IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 336/2012

In the matter between:-

MARGARET TAKANGWANE ZWANE **Applicant**

and

TRYPHINA GUNGUBELE DLAMINI **1st Respondent**
BHEKITHEMBA ZWANE **2nd Respondent**

Neutral citation: *Margaret Takangwane Zwane v Tryphina Gungubele Dlamini*(336/12) [2012] SZHC 51(… March 2012)

Coram: HLOPHE J

Heard: 13th March 2012

Delivered: 15th March 2012

For the Applicant: Mr. B. J. Simelane

For the Respondent: Mr. J. M. Mavuso

Summary: Application Proceedings- Applicant seeks an order *inter alia* allowing her to conduct and be in charge of her husband's funeral- Position of the law such that in a case of a husband who dies intestate, the surviving spouse entitled to conduct and be in charge of the deceased's

funeral – Court approached on the basis of this right- It transpires when the opposition papers are filed that the deceased died testate and provided that deceased's son is the one to conduct and be responsible for deceased's burial – Whilst agreed will valid, it is contended what it provided for was contrary to public policy and good morals hence freedom of testation supposed to be curtailed – Basis of assertion made- court finding that the deceased's choice not *contro bonos mores*- Application dismissed with costs.

JUDGMENT

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[1] This is an application in terms of which the applicant seeks an order of this court *inter alia* interdicting the Respondents and those acting at their behest from burying the late Alfred Gengenene Zwane as well as another order allowing the Applicant to conduct and be in charge of the funeral arrangements of the said deceased person.

[2] There was also sought a declarator to the effect that the Applicant was the only surviving spouse to the deceased as well as an order directing the First Respondent to deliver to the Applicant the identity document and death certificate of the deceased.

[3] These latter orders are not contentious at all and have for different reasons been overtaken by events, with the only remaining ones being the costs order sought and those mentioned in paragraph 1 above. The prayer interdicting the Respondents from burying the deceased was sought and granted to operate as a *rule nisi* with immediate effect, pending finalization of the application.

[4] The facts supporting this application are mainly common course and are that sometime in 1966, the late Alfred Gengenene Zwane married the applicant in terms of civil rites, and in community of property, which marriage subsisted until the deceased's death on the 13th February 2012.

[5] During the subsistence of the said marriage the deceased purported to marry the first Respondent in terms of Swazi Law and Custom. This is alleged to have occurred sometime around 1980.

[6] Whilst we are not told whether or not there are children born of the relationship between the 1st Respondent and the deceased, we are told of the children born between the latter and the applicant who are three in number, excluding the one who is now late. Otherwise the second Respondent is the biological and first born son of the deceased born of a relationship between the latter and a person he did not marry and who does not feature at all in these proceedings.

[7] On the 13th February 2012, the deceased died after having fallen ill since January 2012. According to the Applicant, after the death of the deceased she was not treated with respect in so far as, notwithstanding that she was the only surviving spouse of the deceased taking into account that the other marriage the deceased purported to contract with the first Respondent was allegedly a nullity, in so far as it was contracted during the subsistence of the civil rites marriage, which is by nature exclusive of any other marriage, she was not immediately informed by an elder person that her husband was late as she contends to have been informed through a child who was sent to her. She further claims that without her knowledge and participation in the decision, she

was to learn over the radio that a funeral date for her late husband was set for the 19th February 2012.

[8] Her papers filed of record suggest that it was because of her concluding that she was not being taken seriously that she instituted the current proceedings seeking the orders referred to above.

[9] In opposing the application the Respondents did not dispute much of the facts she stated except to contend that the deceased died testate and that the will he left behind provided how he was to be buried including providing who was to be responsible for his burial, the place where his body was to be kept before burial and where it was to be buried. In fact the will provides as follows at paragraph 5:-

> "5. I hereby direct that upon my death, all burial preparations and the actual burial should be conducted at Tryphinah Zwane's homestead, including the memorial service and burial site. My body should be kept at Tryphinah Zwane's homestead until it is buried".
>
> 6.1 I direct that my son Bhekithemba Zwane will be in charge of and responsible for the necessary burial preparations and the actual burial administration.
>
> 6.2 In the event that the said Bhekithemba predeceases me, I direct that my other son, Musa Zwane will act in his stead.

[10] Because of these provisions, so the Respondents contended, the applicant was not entitled to the relief she sought of being allowed to conduct and be in charge of the funeral arrangements of the deceased. The Respondents contended that the application be dismissed for these reasons.

[11] To avoid sending a wrong message in my paraphrasing the issues I must state that the Respondent's deny the suggestion that Applicant was not being taken seriously or that a child was sent to inform her of the death of her husband. It is alleged a 29 year old son of the deceased was sent to convey the message and that applicant had herself to blame for not being party to the decision when and where the deceased was to be buried because she allegedly refused to attend the meeting called for discussing the same issues. As at the time the matter came for hearing before me, all the reliefs initially sought had either been resolved or overtaken by events such that there were only two prayers which remained for consideration and these are the one that relates to the applicant being allowed to conduct and be in charge of the funeral arrangements as well as the one for costs. Otherwise the prayer for the interim interdict and that which required that the identity documents and the death certificate of the deceased be handed over to the Applicant were fulfilled. The prayer seeking a declarator had become academic as the status of the first Respondent as the only lawfully wedded wife of the deceased was never made an issue by the Respondents.

[12] The parties were then agreed that the central issue for determination was who among all the role players had the right or power to bury the

deceased. Whilst the Applicant contended she was the one by virtue of her marriage aforesaid, the respondents contended they were the ones in terms of the will.

[13] In his submissions, the applicant's counsel contended that by virtue of the marriage regime she contracted with the deceased, she was entitled to conduct and be in charge of the burial of the latter. Whilst the will was acknowledged as a proper and valid one, which complied with all the formalities provided for in The Wills Act of 1959, it was contended that same sought to circumvent the provisions of the law by depriving the Applicant of her right to conduct and be in charge of the funeral of her late husband to which she was entitled by law as the surviving spouse. It was contended that the will concerned could not be enforced and that its provisions could not be recognized because it was *contro bonos mores* which is to say it was repugnant to morality and to public policy.

[14] The Applicant further contended that the immorality complained of stemmed from the fact that but for the will the 1st Respondent would not have had the right to bury the deceased at her place. Furthermore it was contended that the will was an abuse of the law on testation and it was contended that this court had a duty to ensure that it does not grant an order that offends against public morals and public policy. It was argued further that it was typical of Swazis to have certain rituals performed in the gravesite of the deceased ones and that it would not be in keeping with such practice or public policy to have the senior wife or the surviving spouse go to the house of what was termed the

bigamous wife and ask for permission to perform such rituals at the gravesite located at her place.

[15] I was referred to several judgments which although they recognized the freedom of testation principle, they confirmed that same was not absolute but was subject to certain limitations. It was contended that a will which is *contro bonos mores* (contrary to good morals and public policy) was not enforceable. The cases of ***Levy N.O. v Schwartz N.O. 1948 (4) SA 430*** and that of ***Minister of Education v Syfretes Trust Limited N.O. 2006 (4) SA 205*** were cited as examples of the fact that freedom of testation is not absolute and will be limited by public policy or good morals where the relevant clauses in a will violate or are contrary to same.

[16] The Respondents argued through their counsel that the will concluded by the deceased was a valid will which observed or complied with all the formalities of a will. This being the case it was contended that the deceased had exercised his rights in accordance with the Freedom of Testation Principle, in terms of which he could do anything he wished to have done during his burial so long as it was lawful. It was contended that the deceased was entitled in keeping with the principle of freedom of testation, to choose where he wanted to be buried including directing who should be responsible for conducting his burial as well as how same was to be conducted.

[17] It was contended that the deceased by means of the will had directed who was to be responsible for his funeral. It was contended no role was given to the 1st Respondent to play as it was only at her homestead that

the burial was to take place, otherwise the person who had a role to play was the 2nd Respondent his son. Nothing in law prevented him from appointing his son to have such powers. Instead, the argument went, the deceased only chose the home where first Respondent stayed as the place from which he was to be buried.

[18] Having considered all the circumstances, of the matter, I agree that the position advanced on behalf of the Applicant as concerns the position where the applicant is the only surviving spouse, and in an intestate setting, is the correct one. I agree further that the principle of freedom of testation is not absolute but is subject to several limitations such as the law, public policy and good morals. In a case where there is a valid will in place the position as regards who is responsible for the burial is different from where there is no will.

[19] I am not convinced that the choice by the deceased in this particular matter on how, where and by whom he was to be buried violated any of the exceptions to the principle of freedom of testation. I find it difficult to accept that is the case when considering the circumstances of the matter as a whole. It is a fact that in keeping with the principle of freedom of testation the applicant could have chosen to be buried at a strangers place and by a complete stranger having no relationship with him which is what the position in which 1st Respondent stood towards the deceased when considering that the marriage she contracted with him was a nullity. The point is that if a stranger could lawfully be allowed to bury the deceased in line with his will, then why not the first Respondent and the biological son of the deceased.

[20] It should be remembered that it is not per se unlawful or wrong for the deceased to be buried by the 1st Respondent as that could be agreed upon without same offending against public policy or good morals. Whatever the position would be for people whose relationship was secret because of its being bigamous, I doubt the same can be said of a relationship in the same position as the one between the 1st Respondent and the deceased.

[21] Their bigamous relationship lasted for over thirty years, was held publicly as a marriage to the extent both women were regarded by the deceased as his wives to the extent he had homesteads built for them next to each other, without the applicant herself objecting thereto and seeking legal redness in that regard. I doubt that in such a setting the deceased's choosing to be buried at the place built by him and next to his home, can ever be viewed as offending against public policy. I agree that public policy and morality are dynamic concepts which are susceptible to change.

[22] I doubt very much that the public of KaPhunga which had come to accept the relationship of the deceased, given it having lasted over thirty years, would find the deceased's burial at 1st Respondent's place offending against their sense of morality by now

[23] Consequently I am of the view that the provision of the will on where the deceased chose to be buried in the circumstances of this matter, including by who, cannot be said to be against public policy. Accordingly I make the following order:-

23.1 The Applicant's application be and is hereby dismissed.

23.2 Owing to the peculiar circumstances of the matter, and in an attempt to preserve peace between the parties as they will need each other going forward each party is to bear its own costs.

Delivered in open Court on this the ……day of March 2012.

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N. J. HLOPHE

JUDGE