zambia to the relief it granted and, accordingly, that this Court’s



¹ *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA).

order must be set aside as the Government of Zambia had no right to the relief it was granted.

- 6 In the first instance, there are reasonable prospects of an appellate court finding that this Court erred in finding that Zambian law applied because the relief sought was a mandatory interdict to be enforced within South Africa. We must note that despite the Court having found that Zambian law applied, it nonetheless applied South African law when it considered whether “FAA7” was an agreement, interpreting it, as well as in enforcing that agreement. We submit that the Court was correct to apply South African law as that law was plainly applicable to the entire dispute.



- 7 However, the Court then erred in the South African law that it applied. The position in South African law is clear that a contract over a corpse is *ipso facto contra bonos mores*. It is proscribed because a corpse is not a legal thing capable of being owned or contracted over. Instead, there is an exclusive right of the heirs to bury the deceased, which in this case devolved upon the spouse, Ms Esther Lungu, as well as the children of the late President Lungu. Accordingly, the Government of Zambia was not a bearer of any right of burial and its application should have failed for lack of a clear right.
- 8 We expand on the above bases for leave to appeal below. Prior to doing so, however, we begin by setting out the test to be applied by this Court in determining whether or not a case has been made out for leave to appeal.

THE TEST IN AN APPLICATION FOR LEAVE TO APPEAL

9 Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides as follows:

“17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success,²
or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration”.



10 In *Southern African Litigation Centre*,² the SCA held that the import of section 17(1)(a)(ii) of the Superior Courts Act is that “*leave to appeal may be granted, notwithstanding the Court’s view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard*”.

11 Accordingly, we submit – as a point of departure – that notwithstanding any view that this Court may take on the applicants’ prospects of success on appeal (which we submit are in any event good), this Court should grant leave to appeal as there are compelling reasons to do so. This matter raises important constitutional

² *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* [2016] ZASCA 17; 2016 (3) SA 317 (SCA); 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA) para 23.

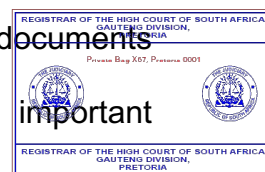
issues and novel points of law of public importance which the SCA and, eventually the Constitutional Court, needs to decide. Although this is not an exhaustive list, the following unprecedented constitutional issues and points of law arise:

- 11.1 First, as far as we are aware, this is the first case in which a foreign state (or indeed even our own) has asserted a right to bury a corpse which is in another country in our courts, against the decision of the spouse of the deceased.
- 11.2 The exclusive burial rights of the spouse and children of the deceased who are his or her heirs are protected by, *inter alia*, the rights to privacy and dignity in sections 14 and 10 of the Constitution of the Republic of South Africa, 1996 (“**Constitution**”). These rights are also protected under the common law.
- 11.3 This matter therefore raises unique constitutional issues and points of law in that the courts are being called on to decide whether the constitutional and common law rights of a spouse and children of the deceased who are his or her heirs may be trumped by a state in the remains of the deceased.
- 11.4 Second, the state purporting to assert a right of burial in this case is a foreign state, which right it says exists under its own laws, not our own laws. As Zambia is a foreign sovereign asserting a right under its own laws, there arises a question whether those laws prevail over the South African Constitution in a case before a South African court, which arises in the Republic’s territory, and which is for mandatory relief to be enforced within the Republic. We submit –



on the basis of, *inter alia*, the Constitutional Court's decision in *Mohamed*³ – that a foreign law that conflicts with the Constitution may never be enforced within the territory of the Republic. This is a complex question meriting a say by the SCA.

11.5 Third, this Court relied on a purported agreement over the body of the late President Lungu, and held that it had to enforce that agreement. Apart from the question whether “FAA7” constituted an agreement (which itself raises fundamental legal questions of contract law and interpretation of documents with which a court on appeal needs to grapple), there is an important antecedent question whether a person may at all contract over the right to bury a dead body under our law. We submit that such a contract is proscribed by our law, against public policy and in any event conflicts with inalienable rights enshrined in the Constitution. It is therefore unenforceable before a South African court. We note that this is not one of the arguments that were before the Court, but we submit that the proscribed and *contra bonos mores* nature of the purported agreement is self-evident and settled in our law.



11.6 Fourth, this Court granted declaratory and mandatory relief to the Government of Zambia without an analysis as to whether the requirements for such relief were met. While this may not be a ground of appeal on its own, taken cumulatively with other grounds, it makes a compelling case for leave to appeal. It is a fundamental error that violated the applicants' right to have their

³ *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

case resolved by the application of law in a fair public hearing before a court, which is protected by section 34 of the Constitution.⁴

- 11.7 The matter therefore clearly raises constitutional issues and points of law of general public importance. In terms of section 17(1)(a)(ii) of the Superior Courts Act and the principle from *Southern African Litigation Centre* referred to above, this is a compelling reason for this Court to grant leave to appeal whatever its view of the applicants' prospects of success (which are in any event strong and are a separate basis to grant leave to appeal).



- 12 Leave to appeal should also be granted in terms of section 17(1)(a)(i) of the Superior Courts Act because there are reasonable prospects of success on appeal.
- 13 In determining whether there are reasonable prospects of success, an applicant for leave to appeal must demonstrate that the application has a realistic chance of success on appeal. The SCA in *Mkhitha* held that there must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.⁵
- 14 In *Smartpurse*, after conducting an extensive review of previous decisions of the SCA, the Court held that “to establish a ‘reasonable prospect of success’ on appeal there must be a reasonable possibility, not a certainty, of success on

⁴ See: *Vodacom (Pty) Ltd v Makate and Another* (CCT 51/24) [2025] ZACC 13 (31 July 2025) at para 48 and *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

⁵ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 17.

appeal. This possibility must exist (it must not be hopeless) and must be reasonable (based on logic).”⁶ Further, “the applicant must show that there is some aspect of the reasoning in the judgment that has the potential to lead a different court to a different conclusion. There must be some factual finding or issue of law that the applicant can demonstrate might, as a matter of law, lead to a different conclusion or in other words, success on appeal.”⁷ (emphasis added)

15 We deal with the applicants’ prospects of success below. We submit that:

- 15.1 It is trite that to succeed the Government of Zambia bore the onus to prove a clear right, a threat to that right and an absence of alternatives. There are reasonable prospects of a different court on appeal finding that no clear right was established because in the first instance the decision of this Court conflicts with our Constitution; and
- 15.2 There are also reasonable prospects of an appellate court finding that neither source relied upon by this Court to found a clear right for the Government of Zambia conferred such a right.



⁶ *Smartpurse Solutions (Pty) Ltd v Firststrand Bank Ltd* [2024] ZAGPJHC 961 at para 67.

⁷ See *Smartpurse* para 68, as well as the authorities cited at paras 25 – 68. See also *Ramakatsa and Others v African National Congress and Another* [2021] ZASCA 31 para 10.

REASONABLE PROSPECTS OF SUCCESS ON APPEAL

General principles governing motion proceedings

- 16 Prior to assessing the applicants' prospects of success, it is important first to set out the legal principles that were applicable given that the Government of Zambia was an applicant for final mandatory relief in motion proceedings.
- 17 In *Midi Television*,⁸ Nugent JA held that the failure to show a clear right is fatal to an application for a final mandatory interdict – reasoning as follows:



“What was before the learned Judge was an application for a final interdict (albeit that the duration of the interdict was limited to the period that E TV resisted submitting to the condition) and it fell to be determined in accordance with ordinary principles. The question to be considered was whether any law obliged E TV to furnish a copy of the documentary to the DPP before it was broadcast, and not whether it was reasonable to require E TV to do so. I have already pointed out that the law prohibits E TV from broadcasting material that prejudices the administration of justice. But there is no general principle of our law, whether in the common law, or in a statute, or to be extracted from the Constitution, that obliged E TV to furnish its material to the DPP before it was broadcast, and least of all a law that prohibited it from broadcasting the material unless it could first demonstrate that the publication would not be unlawful. The law generally allows

⁸ *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA).

freedom to publish and freedom is not subject to permission. In the absence of a valid law that restricts that freedom a court is not entitled to impose a restriction of its own.

...

The question is not whether it might have been reasonable for E TV to have submitted to the request but rather whether it was obliged to do so in law. It was not. In the absence of a law obliging E TV to furnish the documentary to the DPP before it was broadcast the first requirement for the grant of a final interdict - a clear right - was not met and the interdict ought to have been refused.”⁹



- 18 The sharp question that arises in this case is whether anything in law obliges the spouse and children of the late President Lungu as his heirs to repatriate his body for a burial in Zambia, such that the Government of Zambia has a clear right to such repatriation – entitling the Government to a mandatory order. We show below that no law places such an obligation on the spouse and children of the late President Lungu.
- 19 To the contrary, the law gives the spouse and children of the late President Lungu as his heirs exclusive burial rights and say over what must happen to his body – free from state interference. The Government of Zambia therefore had no right,

⁹ Ibid paras 25 – 26.

let alone a clear right, to take possession of the body of the late President Lungu to bury it in Zambia. Its application ought to have failed for lack of a clear right.

20 The second principle governing motion proceedings that was applicable in this case was that the application ought to have been decided on the version of the applicants in this application for leave to appeal, who were respondents in motion proceedings.

21 In *Skog*,¹⁰ the SCA recently recalled the established principle from *Plascon-Evans*¹¹ that—



*“[a]n applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.”*¹²

22 In *MEC for Economic Development Gauteng and Another v Sibongile Vilakazi and Others*,¹³ the SCA recently held that the import of the aforementioned

¹⁰ *Skog N.O. and Others v Agullus and Others* 2024 (1) SA 72 (SCA).

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) [1984] 2 All SA 366.

¹² *Skog* para 18.

¹³ *MEC for Economic Development Gauteng and Another v Sibongile Vilakazi and Others* [2024] ZASCA 126; [2024] 4 All SA 344 (SCA) para 41.

principle is that *“the application is effectively decided on the respondent’s version”*.

- 23 We respectfully submit that this Court failed to apply the above principle when it decided both the questions of the existence of an agreement and on the content of Zambian law, which had to be decided on the applicants’ version as they were respondents in an application brought by the Government of Zambia. Both of these were factual questions on which there were clear factual disputes.

- 24 Before we delve into this Court’s findings on both the purported agreement and Zambian law, we deal briefly with a more fundamental obstacle to the relief that was granted by the Court. This is that the relief granted was proscribed by the Constitution and the common law, and should have been refused on this basis.



The relief granted was proscribed by the Constitution

- 25 The starting point is that the rights in the Bill of Rights apply to everyone who is within the territory of South Africa. Section 7(1) of the Constitution says:

“[The] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

- 26 Foreign nationals are included. Even against the claims of their own government. For as long as they are in South Africa everyone is entitled to rely on the provisions of our Bill of Rights. There are no exceptions. The Lungu family is also entitled to rely on the protections of our Bill of Rights in its dispute against the

Government of Zambia. The Lungu family members are holders of rights, but the Government of Zambia may not be.¹⁴

27 This Court ought to have commenced the inquiry that was before it with reference to the Constitution, which is the supreme law in the Republic. This is especially so since, in their answering affidavit, the spouse and children of the late President Lungu expressly relied on the Constitution,¹⁵ particularly their rights to “*family autonomy and dignity*” (para 31.3 of the answering affidavit), as well as the rights to “*family life and cultural practices*” (para 2.3.3 of the answering affidavit). The question for decision was therefore whether the Constitution of South Africa protected Ms Esther Lungu as the widow of Mr Edgar Lungu with the sole right to bury her deceased husband in accordance with his wishes, her wishes and those of the family.



28 It is apparent from the papers that there were several provisions of the Constitution that were applicable and protected the burial rights of the spouse and children of President Lungu as his heirs, many of which were squarely raised in the pleadings. These rights could never be trumped by the wishes of the Zambian Government over the body of Ms Lungu’s deceased husband.

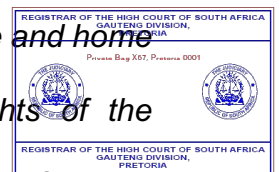
29 The specific fundamental rights that are entrenched in the Bill of Rights of the Constitution and that protect the burial rights of a surviving spouse and the family of a deceased person are set out below:

¹⁴ Cf: *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at para 27.

¹⁵ See answering affidavit at, *inter alia*, paras 2.3.1, 2.3.3, 13.3, 13.4, 31.3.

29.1 The right to privacy in section 14. The right of the surviving spouse and family to have exclusive say on the deceased's burial is sacrosanct. That is so because the burial right is intensely personal. The exclusive right to choose how to bury is the inner sanctum of one's family life and is a fundamental part of each person's autonomy that cannot be interfered with by the state or negated by other purported state interests.

29.2 In *Bernstein*, the Constitutional Court held that the right to privacy is "*the inner sanctum of the person such as his/her family life, sexual preference and home environment which is shielded from erosion by conflicting rights of the community*".¹⁶ The surviving spouse and family's exclusive right of burial, which includes the right to choose a private burial, is fundamental to their family life, part of their privacy and shielded from erosion by the conflicting interests of the public and/or the state.



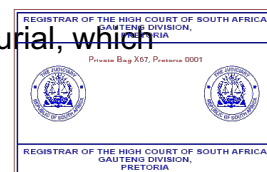
29.3 The second constitutionally protected right that is relevant is the right to dignity in section 10 of the Constitution. The exclusive ability to choose how to deal with the remains of a loved one is part of one's sense of self-worth, self-actualisation and self-governance free of dictation from external forces, particularly those of the state.

29.4 The third relevant right is the right to equal protection of the law in section 9 of the Constitution (which is the flipside of the dignity rights in section 10). This

¹⁶ *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) para 67. See also judgement of Sachs J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 para 117.

right is brought sharply into the equation by this Court's finding that the wishes of the family had to yield to the dictates of the Zambian state.

- 29.5 The other constitutionally entrenched rights that are of relevance are the rights to freedom of religion, belief and opinion (section 15); freedom of expression (section 16); freedom of association (section 18); and to engage in one's own cultural practices. A family's burial practices are often intrinsically linked to their beliefs, culture and sense of expression. Moreover, part of the protected burial choices of the family may include choosing who can attend at the burial, which choice is protected by the right to freedom of association.



- 29.6 Finally, the constitutional rights set out above must be understood in the context of the broader values enshrined in the Constitution, which include

29.6.1 “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms” (section 1(a));

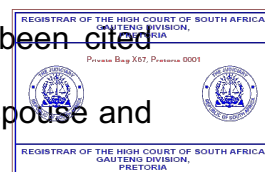
29.6.2 “[s]upremacy of the constitution and the rule of law” (section 1(c)); and

29.6.3 the separate injunction in section 2 that the Constitution is “*the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*”.

- 30 Once these rights are taken into account, they are dispositive of the application. No governmental wishes can override constitutional rights. More so of a foreign government in respect of the rights of a widow to her husband's body that is in South Africa.

31 Moreover, these constitutional rights of burial may not be contracted away because no one may contract over a right of burial under our constitutional order.

32 Indeed, under our common law – which is now given effect to by the Constitution – the position was that Roman-Dutch law proscribed a contract over a corpse because “[t]he human body and its parts were classified as *res extracommercium* (things outside the commercial sphere)”.¹⁷ A corpse was not regarded as a thing that could be owned and thus capable of being transacted over by contracting parties.¹⁸ Instead, according to Professor Price (whose work has been cited authoritatively by our courts), the deceased’s executor and/or their spouse and heirs had a restricted legal right of possession, which conferred on them the right to bury the body in accordance with the wishes of the deceased.¹⁹



33 This limited right of the heirs referred to by Professor Price has been recognised in a number of cases, including the following:

33.1 In *Saiid v Schatz* 1972 (1) SA 491 (T), the Court quoted with approval the work by Professor Price referred to above regarding the position in Roman-Dutch law, particularly the portion that states that:

"Matters affecting the disposal of a corpse are rarely subjects of litigation, with the result that there is very little modern guidance on the subject as a

¹⁷ M Slabbert “‘This is my kidney, I can do what I want with it’ - property rights and ownership of human organs” *Obiter* (2009) vol. 30, No.3 499 at 502.

¹⁸ See M Slabbert “Burial or cremation – who decides?” *De Jure* (2016) vol.49, No.2 230.

¹⁹ T.W. Price “Legal Rights and Duties in Regard to Dead Bodies, Post-Mortems and Dissections” (1951) 68(4) *South African Law Journal* Vol. 68(4) 403 at 405.

*whole. But, applying general legal principles, it would seem reasonably clear that the primary duty of the executor, or, failing him, the surviving spouse, child, parent or other near relative of the deceased in regard to his mortal remains is to dispose of them in accordance with the terms of his will, provided that this is not impossible, too expensive for the estate to bear, or unlawful. It has been stated that in English law the executor is not bound to obey the terms of the will in this particular regard. Even if this proposition is correct for English law, it does not follow that it is correct for Roman-Dutch law. Grotius specifically says that a will, besides disposing of the deceased's property, may deal with other matters such as the guardianship of his children and directions as to his burial. It is taken for granted that the heir (or in the modern law the executor) must carry out all the terms of the will as far as possible. It therefore follows that in our law directions in the will as to the disposal of the body must, if possible and lawful, be followed."*²⁰



- 33.2 The Court in *Saiid* also cited Voet, who similarly says that under Roman-Dutch law, "[i]f the deceased did not impose the duty of burial on anyone, the matter would affect those who have been named in the last will as heirs. If no one has been so named, it affects the legitimate children or the blood relations, each in their order of succession."²¹ On the basis of these works describing the position under Roman-Dutch law, the Court concluded that "*the first respondent would*

²⁰ *Saiid v Schatz* 1972 (1) SA 491 (T) at 493H - 494B.

²¹ *Ibid* at 494D-E.

qualify, together with his minor son, as the heir of the deceased and it seems to me that the duty to attend to the burial of the deceased devolves upon him".²²

33.3 In *Human v Human and Others* 1975 (2) SA 251 (E), the Court held that: "[i]f the deceased has appointed no one to perform them (that is the funeral rites) the duty falls to the heirs nominated by the will: if no heir is nominated the legitimate or cognate heirs who succeeded must do so. Failing these, the duty of burying the deceased falls on the civil authorities, at the expense of his estate".²³ Accordingly, the Court concluded that "[i]t follows, therefore, and I come to the conclusion that the first respondent is to be regarded as the heir of the deceased and, that being so, it seems to me that I should follow, in the absence of any authorities to the contrary, the statement of the law in Voet that it is the duty of the person named in the last will as heir to attend to the funeral rites of the deceased."²⁴



33.4 In *Tseola and Another v Maqutu and Another* 1976 (2) SA 418 (Tk), the Court referred to *Saiid* and *Human* above, and held that: "from these two cases it is quite clear that it is the duty and therefore the right of the heir to bury the deceased and to use his discretion in doing so where no testamentary directions have been given."²⁵

33.5 In *Mbanjwa v Mona* 1977 (4) SA 403 (Tk), the Court held the following about a deceased who had died intestate: "[t]his has two consequences. Firstly, it

²² Ibid at 494E.

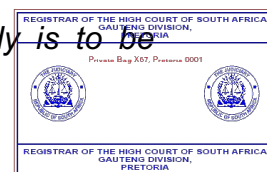
²³ *Human v Human and Others* 1975 (2) SA 251 (E) at 254C.

²⁴ Ibid at 254H.

²⁵ *Tseola and Another v Maqutu and Another* 1976 (2) SA 418 (Tk) at 422H.

means that she left no directions as to her burial. Secondly, it means that it is the duty and, therefore, the right of her intestate heirs to bury her and such right includes the choice of the place of burial as was said by Cloete J in Human's case supra."²⁶

- 33.6 In *Khumalo and Others v Khumalo and Another* 1984 (2) SA 229 (D), the Court held that: "*[i]t seems to me that it is now fairly well settled that it is the heir or heirs of a deceased person who are entitled to decide upon burial arrangements and in particular as to when and where the body is to be buried.*"²⁷



- 33.7 In *Sekeleni v Sekeleni* 1986 (2) SA 176 (Tk), the Court held that: "*In the cases of Saiid, Human and Tseola it was held that, in the absence of any testamentary direction by the deceased as to his burial, the duty of burying him and therefore the corresponding right to do so was that of the heir(s).*"²⁸ The Court went on to quote with approval the passage from Voet cited in *Saiid* above.²⁹

- 33.8 In the cases of *Sekeleni* above, *Mnyama v Gxalaba and Another* 1990 (1) SA 650 (C) and *Mbulu v Thys and Another* 1993 (4) SA 701 (SE), the Courts reiterated the exclusive right of the heirs to bury the deceased in accordance

²⁶ *Mbanjwa v Mona* 1977 (4) SA 403 (Tk) at 405F-G.

²⁷ *Khumalo and Others v Khumalo and Another* 1984 (2) SA 229 (D) at 232E.

²⁸ *Sekeleni v Sekeleni* 1986 (2) SA 176 (Tk) at 178A.

²⁹ *Ibid* at page 179A-B.

with his or her wishes, and held that the wishes of the deceased need not be in a written testamentary instrument, but may be expressed verbally.

33.9 In the recent case of *Simakuhle*,³⁰ the Court held that “*the First Respondent, as the wife to the deceased, has burial rights and may decide where her late husband should be buried.*”;

33.10 Also recently in *P.N and Others v P.N*,³¹ the Court referred to *Simakuhle* and held as follows:

“*This Court is in full agreement with Simakuhle and do add that possession of burial rights extends to the right to decide on the method through which the body of the deceased may be disposed of. Differently put, regard being had to the law of intestate succession, the surviving spouse is first in line to decide what to do with the body of the deceased. The children and the parents of the deceased are second and third in line. The concept of burial rights is not limited to one disposal method but it applies to all known disposal methods. Thus, for the present purposes, the surviving spouse has cremation rights. In order to cement this trite common law position, Professor G.H.I Friedman in his work Restitution stated the following:*

‘The primary responsibility for insuring the burial of a deceased person falls on the personal representative of the deceased, who will in turn be entitled to an indemnity for expenses in this regard out of the estate as a first



³⁰ *Simakuhle v Simakuhle* [2024] ZAGPPHC 33 para 36.

³¹ *P.N and Others v P.N* (104659/2022) [2024] ZAGPJHC 924 para 15.

charge... Thus, the surviving spouse will be responsible for the burial of a spouse, and the parent for the burial of a child in the absence of a surviving spouse’.” (emphasis added)

34 The heirs’ exclusive burial rights in terms of the common law must now be understood in light of the protections afforded by the Constitution as set out above and must be infused with constitutional values.

35 Importantly, under our Constitution and law the burial rights of the family do not change because of the position that the deceased held on the date of his death.

It matters not that the deceased may have been an ex-President or other high ranking official. This is why the *State, Official and Provincial Office Funeral Policy Manual, 2016*, which deals with state funerals, expressly states that the family may choose a private burial. Paragraph 3.5 of the Manual provides as follows:



“3.5 THE FAMILY

(a) On confirmation of the demise, the DG in The Presidency shall present the following options to the next-of-kin:

(i) An Official Memorial Service, State Funeral Service and a Burial or Cremation.

(ii) An Official Memorial Service, State Funeral Service followed by a Private Burial or Cremation (not on the same day).

(iii) A Private Burial or Cremation followed by a State Memorial Service.

(iv) A Private Burial or Cremation only.

(v) A State Memorial Service only.”

36 Under our Constitution and law, the choice is therefore exclusively that of the family. This is why, when the Lungu family communicated to the South African government that, following unsuccessful negotiations with the Government of Zambia, they wished to proceed with a private burial, its response was to state unequivocally that the South African government respects the wishes of the family. That correspondence was placed before this Court.³²

37 We respectfully submit that this Court erred when it failed to conduct the inquiry before it with reference, first, to the Constitution. The constitutional rights referred to above protect “everyone” within the borders of the Republic and were plainly of application in this matter.



38 In terms of section 7(2), read with section 8(1), of the Constitution, this Court was obliged to protect and promote the constitutional rights referred to above. Section 8(1) makes it clear that the Bill of Rights binds the judiciary.

39 According to settled Constitutional Court jurisprudence, this Court was enjoined to protect and promote the constitutional rights of the spouse and children of President Lungu in South Africa. This obligation applied regardless of the Court’s view of what the position was under Zambian law (a question which we address below).

³² See annexure “EL15” to the answering affidavit.

40 In *Mohamed*,³³ the Constitutional Court held as follows:

“But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated.



...

These cases are consistent with the weight that our Constitution gives to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposes on the state to “protect, promote and fulfil the rights in the Bill of Rights”. For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he has no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government’s obligation to protect the right to life of everyone in South

³³ *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment.”³⁴

41 *Mahomed* was an extreme case. A non-South African was accused of committing terrorist acts in a foreign country and thereafter entered South Africa illegally. When sought by the United States of America, the Court held that in the first place since he was in South Africa he was entitled to the protections of our Bill of Rights.



42 The unique facts of *Mahomed* aside, a paradigmatic case on the topic is *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC), where the question to be answered was whether section 27 of the Constitution applies only to citizens or everyone. The Court, per Mokgoro J held:

“[46] The socio-economic rights in sections 26 and 27 of the Constitution are conferred on “everyone” by subsection (1) in each of those sections. In contrast, the state’s obligations in respect of access to land apply only to citizens. Whether the right in section 27 is confined to citizens only or extends to a broader class of persons therefore depends on the interpretation of the word “everyone” in that section. The applicants relied on section 25 of the Constitution, as well as various other rights in the Bill of Rights, to argue that

³⁴ Ibid paras 53 and 59.

“everyone” in section 27 included non-citizens and therefore also (for the purposes of this case) permanent residents.

[47] This Court has adopted a purposive approach to the interpretation of rights. Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country”, and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word “everyone” in this section cannot be construed as referring only to “citizens”.³⁵



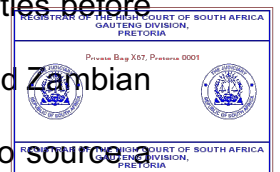
- 43 Accordingly, the true enquiry was not about a contest between South African law and Zambian law. The enquiry was whether the Constitution of South Africa protects Ms Lungu, who is in South Africa, in respect of her husband’s remains, which are in South Africa. There was an obligation on the Court to follow the spirit, purport and objects of the Bill of Rights. It is contrary to the Republic’s obligations (which extend to the judiciary) to protect the constitutional rights to privacy and dignity, among others, to subject the Lungu family within the territory of the Republic to a purported foreign law that denudes them of these rights.
- 44 It is therefore evident that the Constitution, as well as the common law which it furthers, proscribed the relief granted to the Government of Zambia. It affords exclusive burial rights to the spouse and children of the Lungu family while in South Africa, which rights cannot be interfered with by the state, let alone a

³⁵ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) paras 46-47.

foreign state. This Court ought to have upheld and protected the Bill of Rights and the Constitution, and accordingly dismissed the Government of Zambia's application.

45 There are thus prospects of a different court on appeal setting aside this Court's order.

46 Even if we are wrong on this point, however, there are reasonable prospects of an appellate court finding that – on the evidence adduced by the parties before it – this Court erred in its findings on both the purported agreement and **Zambian law**, and therefore that these instruments could not be relied upon to **source a** clear right on the part of the Government of Zambia to the relief which the Court granted. We address this next.



The Court erred in both its application of and findings on **Zambian law**

47 Respectfully, it is submitted that the Court erred in finding that there was a conflict between **Zambian law** and South African law.

48 First, even if it were true that there was a conflict (which, as we show below, there was not), we have already set out above that the Court ought to have grounded the inquiry in the Constitution, and protected and promoted the Lungu family's constitutional rights to privacy and dignity, among others, which rights were expressly relied upon.

49 Second, even on the pure application of the principles from *Society of Lloyd's* relating to conflict of laws, there are reasonable prospects of another court finding

that South African law ought to have been applied by the Court in deciding the application because:

49.1 The dispute between the parties arose in and is being litigated in South Africa; the subject matter of the dispute – being the remains of President Lungu – is in South Africa; President Lungu was lawfully in South Africa at the time of his death; the programme in “FAA7” that is purportedly the agreement between the parties was drawn up by the Lungu family in South Africa; the relief is being sought before a South African court and is to be enforced in South Africa; and the cause of action plainly arose in South Africa. The South African legal system therefore has the closest and most real connection to the suit.

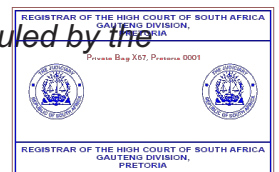


49.2 The “*domicile, habitual residence and nationality of the late President and the Family*” (para 26 of this Court’s judgement) are at best neutral factors given that this matter does not concern the person of President Lungu (he is dead and has no legal personality). The dispute concerns his remains, which are in South Africa and is against his surviving spouse and family, who are also in South Africa, and their clear wish is to bury him in South Africa.

50 Third, the Court erred in applying Zambian law to the dispute in circumstances where the Government of Zambia, as *dominus litis*, failed to place the Zambian law properly before the Court by way of expert evidence. It is trite that in our law, a party who wishes to have a dispute determined by the application of a foreign law must prove that foreign law by way of expert evidence because the content of that law is a matter of fact. In *The Asphalt Venture Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA), the SCA held as follows:

*“As this court has consistently said, foreign law is a question of fact and must be proved. This is achieved by reference to the evidence of experts, ie lawyers practising in the courts of the country whose law our courts want to ascertain.”*³⁶

- 51 The version of the Zambian law on which the Government relied and which was accepted by this Court was contested by the Lungu family in their answering affidavit. They stated that *“there is no conflict of law. There is no law in Zambia that states that the wishes of the next of kin can be ignored and overruled by the [Government]”* (para 13.4 of the answering affidavit).

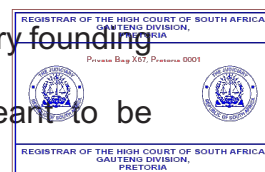


- 52 Given that Zambian law was a question of fact that needed to be proved by the Government, that the Government’s version of the Zambian law was not supported by any expert evidence, as well as that there was a dispute of fact as to the content of Zambian law raised by the Lungu family, the version of the Lungu family ought to have prevailed as they were respondents in motion proceedings. This is especially so since there is a presumption in our law that the law of a foreign state is consistent with ours unless the party alleging that it is different adduces evidence of the foreign law, which is done by way of an expert. In this regard, the Court in *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) held that:

³⁶ *The Asphalt Venture Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA) para 31. See also *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G.

*"It is assumed that on any relevant point there is no difference between our law and the law in the foreign country. The result is that the party who wants the Court to find that there is a difference, the party who in that sense relies upon the foreign law to assist him to a point where South African law would not bring him, must produce evidence."*³⁷

53 The Government of Zambia did not lead expert evidence of Zambian law, but instead referred to its own understanding of Zambian law in its supplementary founding affidavit.³⁸ According to paragraph 12.30 of the supplementary founding affidavit, the Government's version on the Zambian law was meant to be confirmed by *"Mr. Mutemwa Mutemwa who is State Counsel in private practice (the equivalent of Senior Counsel in the Republic of South Africa), who is an expert as far as Zambian law and the Zambian legal system is concerned"*. Apart from the fact that this would have been an incompetent procedure of adducing Zambian law before the Court, the affidavit of Mr Mutemwa referred to by the Government was, in any event, never filed and thus never came before the Court.



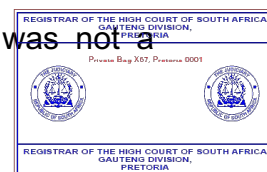
54 It follows that the Government of Zambia's version regarding Zambian law was never proved. It was also, as pointed out above, sharply disputed by the Lungu family in their answering affidavit. The version of the Lungu family, who were respondents in motion proceedings, ought to have prevailed. The Court therefore

³⁷ *Harnischfeger Corporation and Another v Appleton and Another* 1993 (4) SA 479 (W) at 485I – 486A. See also *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 79E-I and *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) para 34.

³⁸ See supplementary founding affidavit at paras 12.1 to 13.7.

should have proceeded on the basis that Zambian law was consistent with South African law.

- 55 While it would have been possible for this Court to exercise its power under section 1(1) of the Law of Evidence Amendment Act 45 of 1988 to “*take judicial notice*” of Zambian law “*in so far as such law can be ascertained readily and with sufficient certainty*”, nothing in the judgement suggests that it did so. In any event, the Court would not have been able to exercise this power in this case because the version of the Zambian law put forward by the Government was not a sufficiently certain account of Zambian law.



- 56 Fourth, the net result of the defective procedure followed by the Government in failing to place Zambian law properly before the Court was that the judgment of this Court does not engage in any proper exposition of the Zambian law. Had it done this, the Court would have engaged in a thorough analysis of the Zambian Constitution, which is the supreme law of Zambia and in many ways mirrors the South African Constitution. Article 1(1) of the Zambian Constitution provides that the Constitution “*is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.*”
- 57 The Zambian Constitution protects, *inter alia*, the fundamental rights to privacy, personal liberty, freedom from inhuman treatment, freedom of conscience, freedom of expression and freedom of association.³⁹ These equivalent rights

³⁹ See Articles 11, 13, 15, 17, 19 and 20 of Zambia's Constitution.

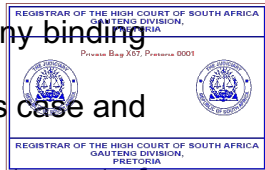
under the Zambian Constitution protected the burial rights of the Lungu family in the same way that their equivalents in the South African Constitution protect a widow and her family's burial rights. As such, any proper examination of Zambian law should have proceeded from its own Constitution and asked whether the claims of the Government do not clash with Ms Esther Lungu's constitutionally protected rights and those of the family. Therefore, the correct interpretation of Zambian law must itself be consistent with the Zambian Constitution.

58 Fifth, the Court's reliance on the decision in *Kaunda* as a source of Zambian law was incorrect. That is because the decision in *Kaunda* was inapplicable on the facts of this case. It is common cause that President Lungu was stripped of his benefits as a former President under the Benefits of Former Presidents Act, 1993 ("**Benefits Act**"). Even if the import of *Kaunda* is that the Zambian state may subject the family of a former President to the benefit of a state funeral contrary to the wishes of the family and that former President (which is not the case), it is clear that – unlike in *Kaunda* – there was no such benefit to be imposed as President Lungu was stripped of all of his benefits as a former President. It is notable that the nature of a state funeral was never pleaded fully: it is not clear whether it is a benefit conferred by the state or a right vesting on the surviving spouse. But what is clear is that whatever its nature, the Zambian Government could not prove any law which entitles it to exercise autonomy over the corpse of a former president contrary to the wishes of the surviving spouse.

59 Sixth and in any event, it is clear from *Kaunda* that it did not establish any principle that the benefit of a state funeral is compulsory even when the wishes of the family and that ex-President are not to have a state funeral, but rather to



the have a private burial. *Kaunda* concerned a family that wished belatedly to change the terms of a state funeral of a former President the proceedings of which had already commenced and to which the family had unequivocally agreed. The remarks made by the Court in relation to the wishes of the family having to yield to the protocols of a state funeral must be understood in that context – it was in the middle of a funeral. That president had not been stripped of his benefits unlike the current.

60 So apart from being entirely *obiter* and thus not a representation of any binding law, the statements of the Court in *Kaunda* are of no application in this case and should not have been relied upon by the Court as an authoritative statement of


Zambian law. The Lungu family has elected to bury President Lungu in a private ceremony. It has not agreed to any state funeral and no proceedings are in motion. The protocols that apply to a state funeral in Zambia are therefore wholly irrelevant to this case.

61 Having stripped him of his benefits, the Zambian Government could not lawfully reinstate those upon the late President Lungu's death.

62 For all of the reasons set out above, there are reasonable prospects of a court on appeal coming to a different conclusion in relation to the application of Zambian law to this matter, and that law being a source of any clear right on the part of the Government of Zambia to the relief which this Court granted the Government.

The Court erred in finding that there was an agreement

63 We have already addressed the fundamental flaw with this Court having sourced a clear right of the Government of Zambia from a purported agreement. Such an agreement is proscribed and therefore unenforceable. This should have been the end of the matter.

64 However, even if our law permitted an agreement over a corpse, this Court's finding that annexure "FAA7" to the Government of Zambia's supplementary founding affidavit constituted an agreement between the parties, which was capable of being enforced by the Court when it made its order, is not borne out by the evidence that was before the Court. It is clear from the parties' respective affidavits that it was common cause between the parties that annexure "FAA7" was not such an agreement.



65 In the Government's supplementary founding affidavit, to which annexure "FAA7" was annexed, the Government makes it clear that "FAA7" was merely a tentative programme drawn up by the Lungu family on 10 June 2025, and that this programme was overtaken by events because the family received another programme from the Government, which it rejected on the basis that *"the body should not go to the Mulungushi Conference Centre and that President Hichilema should not preside over the reception ceremony"* (para 7.11 of the supplementary founding affidavit).

66 The supplementary founding affidavit then explains that the tentative programme in "FAA7" was abandoned and that the parties did not proceed on the basis of "FAA7", but rather engaged in further negotiations followed in order to reach

agreement on a new programme. Accordingly, the Government “*issued a further press statement wherein the Zambian public was informed that the body of the late President would no longer arrive in Zambia on 11 June 2025, that constructive consultations between the Applicant and the Family and other stakeholders are ongoing and that full details of the state funeral programme would be released as soon as the consultations are concluded*” (para 7.12).

67 The supplementary founding affidavit then proceeds to set out that further negotiations took place on dates long after “FAA7” with a view of reaching an agreement. Although the supplementary founding affidavit asserts that such an agreement was subsequently reached⁴⁰ (which is denied by the Lungu family), it is clear that the basis of this alleged agreement is not “FAA7”, which had long passed and had been overtaken by subsequent negotiations. The basis of this alleged agreement lies in subsequent documents and events, not “FAA7” as erroneously held by the Court.



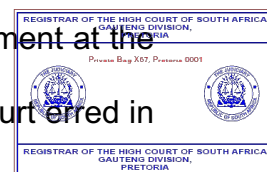
68 As such, on the Government’s own version, “FAA7” was not an extant agreement at the time at which the Government brought proceedings and the Government was not purporting to be enforcing “FAA7” when it launched its application. It instead sought to enforce another alleged agreement purportedly entered into long after “FAA7”.

69 The Government’s version that “FAA7” was not applicable at the time the Government brought its application is consistent with the version put forward by

⁴⁰ See paras 8.1 to 10.5 of the supplementary founding affidavit.

the Lungu family. In its answering affidavit, the family states that “FAA7” was overtaken by events because the Government subsequently sought to impose different programmes on the Lungu family contrary to the terms of “FAA7”.⁴¹ Even though the family admits that subsequent negotiations took place after “FAA7”, it disputes the Government’s version that these subsequent negotiations produced any agreement. On the principles governing motion proceedings, this dispute of fact ought to be decided on the Lungu family’s version.

70 As neither party pleaded a version that “FAA7” was an extant agreement at the time when the Government of Zambia brought its application, the Court erred in regarding this document to be an extant agreement from which a clear right of the Government could be extrapolated. It is trite that a Court must exercise judicial restraint and decide an application within the four corners of the version pleaded in the parties’ affidavits. In *Fischer*,⁴² the SCA held as follows:



“[I]t is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues.

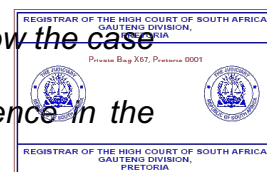
That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘it is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances

⁴¹ AA paras 27.1 to 29.9.

⁴² *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 13-15.

where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone." (our emphasis)

- 71 The SCA has explained that this cardinal principle is “*not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.*”⁴³



- 72 It is prejudicial for the Court to have found that “FAA7” was an extant agreement from which a right on the part of the Government of Zambia could be sourced for purposes of the relief the Court granted, when that version was not pleaded by either of the parties. This would justify interference on appeal. There are reasonable prospects of an appellate court finding that on the evidence that was before the Court, “FAA7” was plainly not an extant agreement and that it therefore could not serve as the source of any right of the Government of Zambia to the relief which this Court granted to the Government.
- 73 What this discussion reveals is that the true dispute between the parties was whether *the* agreement as pleaded by the Government of Zambia was concluded

⁴³ *National Credit Regulator v Lewis Stores (Pty) Ltd and Another* [2019] ZASCA 190; 2020 (2) SA 390 (SCA); [2020] 2 All SA 31 (SCA) para 29, quoting *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-G.

or not – the agreement after “FAA7”. That issue was never resolved. Instead the decision is based on an agreement in respect to which it is common cause was not the agreement sought to be enforced. Where the issue between the parties has not been decided then there has been a failure of justice. It is this failure of justice that we argue should be referred to the SCA for determination. If this Court had not misdirected itself as to the exact agreement that was being asserted by the Government, it would not have made the conclusion that it did.

74 In any event, there are other problems with the Court sourcing any right on the part of the Government of Zambia to the relief it ordered from the tentative programme in “FAA7”, even if that document could be construed as an agreement:



74.1 First, the order made by the Court is inconsistent with the terms of “FAA7”. As is plain from “FAA7”, any repatriation in terms of “FAA7” was to be carried out by the Lungu family by way of private charter. “FAA7” does not authorise any repatriation by the Government of Zambia, which is what the Court ordered. Accordingly, there is no nexus between the Court’s order and “FAA7”, such that “FAA7” cannot be relied upon as a source of the right of the Government of Zambia to the relief which this Court granted to the Government.

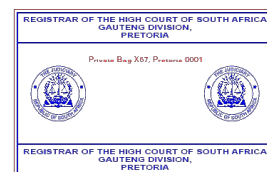
74.2 Second, even if an agreement had at some point been reached (which the Lungu family denies), the Lungu family was entitled to resile from the agreement when it became clear that the Government of Zambia was not negotiating in good faith and sought to superimpose its own wishes that were

contrary to those of the Lungu family.⁴⁴ The Lungu family enjoys exclusive burial rights over the remains of President Lungu and cannot be forced to have a burial that is contrary to their wishes and those of President Lungu.

- 75 We respectfully submit that there are reasonable prospects of a court on appeal finding that “FAA7” was not an extant agreement that was open to be relied upon by this Court as a source of any clear right on the part of the Government of Zambia to the relief which the Court granted to the Government.

CONCLUSION

- 76 For all the reasons set out above, we respectfully submit that a case has been made out for leave to appeal and that the applicants’ application for leave to appeal to the SCA should succeed.



TEMBEKA NGCUKAITOBI SC
NTOKOZO QWABE
Chambers, Sandon
7 September 2025

⁴⁴ In this regard, the applicants rely on the decision of the Constitutional Court in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 101, where the Court warned against negotiations conducted as a charade, without genuine intent to reach consensus.