

**REPUBLIC OF SOUTH AFRICA**



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

Case Number: 2025-096565

|            |                                                                                   |
|------------|-----------------------------------------------------------------------------------|
| (1)        | REPORTABLE: NO                                                                    |
| (2)        | OF INTEREST TO OTHER JUDGES: NO                                                   |
| (3)        | REVISED: NO                                                                       |
| 16/09/2025 |  |
| DATE       | SIGNATURE                                                                         |

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**

Respondent

*This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 16 September 2025.*

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## APPLICATION FOR LEAVE TO APPEAL JUDGMENT

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**CORAM: LEDWABA AJP, MUDAU ADJP et POTTERILL J (The Court)**

[1] This is an application for leave to appeal against the judgment delivered by this Court on 8 August 2025. In its judgment, this Court upheld an application to repatriate for a state funeral and burial thereafter in the Republic of Zambia the mortal remains of the late former President of Zambia, Mr Lungu, in favour of the respondent.

[2] Section 17 of the Superior Courts Act 10 of 2013 (“the Act”) provides as follows: “(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; or (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;...” As stated in *Ramakatsa and Others v African National Congress and Another*,<sup>1</sup> “...the merits remain vitally important and are often decisive.”

[3] The test for reasonable prospects of success is well established in that the applicant must convince the Court on proper grounds that there is a sound, rational basis for the conclusion that there are prospects of success on appeal.<sup>2</sup> In the context of section 17(1)(a)(ii) of the Superior Courts Act, a compelling reason for an appeal to be heard can include unique legal principles that a higher court should pronounce on.

[4] Turning then to the merits of the application, the applicants (“the family”) have a three-pronged approach. First, the contention was repeated that as heirs, they have exclusive burial rights in terms of the common law, which must be taken into account, considering the protections afforded by the Constitution. Second, the family submitted

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<sup>1</sup> (724/2019) [2021] ZASCA 31 (31 March 2021) at para 10.

<sup>2</sup> *S v Smith* 2012(1) SACR 567 (SCA) at para 7.



that as the dispute between the parties arose in and is litigated in South Africa; the mortal remains of the late President Lungu is in South Africa; the programme in "FAA7" was drawn up by the Lungu family in South Africa; the relief is being sought before a South African court, consequently the South African legal system has the closest and most real connection to the dispute and the Court should have relied on South African law. The attack further in this regard is that 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 this Court by way of expert evidence. In addition, this Court's reliance on the decision of Kaunda as a source of Zambian law was incorrect because the late President Lungu was stripped of all his benefits as a former President during his lifetime. Thirdly, it was argued that the order made by this Court is inconsistent with the terms of "FAA7" because 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, but the court ordered that the Government of Zambia should repatriate the body of the late President Lungu.

[5] The applicants' counsel further argued that a contract cannot be concluded in respect of a corpse because it has no commercial value. This argument, in our view, is not relevant to the issues in this matter.

[6] The applicants further referred this court to the case of *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)*.<sup>3</sup> *Mohamed* dealt with the removal by the government, whether by deportation or extradition, of a person to a foreign country for trial on an offence carrying a death penalty without the government first securing an undertaking from such a country that a death sentence will not be imposed or, if imposed, carried out, contrary to s 10 of the Constitution. The *Mohamed* case is distinguishable because it cannot be said that, on the facts of this case, it was necessary to first secure an undertaking from the Zambian government that their president will not speak at all events.

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<sup>3</sup> 2001 (3) SA 893 (CC) (*Mohamed*).

[7] This Court is satisfied that on the merits there are no reasonable prospects of success. As for the application of Zambian law, the Court considered that the deceased was on a temporary visit to the Republic for medical reasons. The main parties to the dispute are peregrini. The Kaunda decision is a leading case in Zambia dealing with state burials. The argument that the deceased was stripped of his benefits is of no moment. He remains a former state president with attendant burial benefits at state expense upon death. The allegation that the respondent failed to place expert evidence of Zambian law before this Court is without merit, as the Attorney General is an expert in Zambian law. The mere fact that "FAA7" records that the parties will consult and agree as to who will speak at all events does not vitiate the consensus that was reached. Conflicts and disagreements about burial rights are a common feature in our courts. Some disputes regarding burial rights are settled after parties have reached agreements. This is common, although a corpse has no commercial value.

[8] The argument was that this matter raised unique constitutional issues and points of law as to 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 pertaining to the remains of the deceased. Furthermore, for a Foreign State to assert a right of burial under its own laws, not South African law, are compelling reasons for the Supreme Court of Appeal to pronounce on. We are satisfied that no compelling reasons exist to grant leave to appeal simply because the matter is so fact specific that there is very little to no prospects that the same set of facts will confront a Court again.

[9] There is no reason why costs should not follow the result.

[10] In the result, the following order is made:

1. The application for leave to appeal is dismissed with costs, which includes the employment of two counsel on Scale C.





A.P. LEDWABA  
ACTING JUDGE-PRESIDENT OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA



T.P. MUDAU  
ACTING DEPUTY-PRESIDENT OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG



S. POTTERILL  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Heard on: 8 September 2025

For the applicants: Adv. T. Ngcukaitobi SC

Adv. N. Qwabe

Instructed by: Mashele Attorneys Inc.

For the respondent: Adv. B.C. Stoop SC

Adv. D. Mtsweni

Instructed by: VFV Attorneys

Date of judgment: 16 September 2025