20-9-75

15-9-75

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

PUBLICATIONS CONTROL BOARD *Appellant,*

versus

CENTRAL NEWS AGENCY *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Hepp.S.A.(Bmftn.)

Respondent's Attorney / *Prokureur vir Respondent* ~~McIntyre~~ & v.d.Post

Appellant's Advocate / *Advokaat vir Appellant* L.A.Rose Innes S.C. R.J. Bonnie

Respondent's Advocate / *Advokaat vir Respondent* W. J. Thring

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

3

Coram: Jansen, Rabie, de Villiers, Kotzé ARR et Joubert WNAP

Rose Innes - 9.45 - 11.00, 11.15 - 12.15, 3.47 - 3.55,

Thring - 12.15 - 12.45, 2.15 - 3.30,

C.A.V.

(C.F.D.)

The Court dismisses the said appeal with costs.

(Judgment per De Villiers JA)

9/12/76

Registrar

Writ issued Lasbrief uitgereik	Bills taxed—Kosterekenings getakseer		
	Date Datum	Amount Bedrag	Initials Paraaf
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

PUBLICATIONS CONTROL BOARD Appellant

and

CENTRAL NEWS AGENCY LIMITED Respondent

Coram : JANSEN, RABIE, DE VILLIERS, KOTZÉ J J. A et
JOUBERT A.J.A.

Heard : 17 August 1976

Delivered: 9 December 1976

J U D G M E N T

DE VILLIERS, KOTZÉ JJ.A et JOUBERT A.J.A.:

On appeal to the Court a quo in terms of Section 14 of the Publications and Entertainment Act No. 26 of 1963 (the Act), the decision of the appellant by which it

declared ...../2

declared a publication entitled "Naked Yoga" to be objectionable in terms of section 113 (3) (a) of the Customs and Excise Act No. 91 of 1964 (the Customs Act) was set aside. The matter is now before us on a further appeal. The respondent imported copies of "Naked Yoga" in September 1972 after the appellant found it not to be objectionable and after it was released by the Department of Customs and Excise on 11th August 1972 "as not objectionable and ..... regarded as no longer under embargo." The reason for the appellant's finding was conveyed to the respondent in a letter from its attorney as follows:

> "When the publication was in the first place submitted to it for a decision, the Board considered the publication to be 'a publication of a technical, scientific or professional nature bona fide intended for the advancement of or use in any particular profession or branch of arts, literature or science' as provided in Section 5 (4) (b) (iii) of Act 26 of 1963. The Board considered the publication to be a bona fide publication for the advancement of the practice of 'Yoga' and considered that it had to find it unobjectionable in terms

of ...../3

of the subsection quoted above."

The appellant reversed its decision in August 1973 after it received instructions from the Minister for the Interior to review its decision under the then newly enacted section 8 A of the Act inserted therein by sec. 26 of Act No. 62 of 1973. The reversal by the appellant of its decision as aforesaid led to the proceedings in the Court a quo. In its judgment setting aside the August 1973 decision, whilst holding that the contention advanced on behalf of the respondent that the exemption contained in Section 5 (4) (b) (iii) did not aid it, it afforded relief on the basis that "Naked Yoga" is not objectionable within the meaning of the Act.

The Court a quo assumed without deciding that section 5 (4) (b) (iii) of the Publications and Entertainments Act No. 26 of 1963 constituted an exemption from section 113 (1) (f) of the Customs and Excise Act No. 91 of 1964. In argument before us counsel relied on the same assumption. It has now become necessary for us to determine whether this assumption was well-founded.

By ...../4

By way of elucidation it may be pointed out that section 21 (1) (f) of the old Customs Act No. 55 of 1955 prohibited the importation of certain goods into the Union of South Africa, namely : " goods which are indecent or obscene or on any ground whatsoever objectionable, unless imported for research purposes by educational institutions under a permit issued by the Minister of the Interior." It is important to note that the Minister of the Interior had a discretionary power to allow, pursuant to the granting of a permit, the importation of goods which were indecent or obscene or objectionable provided that such importation was for research purposes by educational institutions. Furthermore, the relevant provisions of section 21 (3) of the old Customs Act provided as follows:

" In the event of any question arising as to whether any goods are indecent or obscene or objectionable, the decision of the Minister of the Interior shall be final: Provided that in respect of printed, lithographic and photographic matter the decision shall be given after consultation with

the ...../5

the Board of Censors appointed in terms of sub-section (1) of section two of the Entertainments (Censorship) Act, 1931 (Act 28 of 1931) - - -"

It is clear from the provisions of Section 21 (3), in its original form, that the Legislature selected the Minister of the Interior to decide, in his absolute discretion whether any goods were indecent or obscene or objectionable for the purposes of Section 21 (1) (f).

The coming into operation of the Publications and Entertainments Act No. 26 of 1963, however, brought about a change of policy inasmuch as the Legislature conferred on the appellant the powers and functions which the Minister of the Interior held and exercised in terms of Section 21 (1)(f) and 21 (3) of the old Customs Act. Section 21 (1) (f) was amended by Section 20 (a) of Act No. 26 of 1963 to read as follows:

" The following goods are hereby prohibited from importation into the Union, namely -

(f) goods which are indecent or obscene or on any ground whatsoever objectionable, unless imported for

research purposes by educational institutions under a permit issued by the Publications Control Board referred to in section two of the Publications and Entertainment Act, 1963."

Section 21 (3) of the old Customs Act was amended by Section 20 (b) of Act No. 26 of 1963 to provide the following:

" (a) In the event of any question arising as to whether goods are indecent or obscene or objectionable, the decision of the Publications Control Board referred to in section two of the Publications and Entertainment Act, 1963, shall be final, but subject to a right of appeal as provided in section fourteen of that Act as if such decision were a decision referred to in that Section.

(b) - - - - - - - - - - -

(c) For the purpose of any decision as to whether goods are indecent or obscene or objectionable within the meaning of this sub-section, the provisions of sub-section (2) of section five and section ten of the

Publications and Entertainments Act, 1963,

shall mutatis mutandis apply."

The replacement of the Minister of the Interior by the appellant for the purpose of deciding whether goods are indecent or obscene or objectionable in terms of section 21 (1) (f), as amended, made it necessary (1) to provide for an appeal against the decision of the appellant and (2) to prescribe criteria by means of which the appellant could determine whether goods were indecent or obscene or objectionable. Section 21 (3) (a), as amended, provided for appeals against the appellant's decisions in that section 14 of Act 26 of 1963 was made applicable to such appeals. The necessary criteria to enable the appellant to determine whether goods were indecent or obscene or objectionable were furnished by section 21 (3) (c) in that the provisions of sections 5 (2) and 10 of Act 26 of 1963 were made mutatis mutandis applicable.

The old Customs Act was repealed and replaced by the Customs and Excise Act No. 91 of 1964, to which reference will hereinafter be made as "the present

/Customs ../8

Customs Act." It appears that Section 113 (1) (f) of the present Customs Act is virtually in identical terms with Section 21 (1) (f) of the old Customs Act, as amended, except that the words "for research purposes by educational institutions" which appeared in Section 21 (1) (f) of the old Customs Act, as amended, have been omitted from Section 113 (1) (f) of the present Customs Act. Section 113 (3) (a) and (c) of the present Customs Act is the exact counterpart of Section 21 (3) (a) and (c) of the old Customs Act, as amended. What is of importance is the fact that Section 113 (3) (c) of the present Customs Act expressly refers to the provisions of Sections 5 (2) and 10 of Act 26 of 1963.

The Legislature integrated the relevant provisions of the old Customs Act and those of Act 26 of 1963 for censorial purposes in order to ensure that local and imported publications and objects were placed largely on the same footing. This appears from the references in Sections 1 (2) (b), 5 (1) (b) (ii), 8 (1) (a), (b), and 14 (1) (b) of Act 26 of 1963 to provisions of the old Customs Act.

In terms of Section 12 (1) of the Interpretation Act No. 33 of 1957, as amended, the said references to provisions of the old Customs Act should be construed as being references to the re-enacted provisions of the present Customs Act.

It is now incumbent on us to consider the provisions of Section 5 of Act 26 of 1963. Section 5 (1) prohibits the production, dissemination and importation of undesirable publications and objects. Its provisions need not detain us. The remaining sub-sections of Section 5, which are relevant for purposes of our inquiry, read as follows:

"(2) A publication or object shall be deemed to be undesirable if it or any part of it -

(a) is indecent or obscene or is offensive or harmful to public morals;

(b) is blasphemous or is offensive to the religious convictions or feelings of any section of the inhabitants of the Republic;

(c) brings any section of the inhabitants of the Republic into ridicule or contempt;

(d) is harmful to the relations between any sections of the inhabitants of the Republic;

(e) ...../10

(e) is prejudicial to the safety of the State, the general welfare or the peace and good order;

(f) discloses, with reference to any judicial proceedings -

(i) any matter which is indecent or obscene or is offensive or harmful to public morals or any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals;

(ii) for the dissolution or a declaration of nullity of a marriage or for judicial separation or for restitution of conjugal rights, any particulars other than -

(aa) the names, addresses and occupations of the parties and witnesses;

(bb) a concise statement of the allegations, defences and counter-allegations in support of which evidence has been given;

(cc) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(dd) the judgment and the verdict of the court and any observations made by the judge in giving judgment.

(3) ...../11

(3) The provisions of sub-paragraph (ii) of paragraph (f) shall not be construed so as to permit the disclosure of anything contrary to the provisions of sub-paragraph (i) of that paragraph.

(4) The provisions of this section shall not apply with reference to -

(a) the printing of any pleading, transcript of evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings;

(b) the printing or publishing -

(i) of any notice or report in pursuance of the directions of a court of law;

(ii) of any matter in any separate volume or part of any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law;

(iii) of any matter in a publication of a technical, scientific or professional nature bona fide intended for the advancement of or use in any particular profession or branch of arts, literature or science; or

(iv) of any matter in any publication of a bona fide religious character."
(Our underlining).

Section ...../12

Section 5 (2) sets out the grounds upon which a publication or object, or any part of it, is deemed to be undesirable, whereas Section 5 (3) deals with the construction of Section 5 (2) (f) (ii). Section 5 (4) exempts from the provisions of Section 5 the local printing of documents for use in judicial proceedings; the local printing or publication of notices by order of court; the local printing or publication of bona fide law reports; the local printing or publication of matter (which is bona fide intended for the advancement of or for use in any particular profession or branch of arts, literature or science) in a publication of a technical, scientific or professional nature; and the local printing or publication of any matter in a publication of a bona fide religious character.

Section 113 (3) (c) of the present Customs Act provides as follows :

" For the purpose of any decision as to whether goods are indecent or obscene or objectionable within the meaning of this sub-section, the provisions of sub-section (2) of

/13 ....

of section five and section ten of the Publications and Entertainments Act, 1963, shall mutatis mutandis apply."

It is apparent therefore that, unlike Section 5(2) of Act 26 of 1963, Section 5 (4) of the latter Act is not expressly applied by Section 113 (3) (c) of the present Customs Act for the purpose of any decision as to whether the importation of any goods falls within the scope of Section 113 (1) (f) of the present Customs Act. There was no need for the Legislature to refer in Section 113 (3) (c) of the present Customs Act to Section 5 (1) of Act 26 of 1963, since the latter section deals mainly with the prohibition of the local production and dissemination of undesirable publications and objects, whereas Section 113 (1) (f) of the present Customs Act prohibits the importation of "goods which are indecent or obscene or on any ground whatsoever objectionable, unless imported under permit issued by the Publications Control Board referred to in section two of the Publications and Entertainments Act, 1963 (Act No. 26 of 1963)." The Legislature, however,

/14 .....

expressly referred in Section 113 (3) (c) of the present Customs Act to Section 5 (2) of Act 26 of 1963 in order to provide the necessary criteria "for the purpose of any decision as to whether goods are indecent or obscene or objectionable within the meaning of this sub-section." On reading sub-sections (2) and (3) of Section 5 of Act 26 of 1963 together, it becomes clear from their context that Section 5 (3) is inseparably connected with Section 5 (2) for the purpose of a proper construction of Section 5 (2) (f) (ii). We are accordingly of the opinion that Section 5 (3) must be read with Section 5 (2) in applying Section 113 (1) (f) of the present Customs Act despite the fact that Section 113 (3) (c) of the latter Act does not specifically refer to Section 5 (3). As already stated Section 5 (4) of Act 26 of 1963 expressly exempts from the provisions of Section 5 the local printing or publishing of certain documents, notices and matter, including inter alia the printing of documents for use in judicial proceedings and the printing or publication

of ...../15

of bona fide law reports. It is significant to observe that Section 5 (2) (f) of Act 26 of 1963 deems a publication or object to be undesirable, if it or any part of it, discloses certain matter with reference to any judicial proceedings, When Section 5 (4) is read in conjuction with Section 5 (2) it becomes clear that the former contains important exemptions from the applicability of the latter. Where in applying Section 113 (1) (f) of the present Customs Act to the importation of goods, it becomes necessary to determine whether such goods are indecent or obscene or objectionable, the result would be in invoking Section 5(2) of Act 26 of 1963, without having regard to the exemptions mentioned in Section 5 (4) of the latter Act, that a foreign law report which happens to contain any indecent or obscene or offensive matter with reference to any judicial proceedings would be deemed to be undesirable in terms of Section 5 (2) of Act 26 of 1963, whereas a locally printed law report which contained the identical matter would by virtue of

the ...../16

the provisions of Section 5 (4) of Act 26 of 1963 not be deemed to be undesirable. This would not only amount to an anomaly but would also thwart the aforementioned purpose of the Legislature, in integrating the provisions of the present Customs Act and those of Act 26 of 1963 for censorial purposes, to place local and imported publications largely on the same footing. We have already pointed out that the Legislature has omitted the words " for research purposes by educational institutions" from Section 113 (1)(f) of the present Customs Act, which omission would seem to be some additional indication, considered in the light of the aforementioned purpose of the Legislature, that the Legislature intended Section 5 (4) to be read in conjuction with Section 5 (2) whenever Section 113 (1) (f) of the present Customs Act is to be applied. Compare what SCHREINER J.A. stated in Durban City Council v Gray 1951 (3) SA 568 (A) at p. 580 B " ..... it is within the powers of a court to modify the language of a statutory provision where it is necessary to give effect to what was

clearly ..../17

clearly the Legislature's intention." We are accordingly of the opinion that in order to give effect to the clear intention of the Legislature section 5 (4) of Act 26 of 1963 is applicable to a decision under section 113 (3) (c) of the present Customs Act and that section 5 (4) of Act 26 of 1963 does constitute an exemption from section 113 (1) (f) of the present Customs Act. The aforesaid assumption is therefore well-founded.

We have had the advantage of reading the judgment of our brother Jansen wherein he has fully set out the issues involved in, and the facts appertaining to this appeal. We are, however, unable to agree with his conclusion that the appeal should be allowed. In our view the appeal should, for reasons that follow, be dismissed on the ground that "Naked Yoga" falls within the exempting provisions of section 5 (4) (b) (iii) of Act 26 of 1963. In our view therefore both the appellant and the Court a quo should have found that it was not objectionable. While we agree

with ...../18

with the interpretation that the exemption provided for in section 5 (4) (b) (iii) only applies if the challenged matter is (a) a publication of a technical scientific or professional nature and (b) bona fide intended for the advancement of or use in a particular profession or branch of the arts, literature or science, we are of the view that "Naked Yoga" complies with both these requirements. Mayer, on behalf of the appellant, desribes Yoga as "an ancient philosophy combined with a system of physical culture designed, inter alia, to keep the body supple and fit." He is substantially supported in this view by the other two deponents, Muhl and Yates, on behalf of the appellant who both suggest it to be a philosophy and as such a subject of study. That Yoga is in fact a science appears from its ordinary dictionary meaning : The Oxford English Dictionary Vol 9 attributes inter alia the following meaning to "science" viz. "2. Knowledge acquired by study; acquaintance with or mastery of any department of learning."

/ Webster's ..../19

Webster's Third New International Dictionary (1966) assigns the following meaning to it viz. "2a: a branch or department of systematized knowledge that is or can be made a specific object of study." Having regard to the wide and extensive meaning of the word "science" it follows, in our opinion, that a scientific work may vary in quality, nature, treatment, learning and standard, depending upon numerous factors such as, for instance, the scope of the work, the complexity of the subject matter, the method of presentation etc. An analysis of the text of "Naked Yoga" considered in the light of the undisputed evidence adduced, clearly establishes that "Naked Yoga" is a publication of a scientific nature, even though possibly of an elementary character, dealing conventionally with Yoga which is a recognised branch of science, except for the innovation that the postures (asanas) should preferably be done in the nude and in private.

Yates declares the text of "Naked Yoga" to be

"a ..... /20

"a bona fide exposition of the basic Yoga precepts, and the philosophy and material relevant to the philosophy (to be) well explained and well considered."

The introduction of this innovation does not indicate an absence of bona fides, because a consideration of the text of " Naked Yoga", the undisputed evidence adduced and the author's reasons for its introduction, prima facie indicates that it is not contrary to the basic principles of Yoga. Indeed Mayer considers the illustrated postures to be true Hatha Yoga postures. Muhl desribes them as bona fide Yoga postures and exercises and Yates regards them as being "genuine Yoga postures performed by proficient exponents of the practice."

Mayer condemns outright the practice of Yoga in the nude for a variety of personal reasons. Muhl deals fully with the subject of practising Yoga in the nude as follows :

/ 21 .....

"Although Yoga is not normally practised nude, neither by myself nor my students, such nude practice by a devotee in private, would not be contrary to the basic principles of the philosophy. The mind of the devotee during practice need not be embarrassed or over-aware of being unclothed. The effect of being unclothed upon one's practice of Yoga will depend upon the sensitivities and feelings of the individual devotee and whether one practises Yoga nude in private depends not on precepts of the philosophy but on personal taste. I personally find loose clothing to be more practical in my Yoga activities."

Her views are supported by Yates :

"Regarding the nudity of the persons performing the postures, it is my view that there is no teaching in the philosophy of Yoga which prohibits or militates against the practice of Yoga unclothed. Indeed, it is basic to the concept of Yoga that as little clothing as possible must be worn during exercises, in order that the body may have the greatest possible contact with its environment. Whether or not a particular devotee does practice in the nude or with only a little clothing depends upon his personal preference. I do not consider that the practice of Yoga unclothed and in private will lead to over-awareness, self-consciousness or embarrassment, any more than bathing unclothed will do so. One's attitude towards one's own body ought to be one of respect, and over awareness of nudity in terms of sensuality as opposed to

/ 22 .....

sensitivity is not in accordance with Yoga teaching."

The author accordingly had reason to believe that devotees of Yoga might well accept the innovation. The fact that some devotees might not do so, cannot derogate from his bona fides. The inclusion of the photographs of the models doing the asanas in the nude is also not indicative of an absence of bona fides. Their inclusion is functional and naturally appropriate. It is both unrealistic and unwarranted to suggest that the object of the author could have been attained equally effectively had the models been clothed for example in leotards.

Aspects which are corroborative of the view that the photographs go no further than is required for the purpose of the innovation, are the following: All 46 of them are of true Yoga postures. The well-proportioned girls assuming the postures in the photographs

are ...../23

are proficient exponents of the practice. Of the 46 photographs, 39 are taken from either the side or the back and only 7 from the front. On some of the 39 photographs taken from the side one or two breasts can be seen but only 3 thereof is a very slight protuberance of pubic hair visible. On all but one of the photographs taken from the front both breasts can be seen but pubic hair can only be seen on two of them and then only in part and mostly in shadow. The models - all with dead-pan faces - are not pictured in provocative, erotic or sensually stimulating positions. All of the said aspects indicate that a considerable amount of restraint was exercised by the author and that unbridled rein was not given to the exploitation of the female form. As against this it has been pointed out that in a few of the photographs breasts and buttocks are possibly unnecessarily high-lighted but in our view that may very likely have been accidentally and not intentionally achieved. Further aspects to which our

attention ..../24

attention has been drawn as indicative of an absence of bona fides are the considerable outlay in effort and money that probably accompanied the production of "Naked Yoga" and the fact that the two photographs on the front and back pages are not described as being of genuine asanas. As to the first we find it difficult to draw any adverse inference from it. The author would naturally want his innovation to be accepted and a high class publication with high class artistic photographs - as they undoubtedly are - is certainly calculated, and justifiably calculated, to achieve his object. As to the second it need merely be stated that there is no evidence that the photographs in question, may not also in fact represent genuine asanas. In any event these aspects are far outweighed by the aspects which point in the opposite direction. In other words on a balance of probabilities the primary purpose of "Naked Yoga", in our view, is to propagate yoga, albeit with the innovation that it should be practised in

the ..../25

the nude and in private and not, as found by the Court a quo, to disseminate photographs of the naked female in various yoga poses.

We accordingly come to the conclusion that "Naked Yoga" is indeed a publication of a scientific nature and that the matter contained in "Naked Yoga" is bona fide intended for the advancement of or for use in the science of Yoga. Hence we repeat that we are of the opinion that "Naked Yoga" falls within the exemption provided for by section 5 (4) (b) (iii) of Act 26 of 1963 and that the Court a quo erred in its finding. In view hereof it is not necessary for us to consider whether "Naked Yoga" is indecent or obscene or objectionable in terms of section 113 (1) of the present Customs Act.

The sole remaining question to be determined is whether, in the absence of a cross-appeal, it is open to the respondent to raise issue whether "Naked Yoga" falls within the provisions of the exemption contained

/ in ...../26

in section 5 (4) (b) (iii) of the Act. The statutory provisions applicable are section 20 (1) (b) of the Supreme Court Act, No. 59 of 1959, and Rule 5 (3) of the Rules of this Court. The combined effect of these provisions is that if a respondent in an appeal wishes to achieve a variation of the judgment or order in the Court a quo he shall lodge a notice of his cross-appeal setting forth therein full particulars of the variation which he seeks. It follows that if he desires no such variation the noting of a cross-appeal is unnecessary and inappropriate.

The terms "judgment" and "order" in the statute and rule of court do not embrace every decision or ruling of a court. These terms are confined to decisions granting "definite and distinct relief". (Dickinson and Another v. Fisher's Executors, 1914 A.D. 424 at 427; Heyman v. Yorkshire Insurance Co. Ltd., 1964 (1) S.A. 487 (A.D.) at 490 D-F).

Mr. Innes contended that the finding by the Court a quo that section 5 (4) (b) (iii) of the Act affords

/the ..../27

the respondent no assistance was a definite and decisive part of its judgment and should have been appealed against in order to achieve a reversal thereof. He placed particular reliance upon Giliomee v. Cilliers, 1958 (3) S.A. 97 (A.D.) ; Botha v. A.A. Mutual Insurance Association Ltd. and Another, 1968 (4) S.A. 485 (A.D.) and a passage at p. 272 C-D in Bay Passenger Transport Ltd. v. Franzen 1975 (1) S.A. 269 (A.D.). These authorities are not, in our view, strictly comparable to the problem presently under consideration.

In Giliomee's case the appellant claimed performance of an agreement in terms of which the respondent had purchased from him the right to work a coal mine. The respondent pleaded the right to cancel the agreement on the ground of false representations and counterclaimed for the payment of damages. The trial Court found for the respondent and awarded damages in the sum of £161-6-2d. In the appeal the respondent made certain concessions as a result of which damages fell to be reduced to £117-12-7d

but .../28

but maintained that one of his claims was wrongly dismissed and would (if rectified) at least reinstate the total amount of damages to the award of the trial Court. It was held that, in the absence of a cross-appeal, the error could not be reversed. The basis of the decision at p. 100 D - F - is that although a composite award was made by the trial Judge, it represents the mathematical aggregate of several separate claims each of which is a substantive order on a specific portion of the respondent's claim.

In Botha's case it was pointed out at p. 489 G by HOLMES, J.A., that where, in a collision case, damages are claimed on the ground of negligence and by agreement the negligence issued is tried first as a separate issue and resolved in favour of the plaintiff "the defendant cannot at that stage appeal. The reason is that the decision is in the nature of a ruling, although not subject to revision by the trial Court, and there is not yet in existence an 'order or judgment' which is the statutory prerequisite of an appeal."

In...../29

In the converse case i.e. where the negligence issue is resolved in favour of the defendant, the action is disposed of and judgment would be given in favour of the defendant. That amounts to a "judgment or order" and is appealable. (At p. 489-490). Mr. Innes argued that if, by agreement, the effect of section 5 (4) (b) (iii) was argued as a preliminary issue the converse situation referred to in Botha's case would "precisely have arisen". We do not agree. The finding arrived at in the Court a quo would not have been an end of the litigation. The final word in the case would not yet have been spoken. The real issue viz. whether "Naked Yoga" constituted " indecent, obscene or objectionable" material remained unresolved. See also Tropical (Commercial and Industrial) Ltd. v. Plywood Products Ltd., 1956 (1) S.A. 339 (A.D.) where, in a breach of contract case, an approach similar to that followed in Botha's case was adopted.

In Franzen's case, the question arose whether a trial Court erred in reducing a plaintiff's proved damages

under ..../30

under the Apportionment of Damages Act, 34 of 1956, and whether his finding could be attacked on appeal where the plaintiff had not cross-appealed. The majority judgment delivered by MULLER J.A. (BOTHA, J.A., HOLMES, J.A. and HOFMEYR, J.A. concurring) dismissed the appeal on a basis which did not require the question to be dealt with. MULLER J.A., however, remarked en passant - and this is the passage relied on by Mr. Innes - that :

> " I am inclined to the view that the collision was caused entirely by his (i.e. the driver of the vehicle which collided with the plaintiff) negligence. However, inasmuch as no cross-appeal was noted by the plaintiff against the finding by the trial Court of contributory negligence on his part, the matter need not be debated further."

The approach adopted by TROLLIP, J.A. required a pertinent answer to the question whether the failure to note a cross-appeal disentitled this Court to eliminate, what he found to be, the erroneous reduction of the plaintiff's damages by the trial Judge. In concluding that the reduction is not a substantive "judgment or order" on a specific claim,

/ 31 .....

TROLLIP J.A. said at pp. 277 - 9:-

" The essence of the enquiry is whether the reduction is by itself a substantive "judgment or order" given by the Court a quo within the meaning of those words in sec.20 (1) (b) of the Supreme Court Act, 59 of 1959, and Rule 5 (3) of this Court, or, is merely a finding or ruling made by the Court a quo in its process of reasoning in arriving at the net damages. If the former, then the variation of that judgment or order by eliminating the reduction cannot be achieved at plaintiff's instance because he did not cross-appeal against it (Gilliomee v. Cilliers, 1958 (3) S.A. 97(A.D.) at p. 100-A -F; Kakamas Bestuursraad v. Louw, 1960 (2) S.A. 202 (A.D.) at p.223 F-H; Solomon and Another, NN.O. v. De Waal 1972 (1) S.A. 575(A.D.) at p. 586 C-D). If the latter, then, as the issue of the quantum of damages has been raised on appeal by the appellant, the plaintiff can seek to support the net amount awarded and this Court, if it deems fit, can uphold (but not increase) it by eliminating the reduction without any cross-appeal (Rondalia Assurance Corporation of S.A. Ltd. v. Gonya, 1973 (2) S.A. 550 (A.D.) at p. 558 B-H). The reason is that the plaintiff does not then seek, nor does this Court grant, any variation of the judgment awarding the net damages, but that the judgment or award is merely supported and upheld on a ground rejected by the Court a quo (cf. Western Johannesburg Rent Board and Another v. Ursula Mansions (Pty) Ltd. 1948 (3) S.A. 353 (A.D.) at p.355; and Sentrale Kunsmis Korporasie (Edms.) Bpk. v. N.K.P. Kunsmisverspreiders (Edms.) Bpk.

1970 (3) S.A. 367 (A.D.) at pp. 384F, 395 H-396A).

Now, sec. 1 (1) (a) of the Apportionment of Damages Act, 34 of 1956, requires a Court to determine the respective degrees of negligence of the parties which have together combined to bring about the damage in issue (see South British Insurance Co. Ltd. v. Smit, 1962 (3) S.A. 826 (A.D.) at p. 836 C-E), and then to reduce the claimant's damages by an amount proportionate to his assessed degree of negligence. That points, I think, to the determination of the reduction being normally, not a substantive "judgment or order", i.e. one granting distinct, formal relief on a specific claim therefor (see Gentiruco A.G. v Firestone S.A. (Pty) Ltd., 1972 (1) S.A. 589 (A.D.) at pp. 605H-606A and cases there cited), but rather a finding or ruling which the Court is required to make in its process of computing the amount of damages to be awarded. In that respect it does not differ from other reductions which the common law requires the Court to make, as, for example, for the duty to mitigate damages, re-employment or re-marriage prospects, and other contingencies. The latter reductions are all undoubtedly of the kind just mentioned. And a reference to the pleadings in the present case confirms that the determination of the reduction was not a judgment or order granting relief on any formal or specific claim therefor. For the appellant, being the defendant, made no such claim; it merely invoked the Act in its alternative plea as a pro tanto defence to plaintiff's claim for damages.

To put the point another way: any cross-appeal by the plaintiff would have had to be directed against the Court a quo's award of

> of net damages seeking an upward variation thereof, and not merely against its decision determining his degree of negligence and the corresponding reduction in damages; the latter would merely have constituted the ground on which that variation was being sought; but as the plaintiff was content with the net damages awarded, no cross-appeal was necessary; however, since the appellant attacked that amount on appeal, plaintiff could support it, and this Court uphold it, on the ground that the reduction under the Act was not justified."

This conclusion appears to us to be largely destructive of the argument advanced by Mr. Innes which moreover fails, in our view, to take account thereof that it is always "open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial Judge" - per CENTLIVRES, J.A. in Western Johannesburg Rent Board and Another v. Ursula Mansions (Pty.) Ltd., 1948 (3) S.A. 353 (A.D.) at 355. This is well exemplified by the decision in Municipal Council of Bulawayo v. Bulawayo Waterworks Co., Ltd., 1915 A.D. 611.

An ...../34

An exception to a declaration was upheld by a trial court. Portion of a second exception (i.e. the first paragraph thereof) was dismissed but need not have been dealt with as the first exception gave complete relief to the defendant. The order of the trial court specifically disallowed the first paragraph of the second exception. A cross-appeal was not noted against the lastmentioned part of the order. Yet this Court dealt therewith on appeal. INNES C.J. said at pp. 624 -5:

> "My conclusion, however, is based upon the assumption that it is competent for this Court to deal with the first paragraph of the second exception. I think that it is; but the question is not without difficulty in view of the form of the order below, which in terms disallowed that paragraph, and against which there is no cross-appeal. In the view which I take of the matter that order must be varied; and the rules require that a respondent who desires the variation of an order appealed against must duly notify his intention of applying for it. But the position here is exceptional, and is not such as was intended to be covered by rule.
>
> The defendant meant his first exception to extend to all relief asked for by

by declaration, including the prayer for damages; indeed, he claimed an order setting aside the declaration in its entirety on the ground of that exception. And the learned Judge upheld that claim, and allowed the first exception as prayed. Having done that, it was quite unnecessary for him to consider the other exceptions, or to make any order upon them. And the fact that he did so could not alter the effect of his order upon the first exception, which gave the defendant all it asked. Having obtained all it asked there was no call on the respondent to vary the order. But under the circumstances I think it is open to the company to support the wide order upon reasons other than those which actuated the learned Judge, if only these reasons were raised before him."

And SOLOMON J.A. said at pp. 631-2:

But then it is said that the learned Judge, in the Court below, overruled this exception, and as there is no appeal from his decision on that point, that we cannot now entertain this question. This contention, no doubt, raises a difficulty; but it is one which is due entirely to the form in which the order was drawn. The learned Judge allowed the first exception, the effect of which was to set aside the whole of the declaration. And that, after all, is the whole object of excepting to a declaration, not to obtain a mere expression of opinion from the Court on the legal points raised by exception, but to obtain a substantive order setting aside the declaration. And that, in my

opinion, is the proper form of order which should be made in such cases. To set out in the formal order of Court that one exception has been allowed and another disallowed is nothing more than stating the grounds upon which the order is based, which is unnecessary and superfluous. Strictly, therefore, the proper order to have made in the Court below was one merely setting aside the declaration, though there would be no objection to its being in the form 'that the first exception taken by the defendant to the plaintiff's declaration be allowed and that the declaration be set aside.' For when once the learned Judge had decided that the first exception was good, the case had been disposed of, and all the latter portion of the judgment was merely academic. The whole of that portion of the order, therefore, which has reference to the second exception was superfluous and may be ignored. If, then, the order had been drawn in the proper form setting aside the declaration, it would have been open to the respondent to support the judgment not only upon the grounds upon which the learned Judge based his decision, but upon any other ground which had been raised in the exceptions; and it is clear that the respondent should not be prejudiced by the form of the order."

/39 .....

The principles set out in the lastmentioned two decisions, seem to us, to be fully applicable in the present case. Here, as in the Bulawayo Waterworks case, it is sought to resist the appeal on a ground raised in the Court a quo but rejected by it. We are of the view, therefore, that the judgment in the Court a quo can be supported on the said ground even though a cross-appeal has not been noted. In the Court a quo the respondent obtained the order sought by it - an order setting aside the appellant's decision declaring the publication "Naked Yoga" to be objectionable. The respondent is content with the said order, seeks no variation of it and may support it on any relevant ground in the same way as the appellant may attack it on any relevant ground. (Sentrale Kunsmis Korporasie (Edms.) Bpk. v. N.K. P. Kunsmisverspreiders (Edms.) Bpk.. 1970 (3) S.A. 367 (A.D.) at 395 G-396A.

In .../38

In the result the appeal is dismissed with costs.

JUDGE OF APPEAL.

JUDGE OF APPEAL.

ACTING JUDGE OF APPEAL.