REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

JUDGMENT

Case no: HC-NLD-CIV-APP-AMC-2020/00002

In the matter between:

AMON NDEVAHOKWA SHIPENA **APPELLANT**

and

JUSTINA ITEMBU **RESPONDENT**

Neutral Citation: *Shipena v Itembu* (HC-NLD-CIV-APP-AMC-2020/00002 [2022] NAHCNLD 77 (15 August 2022)

CORAM: MUNSU AJ

Heard: **20 May 2022**

Delivered: **15 August 2022**

Flynote: Child Care and Protection Act, No. 3 of 2015 – guardianship of minor children – overriding objective – best interests of the child.

Summary: In this matter, the biological mother of the two minor children passed away, leaving them in the care of their biological father. The respondent who is the maternal grandmother to the minor children applied for guardianship in respect of the minor children. The appellant opposed the application. The Children's Court granted the application without hearing the entire merits of the matter. The court did not hear

evidence of witnesses, including the parties. The order was also granted in the absence of the appellant. Dissatisfied with the outcome, the appellant lodged an appeal against the decision of the Children's Court.

Held: the proceedings in the court *a quo* did not warrant the drastic step resorted to by the court.

Held that: the appellant had explained to the court *a quo* the reason he was unavailable for the hearing.

Held further that: the court *a quo* should have shown some degree of patience if it were to give substance to the fundamental principle of natural justice, which mandates that a person be heard before a decision is made that would negatively affect them.

Held that: Children are among the most vulnerable members of society who depend on others for protection and care.

Held further that: as upper guardian of all minors, this court cannot over-emphasise the importance of resolving issues involving children on the merits and not on technicalities. It is through this that the overriding objective, which is the best interests of the child, can be better preserved.

In the result, the court upheld the appeal.

ORDER

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1. The appeal is upheld.
2. The order dated 27 December 2019 handed down by the court *a quo* under ref. no. OH/OK/G/87/2019 is hereby set aside.
3. The matter is remitted back to the Children's Court for the District of Eenhana for hearing.
4. There is no order as to costs.

RULING

MUNSU AJ:

Introduction

[1] On 27 December 2019, the Children's Court for the District of Eenhana granted an order of guardianship in respect of two minor children in favour of the respondent. This is an appeal against the said judgment and order handed down by the court *a quo.*

Background

[2] The appellant and the biological mother to the minor children were married to each other. During August 2017, the appellant's wife passed away, leaving the minor children in the care of their biological father, the appellant. The maternal grandmother, the respondent in this appeal, applied for guardianship in respect of the minor children. The application was granted by the court *a quo.* It is this decision which is the subject of this appeal.

Grounds of appeal

[3] The appellant's grounds of appeal are enunciated in his notice of appeal dated 07 February 2020 as follows:

"1. The Learned Magistrate erred in fact and/or law by setting the matter down for hearing on a date which was not agreed upon by the appellant and his legal practitioner.

2. The Learned Magistrate erred in fact and/or law by concluding that the appellant did not want to be present at the hearing on 27 December 2019 when he was unaware of the hearing date.
3. The Learned Magistrate erred in fact and/or law by denying the appellant his right to legal representation by holding the hearing in his absence and in the absence of his

legal practitioner when in fact the appellant was legally represented from 01 November 2019.

4. The Learned Magistrate erred in fact and/or in law by setting the matter down for hearing on 27 December 2019 when in fact the court was aware that appellant's legal practitioner would be available on 11 December 2019.

5. The Learned Magistrate erred in fact and/or in law by failing to comply with the *audi alteram partem* rule by failing to hear the appellant on the hearing date.

6. The Learned Magistrate erred in fact and/or in law by making her judgment solely based on the contents of the social welfare report filed of record.

7. The Learned Magistrate erred in fact and/or in law by failing to apply her mind to the circumstances of the case and consider the appellant's statement which was filed on record.

8. The Learned Magistrate erred in fact and/or in law by failing to enquire into the financial position of the respondent who was awarded custody and control of the minor children.

9. The Learned Magistrate erred in fact and/or in law by failing to give cognisance to the provisions of section 3(2) of the Children's Status Act, Act 6 of 2006 (sic)."

10. The Learned Magistrate erred in fact and/or in law by concluding that the appellant abandoned the minor children when there was no evidence on record for her to make that inference.

11. The Learned Magistrate erred in fact and/or in law by failing to consider the principle of the best interests of the children as stipulated in section 3 of the Children's Status Act, 6 of 2006 (sic).

[4] I held the view that the grounds of appeal 1 – 5 above would ordinarily be grounds for review. Given the fact that this is an appeal, I requested the parties to address me on the approach this court should adopt in deciding the aforementioned grounds. In this regard, the appellant drew my attention to the fact that halfway during the prosecution of his appeal, he had abandoned same and brought a review application under case no. *HC-NLD-CIV-MOT-REV-2021/00006.* At the stage of case

management of the review matter, this court drew the appellant's attention to section 46 of the Child Care and Protection Act (the Act),[1] which provides for appeals against decisions of the Children's Court. Having considered the aforesaid provision, the appellant abandoned the review application and reinstated the appeal presently serving before court.

[5] Section 46 of the Act reads as follows:

> 'Appeals
>
> (1) A party involved in a matter before a children's court may appeal against any order made or any refusal to make an order or against the variation, suspension or rescission of any order of the court to the High Court.
>
> (2) An appeal in terms of subsection (1) must be dealt with as if it were an appeal against a civil judgment of a magistrate's court.'

[6] According to the appellant, the Act does not provide for review of decisions of the Children's Court. He argued that the Act merely provides for appeal against decisions of the Children's Court. The only review procedure catered for in the Act relates to instances where the Children's Court alters an order of the High Court, as set out in section 98. For these reasons, the appellant submitted that the only procedure that he could have followed was to lodge an appeal as prescribed under section 46. Counsel for the respondent agrees that the appellant followed the correct procedure. In any event, it would not have been appropriate for the appellant to split the grounds of appeal and lodge both a review and an appeal against the same decision.

[7] I propose to deal with the first to fifth grounds of appeal simultaneously. The reason is that they all relate to the same issue, being that the appellant was not heard by the court *a quo*. It becomes necessary to highlight the proceedings in the court *a quo*.

[8] On 05 April 2019, the Commissioner of Child Welfare noted that the parties could not agree on the issue of guardianship. She referred the matter to the Children's Court for a formal enquiry. On 01 November 2019, the matter was postponed to 06 December 2019 for a formal enquiry. On that date, the appellant and his legal

[1] Child Care and Protection Act 3 of 2015.

representative did not attend the hearing. The matter was then postponed in order to allow the applicant/respondent in this appeal to seek legal representation. On 23 December 2019, the matter was postponed to 27 December 2019 for the appellant to be in attendance. The Social Worker, one Ms. Ntinda undertook to inform the appellant of the date.

[9] On 27 December 2019, the appellant and his legal representative were absent. The court enquired from the Social Worker as to the whereabouts of the appellant. In line with her undertaking, the Social Worker informed the court that she managed to communicate the hearing date to the appellant. She proceeded to hand in a letter as proof of the communication she had with the appellant. In the end, the court granted the application in favour of the respondent.

[10] Documents filed with the court *a quo* reveal that the appellant's legal representative had addressed a letter to the Children's Court advising that the appellant would not be able to attend the hearing. She explained that the appellant was scheduled to travel to Windhoek for medical reasons, and for that reason, he was not going to be able to attend court on 06 December 2019. Counsel was unsure as to when the appellant would return as the treatment was likely to take a few days. In the same letter, counsel made a proposal that the matter be postponed to 11December 2019 for hearing. Proof of the Doctor's appointment was attached to the letter.

[11] It was at this stage that all began to go in different directions. The court order dated 06 December 2019 postponed the matter to 20 December 2019. However, there is no appearance or court order for 20 December 2019. The matter only appeared on 23 December 2019 when it was postponed to 27 December 2019.

[12] The Social Worker states in her letter dated 23 December 2019 and addressed to the Commissioner of Child Welfare that she phoned the appellant and informed him of the hearing that was scheduled for 27 December 2019. She goes further to say that the appellant informed her that he would not be available as he was gone for December holiday with the children. He further informed her that he would only return as from 17 January 2020.

Determination

[13] The court *a quo* considered the social welfare report but did not hear the entire merits of the matter. Having had the opportunity to peruse the papers in this appeal, there are issues raised that concern the well-being of the minor children that could only be better resolved through evidence of witnesses. There were no witnesses who testified, including the parties. The application was granted without hearing and in the absence of the appellant.

[14] I do not find the proceedings in the court *a quo* to have warranted such a drastic step. Through his legal representative, the appellant had explained to the court *a quo* the reason he was unavailable for the hearing. Although the appellant's legal representative should have followed up on the matter in order to advise the appellant on the new date for hearing, the fact that she communicated the reason for the appellant's absence is a sign of cooperation with the court.

[15] The initial date for hearing and the date on which the matter was finalised fall within the same month (December). Indeed, December is a holiday month to many, especially those with school going children. The matter was set down for hearing on a Friday, two days after Christmas Day and a day after Family Day. The appellant explained to the Social Worker that he was out on holiday with the children and that he would return during the month of January. Surely, the court should have shown some degree of patience if it were to give substance to the fundamental principle of natural justice, which mandates that a person be heard before a decision is made that would negatively affect them.[2]

[16] Children are among the most vulnerable members of society. They are dependent on others for protection and care, including their parents and families or, if all else fail, the State. As upper guardian of all minors, this court cannot over-emphasise the importance of resolving issues involving children on the merits and not

[2] See the maxim *audi alteram partem.*

technicalities. It is through this that the overriding objective, which is the best interests of the child, can be better preserved.

[17] In light of the foregoing, it is my considered view that the appeal must succeed. To that end, I need not deal with the rest of the grounds of appeal. Suffice to say that any available Commissioner of Child Welfare for the District of Eenhana may hear the matter. Seeing that both parties are old-age pensioners, it is ideal that the Directorate of Legal Aid consider assisting the parties with legal representation.

Costs

[18] The parties are both legally aided. There shall be no order as to costs.

Order

[19] In the result, it is ordered as follows:

1. The appeal is upheld.
2. The order dated 27 December 2019 handed down by the court *a quo* under ref. no. OH/OK/G/87/2019 is hereby set aside.
3. The matter is remitted back to the Children's Court for the District of Eenhana for hearing.
4. There is no order as to costs.

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D.C. MUNSU

ACTING JUDGE

APPEARANCES:

APPELLANT:	G. Mugaviri Of Mugaviri Attorneys, Oshakati
RESPONDENT:	L. Nghipandulua Of Directorate of Legal Aid, Ondangwa