G.P.-S.59968—1970-71—2 500

J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

BIRGIT BUDTZ VAN SCHOOR *Appellant,*

versus

MARTIN EDWARD SEDGWICK VAN SCHOOR *Respondent*

Appellant's Attorney Horwitz, Arvan & Lewis *Respondent's Attorney* SPIEL 1 S.
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate M.W. Friedman *Respondent's Advocate* H.J. Preiss S.C.
Advokaat vir Appelland *Advokaat vir Respondent* R.H. Zulman

Set down for hearing on
Op die rol geplaas vir verhoor op

Coram Holmes, Trollip, Rabie, Muller JJA et
Viljoen Lund AJA

Friedman - 9.45 - 11.00. 11.15 - 11.25,
2.17 - 2.55,
Preiss - 11.25 - 12.45.

(W.L.D.)

C.A.V.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

BIRGIT BUDTZ VAN SCHOOR .....APPELLANT

and

MARTIN EDWARD SEDGWICK VAN SCHOOR .....RESPONDENT

Coram: HOLMES, TROLLIP, RABIE, MULLER, JJ.A. et VILJOEN, A.J.A.

Heard: 17 February 1976.

Delivered: 5 March 1976.

J U D G M E N T

MULLER, J.A.

This is an appeal against an order of absolution from the instance granted by MELAMET, A.J., in the Witwatersrand Local Division.

The...../2

The following are the material facts.

1. The appellant is the mother of three minor children, namely,

(a) Hans Peter Walter, a son, born on 19 November 1956.

(b) Joanna Budtz Walter, a daughter, born on 17 June 1959.

(c) Janet Budtz van Schoor, a daughter, born on 2 January 1962.

The firstmentioned two children, Hans and Joanna, were born out of the appellant's first marriage, to one Michael Walter. When the appellant became divorced from Michael Walter, on 9 August 1963, she obtained the custody of the said two children. The child Janet was born out of appellant's subsequent marriage to the respondent, from whom she was divorced on 30 August 1972. By an agreement, which was made an order of court, the custody of Janet was awarded to the appellant.

2. On...../3

2. On 19 December 1972 the respondent married Pamela Joy van Schoor.

3. After the marriage between the appellant and the respondent was dissolved, the aforesaid three children lived with the appellant in Johannesburg.

4. On 18 June 1973 the appellant left South Africa for Denmark. The children were left in the temporary care of friends of the appellant in Mafeking where they were to spend the mid-year school holidays. (According to the appellant, she went to Denmark, the country of her birth, for health reasons. She did so on medical advice. Her intention was to return to South Africa within a short period or otherwise to arrange for the children to join her in Denmark).

5. For various reasons the appellant's stay in Denmark became a protracted one. With her consent the three children, in the meantime, went to stay with the respondent. In letters to the respondent and the children the appellant intimated that she expected to return to South Africa in 1974.

6. Whilst...../4

6. Whilst the appellant was still overseas the respondent initiated proceedings in the Childrgn's Court to obtain custody of the children. On 2 April 1974 the Children's Court for the district of Johannesburg (sitting at Randburg), acting in terms of sections 30 and 31 of the Children's Act, 33 of 1960, found the children to be children in need of care and ordered that they be placed in the custody of the respondent and his present wife and under the supervision of the Social Welfare Officer, Johannesburg. The ground upon which it was found that the children were children in need of care was presumably that they had been abandoned by their mother. (The appellant contends that she was not advised and had no knowledge of these proceedings, despite the fact that her address overseas was known to the respondent and the Department of Social Welfare in Johannesburg.)

7. In June 1974 the appellant returned to South Africa. Her financial position was such that she could not provide

accommodation...../5

accommodation for the children but she wished to have access to them, and she informed the respondent accordingly. After lengthy correspondence between their respective attorneys, the appellant was notified that respondent refused to allow her access to the children. The appellant was informed that, in so doing, respondent was acting on the advice of a psychiatrist, whichwas to the effect that it would be detrimental for the children to have contact with her.

It was against the aforestated factual background that the appellant, in October 1974, applied to the court a quo on notice of motion for an order granting her access to the said minor children. The only person cited as respondent in the proceedings was the appellant's former husband, the respondent now before this court.

Voluminous affidavits, with a multitude of supporting documents, were filed on both sides. These raise a number of disputes concerning the past conduct of the parties,

their...../6

their respective attitudes towards the three children, the attitudes and wishes of the children, and, in particular, whether it would be in the interests of the children for the appellant to have access to them. It should also be mentioned that the respondent, in his opposing affidavit, contended that, in view of the order made by the Children's Court, placing the children in the custody of the respondent and his present wife and under the supervision of the Social Welfare Officer, Johannesburg, the respondent's present wife should have been cited as a respondent, and that the Commissioner of Child Welfare and the Social Welfare Officer should also have been joined in the proceedings.

It was clear that the issues raised by the parties could not be decided on the papers filed in the application proceedings and, when the matter came before BOSHOFF, J., in November 1974, the parties, through their legal representatives, conceded that the court could not resolve the issues without the aid of oral evidence. The learned

Judge...../7

Judge accordingly referred the matter to trial and ordered that the appellant's (applicant's) founding affidavit stand as summons in the trial. The court also made certain orders providing for the appellant's access to the children pending the conclusion of the trial. In this regard the court directed that the appellant was to have access to the children on certain specified dates in December 1974 and January 1975 and further ordered as follows:

> "Should the trial in the above matter not be determined or concluded by February 1975, or should the same only be set down for hearing towards the end of February 1975, or thereafter, the Applicant shall be entitled to have the said children spend every alternate weekend with her at her place of residence between the hours of 5 p.m. on Friday, to 6 p.m. on Sunday."

The matter was then set down for trial on 3 February 1975.

On 19 December 1974 the registrar of the Wiwatersrand Local Division notified the Chief Social Welfare Officer of

Johannesburg...../8

Johannesburg of a request by the court that a report be furnished by the Department of Social Welfare on the matter in issue. Such a report, dated 7 January 1975, was duly lodged with the registrar on 23 January 1975.

On 30 Janaury 1975 the legal representatives of the parties appeared at a pre-trial conference and the following matters are recorded as having been agreed upon:

"1. The issue in the Trial is the Applicant's (Plaintiff's) rights of access to the minor daughters Joanna and Janet and the terms thereof.

2. Janet and Joanna are presently at boarding school in Pretoria by consent of the Applicant and Respondent.

3. Janet wishes to see the Applicant on an access basis.

4. Hans, the son of the Applicant, is not in issue in these proceedings.

5. Apart from documents and letters annexed to the Record of the Application Proceedings and additional letters sent by the Applicant's and Respondent's Attorneys, the parties agree that it is not necessary to make further discovery.

6. The...../9

6. The opinions of experts have already been exchanged, and are annexed to the Application Proceedings and the parties dispense with notice thereof.

7. Janet is the child of the Applicant and the Respondent and Joanna and Hans are the children of the Applicant.

8. The necessity of Counsel to be present at Pre-Trial Conference."

The matter came to trial on 3 February 1975 before MELAMET, A.J., and the following is recorded in the judgment of the learned Judge with regard to the proceedings on that day:

> "Although the matter had been referred to Trial in terms of Rule 6 (g) of the Rules of Court, the matter came before me on the 3rd February 1975 without any pleadings having been filed. I was informed that the parties had agreed that no further pleadings would be filed and it was basically an issue of the matter being referred to evidence. To avoid any confusion, I shall continue hereinafter to refer to the Plaintiff - the matter having been referred to trial - as the Applicant and to the Defendant as the Respondent.
>
> During the course of Counsel for the Applicant outlining the facts it

appeared...../10

appeared that, as set out above, the children had been declared in need of care and that the Order of the Commissioner of Child Welfare, Randburg, in that regard had not been set aside and was still operative. I then raised the question with Counsel whether it was competent for this Court to make the Order sought having regard to the above facts. This question had been raised in the Respondent's affidavit but not in relation to the jurisdiction of the Court to hear the matter but in relation to the question of joinder of the Commissioner of Child Welfare and the Social Welfare Officer, Johannesburg. In this connection a report from the Social Welfare Officer had been called for by the Registrar on the direction of BOSHOFF,J., and was before me. Neither the Commissioner for Child Welfare, Randburg, nor the Social Welfare Officer, Johannesburg, had been joined in the action and the Affidavits had not been served on them.

Counsel for Respondent adopted the point raised in limine and argument was then addressed to me on the question as to whether this Court had jurisdiction. As a decision on the question adverse to the Applicant would dispose of the Application it was subsequently agreed between Counsel that the Court should treat the matter under the provisions of Rule 33(4) of the Rules of Court."

On...../11

On the issue thus raised, and circumscribed by the learned Judge, — namely, whether, in view of the order granted by the Children's Court placing the children in question in the custody of the respondent and his present wife and under the supervision of the Social Welfare Officer, the Supreme Court was precluded from entertaining the appellant's application (action) —— argument was heard and thereafter judgment was given in favour of the respondent, the order being absolution from the instance. In particular the learned Judge held as follows:

(a) The existence of an order of the Supreme Court regulating the custody of a child does not preclude a Children's Court from holding an enquiry under section 30 of the Children's Act, 33 of 1960 (hereinafter referred to simply as the Act) and, upon finding that the child in question is a child in need of care, from making an order in terms of section 31 of the Act, e.g. placing the child in the

custody...../12

custody of a particular person.

(b) The effect of an order made in terms of section 31(1) of the Act is to divest the parent or guardian of the child of his or her right of reasonable access to that child (section 59 of the Act).

(c) If what is said in (b) above is not a correct statement of the effect of an order under section 31(1) then, inasmuch as the children in the present case were placed under the supervision of the Social Welfare Officer, Johannesburg, it is for that official to determine what rights of access the appellant should have to the children. And there was no evidence of any approach having been made to the said official.

(d) There is no appeal from an order made in terms of section 31 of the Act. The order remains effective

until...../13

until set aside by a Supreme Court on review on any of the recognised limited grounds, or until set aside or varied by the Minister in terms of section 49 of the Act.

(e) That the fact that appellant, who was overseas at the time, was not notified of the enquiry to be held under section 30 of the Act, did not invalidate the proceedings. The question whether such notice should have been given or not was a matter within the discretion of the presiding officer, the Commissioner of Child Welfare. (section 34 of the Act) In any event the present proceedings were not in the nature of review proceedings and the presiding officer of the Children's Court which made the order under section 31 of the Act was not a party to the proceedings.

It was on the basis of the above findings that MELAMET,A.J., concluded that the Supreme Court had no jurisdiction in the

matter...../14

matter.

On appeal before us various contentions were put forward and argued. Because of the view I take of the issue before us, there is no need, for the purpose of deciding the appeal, to express a view on all the matters raised and I shall therefore confine myself to those aspects which I regard as decisive.

Counsel for the appellant contended that the trial Judge erred in holding that, in terms of section 59 of the Children's Act, the parent of a child who has, under the provisions of section 31(1) of the Act, been placed in the custody of another person, is divested of his right of access to that child. I agree with that contention.

Under the common law a non-custodian parent has a right of reasonable access to his minor children. Even though a divorce order granting custody to one of the parents may make no mention of a right of access to be enjoyed by the non-custodian parent, a right of reasonable

access...../15

access exists, and the Supreme Court will, if reasonable access is denied the non-custodian parent, make an order particularizing the access to be given. Only in very exceptional circumstances, and if in the interests of the child, will a non-custodian parent be deprived entirely of his or her right of access (H.R.Hahlo: The S.A.Law of Husband and Wife, 4th Edition p. 466 et seq., E Spiro: Law of Parent and Child, 3rd Edition p. 266 et seq. and authorities cited by these authors).

The crisp question in the instant case is whether the provisions of the Children's Act alter the common law position. Section 31 of the Act provides that a Children's Court may, upon finding that a child is a child in need of care, order inter alia that the child be placed in the custody of a particular person. The Children's Court may further order that a child so placed in custody be under the supervision of a probation officer. This happened in the instant case.

A child in need of care is defined in section 1 of

the...../16

the Act, and it is clear from that definition that a child may be in need of care under circumstances for which one of the parents, or even both of the parents, may not be to blame.

Section 59 of the Act deals with the transfer of certain parental powers when a child in need of care is placed in an institution or in the custody of a particular person. Section 59(1)(a) provides as follows:

> "(1)(a) Subject to the provisions of subsection (3), a parent or guardian of any pupil of an institution or of any child who has under this Act ---------
> -----been placed in any custody other than the custody of the parent or guardian, shall be divested of his right of control over and of his right to the custody of that pupil or child and those rights, including the right to punish and to exercise discipline, shall be vested —
>
> (i) in the management of the institution to which the pupil was sent; or
> (ii) in the person whose custody the child was placed; or
> (iii) in the case of any pupil to whom a licence was granted under section forty-four to live in the custody of any person or in any training institution, in such person or in the managers of such training institution."

And...../17

And sub-section(3)provides:

> "(3) The rights transferred by sub-section (1) from a parent or guardian to the management of any institution or the managers of any training institution or to any other person shall not include the power to deal with any property of a pupil or child or the power to consent to the marriage of a pupil or child or to the performance upon or the provision to a pupil or child of an operation or medical treatment which is attended with serious danger to life."

The reasoning of the learned Judge a quo, in coming to the conclusion that the effect of section 59 of the Act was to divest the appellant of her rights of access to the children, was as follows:

> "Sub-section 59(1) of the Children's Act provides that on a child being placed in any custody other than the custody of the parent or guardian, under the provisions of the Act, the parent or guardian shall be divested of his right of control over and his right to the custody of that child. Such rights shall vest in the person in whose custody the child has been placed.

Sub-section...../18

Sub-section 59(3) provides that the rights transferred by sub-section (1) shall not include the power to deal with any property of the child or the power to consent to the marriage of the child or to the performance upon or the provision to the child of an operation or medical treatment which is attended with serious danger to life.

The remaining sub-sections of the section confer upon the Minister the overriding right in certain circumstances in respect of certain of the powers reserved to the parent or guardian and on the custodian certain rights in regard hereto in the case of emergency.

On the application of the rule of interpretation - inclusio unius est exclusio alterius - the parent or guardian are divested of all rights other than those enumerated in sub-section 59(3). If I am correct in this view the parent or guardian has been divested of his or her right of reasonable access to a child placed in the custody of another under the provisions of the Children's Act."

In my view this reasoning is unsound. The fault therein lies in the part thereof underlined by me. The rule of interpretation relied upon by the learned Judge can only apply if sub-section (1) can be interpreted as divesting

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the non-custodian parent of all his rights. Because it would then follow that the only rights excluded from the operation of sub-section (1), and reserved for the non-custodian parent, would be those enumerated in sub-section (3). But sub-section (1) clearly does not provide for the divesting and transfer of all parental rights. It provides only for the divesting of certain rights (powers), namely, the "right of control over and of his right to the custody of that pupil or child", and "only those rights, including the right to punish and exercise discipline", are transferred from the non-custodian parent to the management of an institution or other person, as the case may be. The provision made in sub-section (3) was necessary inasmuch as the rights (powers) enumerated in that sub-section would otherwise have fallen within the ambit of the particular rights transferred under sub-section (1).

It would have been surprising to me if the legislature had intended that in all cases where, in terms of

section 31...../20

section 31 of the Act, a child is placed in an institution or in the custody of another person, the natural parent or parents should automatically be divested of all rights of access to the child, without provision being made for any means or authority by which even limited permission for access could be obtained. And the question may be posed how can the non-custodian parent be expected to exercise the powers enumerated in sub-section (3) without access to the child.

Counsel for the respondent, arguing in support of the interpretation placed on the section by the learned Judge a quo, contended that the non-custodian parent, although deprived of all rights of access under section 59(1), would not be without a remedy inasmuch as he, so counsel suggested, could approach the probation officer (in the instant case the Social Welfare Officer, Johannesburg), under whose supervision the child is placed in terms of section 31(2), to permit him access to the child. That answer

does...../21

does not, in my view, resolve the problem. One may ask what is the position when no probation officer is appointed under section 31(2), and what happens if the probation officer, in the case where one is appointed, simply refuses a request for access. Surely the legislature would not have intended to leave the rights of access of a non-custodian parent in such an unsettled state.

On a proper reading of section 59 itself, it is my conclusion that the section does not divest the non-custodian parent of rights of reasonable access. That conclusion is, I think, reinforced by the provisions made in other sections of the Act. Thus, section 60 provides for the deprivation of a parent, in certain circumstances, of all parental powers,. But elaborate provision is made for service of reasonable notice on the parent who may be affected (sub-section (1)), for the right to apply for a rescission of any order made under sub-section (1) (sub-section (2)) and for appeals

to...../22

to the Supreme Court (sub-section (3)).

Section 74(3) provides that an order of adoption terminates all the rights and legal responsibilities existing between the child and his natural parents, except the right of the child to inherit from them ab intestato. But the section immediately following (section 75) specifically provides for a limited right of access to the adopted child, under certain circumstances.

Section 83 of the Act provides for the placing, in certain circumstances, of a child in the temporary custody of one of its parents or any other suitable person. But specific provision is made in sub-section (6) for access to the child by a non-custodian parent.

Under section 92(e) the Minister is empowered to make regulations prohibiting or restricting access to pupils in institutions.

From the above it seems clear that the legislature was fully aware of the parental right of access and, where

considered...../23

considered necessary, specifically provided for the regulation thereof. It is therefore significant that in the section with which we are concerned, section 59, the legislature, in circumscribing the rights which the non-custodian parent is divested of, did not specifically mention access, nor make any statutory provision for regulating access to the child.

It is of course true, as pointed out by counsel for the respondent, that in certain circumstances access by a parent to a child, placed in the custody of another person in terms of section 31, could hamper the proper exercise of control and custody vested in that person. But the answer thereto may be that the legislature, although mindful of the fact that there could be such cases, did not see fit, for that reason, to deprive all non-custodian parents of the right of access to children placed in the custody of another person under section 31(1).

It is for the above reasons that I have come to the

conclusion...../24

conclusion that the appellant was not divested of her common law right of access to the children by the order made by the Children's Court in terms of section 31 of the Act. I am also of the view that the learned Judge was wrong in his alternative finding, namely, that, if the appellant's right of reasonable access was not affected by the order of the Children's Court, then it was the function of the Social Welfare Officer, Johannesburg, to define what rights of access the appellant should have; that the Supreme Court is precluded from entertaining any application to define the appellant's rights of access and only has a limited right of review, on one or other of the recognised grounds for review, proceedings, of the exercise of his powers by that official.

The function of the probation officer appointed under section 31(2) (in the instant case the Social Welfare Officer) is a limited one, namely, to supervise the exercise by the person in whose custody the child has been placed of the powers transferred to him in terms of section 59(1),i.e.the powers of control and

custody...../25

custody of the child (excluding the powers enumerated in sub-section 59(3)). Nowhere does the Act say, either expressly or by implication, that the said official is vested with the power, which otherwise vests in the Supreme Court, of defining the rights of access of the non-custodian parent.

In view of the conclusion to which I have come it is not necessary to deal with a further contention advanced by counsel for the respondent, namely, that an order made by the Children's Court is inviolable and cannot (except in review proceedings) be upset or varied by the Supreme Court. This contention was advanced on the supposition that, by reason of the provisions of section 59(1) of the Act, the order made by the Children's Court automatically divested the appellant of her right of access and that to grant the order now sought by her would amount to a variation of the order of the Children's Court. As I have already indicated that is not the case.

Counsel...../26

Counsel for the respondent contended that even if it were to be found that the Judge a quo had erred in granting absolution from the instance on the grounds which I have mentioned above, the same result could have been reached on the basis of non-joinder. In this regard it was submitted that the Commissioner for Child Welfare, who granted the order in the Children's Court, and the Social Welfare Officer, Johannesburg, who was appointed to act in a supervisory capacity, should have been joined in the action. I may add that initially counsel argued that the present wife of the respondent should also have been joined, but he later abandoned this contention in view of the fact that she had joined in the proceedings by filing an affidavit.

With regard to the position of the Commissioner for Child Welfare and the Social Welfare Officer, I think that, if a defence of non-joinder could at all be raised at this stage, it would be a complete answer to say that, in view of the conclusion expressed above — namely,

that...../27

that the order of the Children's Court did not regulate any rights of access (i.e. did not divest the appellant of the rights of access), and that the supervisory functions of the Social Welfare Officer do not include the right to define the appellant's rights of access — neither of the two officials mentioned would have a direct and substantial interest in the result of the action (Kock & Schmidt v. Alma Modehuis (Edms.) Bpk.1959 (3) S.A. 308 (A.D.) at p. 318). The interest of each of them would only be an indirect interest. But be that as it may, in my conclusion the respondent is precluded from raising the question of non-joinder before us. I say so for the following reasons.

As I have already stated, the respondent did, in his opposing affidavit, raise the question of non-joinder of the Commissioner of Child Welfare and the Social Welfare Officer. After all the affidavits and supporting documents had been filed the issue of the applicant's right of access and the terms thereof were referred to trial by

BOSHOFF,J. Thereafter the parties, through their legal representatives, agreed at a pre-trial conference that "the issue in the Trial is the Applicant's (Plaintiff's) rights of access ---------"

I have also mentioned earlier in this judgment that, when the matter came to trial before MELAMET,A.J., on 3 February 1975, the parties informed the learned Judge that they "had agreed that no further pleadings would be filed and that it was basically an issue of the matter being referred to evidence." The Judge then raised the question of the jurisdiction of the court, namely, whether, in view of the existence of the order of the Children's Court, it would be competent for the Supreme Court to make the order sought by the appellant. What then took place is recorded as follows in the judgment of MELAMET,A.J. :

> "Counsel for the Respondent adopted the point raised in limine and argument was then addressed to me on the question whether this Court had jurisdiction. As a decision on the question adverse to the applicant would dispose of the Application it

was...../29

> was subsequently agreed between counsel that the Court should treat the matter under the provisions of Rule 33(4) of the Rules of Court."

Rule 33(4) provides as follows:

> "If it appears to the court mero motu or on the application of any party that there is, in any pending action, a question of law or fact which would be convenient to decide either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of."

It is therefore clear that the only issue (question) dealt with by the court a quo, pursuant to the agreement between the parties, was whether, in view of the existence of an order of the Children's Court, the Supreme Court could entertain the action. And that is the only issue upon which we can adjudicate on appeal. The respondent cannot now seek to introduce a further question not dealt with by the court a quo.

In view of what has been stated above the appeal

should...../30

should succeed, and the matter must be referred back to the court a quo for trial.

In the course of his argument counsel for the appellant raised the question of interim relief pending the conclusion of the trial in the event of the appeal succeeding. He invited this court to make an order regulating the appellant's rights of access during the period of the trial. Indeed, he attempted to justify the inclusion in the appeal record of all the documents which were before the trial court, a matter to which further reference will be made later in this judgment, inter alia on the basis that it was necessary to put the whole record before this court so that it would be in a position to make an appropriate interim order.

The position, however, is that BOSHOFF,J., made an order on 21 November 1974 defining the appellant's rights of access pending the conclusion of the trial. The effect of noting an appeal against the order of absolution of the instance granted by MELAMET,A.J., was to suspend the last-

mentioned...../31

mentioned order automatically. (Gentiruco A.G. v. Firestone S.A.(Pty.)Ltd.1972 (1) S.A. 587 (A.D.) at p. 667 and Standard Bank of S.A. Ltd. v. Stama (Pty.) Ltd. 1975 (1) S.A. 730 (A.D.) at pp. 746 & 748). Consequently the order of BOSHOFF,J., was, and still is, of full force and effect, and will remain in force until the trial is concluded, unless set aside or varied by the court a quo. There is accordingly no need for this court to make an interim order.

There remains the question of costs. Inasmuch as the appellant succeeds on appeal she is entitled to the costs of appeal. For the purposes of appeal, however, the appellant lodged a record consisting of 532 pages, of which only a very minor portion was necessary for the determination of the narrow legal issue which was before this court.

We were informed from the Bar that, at the stage when the appellant's legal advisers were about to prepare the appeal record, the attorneys for the respondent expressed the view that only certain selected documents should be

included...../32

included in the appeal record. The attorneys for the appellant, however, took the stand that the whole of the record should be included and that is what was done. On appeal before us counsel for the appellant sought to justify the inclusion of the whole record on various grounds none of which are, in my view, of any substance.

The only parts of the record which can be regarded as necessary for the determination of the appeal are the following:

1. The notice of motion. (pages 2 - 4 of the record.)
2. The appellant's (applicant's) founding affidavit (without annexures) which, in terms of the order made by BOSHOFF,J., was to stand as summons in the trial. (pages 5 - 25 of the record.)
3. Paragraphs 1(c) to 1(e) of the respondent's opposing affidavit. (pages 80 - 83 of the record.)
4. The orders of the Children's Court. (pages 131 - 133 of the record.)
5. Pages 20 to 22 of the appellant's (applicant's)

replying...../33

replying affidavit. (pages 334 to 336 of the record.)

6. The request by the registrar of the Witwatersrand Local Division for a report by the Department of Social Welfare, and the Social Welfare Officer's report. (pages 479 - 493 of the record.)

7. The judgment of BOSHOFF, J., and the Order of Court. (pages 501 - 510 of the record.)

8. The minutes of the pre-trial conference. (pages 511 - 513 of the record.)
501 - 503

9. The judgment of MELAMET, A.J., (pages 514 - 527 of the record.)

10. The notice of appeal. (pages 528 - 529 of the record)

11. The consent of the parties. (pages 530 - 531 of the record.)

12. The attorneys' certificate. (page 532 of the record.)

The two judgments referred to above record all the material facts.

The appellant should not be entitled to the costs of any part of the record other than the documents mentioned

above...../34

above, and it will be ordered accordingly.

The order of the court is as follows:

(a) The appeal is allowed with costs. The costs of the record are limited to the documents mentioned in this judgment.

(b) The orders of MELAMET, A.J., are set aside, and the matter is referred for trial to the court a quo, which court shall also at the conclusion of the trial make an order as to any costs incurred in and wasted by the proceedings before MELAMET, A.J.

G.v.R. MULLER, J.A.

HOLMES, J.A.
TROLLIP, J.A.
RABIE, J.A.
VILJOEN, A.J.A.