



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 089/2026

In the matter between:

ESTHER LUNGU

BERTHA LUNGU

TASILA LUNGU

DALIESO LUNGU

CHIYESO LUNGU

CHARLES PHIRI

MAKEBI ZULU

and

GOVERNMENT OF THE REPUBLIC OF ZAMBIA

TWO MOUNTAINS BURIAL SERVICES (PTY) LTD

MINISTER OF INTERNATIONAL RELATIONS

AND COOPERATION

First Appellant

Second Appellant

Third Appellant

Fourth Appellant

Fifth Appellant

Sixth Appellant

Seventh Appellant

First Respondent

Second Respondent

Third Respondent

Neutral citation: *Esther Lungu and Others v Government of The Republic of Zambia and Others* (089/2026) [2026] ZASCA 87 (23 June 2026)

Coram: SMITH, KEIGHTLEY and NORMAN JJA and MOLITSOANE and MOOKI AJJA

Heard: 29 May 2026

Judgments: Keightley JA (majority): [1] to [62]
Norman JA (dissent): [63] to [112]

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Summary: Burial dispute – Government of Zambia claiming right to repatriate and bury late former President – family disputing on basis of deceased's expressed wishes and constitutional rights to dignity, privacy and family autonomy – foreign custom and protocols to be proved by expert evidence – common law and constitutional rights of family prevail – in absence of proof of agreement Zambian Government has no right to repatriate and bury – family's right prevails.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ledwaba AJP and Mudau ADJP et Potterill sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
 - 2 The order of the high court is set aside and is replaced by the following order:
‘The application is dismissed with costs, including those of two counsel where so employed.’
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JUDGMENT

Keightley JA (Smith JA and Molitsoane and Mooki AJJA concurring):

Introduction

[1] The death of a loved one inevitably evokes grief for the family of the deceased. The burial of the earthly remains is an important rite, allowing the family to share the burden of grief with their community, while at the same time inviting a celebration of a life lived. The perimeter of grief extends outwards, when the deceased is a former head of state, embracing not just family and friends but also the nation. Sadly, in this case, which involves the burial of the deceased former President of the Republic of Zambia, President Edgar Lungu (the late President Lungu), the

very ritual intended to bring closure has, instead, pitted family against the state in a hard-fought legal dispute far from the protagonists' home.

[2] The first appellant is the wife of the late former President Lungu, Esther Lungu (Ms Lungu), and the second to sixth appellants are his children and other close relatives. I refer to them collectively as 'the family'. The seventh appellant is Makebi Zulu (Mr Zulu) who is the family's spokesperson. The first respondent is the Government of Zambia (the *Zambian Government*). The mortuary where the late former President Lungu's remains lie is the second respondent, Two Mountains Burial Services (Pty) Ltd. The third respondent, the South African Minister of International Relations and Co-operation, was cited in the high court proceedings but no relief was sought against the Minister. Neither second nor third respondents have participated in the appeal.

[3] The late former President Lungu came to South Africa from Zambia in January 2025 for medical treatment. His condition being terminal, he died in this country on 5 June 2025. For reasons that will become clear shortly, there is a dispute between the family and the *Zambian Government* over how, and consequently where, the late former President Lungu should be buried. In the immediate aftermath of his death, several meetings were held between representatives of the family and the *Zambian Government* in an effort to reach consensus on the manner of burial. This is a matter of some dispute, but stated broadly, the *Zambian Government* wishes to give the late President a state funeral in Zambia, with all the formal trappings, including the involvement of the current President of Zambia, Mr Hakainde Hichilema (President Hichilema). The family, on the other hand, citing the late former President Lungu's stated wishes – including a deathbed declaration – insist

that if a state funeral is to be accorded to him, then President Hichilema should play no role.

[4] When the attempts at mediating a solution failed, the Zambian Government instituted an urgent application in the Gauteng Division of the High Court, Pretoria (the high court) on 24 June 2025. The urgent application was for interim relief, aimed at retaining the late former President Lungu's remains in the mortuary pending an application to be instituted by the Zambian Government for an order permitting it to repatriate the body to Zambia. An interim order was granted by agreement between the parties on 25 June 2025. It incorporated timelines for the filing of further affidavits in support of, and opposition to, the Zambian Government's application for final relief, with a hearing date set for 4 August 2025.

[5] The application was heard by the high court comprising Ledwaba AJP, Mudau ADJP and Potterill J. On 8 August 2025, the panel delivered a joint judgment and order, the relevant paragraphs of which were as follows:

‘4. It is ordered that [the Zambian Government] is entitled to repatriate the body of the [late former President Lungu] ... for a state funeral and burial in Embassy Park, Lusaka, Republic of Zambia.

5. [The second respondent] is authorised and ordered upon service of the court order by the Sheriff of this Honourable Court, to immediately surrender the body of the [late former President Lungu] to a representative ... of the Zambian High Commission to enable [the Zambian Government] to repatriate the body to Zambia for the purposes stated in paragraph 4 above.

6. [The family is] authorised to be present when paragraphs 4 and 5 of this Order are executed, and an Aide De Camp, [late former President Lungu's] physician, and two Family members may accompany the coffin containing the body of [late former President Lungu] during the repatriation.

7. There is no order as to costs, which includes reserved costs.’

[6] The high court refused leave to appeal with costs on 16 September 2025. It found that there were no reasonable prospects of success on the merits, and there were no important constitutional or other points of law justifying an appeal. This Court granted leave to appeal to the appellants on 11 December 2025.

Facts

[7] The late former President Lungu was the sixth President of Zambia. He was in office from January 2015 until August 2021, when his political party, the Patriotic Front, was replaced in an election by the United Party for National Development. Its presidential candidate, President Hichilema, is the current President of Zambia. On the vacation of his office, the late former President Lungu was granted the normal benefits accruing to former Presidents under the Benefits of Former Presidents Act, 1993 (the Benefits Act). However, on 30 October 2023, he received a letter from the Office of the President (the withdrawal letter) referring to his pension and other benefits. The withdrawal letter recorded that the late former President Lungu had publicly announced that he had returned to active politics. It drew attention to the Benefits Act which provided that the pension and other benefits conferred would not be paid to a former President who engaged in those activities. The letter proceeded as follows:

‘4. Therefore, following Your Excellency’s decision to return to active politics, as evidenced from your acts and the speech delivered by Your Excellency at the 9th Memorial Anniversary, you are hereby informed that Zambian Government, shall henceforth, no longer provide benefits accruing to the Office of the Sixth President of the Republic of Zambia in accordance with the law.

5. Accordingly, Your Excellency, be informed that Zambian Government will enforce the law with immediate effect by withdrawing all of the benefits conferred on you by the Act.

6. Accordingly, Your Excellency, please note that you shall be removed from the payroll effective 1st November 2023.

7. In addition, the Office of the Sixth President is closed with immediate effect and all staff assigned to that Office will be redeployed. Further, take note that Zambian Government will no longer provide security, accommodation, transport and other requirements as the law provides, to a Former President.’

[8] These measures were implemented immediately with the effect that, at the time of his death, the late former President Lungu was accorded none of the benefits normally attaching to the office of a former President. The parties disagree on the legal effect of the withdrawal letter, which is an issue I address later.

[9] The withdrawal of the late former President Lungu’s benefits and the closure of his official office was the culmination of a series of prior actions taken by the Zambian Government. On 6 September 2023, the late former President Lungu boarded a flight bound for Seoul in South Korea to attend the 8th HWPL World Peace Summit. He was removed from the aeroplane by Zambian Government security personnel. On 9 September 2023, the police prevented him from attending a church service to which he had been invited by the Ndola Pastors’ Fellowship. The police then cancelled the service. In a third incident, the Zambian Government implemented a protocol requiring the late former President Lungu to obtain the consent of President Hichilema before traveling out of Zambia. He sought consent to visit his primary health care providers in South Africa in September 2023. In a letter dated 7 September from the Office of the President, he was advised that: ‘...authority has not been granted for you, Your Excellency, for travel to South Africa for medical review’. No reason was provided.

[10] None of these incidents are disputed. The Zambian Government stated that the late former President Lungu was removed from the flight to Seoul because it had

received information that the late former President Lungu would use the peace summit to further a political agenda, which was prohibited under the Benefits Act. The explanation for the refusal to permit him to travel to South Africa for medical reasons is that the late former President Lungu did not provide the Zambian Government with any particulars of the medical treatment he was to receive. The Zambian Government provides no evidence that it ever requested these details, nor does it explain how the nature of the treatment could possibly have been relevant to a request for authorisation to travel out of Zambia.

[11] In late 2024 the late former President became more ill and realised that he required urgent medical attention. In January 2025, during a visit by the United Nations Special Rapporteur on the right to freedom of opinion and expression, he took the opportunity to leave Zambia on a commercial flight without Zambian Governmental authority. He was accompanied by Ms Lungu and other members of the family. When he was medically examined in South Africa he was diagnosed with terminal cancer of the oesophagus. He was advised that due to the delay in this diagnosis, the cancer was inoperable. The late former President Lungu never returned to Zambia. He remained in South Africa, receiving palliative care, until his death.

[12] One does not have to scratch too far beneath the surface to appreciate that from at least September 2023 the late former President Lungu viewed himself to be *persona non grata* in his own country. I make no comment on whether he was justified in his views, but what is certain is that it was these experiences by the late former President Lungu that explain the strong views he expressed prior to his death about his burial.

[13] Ms Lungu states in her answering affidavit that during the period that the late former President Lungu was receiving palliative care in South Africa he openly and consistently expressed the wish that he did not want the Zambian Government, and particularly President Hichilema, to be anywhere near his body or funeral. He felt that he had been mistreated by them and he voiced an objection to the participation in his burial by those who, in his view, had forsaken him in life. He expressly did not want President Hichilema to preside at his funeral as he felt that it would be ‘immoral and disrespectful to subject a person to rites they did not believe in in their lifetime, at their funeral and worse still superintend over a perceived enemy’s funeral as if they were spoils of war.’

[14] The late former President Lungu felt that he would not be afforded a dignified send-off if President Hichilema was present. He expressed his views in an interview with a Zambian researcher, Dr Sishuwa, in May 2025. According to Ms Lungu, the late former President Lungu repeated his wishes to her shortly before he was sedated for intubation. He never regained consciousness.

[15] The family accepted the late former President Lungu’s wishes and, after his death, began planning a private funeral. They planned to repatriate the body to Zambia on a private charter plane on about 11 June 2025. At the same time, the Zambian Government despatched a delegation to South Africa to meet with the family. The delegation conveyed that the Zambian Government was desirous to accord the late former President Lungu a state funeral and burial. They discussed the logistical arrangements with the family, which included the burial of the remains at Embassy Park, the designated burial site for late Zambian Presidents. Mr Zulu, raised several objections by the family, chief among which was that President Hichilema should not be permitted to attend the funeral.

[16] What followed was a series of meetings between representatives of the Zambian Government and of the family between 6 and 17 June 2025 in an attempt to find common ground between the wishes of the family and those of the Zambian Government regarding the funeral arrangements. The parties also exchanged written communications, and released press statements between 6 June and 23 June 2025. I deal with the relevant details of the meetings and other exchanges later.

[17] Ultimately, on 23 June 2025, the family advised that it would not agree to the repatriation for purposes of a state funeral and burial at Embassy Park. The family announced its decision to arrange a private burial of the late former President Lungu in South Africa. It was this decision that prompted the Zambian Government's approach to the high court for relief.

In the high court

[18] In its application to the high court the Zambian Government asserted a clear right to determine where and how the late former President Lungu was to be buried, regardless of the wishes of the family. It averred that insofar as there was a conflict of laws to be resolved by the court, Zambian law should prevail. The Zambian Government relied primarily on the Benefits Act as the source of its right to bury the late former President Lungu. A second source of the Zambian Government's alleged right under Zambian law was the traditions, customs and protocols that apply to the burial of former heads of state.

[19] The Zambian Government contended that even if South African law was applicable, the family was bound by an agreement reached between them and the Zambian Government during the series of meetings held between the parties. The

Zambian Government's stated position was that the family had agreed to the late former President's burial at Embassy Park in Zambia and that the family 'cannot now be permitted, at a whim, so to speak, to renege on that agreement'. The Zambian Government pleaded that it had a right to the enforcement of its terms.

[20] The family disputed that Zambian law was applicable. They relied on ss 10 and 39 of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 10 provides that 'everyone has inherent dignity and the right to have their dignity respected and protected' and section 39 enjoins courts to promote values of dignity, equality, and freedom. The family asserted that these principles were applicable in the resolution of disputes involving personal matters, including legacy and status. Their right to dignity and family autonomy had to be respected and protected in cases of conflict between them and the Zambian Government. Their position was also protected under the common law, which recognises that the next of kin have the right to decide on matters of burial.

[21] They denied that the Benefits Act accorded the Zambian Government any right to bury the late former President Lungu. First, because his benefits under that Act had been revoked, and, second, because at best, all that the Benefits Act provided for was reimbursement for funeral expenses. The family also denied that the Zambian Government had any right under Zambian custom, tradition and protocol to decide on the burial of a former President who had been stripped of the benefits of his office. Finally, the family disputed that there was an agreement between the parties for the repatriation and state funeral of the late former President Lungu.

[22] In its judgment the high court identified the main issue to be whether the parties had agreed on the repatriation and burial of the late former President Lungu

(the contractual issue). Central to this issue, in the high court’s view, was a document attached to the supplementary founding affidavit as annexure FAA7. The high court described it as a ‘tentative programme’ drawn up by the family, reflecting that the body would be repatriated to Zambia on a private charter plane on 18 June 2025 for purposes of a state funeral and burial. The high court applied the accepted principles of interpretation of written documents. It concluded that:

‘If regard is had to the grammar and syntax of “FAA7”, the purpose for which it was drawn up, considering that both parties were alive to the disputes between them, “FAA7” can only be interpreted as an agreement between the parties. The agreement entailing, first and foremost, repatriation to Zambia for burial purposes. Based upon the chronology of the common cause facts referring to the media briefing and the proposed programme drafted by the Family, fortifies this finding. There is thus no factual dispute before this Court. The legal principle of *pacta sunt servanda* (agreements must be kept) also finds application.’¹

[23] Although the high court applied South African legal principles to its interpretation of FAA7, it found that Zambian law was the proper *lex causae*. The high court was persuaded by the finding of the High Court for Zambia in *The People v The Secretary to the Cabinet: Ex Parte Kaweche Kaunda (Kaunda)*² that a state funeral in Zambia is a public ceremony, in which strict rules of protocol are observed. The high court in *Zambia v Lungu (HC)* found that:

‘... 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. This finding too caters for the order that follows below.’³

¹ *Government of the Republic of Zambia v Lungu and Others* 2025 JDR 3796 (GP); [2025] ZAGPPHC 858 (*Zambia v Lungu (HC)*) para 25.

² *The People v The Secretary to the Cabinet: Ex parte Kaweche Kaunda* (2021/HP/0768); [2021] ZMHC 6 (*Kaunda*).

³ *Zambia v Lungu (HC) (Kaunda)* para 27.

[24] Consequently, on the bases of both contract and Zambian protocol and custom, the high court granted the order sought by the Zambian Government. It did not consider or make any finding in respect of the Benefits Act.

On appeal

[25] The core issue in this appeal is whether the high court correctly concluded that the Zambian Government had established a clear right to bury the late former President Lungu contrary to the wishes of his family. One question that may be disposed of immediately is that of the Benefits Act and the Zambian Government's pleaded case that this legislation is the source of its right.

[26] Contrary to its pleaded case, at the hearing of the appeal counsel for the Zambian Government expressly eschewed any reliance on the Benefits Act. This concession was correctly made. In the first instance, the late former President Lungu had been stripped of all benefits under that Act while he was alive. The letter of withdrawal makes it quite clear that his benefits were terminated. They were not, as the Zambian Government contended, merely suspended and revived on his death. In any event, while the Benefits Act places an obligation on the Zambian Government to reimburse a deceased former President's family for funeral expenses, none of its provisions give the Zambian Government any entitlement to make decisions about their burial. There was thus never any merit in its contention that the Benefits Act accorded it a clear right to bury the late former President Lungu contrary to his wishes and those of his family.

[27] The family submits that the high court erred in three main respects. First, it committed a fundamental error in failing to consider the family's constitutional rights, particularly its rights to dignity, family autonomy and privacy. They submit

that these rights were expressly pleaded and that they are the underlying basis upon which the dispute over the right to bury the late former President Lungu is to be determined. Moreover, submits the family, their constitutional rights align with the common law, which recognises that it is the next-of-kin who has the right to decide on issues of burial. Thus, the high court's finding that the Zambian Government had established a clear right, is contrary to the rights of the family under both the Constitution and the common law.

[28] The second error of the high court, as identified by the family, is its recognition and application of Zambian law in deciding that custom and practice dictate that the Zambian Government has the final say in burying the late former President Lungu. This is because there was no expert evidence before the high court establishing, as a fact, what the law of Zambia is on the issue. In addition, the family submits that the high court erred in its reliance on the *Kaunda* judgment.

[29] The third error committed by the high court, according to the family, was in its finding that the parties concluded an agreement which bound the family to permit the late former President Lungu's body to be repatriated to Zambia for a state funeral. In particular, the high court erred in finding that annexure FAA7 was the document recording an agreement between the parties. This was never the Zambian Government's pleaded case. Nor, submits the family, do the facts, considered as a whole, establish anything more than ongoing discussions between the parties on the issue of burial, which discussions were never finalised.

[30] Before turning to the issues raised in these grounds of appeal, it is necessary to say something about the conflict of laws question. The family correctly criticises the high court for finding that the *lex causae* was Zambian law, while at the same

time using South African legal principles in determining the contractual issue. This ambiguity in the high court's judgment is indicative of a more fundamental problem, which is that, properly understood, the dispute does not truly concern a conflict of laws at all.

[31] The Zambian Government accepts on appeal that the family is entitled to rely on their Constitutional rights, based on their presence within South Africa. This is consistent with long-standing Constitutional Court authority that the Bill of Rights applies to all people in South Africa, regardless of their nationality.⁴ In addition, the Zambian Government accepts that the contractual issue must also be determined by applying South African law. This, too, is a concession correctly made. All of the conduct relevant to this issue took place in South Africa. What is more, the Zambian Government took no steps to tender evidence on the Zambian law of contract. Consequently, the only law that can apply to this question is South African law. There is thus no conflict of laws question on the contractual issue.

[32] In respect of the Zambian Government's reliance on Zambian custom and practice, too, there is no true conflict of laws question. This is so because, as pointed out by the family, no evidence was tendered to establish the requisite legal principles the Zambian Government relies upon. A party relying on the application of foreign law must prove the content of that law as a matter of fact.⁵ This requires evidence tendered by an independent expert. It follows that a party may not be an expert in its own proceedings.⁶ In the absence of expert evidence to establish the content of any

⁴ *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 47.

⁵ *The Asphalt Venture Windrush Intercontinental SA and Another v UACC Bergshav Tankers AS* [2016] ZASCA 199; 2017 (3) SA 1 (SCA) para 31.

⁶ *Stock v Stock* 1981 (3) SA 1280 (A) at 1296E-F; *See also Jackson v Jackson* 2002 (2) SA 303 (SCA) para 16.

foreign law relied on by a party, it is presumed that the foreign law is consistent with South African law.⁷

[33] The Zambian Government's application was instituted by Mr Mulilo Kabesha (Mr Kabesha). He is the attorney-general of Zambia. In the supplementary founding affidavit deposed to on behalf of the Zambian Government Mr Kabesha stated that by virtue of the Zambian Constitution he is duly authorised to represent the Zambian Government and to bring the application on its behalf. He is also the Zambian Government's chief legal advisor.

[34] Mr Kabesha averred that in Zambian law, the burial of a former President is treated as a public state event, integral to the Zambian national identity and constitutional heritage. Consequently, he averred, the Zambian President has the final say in the burial of a deceased President. As evidence of these legal principles, Mr Kabesha relied on his own professed expertise, stating that: 'I consider myself to be an expert in the field of Zambian Law and I respectfully confirm that the Zambian legal principles set out above, are correct'. Perhaps appreciating that confirmation by an independent expert would be necessary, Mr Kabesha stated that Mr Mutemwa Mutemwa (Mr Mutemwa), a counsel in private practice, confirmed the correctness of the principles stated. There was no confirmatory affidavit from Mr Mutemwa.

[35] Consequently, the only evidence of the Zambian law relied upon by the Zambian Government was that stated by the person who instituted the proceedings on its behalf. There being no admissible expert evidence to establish these principles,

⁷ *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA); [1998] 3 All SA 175 (A); 1998 BIP 198 (SCA) para 34.

in effect, South African legal principles apply. For this reason, too, there is no true conflict of laws question at play in the dispute.

[36] The remaining questions in the appeal are:

- (a) What are the respective rights of the parties under our common law, as understood within the context of appropriate constitutional rights and principles?
- (b) In the event that it is the family who has the right to decide on the burial of the late former President Lungu, was the high court correct in finding that the family was contractually bound to permit the Zambian Government to repatriate and bury his remains?

The common law and constitutional position

[37] For decades the accepted common-law position, stated in several provincial division decisions, has been that in the absence of directions from the deceased, decisions regarding his or her burial fall to the heirs in accordance with the principles of succession.⁸ This accords with our Constitution, which recognises the right to privacy and dignity. A family's right to decide on the burial of a loved one falls within the inner sanctum of an individual's family life.⁹ It is an exercise of family autonomy involving the final act of kinship family members will perform for their loved one. Any interference impacts upon the family members' sense of self-worth and self-actualisation and, consequently, their dignity.

⁸ *Saiid v Schatz and Another* 1972 (1) SA 491 (T) at 493H-494D; *Human v Human and Others* 1975 (2) SA 251 (E) at 254C; *Tseola and Another v Maqutu and Another* 1976 (2) SA (TK) at 422H; *Mbanjwa v Mona* 1977 (4) SA 403 (TkS) at 405F-G; *Khumalo and Others v Khumalo and Another* 1984 (2) SA 229 (D) at 232E; *Sekeleni v Sekeleni and Another* 1986 (2) SA 176 (TkS) at 178A; *Mnyama v Gxalaba and Another* 1990 (1) SA 650 (C); *Mabulu v Thys and Another* 1993 (4) SA 701 (SE); *Simakuhle v Simakuhle* 2024 JDR 0331 (GP) para 36; *P N and Others v P N* [2024] ZAGPJHC 924 para 15.

⁹ See *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) (*Bernstein*) para 67.

[38] Of significance in this appeal is the fact that the burial dispute in question is not one between competing family members, as is most often the case. Instead, it involves the claim to a right of burial as an exercise of public power by a state against the avowed wishes of the affected family. In this situation, courts are enjoined to ensure that the constitutional rights of Ms Lungu and those of her family members are protected against the exercise of excessive state power. Absent a clear and convincing legal basis for finding differently, it would not be constitutionally permissible for the Zambian Government's interests to override those of the family.

[39] The Zambian Government submitted that there was good reason to reach a different conclusion. It pointed to recent cases in which, relying on the constitutional principle of ubuntu, high courts have been persuaded that fairness and the public interest may legitimately permit a form of burial contrary to the wishes of the heir.¹⁰ The Zambian Government referred to the following exposition by the Constitutional Court of the concept of ubuntu in *S v Makwanyane*:¹¹

‘The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however.’

[40] It was the Zambian Government's submission that because of the late former President Lungu's public position as a former head of state, the principle of ubuntu justified the high court's conclusion that the family's personal interests should yield

¹⁰ *Finlay and Another v Kutoane* 1993 (4) SA 675 (W); *See also W and Others v S and Others* (360/16) [2016] ZAWCHC 49 (4 May 2016) para 32; *Lemaku v Simunye* 2022 JDR 1481 (FB); *LS v RL* 2019 (4) SA 50 (GJ) para 40.

¹¹ *S v Makwanyane* 1995 (2) SACR 1 (CC); 1995 (3) SA 391 (CC) para 224.

to the communal interests of the Zambian nation. This, it submitted further, was consistent with the judgment in the *Kaunda* matter.

[41] I am not persuaded by these submissions. The *Kaunda* judgment involved an application for leave to apply for judicial review. As such, it was an *ex parte* hearing without the benefit of evidence adduced in the form of founding and opposing affidavits as in this matter. The Zambian Government relies on the Zambian high court's finding that:

‘A state funeral in my firm understanding is a public funeral ceremony, observing the strict rules of protocol, held to honour people of national significance.’¹²

[42] However, the difficulty for the Zambian Government is that the judgment does not refer to any evidence of the content of these protocols. The dictum goes no further than recording the ‘understanding’ of Muma J, who presided over the matter. In the absence of admissible evidence establishing the protocols governing state funerals in Zambia, the *Kaunda* judgment does not advance the Zambian Government's case that protocol and custom give it the right to bury the late former President Lungu.

[43] There is a further difficulty with the Zambian Government's reliance on the *Kaunda* judgment. The Zambian high court expressly found that ‘there is no empirical evidence adduced in relation to the wish of the [deceased]’. That is not the position in this appeal. Although there is no written record of the late former President's burial wishes, Ms Lungu and other members of the family aver that, up to the time of his impending death, he consistently instructed that the Zambian

¹² *Kaunda* fn 3 above.

Government - and President Hichilema in particular - should play no part. According to Ms Lungu, he expressed his wish outside the family circle, to Dr Sishuwa, in an interview shortly before his death. Dr Sishuwa furnished a confirmatory affidavit in this respect.

[44] The Zambian Government sought to place doubt on the family's averments regarding the late former President Lungu's burial wishes. It contended that the family's version was irreconcilable with the late former President Lungu's desire for a state funeral. The Zambian Government does not lay a factual basis for this allegation. It is so, as the Zambian Government was at pains to point out, that there is no evidence to suggest that the late former President Lungu expressed any wish to be buried in South Africa. In my view, this is not a determining factor.

[45] What is patently clear is that all the evidence points to the late former President's expressed aversion to any involvement by President Hichilema in his funeral and burial. His concern was with the manner of his burial, not the place thereof. If he cannot be buried in Zambia without the involvement of President Hichilema, the obvious alternative was a burial outside that country. The late former President spent his last months in South Africa. Ms Lungu avers that he realised that he would never return. Ms Lungu and family members were in South Africa with him in his final months. They retain a physical presence here, albeit that they have not moved here permanently. The family's decision is not unreasonable and is consistent with the late former President Lungu's primary concern, namely the exclusion of any involvement by President Hichilema in his funeral and burial.

[46] The family's evidence in this regard does not stand in isolation. It is consistent with the undisputed evidence of his treatment by the Zambian Government in the

three incidents in September 2023 referred to earlier, culminating in the decision to strip him of the benefits of his former office. The family were the respondents in the application before the high court. Applying the *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty)Ltd*¹³ approach, the family's version must prevail. It must be accepted that it was the late former President's wish that President Hichilema would not be a welcome presence at his funeral. This is very different to the *Kaunda* case, where the Kaunda family initially objected to the late President Kaunda being buried at Embassy Park. The Kaunda family later agreed to a burial at Embassy Park, with the late former President Lungu in attendance as head of state.

[47] What of the Zambian Government's related contention that the principle of ubuntu supports the high court's conclusion that the Zambian Government's interests should prevail over those of the family? In my view, this submission, too, lacks merit. The provincial division decisions relied on by the Zambian Government involved private disputes about the burial of a deceased person. I have already noted that this case is substantively different in that it concerns a dispute between family members and a state. In this situation, courts are bound not only to respect but also to protect the constitutional rights of family members.

[48] There is nothing irrational about the family's position: they are honouring the wishes of the late former President Lungu by refusing to permit a repatriation and burial by the Zambian Government. The late former President Lungu represented a particular political community. This attracted the ire of the Zambian Government. His expressed burial wishes are consistent with the interests of the community he represented. They are also consistent with his own sense of dignity and, by

¹³ *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 at 634G-635D.

extension, that of his family. As such, the constitutional principle of ubuntu supports, rather than overrides, the need to respect his burial wishes, and the family's decision to honour them.

[49] For all of these reasons, I find that neither the Constitution nor the common law establish a right on the part of the Zambian Government to repatriate and bury the late former President Lungu contrary to the family's decision.

Contractual issue

[50] The Zambian Government submits that what transpired as a result of the meetings and negotiations between it and the family was a binding agreement that the body would be repatriated to Zambia for a state funeral and burial at Embassy Park. The first meeting was held on 6 June 2025, the day after the late former President's death. At that stage, the family was preparing to arrange a private repatriation and burial in Zambia. They objected to the Zambian Government's proposal that the body be repatriated on a military airport for burial at Embassy Park. The family advised the Zambian Government that this would go against the late former President Lungu's wishes: he had wanted his body to be flown on a private aircraft and, importantly, if he was accorded a state funeral, President Hichilema should not be permitted to attend.

[51] A second delegation met with the family on 10 June 2025. It was at this meeting that the family presented the Zambian Government with the document FAA7. This was a proposed programme for the repatriation, funeral and burial. It involved the repatriation of the remains on a private charter aircraft on 18 June 2025, the receiving of the body in Zambia by the family and military honours. The body would be available for viewing from 19 to 20 June 2025, followed by a state funeral,

hosting foreign dignitaries on 21 June. There is no reference in FAA7 to any role for President Hichilema. Further proposals contained in FAA7 were that the body would always lie in state at Chifwema; it would be accompanied by a relative; and the parties would consult and agree on who was to speak at all events.

[52] It was never the Zambian Government's case that FAA7 comprised the terms of the written agreement between the parties. The high court erred in relying on FAA7 as embodying an agreement. It is common cause that FAA7 was in the form of a proposal, and that negotiations between the parties continued after the family presented it to the Zambian Government. This much is clear from the Zambian Government's own press release on 11 June 2025, announcing that 'constructive consultations between the Zambian Government, the [f]amily and other [s]takeholders are still ongoing'.

[53] The Zambian Government avers that it was on 14 June 2025, at a meeting held at the Southern Sun Hotel, Sandton, that the parties reached agreement. It refers to two television news broadcasts, the transcripts of which it annexes to its supplementary founding affidavit, as evidence that on 14 June 2025 the family agreed to a state funeral presided over by President Hichilema. The family denies this, contending that it is a misrepresentation of events, and that they were willing to accept no more than President Hichilema's presence when foreign dignitaries arrived at the state funeral.

[54] At the centre of the Zambian Government's contention are the transcripts of news broadcasts by two Zambian news agencies, the Zambian National Broadcasting Corporation (ZNBC) and the Zambia National Information Services (ZNIS) on 15 June 2025. The Zambian Government avers that these news reports

covered the joint press conference between Zambian Government and the family after agreement had been reached. In particular, the Zambian Government relies on the following statement in the transcript, which records Mr Kangwa, the secretary to the Cabinet as saying that: ‘... in accordance with the family’s wishes and the dignity befitting the service of the sixth President to our nation, a state funeral shall be held and shall be presided over by the President of the Republic of Zambia, Mr Hakainde Hichilema, culminating in the former president’s burial on Monday, 23 June 2025’.

[55] The submission by the Zambian Government is that the transcripts show that Mr Zulu, the family’s spokesperson, was present at the press conference and offered no opposition to the statement that President Hichilema would preside over the state funeral. On the contrary, asserts the Zambian Government, the transcripts record Mr Zulu’s announcement that the family ‘wishes to announce that it has reached agreement with representatives of the government’ on the repatriation, funeral and burial arrangements. This, it says, is incontrovertible proof that the family agreed to a state funeral, presided over by President Hichilema followed by the burial at Embassy Park. The Zambian Government accuses the family of subsequently reneging on this undertaking when, on 23 June 2025, they announced that the body would not be repatriated, and that a private funeral in South Africa would be held instead. It submits it has a contractual right to enforce the agreement and to proceed with the repatriation and burial of the late former President Lungu’s body in accordance with the agreement reached.

[56] The family consistently disputed that it had reached an agreement on the terms stated by the Zambian Government. It contends that it was the Zambian Government which, at the last moment, imposed a condition that the family found unacceptable, namely the involvement of President Hichilema. On the trite principle applicable to

material disputes of fact in motion court proceedings, the family's denial that it concluded an agreement on the terms relied on by the Zambian Government must be accepted unless it is so far-fetched or clearly untenable as to be rejected.¹⁴

[57] On closer examination, the transcripts of the news broadcasts do not justify rejection of the family's version. A comparison between them shows that the broadcasts comprised 'sound bites' from different speakers, put together by each news channel to form its own composite news item.

[58] This is demonstrated by the inclusion of the respective news presenter's name, and personal comments at the commencement and throughout each transcript. A third transcript attached to the supplementary founding affidavit is that of a public address by Mr Zulu. Sound bites from this address have been included in those from the ZNBC and ZNIS transcripts, word for word. Clearly, what transpired was that Mr Zulu's comments from his press conference were 'spliced' into the news broadcasts as part of the overall coverage on the issue. Consequently, while the transcripts give the impression that Mr Zulu's comments were made in the presence of Mr Kangwa and in response to his announcements, this is in fact not so. The transcripts are not evidence of the family's agreement to a state funeral presided over by President Hichilema.

[59] It is common cause that there were ongoing negotiations between the parties, with the exchange between them of several proposed programmes over a period of approximately two weeks after the late former President Lungu's death. These were revised, and at least one was withdrawn by the Zambian Government. What is

¹⁴ Op cit fn 12.

consistently unclear from all these versions of proposed programmes is the role of President Hichilema in the proceedings. In the absence of definitive evidence from the Zambian Government that the family had agreed to renounce its strongly-held position on President Hichilema's involvement, the family's version that there was no agreement must prevail.

[60] For these reasons, I find that the high court erred in concluding that the Zambian Government had established a contractual right to an order directing the repatriation of the late former President Lungu's body for purposes of a state funeral in Zambia.

Conclusion and order

[61] The Zambian Government's failure to establish a right under either the common law or contract to override the family's burial decision is fatal to its case. The high court erred in finding that the Zambian Government was entitled to relief. It ought properly to have dismissed the application. The appeal must be upheld and the order of the high court set aside. There is no reason why costs should not follow the result.

[62] I make the following order:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The order of the high court is set aside and is replaced by the following order:
'The application is dismissed with costs, including those of two counsel where so employed.'

R M KEIGHTLEY
JUDGE OF APPEAL

Norman JA (dissent):

[63] I had the benefit of reading the majority judgment and I am grateful to my colleague Keightley JA for the exposition of the facts. However, I differ with respect, from the findings made therein and the order proposed. I shall briefly refer to relevant facts for context and in support of my findings, where necessary.

[64] The profound words of Ms Tasila Lungu, the daughter of the late former President Dr Edgar Lungu, when she announced the passing of the late former President Lungu defined the worth, stature and the calibre of the person that the late former President was to his family, Zambia and her people. She said:

‘In this moment of grief, we invoke the spirit of One Zambia, One nation. The timeless creed that guided President Lungu’s service to our country.’

[65] That spirit is in perfect alignment with the South African principle of Ubuntu. The late Archbishop Emeritus Desmond Tutu, when asked by Mr Eric Sirotkin¹⁵ what ubuntu means, explained it as follows:

‘There is no direct translation in Western terms. Ubuntu means I am human through my relations with others. You are a person through other persons. It speaks of social or communal harmony as a human person is seen as corporate. The solitary individual person is in our understanding a contradiction in terms Ubuntu says I am human only because you are human. If I undermine your humanity, I dehumanise myself. Ubuntu speaks of warmth, compassion, generosity, hospitality,

¹⁵ Eric Sirotkin *Witness: A Lawyer’s Journey from Litigation to Liberation* (2023) ‘*Ubuntu What is Ubuntu? Meeting with Archbishop Desmond Tutu*’ Accessed at <<https://ubuntuworks.org/what-is-ubuntu-meeting-with-archbishop-desmond-tutu-ubuntuworks/>>.

seeking to embrace others. You must do what you can to maintain this great harmony, which is perpetually being undermined by resentment, anger, or a desire for vengeance.’

[66] The Constitutional Court embraced the term in its judgment in *S v Makwanyane*.¹⁶ Justice Mokgoro explained ubuntu in these terms:

‘Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our “rainbow” heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly prized. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.’

[67] Ubuntu resonates with the facts of this case in that, the late former President Lungu left office after his political party, the Patriotic Front lost in an election to the victorious party, the United Party for National Development that elected the current President Hakainde Hichilema as President. The late former President Lungu decided to return to active politics. Thereafter, he was subjected to ill-treatment by the current Government of Zambia to the extent of being denied permission to travel to South Africa to receive medical treatment. The incidents of his ill-treatment are outlined in the majority judgment. After his death the very Government that ill-

¹⁶ *S v Makwanyane and Another* fn 11 above para 307.

treated him extended a hand to his family by expressing its wish to bury him with dignity by repatriating his mortal remains to his home, Zambia, to extend the period of mourning by the Zambian nation, to confer military honours on him and to accord him a state funeral.

[68] Having considered the spirit of One Zambia, One Nation and ubuntu, I now proceed to deal with the facts that are germane to the issues at hand.

Before the high court

[69] The Government of Zambia (the Zambian Government) sought a final order in its amended notice of motion supported by a supplementary affidavit that: a declarator that the Zambian Government is entitled to repatriate the body of the late former President Edgar Lungu (the late former President) for the purposes of a state funeral and burial thereafter in Embassy Park, Lusaka, in the Republic of Zambia (first order); the Two Mountains (a funeral parlour), upon demand by the sheriff of the court, be authorised and ordered to surrender the body of the late former President to a representative of the Zambia High Commission so as to enable the Zambian Government to repatriate the body to Zambia for the state funeral and burial (second order); and an order authorising the first to seventh respondents (the family) to be present when the second order is executed, together with an Aide De Camp, the late former President's personal physician and two family members may (subject to such restrictions the Applicant may reasonably impose), accompany the coffin containing the body of the late former President during repatriation (third order). A cost order was sought only against those respondents who opposed the application.

[70] The application was opposed by the family. The High Court of the high court constituted by Ledwaba AJP (as he then was), Mudau ADJP and Potterill J, heard

the application on 4 August 2025 and delivered its judgment in favour of the Zambian Government on 8 August 2025. Thereafter an application for leave to appeal was dismissed by the High Court on 16 September 2025. The appellants are before us having been granted leave on petition by this Court on 11 December 2025.

[71] There were two issues for decision before the High Court, namely, whether an agreement was reached pertaining to the repatriation and burial of the late former President; and which law, Zambian law or South African law, applied, and which party that law afforded a right of burial. Both issues were decided in favour of the Zambian Government and no cost orders were made.

High Court findings

[72] The High Court made the following findings that are of relevance to this appeal: That ‘FAA7’ reflected an agreement between the parties. It rejected the family’s contention that it was entitled to cancel the agreement. According to the High Court the agreement leaves no room for doubting that President Hichilema would be involved in receiving foreign dignitaries as the Head of State of the host country. That the details of who else was going to speak, other than the leader of the opposition party that the deceased belonged to were trivial. That Zambian law should apply to the dispute because of the domicile, habitual residence and nationality of the late President and his family as connecting factors, point to Zambian law as the proper *lex causae*. In terms of Zambian law, public policy requires that the wishes of a late President or his or her family must yield before the requirement that the deceased heads of state be afforded a state funeral and be buried at Embassy Park in Zambia.

Before this Court

Zambian Governments' submissions

[73] The Zambian Government contends that the High Court did not err because the parties had agreed on the repatriation of the late former President and the state funeral as shown in FAA7; the Zambian Government has the right and duty to accord the late former President a state funeral and burial at Embassy Park relying on *The People v The Secretary to the Cabinet: Ex Parte Kaweche Kaunda*,¹⁷ the family is bound by the agreement and was not entitled to cancel it; that fairness and reasonableness, expectations of the community as found in *W and Others v S and Others*¹⁸ and in *Lemaku v Simunye*¹⁹ should be the determining factor; that ubuntu as a constitutional value would recognise the dignity of the family in its relationship with the broader community that the late President had served and in this regard relied on *S v Makwanyane*;²⁰ and that the appeal should be dismissed with costs.

Family submissions

[74] The High Court erred in its decision to grant the orders sought by the Zambian Government; it failed to conduct an analysis as to whether the requirements for final relief were met; it erred to the extent that it sourced the Zambian Government's clear right to final mandatory relief from the purported agreement in FAA7, erred in its finding that there was a conflict of laws and the *lex causae* was Zambian law; it overlooked the constitutional rights of Ms Lungu, her children and the heirs of the late former President; relying on *Vodacom (Pty) Limited v Kenneth Nkosana Makate*

¹⁷ *The People v The Secretary to the Cabinet: Ex Parte Kaweche Kaunda* (HP 768 of 2021) [2021] ZMHC 6 (7 July 2021).

¹⁸ *W and Others v S and Others* (360/16) [2016] ZAWCHC 49 (4 May 2016).

¹⁹ *Lemaku v Simunye* (1887/2022) [2022] ZAFSHC 114 (25 May 2022).

²⁰ *S v Makwanyane* fn 11 above para 224.

and Another,²¹ it was contended that failure to consider the rights of the family led to a failure of justice that breached the rule of law, it violated the family's rights to a fair hearing in section 34 of the Constitution and is sufficient ground to set aside the High Court's decision.

[75] FAA7 was a mere tentative programme drawn up by the family in the course of negotiations without any *animus contrahendi*; FAA7 was not the alleged contract that was at issue between the parties ; the contract that was at issue was an agreement alleged by the Zambian Government was formed after FAA7, in terms of which the family apparently agreed to a state funeral in Zambia presided over by President Hichilema; the High Court misconstrued the agreement that was at issue and thus failed to decide the true dispute between the parties which failure led to a failure of justice necessitating interference by this Court; erred in its finding that there was a conflict of laws between the South African and Zambian law where Zambian law was not properly pleaded; failed to conduct a proper conflict of laws inquiry in line with this Court's decision in *East Asian Consortium B.V. v MTN Group Limited and Others*;²² the Zambian Government failed to establish a clear right and that was fatal to an application for final relief and in this regard relied on *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)*.²³

[76] That the family was entitled to rely on the rights entrenched in sections 15, 16, 18 and 30 of the Constitution irrespective of the fact that they were foreign nationals and are entitled to claim those rights even against their own government.

²¹ *Vodacom (Pty) Limited v Kenneth Nkosana Makate and Another* [2025] ZACC 13; 2025 (10) BCLR 1174 (CC); [2025] 11 BLLR 1105 (CC); 2025 (6) SA 352 (CC).

²² *East Asian Consortium B.V. v MTN Group Limited and Others* [2025] ZASCA 50; 2025 (5) SA 33 (SCA); [2025] 3 All SA 13 (SCA).

²³ *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA) para 25-26.

In this regard reliance was placed on *Khosa and Others v Minister of Social Development and Others*, *Mahlaule and Another v Minister of Social Development*;²⁴ no one may have a proprietary right in human remains as the human body and its parts are classified as *res extra commercium* (things outside the commercial sphere) because a corpse is not regarded as a thing that can be owned and is incapable of being transacted over by contracting parties. The family further submitted that in terms of South African law, the former First Lady, as the surviving spouse of the late former President, and not the Zambian Government, has the right to choose where and how the late former President is to be buried.

[77] At the hearing the Zambian Government conceded, correctly in my view, that South African law applies to these proceedings; it also conceded that the clear right that it contends for does not stem from the Benefits Act but the Benefits Act was relied upon for context. The family did not pursue the argument that there can be no agreements concluded in relation to the corpse as that would be *contra bonos mores*.

Discussion

[78] In light of the Zambian Government's concession that the South African laws are applicable to this dispute it is not necessary to revisit that issue. It is important though to mention that both South Africa and Zambia have their respective Constitutions as their supreme laws. The Constitution of Zambia vests the sovereign authority in the people of Zambia, which may be exercised directly or through elected or appointed representatives or institutions.²⁵ This means that citizens are the

²⁴ *Khosa and Others v Minister of Social Development and Others*, *Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

²⁵ Section 5(1) of the Zambian Constitution provides:

'Sovereign authority vests in the people of Zambia, which may be exercised directly or through elected or appointed representatives or institutions.'

ultimate source of power which they exercise through voting. Zambia has in its Constitution principles that are listed as national values, principles and economic policies which include, among others, morality, ethics, human dignity, equity, social justice, equality and non-discrimination. It also recognises customary law to the extent that it is not contrary to its Constitution. It is clear from its Constitution that it has the safeguards to limit and control state power and the observance of the rule of law. I highlight this because in the majority judgment it is found that ‘courts are enjoined to ensure that the constitutional rights of Ms Lungu and those of her family members are protected against the exercise of excessive state power’ as if the Zambian Government power is unbounded. It is bound by the Constitution of Zambia.

The wishes of the deceased

[79] What were the wishes of the late former President as conveyed to the Zambian Government by the family?

- (a) The ‘specific wishes’ and those of the family are contained in FAA10 . FAA10 encapsulates what is referred to as a compromise reached between the parties and is a ‘Final Press on Dr Edgar Chagwa Lungu’. FAA10 conveyed the agreement reached on repatriation of the remains of the late former President, as well as his funeral and burial programme. FAA10 follows after FAA7.
- (b) It is a statement that was presented by the spokesperson for the family, Mr Makebi Zulu. It first records that ‘[t]he family of the former President Edgar Chagwa Lungu, who passed away in South Africa on the 5th of June 2025, *wishes to announce that it has reached agreement with representatives of the government on the repatriation of the remains of the late former President, as well as his funeral and burial programme.*’ (Own emphasis.)
- (c) It listed the specific wishes of the late former President as follows:

- (1) His remains should be repatriated back home in the same manner he had travelled to South Africa, namely, privately.
 - (2) Secondly, his body should lie in state at his personal residence in Chifwema area prior to burial.
 - (3) Thirdly, in the event that he was accorded state funeral, *his successor should not be allowed to attend it.*
 - (4) Fourth, residents of Eastern and Copperbelt provinces be accorded the opportunity to pay their last respects, as these are the places where he was born and grew up.
 - (5) And fifthly, that Archbishop Dr. Alec Banda be requested to preside over the church service that may be held in his honour. (Own emphasis.)
- (d) The wishes of the late former President that are listed above are consistent with his wishes that were conveyed to the Zambian Government at the first meeting of 6 June 2025 at the Radisson Blue Hotel, Sandton.

[80] Thereafter he listed the compromise reached by the parties in relevant parts:

‘...The family of the former President Edgar Chagwa Lungu, who passed away in South Africa on the 5th of June 2025, wishes to announce that it has reached agreement with representatives of the government on the repatriation of the remains of the late former President, as well as his funeral and burial programme.

.....

The two parties have since agreed to honouring the following undertakings, with each party giving and taking so that we could come to a common compromise, and the following has been the compromise.

- (1) Number one, that the body of the late President Lungu shall be transported together with the family from Lanseria Airport in South Africa to Zambia on Wednesday 18th June 2025, using a private charter made available to the family by well – wishers.
- (2) Secondly, following the arrival and receipt of the body by family members in Lusaka, full military honours will be conducted at the Kenneth Kaunda International Airport, after which the body shall be taken to the funeral house in Chifwema where it will lie in state.
- (3) Thirdly, that the body of the late former president will be taken to Mulungishi International Conference Centre on Thursday 19th June, Friday 20th June and Saturday

21st June to enable members of the public to pay their last respects from 09:00 to 16:00, after which it shall be returned on all days to the funeral house in Chifwema to lie in state.

- (4) That the state funeral that will host foreign dignitaries shall be held at Mulungishi Conference Centre on Sunday 22nd June, and the body of former President Lungu shall be taken to the venue and returned to Chifwema after the event where it will lie in state.
- (5) That a valedictory session will be held at the Supreme Court grounds in honour of former President Lungu, a lawyer by profession, on Monday 23rd June, to be followed by a church service on the same day in the show grounds in Lusaka, one that would be conducted by His Grace Archbishop Banda.
- (6) That the body of the late former president shall always lie in state at the funeral house in Chifwema and only be taken away for the above- stated functions during the day, after which it shall be returned to the funeral house every day to lie in state at the conclusion of these events.
- (7) That the body of the late president shall always be accompanied by a relative, the aide-de- camp, and the former president's personal physician.
- (8) That the period of national mourning shall be extended and that the two parties shall always consult and agree on who speaks at all events.
- (9) And further, to avoid the confusion that has been ongoing relating to the Patriotic Front Party, that Honourable Given Lubinda will speak on behalf of the Patriotic Front Party. It is important to emphasise that the family is proceeding based on the guarantees given by the government of the Republic of Zambia that they not deviate from our agreement or betray the trust of the family and the wishes of the former president. The family hopes that this outcome will bring this matter to a close and avoid further trauma to the family and millions of affected Zambians.' (Own emphasis.)

Was there an agreement reached between the parties?

[81] There were several meetings that were held between the parties seeking to reach agreement on the repatriation of the mortal remains of the late President, the state burial and the funeral program. These meetings involved interventions made by the former heads of state in the SADC region. At the first meeting, on 6 June 2025

at the Radisson Blue Hotel, Sandton, the family conveyed that it was tentatively looking at departing Johannesburg for Lusaka on 11 June 2025 aboard a private charter plane already arranged by the family. The family had planned to transport the body of the late former President to Ndola where he was born, Kitwe where he lived during his formative years and Petauke where he hailed from. Zambians living in South Africa had requested a memorial service since most would not be able to travel to Zambia for the funeral. These plans show that as early as 6 June 2025, one day after the passing of the late former President, the family was already planning to repatriate his remains to Zambia. These arrangements were made prior to the family's engagement with the Zambian Government.

[82] At that meeting the first appellant stated:

‘It is admitted that the said discussions took place, however it was pointed out by the Seventh Respondent that any possible state funeral is conducted gratuitously as the late former President enjoyed no benefits and the same was subject to the acceptance by the family.’

[83] At the meeting held on 10 June 2025 at the City Lodge, Waterfalls, the family denied that the current President would preside over the state funeral. It was proposed only that the current President only be allowed to receive foreign dignitaries and could be present at the funeral where foreign heads of state would be present. The current President was not to play any further role in the burial proceedings.

[84] At the meeting held on 14 June 2025 at the Southern Sun Hotel, Sandton, the Zambian Government made reference to FAA7 as a programme that was agreed upon. The family denied that the program was drawn up by the Zambian Government and stated that FAA7 was drawn up by the family and given to the

Zambian Government at the meeting. The family averred that the programme showed that the current President was not to play any role in the burial. The first appellant stated categorically:

‘AD PARAGRAPH 7.11 TO 7.12 THEREOF

25.1 It is denied that the program was drawn up by the Applicant.

25.2 The proposed program attached as *Annexure ‘FAA7’* was in fact drawn up by the family and not the Applicant. This program was given to the Applicant at the meeting by the seventh respondent.

25.3 The program shows that the current President was not to play any role in the burial.’

[85] For the sake of completeness I set out the contents of annexure ‘FAA7’.

‘Program for Repatriation, funeral and Burial of The 6th Republican President, Dr Edgar Chagwa Lungu.’

Wednesday 18 th June 2025	Departure of the Body from Funeral Parlor to Lanseria Airport, Arrival of body at Lanseria Airport Family and body depart Lanseria Aboard a Private Charter. Arrival at Lusaka and receiving of the Body at KKIA by family Military honours Departure for the house in Chifwema where the body will lay in state.
Thursday 19 th June 2025	Departure of Body from Funeral house in Chifwema to Mulungushi Conference centre old wing. Prayer and commencement of body viewing from 09:00 to 16:00 Return of the body to Chifwema to lay in state
Friday 20 th June 2025	Departure of Body from Funeral house in Chifwema to Mulungushi Conference Centre old wing. Prayer and commencement of body viewing from 09:00 to 16:00 Return of the body to Chifwema to lay in state
Saturday 20 th June 2025	Departure of Body from Funeral house in Chifwema to Mulungushi Conference centre old wing. Prayer and commencement of body viewing from 09:00 to 16:00 Return of the body to Chifwema to lay in state

Mr Ziligone; Mr Enock Kavindele, Zambia's Vice President and Mr Haimbe, the Zambian Minister of Foreign Affairs and Mr Zulu, the spokesperson for the family.

[88] They highlight that in FAA9 the parties agreed to the following :

‘9.2.1 a state funeral shall be held and shall be presided over by the President of the Republic of Zambia, His Excellency Mr Hakainde Hichilema culminating in the former president's burial on 23 June 2025.

9.2.2 the mourning period was officially extended by 9 days, from 15 June to 23 June 2025.’

[89] It further stated that the Seventh Respondent who was present during the joint briefing, confirmed the above agreement. In response to the allegations the family stated:

‘AD PARAGRAPH 9 (including the sub paragraphs) THEREOF:

27.1 The speakers did outline a roadmap based on Annexure “FAA7”.

27.2 Again, it is evident that the Applicant is attempting to mislead the Honourable Court. Annexures *FAA9, FAA10 and FA11 indicates that the Seventh respondent conveyed the agreement as outlined in Annexure FAA7 to the Applicant.*

27.3 The funeral would not be presided over by the current President.

27.4 Annexure FAA10 is a transcript of a press briefing given by the Seventh Respondent and correctly outlined the correct factual position at that stage.

27.4.2 It is important to emphasize that the family is proceeding based on the guarantees given by the Government of the Republic of Zambia that they *not deviate from our agreement* or betray the trust of the family and the wishes of the late President Lungu.’

[90] The family does not dispute the contents of FAA9 at all. They did not deny the contents of FAA9 or FAA11. They stated that those annexures and FAA10 indicated that the Seventh Respondent (its spokesperson) conveyed the agreement as outlined in FAA7 to the Applicant (the Zambian Government).

[91] In FAA9 , the transcript of the news ZNBC on 15 June 2025 recorded that Mr Kangwa, Secretary to the Cabinet, confirmed at the briefing that:

‘Now in accordance with the family’s wishes and the dignity befitting the service of the sixth President to our nation, a state funeral shall be held and shall be presided over by the President of the Republic of Zambia, Mr Hakainde Hichilema, culminating in the former president’s burial on Monday 23rd June 2025.

The President of the Republic of Zambia, Mr Hakainde Hichilema , has officially extended the mourning period by nine days from today, the 15th June 2025 , to 23rd June 2025 , the date of burial.’

[92] A transcribers certificate by Lee Smith Recording & Transcription Services certified the recording as a true and correct transcription of the sound file. It bears the date of the recording as 15 June 2025, duration 00:05:34 , reference ZNBC News Broadcast.

[93] What is contained in FAA9 is confirmed in FAA11, which is a transcript of a ZANIS News broadcast held on 15 June 2025, the TV presenter is Mr Henry Himoonde. The same Zambian Government officials referred to in FAA9, were present together with Mr Makebi Zulu (Mr Zulu) for the family and Bishop Joshua Banda. It shall be recalled that according to the wishes of the late former President, Bishop Banda was to preside over the church service. That was also recorded in FAA7.

[94] It was confirmed at that briefing by Mr Kangwa that: the arrangements for the repatriation of and the burial of the late former President had been concluded; according to the family’s wishes and the dignity befitting the service of the late President, a state funeral shall be presided over by the current President of Zambia and the late President’s burial on 23 June 2025, that the current President had

officially extended the mourning period by nine days from today, the 15th of June 2025 to the 23rd June 2025, the date of burial.

[95] Mr Zulu spoke immediately after Mr Kangwa and stated :

‘The family of the former president, Edgar Chagwa Lungu, who passed away in South Africa on the 5th of June 2025 , wishes to announce that it has reached agreement with representatives of the government on the repatriation of the remains of the late former president, as well as his funeral and burial programme. This follows the resolution of the impasse that had caused disagreement between the two parties.

We wish to thank the former heads of state in the SADC region and head of state in the SADC region for their intervention in this matter. We also wish to thank the clergy that took time to engage for the final resolution in this matter.’

[96] These responses demonstrate without a doubt and contrary to the findings in the majority judgment that, the agreement in FAA7 was pleaded. The family understood and accepted that the agreement is in FAA7 referred to in certain paragraphs ‘as a roadmap agreed upon’. Most importantly, just like the Zambian Government the family also relied on FAA9, FAA10 and FAA11 as media briefings and videos conveying the agreement to the members of the public and in particular the people of Zambia. All those documents viewed together, both textually and contextually, confirm what is outlined as agreement between the parties and outlined in Annexure FAA7 on 14 June 2025. Mr Zulu, who was present at those briefings, did not dispute the recordings as false. Because there were negotiations on various issues and in particular the issue of the presence of the current President at the funeral FAA7 was conveyed in Annexures FAA9, FAA10 and FAA11, according to the family. The admissions made by the family support the Zambian Government case that there was indeed an agreement between them.

[97] The family may have been averse to the presence of the current President and to him playing a role at the late former President's funeral at some point but that was resolved and specifically confirmed in FAA 9, FAA 10 and FAA11 (which qualify as contemporaneous recordings) as demonstrated above. The family cannot adopt two mutually exclusive versions, with respect, by confirming the agreement in FAA7 and as conveyed in FAA9, FAA10 and FAA11, and before this Court deny that there was an agreement and insist that the current President was not to play any role. That is not borne out by the facts referred to above and the documentary evidence on record. It follows that the family's contentions that are contrary to what is evinced in the documents that it itself relies on must be rejected.

[98] In *Endumeni*, this Court summarised the trite principles of interpretation: As a process of attributing meaning to the words used either in a contract or legislation, by considering the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production'.²⁶

[99] In the majority judgment it is suggested that the broadcasts comprised of 'sound bites transcripts' and what transpired was that Mr Zulu's comments from his press conference were 'spliced' into the news broadcasts as part of the overall coverage on the issue. In the majority judgment a conclusion is made that while the transcripts give the impression that Mr Zulu's comments were made in the presence of Mr Kangwa and in response to his announcement, this is in fact not so. It is concluded in the majority judgment that the transcripts are not evidence of the family's agreement to a state funeral presided over by President Hichilema. It is not

²⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.

apparent to me how this finding was made because the family admits all the transcripts as I have demonstrated with reference to the pleadings above. The authenticity of the broadcasts was never questioned before the High Court or before this Court. As mentioned before the family just like the Zambian Government relied on the broadcasts and videos in support of the agreement. There are transcriber certificates in respect of each broadcast, how and when the alleged ‘splicing’ would have occurred and why the family did not raise it, makes the finding in the majority judgment, with respect, unfounded and not supported by any evidence. Crucially, it was never raised with any of the parties in argument. I find that the transcripts of the recordings are reliable.

[100] I now wish to conclude on the agreement aspect. The Zambian Government rested its entitlement to repatriate the body of the late former President based on the agreement it concluded with the family, on the Benefits Act and on the public policy of Zambia. As mentioned before the reliance on the Benefits Act was abandoned. The public policy of Zambia does not find application since South African laws are applicable. I have found that there was agreement between the parties. A burial of the late former President in South Africa is not only against the late former President’s wishes but it is against the agreement between the parties as demonstrated above. The rights of the family were never undermined by the Zambian Government. It sent various delegations to negotiate with the family because it realized and respected the family’s autonomy to decide on the burial of the late President. There is no case made out on the infringement of any of the family’s rights entrenched in the Bill of Rights. In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (Beadica)*²⁷ the

²⁷ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (*Beadica*) para 92.

Constitutional Court found that the freedom of contract is based on the constitutional values of freedom and dignity and is vital for economic development to achieve the constitutional vision of South African society.

[101] The majority judgment places significant weight on the constitutional rights of the family to dignity and family autonomy, and on the principle that courts must guard against the exercise of excessive state power over private individuals. I do not dispute that these rights are engaged whenever a dispute concerns decisions about burial. Nor do I dispute that the family, as foreign nationals present in South Africa, is entitled to rely on the protections of the Bill of Rights. Where I differ is on how those rights were affected on the particular facts of this case.

[102] The family's rights to dignity and autonomy did not require them to enter into an agreement with the Zambian Government. Those rights are precisely what entitled them to negotiate, to insist on conditions and to withhold consent until they were satisfied with the terms. They exercised that autonomy freely across several meetings. When agreement was ultimately reached on 14 June 2025, it was agreement that expressly reflected the wishes of the late former President Lungu and those of the family. It is the agreement the family announced publicly to the Zambian people as their own.

[103] To permit the family to resile from that agreement on the grounds that their dignity and autonomy entitle them to change their minds would, in effect, allow constitutional rights to serve as a shield against the ordinary consequences of voluntary choices. The Constitutional Court rejected that approach in *Beadica*. Freedom and dignity are not undermined by holding parties to agreements they

freely concluded; they are undermined by allowing one party to treat a concluded contract as non-binding whenever it becomes inconvenient. As the Constitutional Court observed in *Beadica*, the public policy imperative to enforce voluntarily undertaken contractual obligations is itself an expression of the constitutional values of freedom and dignity.

[104] Nor am I persuaded that this is properly characterised as a case of state power pressing down on private rights. The Zambian Government did not compel the family to negotiate. It did not dictate the terms of the agreement. It accepted the family's conditions, for example, those including the private charter, the lying in state at Chifwema and the consultation on speakers. When the family resiled from that agreement on the morning of 18 June 2025, the Zambian Government had no other avenue available to it than approaching the court. Seeking judicial enforcement of a concluded contract is not the exercise of excessive state power. It is the exercise of a right available to any contracting party in a constitutional democracy that recognises the rule of law and the enforceability of agreements.

[105] On 19 June 2025, the President of Zambia announced to the Zambian nation the decision of the family and that the family failed to honour the agreement that the late President's body be repatriated for a state funeral. It is that breach that necessitated the launching of the application, with Zambian Government seeking, in the main, a declarator that it is entitled to repatriate the body of the late former President for purposes of a state funeral and burial thereafter at the Embassy Park, Lusaka. Therefore, the balancing of rights issue does not arise. When the family reneged there was no other remedy to the Zambian Government other than approaching court.

[106] Once the agreement was reached as I have found, the Zambian Government implemented it in several ways which are not disputed: (a) a permit to repatriate the human remains was issued on 16 June 2025 by Dr George Sinyangwe, a Permanent Secretary, Ministry of Health, Lusaka; (b) a request was made by the High Commission of the Republic of Zambia, Commissioner Inonge Mwenya, to Two Mountains funeral parlour on 16 June 2025 for assistance with repatriation; (c) the repatriation was announced by the Secretary of Cabinet for the benefit of the Zambian nation on 17 June 2025; (d) a letter from the Director-General of Health, South Africa, Dr SSS Buthelezi, was issued giving permission for the exportation of the human remains; (e) a site-planning meeting was held at Lanseria Airport with family representatives and officials from the Zambia High Commission, DIRCO and the South African National Defence Force; (f) the mourning period was extended by nine days; (g) a public road was refurbished to facilitate access by mourners; (h) public press statements were made by the Secretary of Cabinet; and (i) a burial place was prepared, a photograph of which forms part of the record.

[107] The body of the late former President has been lying in a funeral parlour for a year. All these factors are sufficient to support the contention that it is in the public interest that the agreement between the parties be given effect to. The agreement caters for the wishes of the late former President and those of the family as conveyed to the people of Zambia.

[108] Mr Magezi E Baloyi²⁸ discussed in an article how death and funerals are uniting factors in African communities. He wrote that an African funeral is a very social event for the entire community in which the deceased lived, and that ‘death, amongst other things, is a uniting factor and discussed how death invites people into a family, regardless of bad blood, flawed relationships and separation ‘

[109] In *Barkhuizen v Napier NO*,²⁹ the Constitutional Court confirmed:

‘I do not understand the Supreme Court of Appeal as suggesting that the principle of contract *pacta sunt servanda* is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgment. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of the parties’ relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.’

[110] The proper approach as stated in *Barkhuizen*³⁰ and confirmed in *Beadica*³¹ is to determine whether the enforcement of the agreement: by way of the repatriation of the mortal remains of the former President and him being accorded a state funeral

²⁸ Baloyi M E. (2014). In an article titled: ‘*Distance no impediment for funerals: death as a uniting ritual for African people- A pastoral study*’, published in the Department of Philosophy, Practical and Systematic Theology, University of South Africa, South Africa, Verbum et Ecclesia (online Vol.35) N.1 Pretoria, he wrote that: ‘An African funeral is a very social event for the entire community in which the deceased lived. Regardless of whether the deceased was a Christian or not, death has always been a reunion for long-separated relatives, believers and non-believers. Nowadays, tents, cars and the gathering of multitudes of people demonstrate how death can bring people together, irrespective of distance and relationships. Of course, this is not to deny the fact that death can be a cause of division between relatives and friends. Nonetheless, the funeral itself is also a uniting factor; many people come together, regardless of distance, to pay their last tributes to the deceased and to provide the bereaved family with emotional support. In this article, I argue that death, amongst other things, is a uniting factor that is able to bring people, who are separated by distance and other factors, together. The aim of this article is to discuss how death invites people into a family, regardless of bad blood, flawed relationships and separation.’

²⁹ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) para 15.

³⁰ *Barkhuizen* para 70.

³¹ *Beadica* fn 27 above para 71.

and the agreed program, is inimical to the values that underlie our constitutional democracy, as given expression to in section 34 and thus contrary to public policy³². A short answer is that in light of the agreement in FAA7 read with FAA9, FAA10 and FAA11, between the parties, it is apparent that the parties considered not only the wishes of the late former President but those of the family and the Zambian nation. The agreement also considers the interests of the Zambian community and thus does not offend public policy.

[111] The Constitutional Court in *Beadica*³³ stated:

‘The public policy imperative to enforce contractual obligations that have been voluntarily undertaken recognizes the autonomy of the contracting parties and, in so doing, gives effect to the central constitutional values of freedom and dignity. This imperative provides the requisite legal certainty to allow persons to arrange their affairs in reliance on the undertakings of the other parties to a contract, and to coordinate their conduct for their mutual benefit.’

[112] For all the above reasons I find that there are no grounds to interfere with the decision of the High Court. It follows that the appeal must fail. Had I commanded the majority, I would have dismissed the appeal. In so far as costs are concerned, I would also follow the approach adopted by the High Court and make no order as to costs.

T V NORMAN
JUDGE OF APPEAL

³³ *Beadica* fn 27 above para 92.

Appearances:

For the Appellants:	T Ngcukaitobi SC with N Qwabe
Instructed by:	Mashele Attorneys Incorporated, Johannesburg Moroka Attorneys, Bloemfontein
For First Respondent:	B C Stoop SC with A A R Marques
Instructed by:	VFV Attorneys, Pretoria Honey Attorneys, Bloemfontein.