



REPORTABLE

CASE NO: SA 72/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MA

First Appellant

IA

Second Appellant

JA

Third Appellant

and

AG

Respondent

Coram: SHIVUTE CJ, SMUTS JA and HOFF JA

Heard: 1 March 2021

Delivered: 10 March 2021

Summary: This dispute concerns the guardianship of a minor child, G, aged seven years, following the death of her mother on 19 September 2017. The deceased mother was not married to the father of G, the respondent in this appeal. The High Court found that the children's court has jurisdiction to hear and determine the guardianship of G including the effect of the first appellant's nomination as a guardian of G in a testamentary disposition to the exclusion of the respondent. As a consequence, the court *a quo* declined jurisdiction to determine the guardianship application as a court of first instance.

The appellant noted an appeal to the Supreme Court within the prescribed time. The record of appeal was however filed two weeks late resulting in the appeal being deemed to have been withdrawn. The appellant only filed a condonation application and did not apply to reinstate the appeal. The condonation application is opposed by the respondent.

On the question of condonation and reinstatement of the appeal, the issue to be determined is whether appellant provided a reasonable and acceptable explanation for the non-compliance and whether there are reasonable prospects of success on appeal?

Held, the condonation application was defective by reason of the comprehensive failure to provide an acceptable or satisfactory explanation for the non-compliance. It followed that the application for condonation would ordinarily fall to be dismissed for this reason alone and without the need to consider the prospects of success of the appeal.

Held, because of the public importance of the case, which involves the interests of a minor child, the court considered the merits of the case.

Held, after the respondent withdrew his challenge to the validity of the will, any basis for the High Court to assume jurisdiction fell away. The High Court did not err by declining jurisdiction when the legislature specifically ordained the children's court to hear and determine applications for guardianship.

Consequently, the application for condonation is dismissed with costs and the matter is struck from the roll with costs. The orders of the High Court are replaced by a single order declining jurisdiction.

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and HOFF JA concurring):

[1] This dispute concerns the guardianship of a young minor child, G, aged seven years, following the sad death of her mother on 19 September 2017. The deceased mother was not married to the father of G, the respondent in this appeal. The issue for determination in this court is whether the High Court had erred in declining to exercise jurisdiction to determine an application for guardianship as a court of first instance which would ordinarily resort under the jurisdiction of the children's court established under the Child Care and Protection Act 3 of 2015 (the Act). The High Court found that the children's court has jurisdiction to hear and determine the guardianship of G, including the effect of the first appellant's nomination as a guardian of G in a testamentary disposition to the exclusion of the respondent and, as a consequence, declined jurisdiction.

[2] The designated first appellant, a sister to the deceased mother of G, was nominated as guardian by the deceased mother in her last will. This appellant together with her parents who assist her in caring for G (cited as second and third appellants), seek to appeal against the High Court's ruling. In the application proceedings which form the subject of this appeal, the first appellant was the sole applicant. I have not traced a joinder application by her parents in the record. It is not clear why they have been cited as second and third appellants, although they were referred to as fellow applicants in a subsequent interlocutory proceeding brought to stay the proceedings in the children's court. But they did not file any affidavits in that interlocutory application and the appellant's founding affidavit in that application did not explain quite why they featured in the heading. Indeed, apart from their reference in their heading, they are not further mentioned in that application. The citation of the second and third appellants would appear to be an error in the compilation of the record. Only the appellant filed a power of attorney

and will further be referred to as appellant despite her designation as first appellant in the record.

[3] The appeal record was however filed out of time and the appellant has filed an application to condone the late filing of the record. That application is opposed and will be addressed after first setting out the background facts to these proceedings.

Factual background

[4] The deceased mother of G, who hailed from Namibia, was residing in South Africa when she became involved in a relationship with the respondent. Their daughter G was born from this relationship. G lived with her deceased mother until her untimely death from a terminal illness. G was three years and ten months old when her mother succumbed to her illness. Prior to that unfortunate event, the respondent had access to G and, for certain periods, her deceased mother cohabitated with him, together with G.

[5] Prior to her death, the deceased executed a will in which she nominated the appellant as guardian of G in the event of her death in the following terms:

‘In so far as I am legally entitled to do so, as guardian of my minor daughter, (G), I nominate my sister (MA) who shall not be required to furnish security for acting in that capacity.’

[6] Shortly before her death, the deceased mother returned to Namibia from South Africa and stayed with her parents after being discharged from hospital. G accompanied by the respondent arrived in Windhoek a week after the deceased’s

return to Windhoek and G stayed with the appellant's parents and thereafter with the appellant or her parents since then, save for a very brief period with the respondent.

[7] The appellant in March 2018 filed an application for custody, control and guardianship of G in the children's court, Windhoek relying upon her nomination in the deceased's will. This application was opposed by the respondent who filed a counter-application for guardianship and custody of G. In his opposition to the appellant's application, he challenged the validity of the deceased's will.

[8] In a preliminary ruling, the children's court found that it lacked jurisdiction to determine the validity of the will. The application and counter-application in the children's court became postponed and the appellant in April 2019 launched an application to the High Court seeking to be appointed as guardian and for custody of G with reasonable access by the respondent, on the grounds of the testamentary nomination. The appellant further sought an order suspending the proceedings in the children's court. The respondent also opposed the High Court application.

[9] The appellant's basis for approaching the High Court was that the children's court lacked jurisdiction to determine the validity of the will, given the respondent's challenge to its validity. At the hearing in the High Court, senior counsel representing the respondent informed the court that he withdrew his challenge to the will's validity (and in fact stated that the respondent accepted the validity of the will), but contended that a testamentary 'grant' of guardianship would be unenforceable as he is the biological father of G and an equal guardian. I point out

that the terms 'grant' or 'appoint' in this context, as used by the parties, would be incorrect. It is a nomination as is plainly stated in the will and the children's court would still be required to determine what would be in the best interests of G, and take into account the wishes of the deceased when doing so. The respondent asserted that he was involved in G's life and that it would be in the best interests of G for guardianship to be awarded to him. This is disputed by the appellant.

Proceedings in the High Court

[10] The issue to be determined by the High Court was thus whether the High Court as a court of first instance should usurp the children's court and assume jurisdiction to determine matters relating to custody, guardianship and control of minor children which would otherwise resort under the jurisdiction of the children's court. Counsel who appeared for the appellant in this court submitted that the court below wrongly delineated the issue as it was the stay application which served before it. The stay application was brought as one of urgency at an advanced stage and was postponed by the duty judge for a status hearing before the managing judge in the main application 'to enable the parties to consider all pending litigation between them . . . to determine the best suitable manner in which those issues – including that relating to jurisdiction – are to be resolved'. Counsels' oral argument in the court below was transcribed and included in the record. It is apparent from the submission from both sides that the issue argued was that as summarised by the High Court, namely jurisdiction, which had no doubt crystallised as the crux of the dispute as foreshadowed by the duty judge in the urgent stay application. This point taking not raised in written argument is of no moment as the High Court and counsel directed their attention to the real issue in dispute being that of jurisdiction. That after all is what case management seeks to

achieve – to determine the real disputes between parties. The High Court (and counsel before it) cannot be faulted for doing so.

[11] After a careful analysis of the Act, the High Court concluded that it was the intention of the legislature that the children's court should be the first port of call in all matters affecting issues of custody, guardianship and access to children born out of wedlock in the position of G, including adjudicating upon applications for guardianship of children on the death of the custodial parent. The High Court further referred to the right of parties to appeal against decisions of the children's court to the High Court. As the validity of the will was, as termed by the High Court, no longer in issue, the question for the children's court to consider was the 'propriety' of the deceased's 'award' of guardianship of G to the appellant.

[12] The High Court concluded that the children's court had jurisdiction to determine whether it was open to the deceased to make such a nomination to a person other than a biological parent without regard to the latter's wishes and made a declaratory order to that effect. The court further directed that each party pay its own costs. This order was given on 20 September 2019 including a further order postponing the matter to 10 October 2019 'for a determination of the future conduct of the matter before this court, if at all'.

[13] On 17 October 2019, the High Court issued an order that it lacked jurisdiction to adjudicate the matter as the matter resided in the children's court and removed it from the roll.

Application for condonation

[14] The appellant timeously noted her appeal on 12 November 2019 – as calculated from the order given on 17 October 2019. The record of appeal was however only filed on 30 January 2020, two weeks late. The failure to have done so results in the appeal deemed to have been withdrawn.¹ Yet the appellant's application for condonation merely seeks condonation for the late filing of the record and not reinstatement of the appeal. This is but one of the several flaws which beset this condonation application. When this was pointed out to counsel for the appellant, an application was made from the bar to amend the notice of motion to seek relief directed at reinstating the appeal.

[15] The legal practitioner tasked with compiling the record states that she was under the impression that the record was due three months after filing the notice of appeal. (The practitioner also explained that she was busy with other matters, went on leave and there was a further delay in waiting for the input of her senior colleague on the composition of the record).

[16] The test in condonation applications is well settled and oft repeated, given the disturbing frequency with which these applications are necessitated by practitioners failing to comply with the rules of this court. The test requires applicants seeking condonation to provide a reasonable and acceptable explanation for the non-compliance and secondly to satisfy this court that there are reasonable prospects of success on appeal. As has been repeatedly stressed, there can be some interplay between these two criteria, such as may occur where prospects of success are overwhelming and the public importance of an issue may

¹ In terms of rule 9 of the rules of this court.

lead to the condonation being granted even where the non-compliance was not satisfactorily explained.² It has however also been held that ordinarily where there is no acceptable explanation for a glaring or flagrant non-compliance with the rules, the application may be dismissed without consideration of the prospects of success on appeal.³

Explanation for non-compliance

[17] The judgment actually appealed against was handed down already on 20 September 2019 although the last paragraph of the order indicated that it was not as yet final. This then was clarified in the subsequent order on 17 October 2019. Yet the practitioner responsible for the record on her own version for the first time only turned to attend to the record on 15 January 2020, the day before it was due as calculated from 17 October 2019. I pause to point out that the record in this matter is entirely uncomplicated as an opposed application. No transcription was required in this matter.⁴ The full application papers needed to be properly bound and indexed together with the judgment, the further court order of 17 October 2019 and the notice of appeal.

[18] The explanation tendered for the delay is essentially that the practitioner had the 'impression' that the record had to be filed three months from the date of the notice of appeal. The practitioner does not take this court into her confidence as to quite how she laboured under such an 'impression'. Rule 8(2) of the rules of this court spells out in plain language that a record is to be filed within three months of the date of judgment appealed against. Precisely the same time limit

² *Road Fund Administration v Scorpion Mining Company* 2018 (3) NR 829 (SC) paras 2-3.

³ *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 34 and as applied in *Tweya & others v Herbert & others* (SA 76/2014) [2016] NASC (6 July 2016).

⁴ Even though the record includes the transcript of oral argument in the High Court.

applied in the previous rules of this court which were in force from 1990 to 2017. The same time limit also applied to appeals to the South African Appellate Division prior to independence when that court was the final court of appeal in respect of appeals from Namibia. This ‘impression’ can thus have no basis in any prior formulation of rules.

[19] In the absence of the ‘impression’ being explained at all (and where an explanation is certainly called for), it is nothing more than a self-serving statement set up to suit the timing of her eventual filing of the record, without any plausible basis and thus lacking in credibility. What is clear from this extremely unsatisfactory explanation is that the practitioner plainly did not have the slightest regard for the applicable rule which is clear and unambiguous in its requirement. The practitioner furthermore does not state when she was eventually moved to look at the rules and establish what is required by the rules and what so moved her to do so. The condonation application is only filed on 24 March 2020 – nearly two months after the record was filed. This fact is relevant in applications of this nature, given the obligation on a practitioner to bring a condonation promptly after becoming aware of the non-compliance in question.

[20] The duty upon legal practitioners to acquaint themselves with the rules has been repeatedly and emphatically stressed by this court,⁵ as was very recently again summarised in *Sun Square Hotel (Pty) Ltd v Southern Sun Africa & another*⁶ with reference to the leading prior judgments of this court in the following way:

⁵ *Channel Life Namibia (Pty) Ltd v Otto* 2008 (2) NR 432 (SC); *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay & others* 2013 (4) NR 1029 (SC); *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* 2014 (1) NR 166 (SC); *Katjaimo v Katjaimo & others* 2015 (2) NR 340 (SC) para 34; *Tweya & others v Herbert & others* (SA 76/2014) [2016] NASC (6 July 2016).

⁶ 2020 (1) NR 19 (SC) paras 8-11 (*Sun Square*).

[8] In *Channel Life Namibia Ltd v Otto* the then Chief Justice lamented the fact that so many appeals had to be preceded by condonation applications involving non-compliance with the rules of court. He addressed the role of legal practitioners as follows:

“Before doing so I must point out that at each session of the Supreme Court there are various applications for condonation because of non-compliance with some or other of the rules of the court. Many of these applications could have been avoided through the application of diligence and by giving the process a little more attention. Practitioners should inform themselves of the provisions of the Rules of the Supreme Court and cannot accept that those rules are the same as that of the High Court.”

[9] In *Kleynhans v Chairperson of the Council of the Municipality of Walvis Bay & others* the court referred with approval to the following remarks from Friedman AJA in the South African Appellate Division:

“An attorney instructed to note an appeal is in duty bound to acquaint himself with the Rules of the Court in which the appeal is to be prosecuted. See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 685A-B.”

As it is evident from what is stated above, the duty of a legal practitioner when representing a client on appeal has often been emphasised in past decisions and has been settled law for a very long period of time.

[10] The warning was reiterated by the Chief Justice in the case of *Shilongo v Church Council of the Evangelical Lutheran Church in the Republic of Namibia* in the following terms:

“Virtually every appeal that I was involved in during the recent session of the court was preceded by an application for condonation for the failure to comply with one or other rule of the Rules of Court. In all those appeal matters, valuable time and resources were spent on arguing preliminary issues relating to condonation instead of dealing with the merits of the appeals. In spite of observations in the past that the court views the

disregard of the rules in a serious light, the situation continues unabated and the attitude of some legal practitioners appears to be that it is all well as long as an application for condonation is made. Such an attitude is unhelpful and is to be deprecated.

and at p 169G-H para 6:

It is therefore of cardinal importance that practitioners who intend to practice at the Supreme Court and who are not familiar with its rules take time to study the rules and apply them correctly to turn the tide of applications for condonation that is seriously hampering the court's ability to deal with the merits of appeals brought to it with attendant expedition.”

[11] In the *Katjaimo v Katjaimo* case the same issue was taken up by the Deputy Chief Justice who made the following statement in this regard:

“Sufficient warning has been given by this court that the non-compliance with its rules is hampering the work of the court. The rules of this court, regrettably, are often more honoured in the breach than in the observance. That is intolerable. The excuse that a practitioner did not understand the rules can no longer be allowed to pass without greater scrutiny. The time is fast approaching when this court will shut the door to a litigant for the unreasonable non-observance of the rules by his or her legal practitioner.”

(footnotes excluded)

[21] These frequent and repeated warnings by this court concerning the laxity of practitioners and their duty to acquaint themselves with the rules, thus reiterated in the most recently reported judgment of this court on the issue,⁷ find application. What is all the more disturbing in this matter is that there is the self-same attempt at an explanation which was tendered and so roundly rejected in *Sun Square* – of labouring under the misapprehension of the same requirement in the rules - when it is obvious in both cases that the practitioners in question did not even bother to

⁷ See *Sun Square*.

look at the rules. In *Sun Square*, this court found that an 'explanation' amounting to ignorance of a rule amounted to no explanation, with reference to the same flawed explanation. As was pointed out in *Sun Square*, if such an explanation were to be accepted, this court would be obliged to accept every other explanation for failing to comply with the rules.

[22] Another defect in the condonation application is the failure to address the question of prospects of success of the appeal and even to refer to this requirement.

[23] Given the comprehensive failure to provide an acceptable or satisfactory explanation for the non-compliance, it follows that the application for condonation would ordinarily fall to be dismissed for this reason alone and without the need to consider the prospects of success of the appeal. Whilst no doubt appreciating the hopeless inadequacy of the explanation, appellant's counsel urged this court to overlook it, given the public importance of this case, because the interests of a minor child are at stake.

The merits of the appeal

[24] Given the public importance of the issues raised in this appeal which concern a minor child of seven years and the jurisdiction of children's courts, I turn to address the merits of the appeal.

[25] The crisp question raised by the merits of this matter is whether the High Court erred in declining to exercise jurisdiction to hear and determine an application for the guardianship of G as a court of first instance, including what the

court termed the propriety of the deceased 'awarding' guardianship of G to the appellant to the exclusion of the respondent in her last will. At the outset, it would seem that this terminology used would appear to be incorrect. It is not clear to me that the deceased in this matter sought to 'award' the guardianship to the appellant and whether this of its own could in any event be competent. Not only would applications for guardianship be a matter for the children's court to determine in the best interests of G, but the deceased herself in her will instead chose the term 'nominate' which is distinctly different from purporting to appoint or award guardianship and thereby acknowledging that a guardian is appointed by the children's court in the best interest of the child. By directing an application for guardianship in the children's court, the appellant correctly acknowledges this.

[26] Counsel for the appellant argued that exceptional circumstances exist for the High Court to assume jurisdiction in the application for guardianship, given the fact that the children's court decided to proceed with a formal enquiry to determine guardianship and custody, despite the fact that the validity of the will was challenged which the latter court accepted it did not have jurisdiction to determine. Whilst this strictly speaking reflects what is contained in that court's ruling on preliminary issues, the proceedings were then postponed and the High Court application, as well as a later application for interim relief staying the children's court enquiry, proceeded. Appellant's counsel contended that the issue of jurisdiction then became *res judicata*, upon the children's court ruling on preliminary issues. This, so it was argued, would constitute 'exceptional circumstances' for the High Court to assume jurisdiction, even though this was not the basis of the application to that court which did not refer to exceptional

circumstances and rather centred on the lack of jurisdiction of the children's court to express itself on the validity or otherwise of the will.

[27] Appellant's counsel submitted that the time for assessing jurisdiction is when proceedings are instituted. That proposition, as a general principle, is sound.⁸ Counsel proceeded to argue that once the children's court ruled that it had no jurisdiction to determine the validity of the will, it was then deprived of jurisdiction (having determined its own jurisdiction) and, so it was argued, exceptional circumstances existed for the High Court to assume jurisdiction.

[28] That argument is however unsound and fails to take into account that the children's court correctly found that it lacked jurisdiction to rule on the validity of the will and that issue only. That court however did not find it lacked jurisdiction to determine the application for guardianship. On the contrary, that court in fact postponed it.

[29] The appellant thereafter approached the High Court to determine guardianship on the basis that the children's court had no jurisdiction to determine the validity of the deceased's will. At an advanced stage of the proceedings in the court *a quo*, the respondent made it clear that he no longer contested the validity of the will (in correspondence shortly beforehand and by counsel during oral argument).

[30] Once that was no longer an issue, so too was the basis for the approach to the High Court to assume jurisdiction to determine the matter. Counsel for the

⁸ *Coin Security Group (Pty) Ltd v Smit N.O. & others* 1992 (3) SA 333 (A) at 343G-345C; *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 301C-D.

appellant however in oral argument asserted that the point (challenging the validity of the will) had not been abandoned and could be raised again if the matter were to be referred back to the children's court. This despite the concession by counsel for the respondent in the court below that the will was valid and the statement on the respondent's behalf that before the court below that the point was not persisted with as well as the correspondence to that effect shortly before the date of hearing included in the record.

[31] Counsel for the respondent in this court confirmed that the point was withdrawn and abandoned. Counsel for the appellant's response was that, had this been made clear – by way of an unequivocal abandonment – the appeal would not have proceeded because the determination of the validity of the will or its interpretation constituted the 'exceptional circumstances' in support of the appellant's claim for the High Court to assume jurisdiction.

[32] The High Court plainly understood the position to have been that the point was withdrawn and no longer in issue and stated this in as many words in its judgment. That understanding was in my view well founded with reference to the correspondence and was confirmed by respondent's counsel.

[33] Even though not termed an abandonment, the withdrawal of the challenge to the validity of the will could not be resuscitated in these proceedings. The withdrawal of the challenge and the acceptance of the validity of the will had the effect of abandoning that challenge. If the appellant was unsure of this, as was argued on her behalf, this could have been clarified in correspondence instead of embarking upon this appeal, particularly given the concession, correctly made by

counsel, that the basis for the High Court to assume jurisdiction would then fall away. Even though this concession, very properly made, would mean that this appeal against the court's finding on jurisdiction would fall away, it however remains apposite to refer to the pertinent provisions of the Act concerning jurisdiction and the High Court's ruling on that issue to provide clarity on those issues.

[34] The Act deals in detail with matters relating to children, their protection and development, as is spelt out at the outset of the Act in s 2 which sets forth the objects of the Act, which are under subsection 2(2) to be considered in interpreting and giving effect to the Act:

'2. (1) The objects of this Act are to –

- (a) protect and promote the well-being of all children;
- (b) give effect to children's rights as contained in the Namibian Constitution;
- (c) give effect to Namibia's obligations concerning the well-being, development and protection of children in terms of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and other international agreements binding on Namibia;
- (d) promote the protection of families and actively involve families in resolving problems which may be detrimental to the well-being of the children in the family;
- (e) develop and strengthen community structures which can assist in providing care and protection for children;
- (f) establish, promote and co-ordinate services and facilities designed to advance the well-being of children and prevent, remedy or assist in solving problems which may place children in need of protective services;
- (g) provide protective services to children who are in need of such services;

- (h) protect children from discrimination, exploitation and other physical, emotional or moral harm or hazards;
 - (i) ensure that a child does not suffer any discrimination or disadvantage because of the marital status of his or her parents; and
 - (j) recognise the special needs that children with disabilities or chronic illnesses may have.
- (2) The objects referred to in subsection (1) must be given due consideration in the interpretation and application of any provision of this Act.'

[35] The very next section in the Act sets out the central principle underpinning the Act and its application. It is entitled 'Best interests of the child'. Section 3(1) provides:

- '3.(1) This Act must be interpreted and applied so that in all matters concerning the care, protection and well-being of a child arising under this Act or under any proceedings, actions and decisions by an organ of state in any matter concerning a child or children in general, the best interests of the child concerned is the paramount consideration.'

[36] Section 3(2) then proceeds to list factors to be taken into account in determining the best interests of the child.

[37] In s 38 of chapter 4 of the Act, children's courts and commissioners are established and appointed. It provides:

- '(1) For the purpose of this Act, every magistrate's court is a children's court and has jurisdiction in any matter arising from the application of this Act for its area of jurisdiction.
- (2) The law as applicable to magistrates' courts applies to a children's court when it is exercising jurisdiction in respect of matters it may adjudicate on.

- (3) A children's court is a court of record and has a similar status to that of a magistrate's court at a district level.
- (4) Every magistrate appointed for a district is a children's commissioner for that district.
- (5) For the purposes of this Act, the Magistrates Commission may assign magistrates as dedicated children's commissioners for a specific children's court or for more than one children's court.
- (6) A children's commissioner is subject to the Magistrates Act, 2003 (Act No. 3 of 2003).
- (7) A children's commissioner must preside over every session of a children's court.
- (8) A children's commissioner must promote and protect the best interests of a child who comes before a children's court in terms of this Act or any other law.
- (9) A children's commissioner must perform such functions as may be assigned to him or her under this Act or any other law.
- (10) Any officer delegated by the Prosecutor-General to conduct prosecutions before the magistrate's court of any district is *ex officio* a children's court assistant of any children's court held within that district.
- (11) The minister responsible for justice –
 - (a) must ensure that children's commissioners receive training regarding the implementation of this Act and in their specific duties and functions; and
 - (b) may appoint dedicated children's court assistants for any children's court to assist such court in the manner contemplated in section 58(6).
- (12) The functions of a children's court assistant are as prescribed.'

[38] Section 46 of the Act affords a party involved in a matter before a children's court the right to appeal against an order made by that court to the High Court.

[39] A children's court may, in addition to its powers to make orders under the Act, appoint a *curator-ad-litem* in respect of a child if that would in the opinion of the court be in the best interests of the child even if the child is legally

represented.⁹ That court also has the power to order a designated social worker, medical practitioner, psychologist, educational practitioner or any other person with appropriate expertise to carry out a further investigation into the circumstances of a child and compile a written report addressing such matters as the court may require.¹⁰ A person who compiles such a report may obtain supplementary evidence or reports from other suitably qualified persons and be required by the court to present the findings by testifying before court.¹¹

[40] The Act also contains provisions concerning the court's environment¹² and requires that the proceedings are held in private.¹³ The court is also empowered to conduct its proceedings in an informal manner conducive to obtaining the co-operation and participation of those involved in the proceedings.¹⁴ The court is also empowered to call persons to give evidence and to question or cross-examine such persons¹⁵ and may also give directions for the attendance of interested and relevant persons.¹⁶

[41] It is thus clear from the scheme of the Act that the legislature envisages a specialist court with its specifically ordained powers and procedure and an environment appropriate to and tailored for the nature of enquiries to be held by that court. One such enquiry pertains to applications for custody and guardianship.¹⁷

⁹ Section 47(2)(f).

¹⁰ Section 47(2)(g) .

¹¹ Section 48(3).

¹² Section 54.

¹³ Section 55.

¹⁴ Section 56(2).

¹⁵ Section 56(1).

¹⁶ Section 56(3).

¹⁷ Sections 100, 101 and 113.

[42] The appellant herself initially applied to the children's court for guardianship and custody of G on the strength of her nomination in the deceased's will, correctly accepting its jurisdiction. It was only when the respondent opposed that application and brought a counter-application for guardianship, contesting the validity of the nomination in the will, that the appellant approached the High Court to exercise jurisdiction to determine the application and counter-application for guardianship, given the fact that the children's court did not have jurisdiction to determine the validity of the will. But once the respondent withdrew his challenge to the will's validity, any basis for the High Court to assume jurisdiction fell away. Furthermore, the High Court's jurisdiction in that instance would have in my view only extended to determining the validity of the will and once that issue is determined, the High Court would thereafter refer the matter back to the children's court to proceed with the enquiry entrusted to it by the legislature as a specialist court.

[43] The High Court can thus not be faulted in declining jurisdiction when the legislature specifically ordained a specialist court in the form of the children's court to hear and determine applications for guardianship as a court of first instance (with the High Court as the court of appeal).

[44] It follows that an appeal against the judgment and order of the High Court does not enjoy any prospects of success. It further follows that the condonation application would fail on this ground as well.

[45] Even though the appeal falls to be struck, it is apparent that the formulation of the declaratory order in paragraph 1 of the order of 20 September 2019 requires modification. The term 'award' in that order is inapposite. If any term were to be

used at all, it should rather be the term 'name', as used in s 113(2) of the Act, in the event the children's court were to decide that the deceased was sole guardian. The respondent would appear to place this latter aspect in issue and it would be a matter for the children's court to determine. The term 'award' is also inapposite on the facts as the deceased nominated the appellant as guardian in her will. This is also after all how the appellant approached the issue by applying to that court for guardianship on the strength of her nomination to that position by the deceased.

[46] It was in my view unnecessary to make a declaratory order on this issue and the order of the High Court should best be confined to the issue of jurisdiction and the consequence of the lack of it. It is not necessary for present purposes to express a view on the interpretation to be given to s 113(2) of the Act. This issue was not ventilated in argument before us.

[47] It follows that the wording of the declaratory order issued by the High Court referring to determining the propriety of awarding guardianship is incorrect and is to be set aside, both by virtue of the interpretation of s 113 in the context of the Act and on the facts where the deceased chose to nominate the appellant in her will. The subsequent order given on 17 October 2019 was confined to declining jurisdiction and is what was required and is confirmed in the refined terms set out below.

[48] During oral argument in this court, it emerged that the respondent had himself brought an application to the High Court (subsequent to the application on appeal), seeking to be appointed as G's sole guardian and for custody and to relocate her. This despite the stance taken by the respondent in the proceedings

on appeal (that the High Court did not have jurisdiction to determine applications for guardianship as a court of first instance). Counsel for the respondent sought to explain the apparent contradiction on the basis that relocation to another country was also being sought which he said was not covered by the Act. Those proceedings are not before us. The respondent's legal practitioner sought to supplement counsel's answer in correspondence directed to the court subsequent to the hearing. This was done without the leave of the court and without the consent of the appellant's practitioners and is improper as no subsequent development justified such correspondence. Had counsel not considered that his state of knowledge of those proceedings was sufficient, it was open to him to apply to the court to place further material before it. This was not done. He instead took instructions and answered the question posed by the court to him. It was accordingly improper for a protagonist to address correspondence unilaterally on the issue to the court afterwards. That correspondence is disregarded. What is however a cause for concern is the manner in which disputatious proceedings have proliferated concerning the issue of the guardianship of this minor child. The parties would do well to heed to the principle underpinning the Act, being the best interests of the child, in the conduct of their litigation.

Costs

[49] Appellant's counsel argued that the respondent should pay the costs of appeal because of his contention that the withdrawal of the challenge to the validity of the will did not amount to an unequivocal abandonment or alternatively that there should be no order as to costs. That approach has been shown to be unsound and will have no impact upon the cost order of this court.

[50] The lack of prospects of success on appeal has meant that the condonation application must fail and the appeal should be struck. The respondent is entitled to his costs occasioned by the dismissal of the condonation application and the striking of the appeal. Both sides have engaged the services of two instructed counsel on appeal and a costs order should also reflect that. There is no cross appeal against the costs order of the High Court. This is understandable, given the late change of stance of the respondent in no longer persisting with this challenge to the validity of the will.

Order

[51] The following order is made:

- (a) The appellants' application for condonation is dismissed with costs.
- (b) The matter is struck from the roll with costs.
- (c) The costs thus awarded are to include the costs of one instructing and two instructed legal practitioners.
- (d) The orders of the High Court of 20 September 2019 and 17 October 2019 are to be replaced by the following order:
 - (i) This court declines to exercise jurisdiction to adjudicate this application, such jurisdiction residing in the children's court, established under Act 3 of 2015 which court should continue with the application and counter-application for the

guardianship and custody of G with which it is currently seized;

- (ii) The application is removed from the roll and no order is made as to the costs of this application.'

SMUTS JA

SHIVUTE CJ

HOFF JA

APPEARANCES

APPELLANTS:

R Heathcote (with him J Jacobs)

Instructed by AngulaCo Inc.,
Windhoek

RESPONDENT:

T A Barnard (with him H Garbers-
Kirsten)

Instructed by Dr. Weder, Kauta &
Hoveka Inc., Windhoek