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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

BLOEMS TIMBER MILLS (PTY) LTD. *Appellant,*

versus

VOLKSKAS BEPERK *Respondent*

Appellant's Attorney Jovius, B.I. & S. *Respondent's Attorney* Lyttelton & Rawsthorne
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate R.L. Selwan *Respondent's Advocate* A.M. van Niekerk
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op 1975

2 13

Boome, Holmes, Trollip, Miller ARRet
Van Winsen, Joubert WNAR

Selwan - ~~9-1-5~~ 10.15 11.00, 11.15 - 12.45, 3.25 - 3.50,

(N.O.S.) Van Niekerk - 2.15 - 3.25,

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 appeal of

BLOEMS TIMBER KILNS (PROPRIETARY) LIMITED.... appellant

versus

VOLKSKAS BEPERK ..... respondent.

Coram: Holmes, Trollip et Miller, JJ.A., Van Winsen et Joubert, A.JJ.A.

Date of Hearing: 16 August 1976

Date of Judgment: 9 September 1976

J U D G M E N T

VAN WINSEN, A.J.A.:

On 30 November 1973 one Bloem, Managing Director of appellant, allegedly acting in reliance upon the assurance of one Munro, a bookmaker, that "the horse was sure to win", wagered two amounts of R5 000 each on the horse Sledgehammer for a win. In pursuance of these wagers and certain others

undertaken/....

undertaken by him at the same race meeting, Bloem, on 1 December 1973, handed Munro a cheque for R15 000 ("the cheque") dated 27 November 1973. The cheque was drawn in the name of appellant (No. 2 account) upon respondent's Brakpan branch, signed by Bloem and made payable to Munro. The cheque was crossed. Unfortunately the horse in question failed to measure up to its predicted performance and arrived at the winning post to the rear of the winner.

On 3 Deeember 1973 Munro deposited the cheque to the credit of his account in the respondent's Rissik Street branch. The cheque was remitted for payment on 7 December 1973 to the Brakpan branch of respondent but returned by that branch to Rissik Street on 12 December marked "Betaling gestaak". On 19 December 1973 the cheque was again remitted to the Brakpan branch for payment but was returned by the latter to the Rissik Street branch on 22 December 1973, still unpaid.

On 17 June 1974 respondent sought an order against appellant for provisional sentence on the cheque. The granting of this order was opposed by appellant, and respondent

abandoned its claim for provisional sentence and filed a declaration claiming judgment in an amount of R15 000, interest and costs. The declaration alleged, inter alia, that respondent was the holder of the cheque in question by virtue of the provisions of section 84 read with section 6 of Act 34 of 1964, of which cheque appellant was the drawer and Munro the payee and that the cheque had been presented for payment on 7 December 1973 but dishonoured, payment having been stopped. Appellant in the plea admitted to being the drawer of the cheque in favour of Munro and that it had been dishonoured by reason of ~~respondent~~ appellant having countermanded payment. Appellant raised a number of defences to this claim but the trial proceeded only on the basis of the following three disputed issues:-

(1) Did respondent by virtue of the provisions of section 84 read with section 6 of Act 34 of 1964 ("the Act") become the holder of the cheque within the meaning of the Act?

(2) Did respondent take the cheque for value?

(3)/....

(3) Did respondent take the cheque in good faith?

The Court a quo resolved all three issues in respondent's favour and the correctness of that Court's conclusions on each issue is challenged on appeal. These issues can be conveniently dealt with in the order stated but before doing so reference should be made to certain essential features of the evidence.

The evidence discloses that Munro, at the time he paid the cheque into the Rissik Street branch of respondent, had been a customer of the bank since 9 May 1973. He had been granted overdraft facilities to a limit of R4 000. From a copy of Munro's ledger account it appears that from 9 May to 24 May he was, despite various deposits, in debit to the bank in varying amounts. Throughout the following months the account was regularly operated upon and was at times in credit and at other times in debit. During July and thereafter the account was on occasion in debit well in excess of the overdraft limit. On 30 November 1973 the account was in debit to an amount of R3 772,42. On 3 December, when

the cheque was deposited together with other sums amounting in all to R17 000, the account was put well in credit. The evidence also discloses that by this time respondent had allowed Munro to draw on his account against cheques deposited by him which had not yet been cleared. This aspect of the matter is referred to in more detail later in the judgment.

As to the first of the above-stated issues it appears that respondent rested its claim to be the holder of the cheque upon the terms of section 84 of the Act which provides:-

> "Rights of bankers if unindorsed or irregularly indorsed cheques or certain other documents are delivered to them for collection:-
>
> If a cheque, or draft or other document referred to in section eight-three, which is payable to order, is delivered by the holder thereof to a banker for collection, and such cheque, draft or document is not indorsed or was irregularly indorsed by such holder, such banker shall have such rights, if any, as he would have had if, upon such delivery, the holder had indorsed it in blank."

The Court a quo rejected the contention advanced on behalf of appellant that this section intended to confer

upon/.....

upon a banker to whom a cheque had been delivered by a holder in the circumstances set out in that section, no more than the rights of a holder for the purpose of collection and that the banker could not acquire the rights of a holder in due course thereto. That Court held that the section intended a banker in the circumstances outlined therein to have all such rights as he would have had if the cheque had been indorsed in blank by the holder.

It is a cardinal rule of statutory interpretation that the language of the enactment is to be construed in a manner consonant with the ordinary meaning of the words used therein unless reasons recognized by the courts dictate a departure therefrom. Assigning to the words used in section 84 their plain meaning, it is difficult to escape the conclusion that it was the intention of the Legislature to put a banker to whom a holder had delivered an unindorsed cheque payable to order in the same position as that in which the banker would have been had such cheque been indorsed. There can be little

doubt that in that event, barring such consensual limitations as may have been placed upon the right of the banker to deal with such cheque, the latter would have become the holder thereof and would have enjoyed the advantage conferred upon a holder under section 28(2) of being deemed to be a holder in due course.

It accordingly falls to be considered whether sound reason enjoins a more restricted construction than that set out above being placed upon the words of section 84. Mr Selvan, for appellant, advanced a number of reasons in favour of a more restricted construction, arguing, as he had done in the Court a quo, that section 84 should be so construed as to confer upon the banker in the circumstances in question no rights other than those necessary to enable him to collect the sum due on the cheque. This construction confronts Mr Selvan with the initial difficulty that it would result in the creation of a new form of holder, viz. a "holder for collection", and one not primarily recognized in the Act and certainly not falling under the definition in section 1(viii) of the Act of a holder as being "... the payee or indorsee of a bill

who is in possession of it, or the bearer thereof". Nor would a "holder for collection" fall under other classes of holders recognized by the Act such as a holder for value, or a holder in due course, or a holder deriving his title from a holder in due course. In the result, therefore, he would not enjoy the right accorded to a holder by section 36 of the Act to sue on the cheque in his own name. In effect, therefore, the construction contended for by Mr Selvan reduces the banker to the position of an agent for collection. Such a result would appear to conflict with the manifest intention of the Legislature to extend rather than diminish the rights of a banker in the circumstances set out in section 84.

Some play was made by counsel in support of a restricted interpretation of the fact that section 84 was "a counterpart" to section 83 of the Act. Section 83 is clearly intended to extend protection, in the circumstances therein set out, to a banker who has credited the account of a customer with a cheque not indorsed or irregularly indorsed and if it is to be treated as a counterpart of section 84 then the juxtaposition of the two sections - if, indeed,

it has any significance - would tend to support the more generous interpretation of section 84. Counsel for appellant further contended that to accord to the words of section 84 their literal meaning would have the effect of allowing the bank to claim to be a holder in due course despite the fact that the cheque on which such claim is founded is not complete and regular on the face of it. This is of course correct but regard being had to the fact that the greater majority of cheques deposited with a bank are destined for discharge by payment and are unlikely to be further negotiated, to recognize the right of a bank to become a holder in due course despite the absence of an indorsement is unlikely to be subversive of sound commercial practice.

A number of cases referred to by counsel in support of ~~this~~ the interpretation of section 84 as contended for by him, e.g., Capital and Counties Bank Ltd v Gordon, (1903) A.C. 240; Freeman v Standard Bank of South Africa, 1905 TH 26 and Standard Bank of South Africa v Minister of Bantu Education, 1966 (1) SA 229 (N), are not in pari materia

and/.....

and do not assist him. On the other hand, the case of Midland Bank Ltd v R.V. Harris Ltd, (1963) 2 All E.R. 685, dealing with a somewhat similarly worded section, § 2 of the Cheques Act, 1957, in England, lends strong support to the conclusion arrived at in the Court a quo.

It is true that the capacity in which a banker holds a cheque delivered to him by his customer, i.e., whether he is given possession of it as a mere agent for the purpose of collection or whether ~~it~~ he is to hold the cheque in ~~its~~ his own right, e.g. as a pledgee or holder, is a matter which can be consensually regulated between banker and customer. But the fact that a banker's capacity can be so restricted to that of an agent for collection affords no support for the view that the Legislature intended to limit the operation of section 84 to cases where a banker was so acting. Section 84 was not intended to define the status of a banker who takes delivery of a cheque in the circumstances outlined in the section. It deals purely with his rights.

I/.....

I .

I conclude, therefore, that no good reason has been advanced for construing section 84 in a manner which limits the plain meaning of words used by the Legislature and that the section was intended to afford a banker to whom a cheque was delivered in the circumstances therein set out all the rights which he would have had if the holder upon such delivery had indorsed it in blank.

Before passing on to deal with the following disputed issue it should be noted that one of the defences pleaded to respondent's claim was that to the knowledge of Munro the cheque was issued by appellant in pursuance of a gambling transaction unenforceable at law, viz. a bet between Bloem and Munro. In this Court it is common cause that the cheque was issued in pursuance of a gambling transaction unenforceable in law; that this affected the cheque with illegality, and, therefore, that, in view of the provisions of section 28(2) of the Act, the onus was on respondent to prove that it gave value in good faith for the cheque.

The appeal, therefore, falls to be decided on this agreed basis. It is accordingly not necessary to pronounce on whether this basis might in any particular be incompatible with the sanction of horse racing and betting by Ordinance 9 of 1927, Transvaal.

The Court a quo found that respondent had given value for the cheque on the ground that respondent had through the manager of its Rissik Street branch, a Mr Burger, decided on 4 December 1973 that Munro was entitled to draw against the cheque before it was cleared for payment.

It will be necessary to refer briefly to the evidence of Burger and Munro as to the course of dealing between respondent bank and its customer, Munro, in relation to the drawings by the latter against uncleared cheques. Burger produced exhibit "E", a copy of a register, certain of the entries in which had reference to cheques in excess of R1 000 that had been deposited with the Rissik Street branch on 3 December 1973. One of the cheques figuring on the register is the cheque in question. The register shows the date of

deposit, the names of the drawer and the payee, the bank on which the cheques are drawn and the amount of each cheque. This register, in the course of the bank's usual practice, was placed before Burger on 4 December for him to decide whether respondent would allow these cheques to be drawn against by its customers before they were cleared, i.e., before respondent received payment from the bank on which they were drawn. Burger decided that Munro would be permitted to draw against the cheque for R15 000, his account having been immediately credited therewith. Burger stated that he had in the past regularly permitted Munro to draw agaist cheques deposited by him but as yet uncleared. The bank practice was that uncleared cheques under R1 000 could be drawn against without his authority. By the time the cheque was returned unpaid by the Brakpan branch on 12 December, he had drawn to the full amount of the cheque.

Munro stated that when he first became a customer of respondent he was not permitted to draw against deposited cheques immediately, but after some months he was allowed by the bank to draw against cheques on the same day that they were deposited. Munro does not say that his drawing against the cheque for R15 000 was other than in pursuance of a course of dealing that had grown up between him and the respondent. It is clear thus that respondent gave its customer value on the cheque by treating it as cash credited to his account and by allowing the customer to abstract that sum from his account. By so doing it afforded the customer a "quid pro quo" in return for the cheque. Such consideration would fall within the meaning of "value" as that word is used in § 27(1)(b) of the Act. Cf. Cowen: Law of Negotiable Instruments in South Africa, 4th Ed. 283.

However, according to our law, it would be necessary for respondent in order to claim that it took the cheque for value to establish that it had extended the quid pro quo to its customer in pursuance of an express or implied agreement with that customer to do so. This has been the view taken/.....

taken by different divisions of the courts in South Africa over a long period of time. See for instance such cases as Freeman v Standard Bank of South Africa, 1905 TH 26 at pp 31-32; Standard Bank of S.A. Ltd v De Villiers, 1935 CPD 382 at p 387; Trust Bank of Afrika Beperk v Gerbich, 1967 (1) PH A.31; Volkskas Beperk v Zagnoiev, 1958 (2) SA 550 (W) at p 553; Danka v Barclays Bank D.C.O., 1967 (4) SA 291 (T) at pp 294-5; Netherlands Bank of South Africa Ltd v Smith, 1971 (3) SA 647 (W) at p 650; Standard Bank of S.A. v Minister of Bantu Education, 1966 (1) SA 229 (N) at p 245.

The law in England would appear to be to the same effect. See A.L. Underwood Ltd v Barclays Bank, (1924) 1 K.B. 775; Baker v Barclays Bank Ltd, (1955) 2 All E.R. 571 at p 582; Westminster Bank Ltd v Zang, (1965) 1 All E.R. 1023 (C.A.). Two of the judges in the latter case, DANKWERTS and SALMON, L.JJ., appear to hold the view that a

bank/.....

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bank becomes the holder for value of a cheque deposited with it by reason merely of the fact that it allows the customer to draw against the cheque before it is cleared. Regard being had to the conclusion come to in the present case, it is unnecessary to decide whether this view is in accordance with the law in South Africa.

Accepting the law applicable in our courts to be as outlined above, appellant's counsel nevertheless contended that respondent had failed to prove in the Court below that an agreement existed between respondent and Munro to allow the latter to draw against uncleared cheques. He points to the fact that there appears on the deposit slip under which the cheque was deposited, the words "Cheques, etc. handed in for collection will be available as cash when paid" and contends that it follows from this that there was no binding agreement whereby respondent obliged itself to treat the amount of the cheque as cash against which Munro could immediately draw.

The mere presence of those words on the deposit slip can clearly not serve conclusively to exclude such a binding agreement. The words were inserted to afford protection to the bank if it wished to avail itself of it. If it did not, it could expressly or by implication waive such protection. It is a question of fact in any particular case whether or not it had done so. If in any such case it were to be found to have done so, then the presence of such words on the deposit slip would not constitute a bar to the coming into being of an agreement of the nature under discussion. It may well be, depending on the circumstances, that the protection afforded by such words could, despite such waiver be revived by the banker but clearly this could not be done without notice to the customer. It is unnecessary for the purposes of this case to decide this matter.

The evidence in this case discloses a fixed practice of allowing Munro to draw against cheques deposited

to/.....

to his account but as yet uncleared and there is an absence of evidence that respondent either overtly or by implication purported to avail itself of the protection in question. In my view, therefore, the words on the deposit slip afford no bar to the acquisition by respondent of the rights of a holder for value in respect to the cheque.

Appellant's counsel, pursuing his argument that no agreement to allow Munro to draw against uncleared cheques, including the one in question, was proved, contended that the evidence went no further than to establish a unilateral decision by Burger not to place an embargo on the cheque and, on the other hand, that Munro did not rely upon respondent allowing him to draw against it while it remained uncleared. I am unable to agree that the evidence lends support to these submissions. What it does disclose is that there was no express agreement between respondent, in the person of its manager, Burger, and Munro that the latter could draw against deposited cheques not yet cleared. However, I find

it difficult to avoid the conclusion, having regard to the totality of the evidence as to the dealings between respondent and the bank, that an implied agreement has in fact been established to allow Munro to draw against such cheques. On the assumption that, despite the course of dealing between respondent and the bank, the right of respondent to place an embargo on any particular cheque could be revived, Burger was in my view correct when he stated in evidence that he would have had to inform Munro of the fact that he proposed to exercise his veto before it could be effective. He conveyed no such information to Munro.

I conclude, therefore, that respondent successfully established in the Court a quo that, arising out of a course of dealing between it and Munro, it had by implication agreed to allow Munro to draw against cheques deposited by him despite the fact that they were not yet cleared and that it was in terms of this agreement that the latter became entitled to and did draw against the uncleared cheque in question. Accordingly respondent must be regarded as a holder who has

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..........[illegible]

given value for the cheque within the meaning of § 27(1)(b) of the Act.

Has respondent proved that it did so in good faith? The answer to this question is to be sought in the state of Burger's mind when he gave value for the cheque. The inquiry is subjective in its nature. It is concerned with what his state of mind was, not with what it ought to have been. CENTLIVRES, C.J., in the course of his judgment in the case of John Bell & Co Ltd v Esselen, 1954 (1) SA 147 (AD) at p 151, referred with approval to the following remarks of DE VILLIERS, C.J., in Liquidators of Cape of Good Hope Society v Bank of Africa, 17 SC 480 at p 489:

> "I take it that in Lord HERSCHELL'S opinion (as expressed by him in the case of The London Joint Stock Bank v Simmons, 1892 A.C. 201) it was not enough that there ought to have been suspicion but that suspicion must have actually existed and that the taker of the instrument wilfully shut his eyes to the fact".

CENTLIVRES, C.J., applying this dictum to the facts of the case dealt with by him, stated:

> "In the present case there is no evidence that the defendant (the payee) actually had a suspicion that Tucker (the drawer) had no authority

to/.....

> to give him the cheque and fraud cannot be imputed to the defendant on the mere fact that he may be said to have had constructive notice of Tucker's lack of authority. His case must, therefore, be approached on the footing that the defendant, bona fide, received and cashed the plaintiff company's cheque".

See, too, Byles: Bills of Exchange, 23rd Ed., p 187.

The subjective nature of the inquiry is similarly enjoined by the terms of § 94 of the Act which provides that —

> "a thing is deemed to be done in good faith within the meaning of this Act if it is in fact done honestly, whether it is done negligently or not".

Now, the evidence is that Burger did not know that the cheque was issued in pursuance of a gambling transaction, nor had he entertained any suspicion that this was the case. The Court a quo found Burger to be a frank and honest witness and accepted his evidence that he did not entertain the slightest suspicion as to the origin of this cheque. Appellant's counsel, while disavowing any intention on the one hand to challenge the correctness of this factual finding and, on the other hand, conceding that the inquiry was whether Burger suspected and

not whether he ought to have suspected that a betting transaction gave rise to the cheque, nevertheless contended that respondent had failed to prove that the cheque had been taken in good faith. Having committed himself to these parameters, counsel presented an argument that, for the most part, transgressed both these boundaries. On the one hand he argued that since Burger admittedly knew Munro to be a bookmaker he incurred a duty to make an inquiry as to the origin of the cheque. On the other hand he contended that, at lowest, Burger was aware of the possibility - and therefore must have entertained a suspicion thereanent - that the cheque was given in respect of a gambling transaction. The first of these contentions is in conflict with his concession that the proper approach is subjective; the second of these is in conflict with the accepted finding of the Court a quo that Burger had no such suspicion. Much of the further argument was germane to an investigation into a case where the question is whether the evidence discloses that the taker of

a cheque must have had - and therefore did have - a suspicion as to the origin of a cheque but wilfully put it out of his mind. If it is to be accepted that in fact Burger entertained no such suspicion, such an investigation is beside the point.

Mr Selvan made much play of the fact that, as he contended, Burger's attitude was one of indifference whether or not the cheque had been given in pursuance of a gambling transaction and, further, that the general policy of the bank was to have no regard to the rights of drawers of cheques. Assuming for the moment that these strictures are well-founded, they can be of significance only if a banker is to be put upon his inquiry where he has a bookmaker for a client and that a failure to pursue such an inquiry is to be equated to a case of a suspicion entertained but wilfully left unexplored. But if a banker is to be regarded as being under such a duty - and I do not think he is, see the remarks of Lord HERSCHELL in London Joint Stock Bank v Simmons, 1892 A.C. 201 at p 223 - one finds oneself back on the path of negligence which Mr Selvan voluntarily - and rightly - sought not to tread.

In/.....

In any event I think the imputation of indifference on Burger's part is not borne out by the evidence if for no other reason than that such indifference would have redounded to his personal discomfiture.

Accordingly I find myself in complete agreement with the view taken by PHILIPS, A.J., in the Court below that respondent took the cheques in good faith and for value.

Mr Selvan submitted that judgment should not in any event have been given in an amount in excess of R11 527,42 which, so he claimed, was the amount outstanding on 12 December 1973. Burger, however, stated in the course of his evidence that as at that date Munro had drawn to the full amount of the cheque, and more. However, be that as it may, the submission depends upon proof that respondent took the cheque as a pledge. Since the cheque was in fact negotiated to respondent in circumstances in which it became

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the holder in due course thereof, no good reason exists why it should be content with less than its pound of flesh.

The appeal is accordingly dismissed with costs.

HOLMES, J.A.)
TROLLIP, J.A.)
MILLER, J.A.) Concur
JOUBERT, A.J.A.)

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 JJA et Joubert AJA.

Heard: 17 August 1976.

Delivered: 9 December 1976.

J U D G M E N T.

JANSEN JA :-

This appeal raises certain aspects of the now repealed Publications and Entertainments Act, No. 26 of 1963. (A much discussed act: e.g. Ellison Kahn, 1966 SALJ 278; W.H.B. Dean, 1972 Acta Juridica 61, 1975 SALJ 1). However, the primary question is whether a

publication/....

publication called "Naked Yoga", printed and published in Great Britain, constituted "goods which are indecent or obscene or on any ground whatsoever objectionable", the importation of which was prohibited by sec. 113 (1) (f) of the Customs and Excise Act, 1964 (No. 91 of 1964, hereinafter referred to as the Customs Act), as it read before its amendment by sec. 49 (a) of Act 42 of 1974. In terms of sec. 113 (3) (a) of the Customs Act the Publications Control Board (the present appellant) had considered the matter in 1972 and had found that it was not so "objectionable". In 1973, however, the Minister of the Interior, by virtue of sec. 8 A (1) (b) of the Publications and Entertainments Act, (No. 26 of 1963, hereinafter referred to as the Publications Act) - a section inserted in that same year by sec. 26 of Act 62 of 1973 - directed the Board to review its decision. The Board then reversed its previous decision and came to the conclusion that

Naked / ....

Naked Yoga was in fact "objectionable". (Vide Government Gazette No. 4004, 24 August 1973). The present respondent (hereinafter referred to as CNA), who had ordered copies of Naked Yoga for import into the Republic and distribution here, appealed against this decision to the Cape Provincial Division (as it was entitled to do under sec. 113 (3) (a) of the Customs Act, read with sec. 14 of the Publications Act: the decision of the Board on review is deemed by sec. 8 A (4) (b) of the Publications Act to be a decision under sec. 113 (3) of the Customs Act). The Court (per STEYN J, VAN HEERDEN J concurring) decided that Naked Yoga was not "objectionable" and set aside the decision of the Board. The Board now appeals against that order.

When the Board first dealt with the matter in 1972, it felt that Naked Yoga "was a bona fide publication for the advancement of the practice of Yoga" and that it was, therefore, bound to find it

unobjectionable by virtue of sec. 5 (4) (b) (iii) of the Publications Act. In 1973, however, it came to the conclusion that Naked Yoga was in truth not such a "bona fide publication" and that it was, therefore, not so bound. CNA contended in the Court below that the Court should adopt the Board's first view. The Court was, however, not so persuaded. It considered that -

> "..... the primary purpose of this work is not to propagate yoga but to disseminate photographs of the naked female form in various yoga postures ..... in my view, it is most probable that the publication's primary objective was not the propagation of the yoga culture."

It is to be noted that throughout it has been assumed that sec. 5 (4) (b) (iii) of the Publications Act constitutes an exemption from sec. 113 (1)

(f) / ....

(f) of the Customs Act, and on this same assumption it is argued before us that the Board's original view was correct and that Naked Yoga falls under sec. 5 (4) (b) (iii). Whather this is a correct assumption is, however, open to serious doubt. Section 113 of the Customs Act provides :-

> (1) The importation of the following goods is hereby prohibited, namely -
>
> .....
>
> (f) goods which are indecent or obscene or on any ground whatsoever objectionable, unless imported under a permit issued by the Publications Control Board referred to in section two of the Publications and Entertainments Act, 1963 (Act No. 26 of 1963) ;
>
> .....
>
> (2) .....

(3) (a) /.....

(3) (a) In the event of any question arising as to whether any goods are indecent or obscene or objectionable, the decision of the Publications Control Board referred to in section two of the Publications and Entertainments 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 reference in sec. 113 (3) (c) above is specifically to subsection (2) of section 5 of the Publications Act

and / ....

and not to any other subsection. On the principle of unius inclusio est alterius exclusio only sec. 5 (2) is intended. It is true that, although not specifically referred to, sec. 6 of the Publications Act must also be taken to apply to the proceedings before the Board and a court on appeal from the Board, but this is a necessary implication of the right of appeal conferred "as if such decision were a decision referred to in" sec. 14 of the Publications Act (cf. Publications Control Board v. William Heinemann Ltd., 1965 (4) SA 137 (A), 146 E - 147 A). A case may also be made out that sec. 5 (3) of the Publications Act, despite not being mentioned in sec. 113 (3) (c) of the Customs Act, may also be applied. But this would be on the basis that it may serve as an aid in construing sec. 5 (2) (f). Neither by such necessary implication nor as such aid, it would seem, is sec. 5 (4) to be read into sec. 113 (3) (c) of the Customs Act. The reference in that section to the Publications Act is "for

the purpose of any decision as to whether goods are indecent or obscene or objectionable" ; a decision under sec. 5 (4) that goods are exempt would not be such a decision - other criteria are applied and whether the goods are "indecent or obscene or objectionable" is a question which does not then arise at all. To read into sec. 113 (3) (c) an implied reference to sec. 5 (4) of the Publications Act, would therefore not only do violence to the principle of exclusio alterius but also to the language of the subsection. The fact that publications originating in the Republic would be exempt in the circumstances mentioned in sec. 5 (4) of the Publications Act, whereas those to be imported would not correspondingly be so exempted in terms of sec. 113 (1) (f) of the Customs Act, does not appear to be such a startling anomaly as to require reading words into the Act that are not there. The control of imports had in the

past / .....

past been stricter than the control of indigenous publications, and there seems to be little reason for accepting that the legislature in 1964 intended to depart completely from that policy, by merely repealing sec. 21 (1) (f) of the previous Customs Act (Act. 55 of 1955) and putting sec. 113 (1) (f) of the Customs Act of 1964 in its place. Sec. 21 (1) (f) (as amended by sec. 20 (a) of the Publications Act) read as follows :-

"21 (1) 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 Entertainments Act, 1963."

It will be noted that the underlined words were omitted from the new sec. 113 (1) (f). But the omission appears to be more consistent with an intention to widen the ambit of the discretion of the Board to grant permits, than to cut down the jurisdiction of the Board, by exempting certain goods from scrutiny as to whether they are "indecent or obscene or on any ground whatsoever objectionable".

For the purposes of this judgment it is, however, unnecessary to decide this matter, and it may be assumed in favour of CNA that sec. 5 (4) of the Publications Act is applicable to a decision under sec. 113 (3) of the Customs Act and that it does constitute an exemption. But Mr. Rose Innes, on behalf of the Board, queries CNA's right now to raise the contention that Naked Yoga falls under sec. 5 (4) of the Publications Act. He argues that in the absence of a cross-appeal CNA is bound by the decision of the

Court a quo in this regard, viz. that Naked Yoga is not exempted by sec. 5 (4). However, it may again be assumed, without deciding, in favour of CNA, that the absence of a cross-appeal is no obstacle to this contention.

On these assumptions is Naked Yoga then exempt from being held "indecent or obscene or on any ground whatsoever objectionable" in terms of sec. 113 (1) (f) and sec. 113 (3) of the Customs Act, by virtue of sec. 5 (4) (b) (iii) of the Publications Act ? The answer turns, in the first instance, on the [redacted] meaning of the latter provision. As the context may be of significance it is necessary to quote sec. 5 (4) in full :-

"(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 <u>bona fide</u> 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~~ <u>bona fide</u> intended for the advancement of or for use in any particular profession or branch of arts,

literature / ....

literature or science ; or

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

It is notable that whereas in (b) (ii) it is obvious that "bona fide" qualifies "series of law reports", it is not so evident what "bona fide intended" in (b) (iii) qualifies. Is it "any matter" or is it "a publication"? A superficial reading suggests the latter, but this gives rise to the apparent tautology of "a publication ..... of a scientific ..... nature bona fide intended for the advancement of or for use in any branch of ..... science". It is difficult to envisage a publication of a scientific nature which is not intended for such purpose. The more natural reading appears to be that linking "any matter" with "bona fide intended". This would mean that matter bona fide intended for the advancement

of any / ....

of any branch of science is only exempted if it is in a publication of technical, scientific or professional nature and not in a publication of a different nature, e.g. a family magazine. Conversely, matter not so intended is not exempt merely because it appears in e.g. a publication of a technical nature. Upon analysis the passage in Publication Control Board v. Gallo (Africa) Ltd. (1975 (3) SA 665 (A)), dealing with sec. 5 (4) (b) (iv) (at p. 682 C - 683 A), does not militate against this view. It is there said inter alia -

> "I think the whole purpose of sec. 5 (1) and (2) would be frustrated, if any undesirable matter under sec. 5 (2) could freely be published merely by giving it a religious character in the wide sense of the word."

In like manner the whole purpose of sec. 5 (1) and (2) would be frustrated if any undesirable matter, itself not bona fide intended e.g. for the advancement of

science, could be freely published merely because it is given an aura of respectibility by being published in a bona fide technical journal.

The exemption granted by sec. 5 (4) (b) (iii) must, therefore, be taken to rest upon two requirements: (a) the challenged matter must appear in "a publication of a technical, scientific or professional nature"; and (b) it must be "bona fide intended for the advancement of or use in any particular profession or branch of arts, literature or science". It is to be noted that the exception in sec. 5 (4) (b) (iii) is essentially different from the "defence of public good" recognized in England by sec. 4 of the Obscene Publications Act, 1959, a defence to a charge under sec. 2, of e.g. publishing an obscene article, which is established "if it is proved that the publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art of learning, or of other

objects/.....

objects of general concern". The exemption also has little in common with the concept of a "redeeming social value" saving challenged matter from being "obscene" - inherent in the Roth test of obscenity (propounded by the U.S. Supreme Court in 1957), as understood since 1966. (Cf. 50 Am Jur 2d, Lewdness, Indecency and Obscenity; 5 ALR 3d, annotation: Modern Concept of Obscenity. In 1973, I believe, the U.S. Supreme Court, however, abandoned the concept that challenged matter could only be obscene if, inter alia, "utterly without redeeming social value", in favour of the concept that it could only be so if, inter alia, it does not, taken as a whole, have serious literary, artistic, political or scientific value). Whereas the English and American approaches appear to require a weighing up of values, the exemption in our Act requires the determination of two factual issues.

Is / .....

Is Naked Yoga then "a publication of a technical, scientific or professional nature" ? It consists of 16 sheets of thick, glossy paper, folded and stapled to constitute a "book", in format resembling a "glossy" magazine, approximately 28 cm by 25 cm by 2 mm, consisting of a front and rear cover and 60 inner pages. The whole front cover, from edge to edge, consists of a fine-screen, full-colour reproduction of a colour photograph, taken from the side, of a girl standing with her right knee flexed and her left leg stretched straight behind, her hands with palms together, fingers up, above her head, her elbows flexed and stretched back, her rib cage thrust forward and her back arched. Except for the position of the arms, the position of the legs and body is that of a lunge in fencing. She stands on a predominantly red, persian patterned carpet, against a back-drop of dark green cloth with vertical folds. She is naked

and / ....

and her light coloured body is in sharp contrast to the dark green of the background. The light falls on her face and right breast, and the nipple and pink areola are clearly visible. The left leg, backward stretched, is highlighed from above, as also the buttocks, the cleft, however, being darkly shadowed. To the left of her head, printed in large white letters, appear the words "Naked Yoga". There is no other print on the front cover exept in the upper right corner where appears in small white letters: "Fabbri magazine special 50 p". The back cover consists of a similar full-colour reproduction, but with no print on it whatsoever. This is a photograph of a different girl, also taken from the side, on, apparently, the same carpet and against the same background. She is also naked and her figure fills the frame. She has adopted a seemingly acrobatic posture, her hands grasping the toes of left foot behind her head, her backward-arched body, arms, left

calf / ....

calf and thigh (with the knee resting on the carpet), forming roughly a circle. Her right thigh is positioned in a forward direction and the lower leg is folded under, also resting on the carpet. In this posture her left breast is thrust forward and up, and the thighs are so postured that the protuberance of the mons veneris, covered with pubic hair, is clearly seen from the side. A spotlight is focussed on the breast, causing the pink nipple and areola to be silhouetted against the dark background. On paging through Naked Yoga one finds, apart from the title page - which merely states, except for the fine print relating to the name of the publisher, etc.: "Naked Yoga Photography by John Adams Written by Malcolm Leigh" - 13 pages of text printed in relatively large type, and 46 pages, each consisting of full-colour reproduction similar to the front and back covers, depicting a girl in the nude purporting to assume a Yoga posture

(asana) / .....

(asana). There are "sitting postures", "standing postures", "inverted postures" and "lying down postures". As in the case of the covers, the girl is in each instance positioned on a carpet (apparently the same) against the undulating dark green back-drop. Each photograph covers the whole page except for a glossy black strip, approximately 7,5 cm wide, running either across the page above the photograph or vertically alongside the photograph. On this strip, printed in relatively large white letters, the name of the posture is given, with a short description thereof, and a statement of the "benefit" attributed to it. In a number of the photographs pubic hair is clearly to be seen and one or both the breasts are in most cases fully visible. Generally speaking the lighting of the figure is fairly even: very little use is made of shadow to obscure the pudendum, as in most cases the position of the limbs or the angle of view serves

to mask / ....

to mask at least the labia.

We have before us the affidavits of 3 teachers of Yoga, apparently well qualified to speak on this subject. According to Rudolf Mayer - and this appears to be common cause - Yoga "is an ancient philosophy combined with a system of physical culture designed, inter alia, to keep the body supple and fit". The practice of Yoga's system of physical culture involves, among other things, the positioning of the body in certain postures - and it is also common cause that the postures (asanas) depicted in Naked Yoga are true Hatha Yoga postures, and it is not disputed that the girls assuming them are "proficient exponents of the practice" - as may well be inferred from the contortions depicted. On the text Rudolph Mayer (on behalf of the Board) says :-

> "The printed text is not a serious exposition of the philosophy or practice / ....

practice of Yoga. It is rudimentary and superficial in this regard, to such an extent that persons interested in Yoga would reject the book as not being a genuine work on the subject and that a teacher of Yoga would certainly not use or recommend the book."

Cynthia Joan Muhl (on behalf of CNA) is less stringent :-

"The text of the publication, though written simply and without much elaboration, is basically not contrary to the precepts of Yoga and may be termed a bona fide attempt at an introduction to certain aspect of the philosophy ..... whilst I would not buy the book myself or recommend it to any students for study, I do not find the book devoid of merit."

Ray Aileen Yates (also on behalf of CNA) says :-

"The text thereof is in my view a bona fide exposition of the basic Yoga

precepts / ....

> precepts and the philosophy, and material relevant to the philosophy, is well explained and well considered."

The deponent, however, does not deal with the utility of the book.

A careful reading of the text, written by an author whose qualifications and pretensions to a knowledge of Yoga is nowhere stated, in the light of the aforegoing appears to establish that the text is at best a very elementary exposition of certain aspects of Hatha Yoga. But, insofar as it recommends that it should be practised naked, it advocates an innovation. Rudolph Mayer says :-

> "It is not, and never has been, a rule or recommendation of the practice of Yoga that the various postures ('asanas') which are an important part of Yoga's system of physical culture should be practised naked. The publication 'Naked Yoga' (the subject matter of these proceedings) is the first work, or purported work, on Yoga in which I have seen the suggestion that the

postures be practised in the nude. I entirely disagree with the suggestion, and I think it is not only impracticable but also contrary to the teachings and spirit of the discipline. It is impracticable because nudity would be quite out of place, and embarrassing and offensive to all, in the group classes which the beginner is encouraged to join. It is contrary to the teachings and spirit of Yoga in that the purity and chastity of mind and body, which are cornerstones of the discipline, cannot be achieved if the practitioner is self-conscious or embarrassed or over-aware of his sexuality. This objection remains even if the postures are practised in private, for one of the basic aims of Yoga is to achieve the mastery of the mind over the body and to join the individual soul with the cosmic universal soul. Self consciousness of any kind is to be avoided.

I have studied the publication of 'Naked Yoga', and while I consider the postures illustrated to be true Hatha

Yoga / ....

> Yoga postures, the fact that they are illustrated by photographs of nude young girls is in such conflict with the principles and practice of Yoga as to lead to the conclusion that the publication is not a bona fide work on Yoga. Nudity is no more a rule or recommendatien of the practice of Hatha Yoga then it is of gymnastics, callisthenics or any other kind of physical culture. 'Naked Yoga' is in my respectful opinion little more than a collection of nude photographs disguised as a manual of Yoga."

That Yoga is not normally practised nude is not disputed by CNA - the contention is merely that to do so is not in conflict with the philosophy. In this regard Cynthia Muhl says :-

> "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 / ....

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."

She is supported by Ray 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 / .....

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 sensitivity is not in accordance with Yoga teaching."

The conflict on the affidavits regarding the compatibility of naked practice with the philosophy of Yoga, can hardly be solved on the papers. It may, however, be pointed out that Naked Yoga itself does not say that the exercises must be performed alone. The text states :-

"The only item you may find useful, though not essential, is a mirror, preferably reaching to the floor, so that you may see and correct yourself

when / ....

> when performing the postures. Yoga, except when an experienced teacher is available, is best practised alone. Alone, you will be free from the distraction of any desire to be better than the others or from any worry of being less able. Alone, you will slowly become aware of yourself and begin to know your body and your mind."

The text does not explain whether the devotee [redacted] and the "experienced teacher" should practise nude. It is significant that Cynthia Muhl only says that "nude practice by a devotee in private, would not be contrary to the basic principles of the philosophy" and that Ray Yates also appears to restrict her opinion to "the practice of Yoga unclothed and in private". In so far as Naked Yoga may be read as recommending Yoga to be practised naked even with a teacher, it would seem to be implied in the affidavits of Cynthia Muhl and Ray Yates that it will be contrary to the basic philosophy of Yoga.

Whether / ....

Whether in conflict with the basic philosophy or not, it is at least clear that to practice Yoga naked is a new departure. It is, therefore, of importance to note what the justification for this is. The text states :-

> "In the photographs the bodies are naked. The results of Yoga will not be just an increase in something known, but an entirely new and fresh set of experiences. Just as the mind best experiences new thoughts in silence, so the body will become best aware of its new sensitivity in the absence of clothes. .....
>
> The body must be naked. It has both form and sensitivity, both of which are destroyed by clothing of any kind, particularly Western clothing which is generally thoroughly constricting. Yoga aims to improve the form and sensitivity of the body and there must be no distracting factors. As you stand naked in front of the mirror, you will become instantly aware of more or less serious distortions of your body. In profile, perhaps

a tendency/....

a tendency to a bulging stomach and rounded shoulders; full-face, perhaps just that, perched on top of a pear ! Yet, in spite of these distortions - which your practice of Yoga will cure - the lines all follow natural unbroken curves. To control and re-define these curves they must not be broken up by clothing. The skin, internal muscles and organs are capable of extra-ordinary sensitivity to external variations. It is through these and the other senses that we become aware of the awe-inspiring, kaleidoscopic richness of the Universe. The clothes we wear serve to protect the body from harmful variations in the environment, such as extremes of heat and cold, but, unfortunately, they also destroy its sensitivity. The body is the vehicle of the mind, the instrument through which it perceives. To enrich these perceptions and thus the quality of information available to the mind, Yoga develops the sensitivity of the body. It must not be hindered by clothing. Practice Yoga naked."

The tone of this discourse is merely axiomatic and it assumes that the practice of Yoga unclothed is a normal

procedure/.....

procedure. There is no reference to it being an innovation, and the only justification mentioned for it being so practised bears on the "sensitivity" of the body.

Having thus gained some impression of the appearance and contents of Naked Yoga, we may revert to the question whether it is "a publication of a technical, scientific or professional nature". The precise ambit of these words is not easy to grasp, but I am inclined to think that not every elementary exposition of scientific fact or publication of the do-it-yourself variety could properly be so designated. But although the text of Naked Yoga is no more than such an elementary statement of certain aspects of Hatha Yoga, I am prepared to assume in favour of CNA that it falls within that ambit. That still leaves the other question unanswered: are the photographs "bona fide intended for the advancement of or for use in any particular profession or branch of ..... science" - viz., in the

circumstances,/....

circumstances, Yoga ? It seems at least doubtful whether part of a publication intended for indiscriminate dissemination (e.g. from any periodical- and news-stand) to the general public could be considered matter falling within the ambit of these words. But assuming it could, it is still necessary in the present case to determine the question of bona fides.

The photographs illustrate the asanas and the reader is told :-

"before /.....

> "before you read the descriptions (i.e. of the postures), first look carefully at the photograph of each posture and try to imagine yourself in the position shown. This will help you to relate the descriptive sequences of movements to the final position."

To this extent the photographs have a functional purpose. A moment's reflection will, however, serve to call to mind a few anomalies. The postures could equally well have been illustrated by black and white photographs, or even drawings, of a much smaller size. And were the models clad, e.g. with leotards, the illustrations would not have been one whit less effective as a guide. But what have we here? Large studio photographs in colour of unclothed girls, printed on heavy glossy paper; and comprising 46 pages, as opposed to 13 pages of text. (It is true that above or alongside each photograph there is the descriptive matter

mentioned above, but this only accounts for a minor part of these 46 pages). The impact of Naked Yoga lies not in the text but in the photographs. It is significant that on the title page "Photography by John Adams" has pride of place above "Written by Malcolm Leigh" and that the qualifications or pretensions of the latter in this field are nowhere stated. Undoubtedly, by far the greater part of the cost of production must be attributed to the photographs. To what purpose? To demonstrate asanas or to show young, attractive, shapely girls in the nude? What does the curve of naked breast, the pink of areola and nipple, the shadow of pubic hair over the swell of pudendum, add to the understanding of the Hatha Yoga posture? In some of the photographs the very placement of the spotlights serves to emphasize these areas, and is not the designed composition of the lights of the essence of the photographic art? And after all, what does

the back and front cover add to the practice of Yoga? - the figures there depicted are not anywhere in the text related to any specific posture. Could the nakedness of the models make the recommendation to practice naked more attractive ?

It/.....

It is hardly to be believed. Man or woman seeking the balm of philosophy, exercise and contemplation could hardly be expected at the mere vision of such perfection to shed his or her own clothes so as to reveal in the mirror, day after day, his or her own naked imperfection.

The inference is clear that the outlay of effort and capital clearly involved in producing the photographs, the predominant part and feature of Naked Yoga, is not really to be attributed to the purpose of advancing the practice of Yoga naked, or for the purpose of providing a publication for use in the practice of Yoga, but is in all probability to be attributed to the purpose of selling, under the guise of Yoga, the photographs to those interested in the naked female figure. The photographs, therefore, do not constitute bona fide matter as envisaged by sec. 5 (4) of the Publications Act. The Court a quo was, therefore, correct in coming to the conclusion that the publication as a whole falls outside the exemption - "the primary purpose" of Naked Yoga being "not to

propagate/

propagate Yoga but to disseminate photographs of the naked female form in various Yoga postures".

Having thus disposed of the so-called "exemption" our attention may now be directed at the Board's main contention, viz. that Naked Yoga is "indecent or obscene or objectionable" in terms of sec. 113 (1) of the Customs Act. As has been mentioned above, for any decision as to whether Naked Yoga is such, the provisions of sec. 5 (2) of the Publications Act applies mutatis mutandis (sec. 113 (3) (c) of the Customs Act.) Sec. 5 (2) reads 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) 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) ....."

It is clear that, at least in respect of (b), (c) and (d), the policy of the Legislature is to protect the sensibilities of each of the many sections in our heterogeneous population - the accent lying not so much on a principle that all should be tolerant of the so-called excesses of others, but on the principle that each should discipline himself so as not to cause offence to any other. In relation to (b), the principle is well illustrated by the decision of this Court in Publication Control Board v. Gallo (Africa) Ltd. (1975 (3) SA 665 (A), 673 D-E), where RUMPFF CJ, delivering a judgment concurred in by all the remaining members of the Court, said inter alia :-

> "I think that the legislation intended freedom of religion to include the right not to be offended in respect of one's religious convictions or feelings, whatever others may think of those convictions or feelings, except where the offensive material is allowed for specific purposes.

Then / ....

> Then, for those purposes, religious convictions or feelings must yield in favour of freedom of expression. For these reasons I think that in a matter like the present, the Court should approach the problem merely by ascertaining what the religious convictions or feelings of a particular section of the people are and whether what is published offends those convictions or feelings."

The standard is not "a kind of reasonable man in the religious sphere" (supra, 673 B-C).

The Board relies on sec. 5 (2) (a), which mutatis mutandis reads (Heinemann case, supra, 145 G) :-

> "Goods shall be deemed to be indecent or obscene or objectionable [in terms of sec. 113 (1) (f) of the Customs Act], if they or any part of them are indecent ~~or obscene or are offensive or harmful~~ to public morals."

In / ....

In regard to the meaning of the descriptive words after "if", the further deeming provisions of sec. 6 of the Publications Act must be applied (Heinemann case, supra, 146 G - 147 A). Sec. 6 reads as follows :-

"(1) If in any legal proceedings under this Act the question arises whether any matter is indecent or obscene or is offensive or harmful to public morals, that matter shall be deemed to be -

(a) indecent or obscene if, in the opinion of the court, it has the tendency to deprave or to corrupt the minds of persons who are likely to be exposed to the effect or influence thereof ; or

(b) offensive to public morals if in the opinion of the court it is likely to be outrageous or disgustful to persons who are likely to read or see it ; or

(c) / ....

(c) harmful to public morals if in the opinion of the court it deals in an improper manner with ..... physical poses, nudity, scant or inadequate dress, ...

(d) indecent or obscene or offensive or harmful to public morals if in the opinion of the court it is in any other manner subversive of morality.

(2) In determining whether any matter is indecent or obscene or is offensive or harmful to public morals within the meaning of sub-section (1), no regard shall be had to the purpose of the person by whom that matter was printed, published, manufactured, made, produced, distributed, displayed, exhibited, sold or offered or kept for sale.

The Board contends that Naked Yoga, or part of it, falls under one or more of paragraphs (a), (b) and (c) of sec. 6 (1).

Paragraphs/....

Paragraphs (a) and (b) have the common feature that the tests involved are related to what, for the sake of convenience, will be called the "likely readers or viewers". (In the case of (a) they are "persons who are likely to be exposed to the effect or influence thereof" ; in the case of (b), "persons who are likely to read or see it"). Paragraph (c) postulates a more abstract criterion (Mame Enterprises Bpk. v. Raad van Beheer oor Publikasies, 1976 (1) SA 429 (A), 434 H; Publications Control Board v. Republican Publications, 1972 (1) SA 288 (A), 296 B-D; Buren Uitgewers v. Raad van Beheer oor Publikasies, 1975 (1) SA 379 (C), 384 B - 385 E). Who the likely readers or viewers envisaged by paragraphs (a) and (b) are in a particular case, is a question of fact :-

> "The identity ..... of the persons who are likely to read the book or to be exposed / .....

> exposed to its effect or influence, may well be said to be an objective fact, which may be proved in the same way as any other fact; and I incline to the view that evidence to establish the identity of such persons would be admissible" (per STEYN CJ, Heinemann case, p. 147 H).

As a result of judicial interpretation it must be accepted that the persons relevant to the tests in (a) and (b) are not all the likely readers or viewers but a substantial number of them (Heinemann case, supra, 150 F; Publications Control Board v. Republican Publications, supra, 293 C-D).

On principle, reference to the likely readers or viewers, determined as a factual issue, must necessarily preclude the concept of an "average reader" or "the general run of readers" (the latter was adopted by VAN ZIJL J in the Court a quo in the Heinemann case). This appears to be supported by what STEYN CJ said in

the Heinemann case (p. 150 C-G) :-

"I do not understand [redacted] that a publication will fall within the terms of the definitions in these paragraphs only if it tends to deprave or corrupt or is likely to be outrageous or disgustful to all such persons, or to what has been described as 'the general run of readers', or to a comparatively insignificant number of such persons. The latter meaning would result in a curb so drastic that it cannot be supposed that Parliament contemplated its imposition. The first-mentioned meaning would inevitably frustrate the achievement of the objects of the Act, and the same may, I think, be said of 'the general run of readers'. The latter expression could comprise various groups of readers. It is apparent, for instance, that, where the probable readers of a book would be adults and adolescents alike, its possible effect on the immature might be very different from its influence on the more sophisticated. In such circumstances the concept of a general run of readers

would / ....

> would break down, and its application to identify the persons to be considered would remove the protective bar where it is most needed. The more probable meaning is, I think, a substantial number of likely readers. That, of course, does not provide an exact standard, and will, no doubt, lead to difficulties in particular cases, but, in the absence of a more closely defined category in the Act, it will, I consider, best serve to give effect to what is probably intended. I should add a further qualification. It may be accepted, I think, that what the Legislature had in mind in these paragraphs is the effect or influence upon or the reactions of the ordinary reader who is neither a prude nor a libertine."

The "further qualification" - referred to in Publications Control Board v. Republican Publications, supra, 293 B - is, however, open to misunderstanding. The "ordinary reader" here envisaged is not the

"average /.....

"average reader" under another name. Particularly instructive is the application by STEYN CJ of the standard of "a substantial number of likely readers" to the book in question (When the Lion Feeds). The learned CHIEF JUSTICE said (at p. 152 C-E):-

> "The probable readers, therefore, fall within a broad general category in which there would be included persons of mature and of less mature mind, persons of at least some claim to discriminating literary taste and others no more than literate, men and women of strong moral fibre and those less effectively equipped, the majority of them old enough to have acquired knowledge and experience of life but some of them also of the younger generation. Amongst all of them I have to postulate men and women who are ordinary human beings, of normal mind and reactions, the carriers of contemporary attitudes and trends of thought, and, for the purposes of sec. 6 (1) (a) and (b) of the Act, enquire in what way they or

> any substantial number of them would be affected or influenced by the passages complained of in this book, or how they would react to those passages, read in the context of the book as a whole."

By the words "amongst all of them", which I have underlined in the passage above, the learned CHIEF JUSTICE obviously meant "as representatives of each of the aforementioned categories". He therefore postulates ordinary human beings, all of normal mind and reactions, but nevertheless differing inter se in the variety of ways stated. It is also in keeping with this that he later (154 D-E) speaks of "susceptible minds". In referring to the representatives of categories of likely readers as "carriers of contemporary attitudes and trends of thought" the learned CHIEF JUSTICE also is clearly not postulating a single general standard of contemporary morality. He speaks of "attitudes and trends" in the plural. In dealing with the affidavits tendered in the Court a quo and the

submission based thereon by counsel in respect of "what the reaction of the average reader is" (p. 148 D), the learned CHIEF JUSTICE points out that "it is obvious that every reader would not be affected or influenced in the same way or to the same extent" (p. 148 H). He recognizes that "the reactions of some have been so benumbed by repeated exposure to a particular stimulus through the reading of many other books, that they tolerate that kind of stimulus with cold indifference, even if it is presented in extravagant form" (p. 148 H) and he appears to accept the existence of a "tendency towards what might be said to approximate to a phallic cult amongst authors and their readers" (p. 149 A). But clearly implied in the exposition is that there are other contemporary attitudes and trends of thought - hence the reference to the "mixed reception" of certain Afrikaans books (p. 149 C), and also the ultimate conclusion that the

"plain / ....

"plain fact remains that the sexual urge is much too powerful to be so dulled and blunted by exposure to the more indirect daily stimulants of our times that there is no longer a substantial number of ordinary men and women who are liable to be appreciably stirred by descriptions such as these of matters so directly, closely and intimately associated with actual consummation" (p. 154 C). Here, again, the learned CHIEF JUSTICE clearly implies that there are in fact some who are so dulled and blunted, besides those that are liable to be appreciably stirred.

The "ordinary reader" referred to in the "further qualification" does, therefore, not constitute an average; he is only "ordinary" in the sense of being of normal mind and reactions and being a typical example of any of a number of categories of readers, some representing differing contemporary trends and attitudes. Depending upon the findings of fact, there may be any

number / ....

number of different "ordinary" readers. The words "who is neither a prude nor a libertine" appear to do no more than set the outer limits of the trends and attitudes that fall to be considered. It must be remembered that a prude is a "woman of extreme (esp. affected) propriety in conduct or speech" (Concise Oxford Dictionary) and a libertine a "licentious" person (Concise Oxford Dictionary). But in any event these limits seem to lose much of their significance in view of the requirement relating to a "substantial" number of likely readers. If a substantial number of likely readers will react in a certain way, their attitude could not simply be disregarded as mere prudery and of no significance.

The test of obscenity in paragraph (a) of sec. 6 (1), lying in a "tendency to deprave or corrupt the mind", dates back to the English case of R. v. Hicklin, (1868) L.R. 3 Q.B. 360 at p. 371 (cf. Heinemann

case / ....

case, supra, p. 150 H), but relating it to likely readers or viewers is no doubt derived from the test of obscenity enacted in England by sec. 1 (1) of the Obscene Publications Act, 1959. It reads as follows :-

> "For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

It is interesting to note that, as is specifically enacted in sec. 6 (2) of our Publications Act, the English definition was held by the Court of Criminal Appeal to exclude the purpose of the publication: "obscenity depends on the article and not on the author" (R. v. Shaw, [1961] 1 All E.R. 330, 333 F).

Furthermore,/....

Furthermore, the concept of the likely readers or viewers is in the main similarly understood as in the Heinemann case: what is meant by the Act is a "significant proportion" of such readers or viewers, and they are those that in fact are likely to read or see the publication. (Cf. Director of Public Prosecutions v. Whyte and Another, [1972] 3 All E.R. 12 (HL)), In his opinion in this case LORD WILBERFORCE e.g. said (p. 18 b-d) :-

> "I doubt the validity of an approach which seeks the 'most likely' readers and then rejects others than the 'most likely' as not likely. It looks very much as if the justices thought that their task was to identify a category of most likely readers, but this is not what the Act requires, or permits. Account ought to be taken of other persons, less likely perhaps than the main category, to read the books, if these others were also likely to do so. In the case of a general shop, open to

all and / ....

> all and sundry, and offering all types of books, common sense suggests the conclusion that likely readers are a proportion of all such persons as normally resort to such shops, and it would require strong evidence to justify a conclusion that the likelihood of reading the books was confined to one definable category."

Elsewhere in the opinion (p. 19 g-j), it is very clearly brought out that the likely reader or viewer is not "some reasonable average man" :-

> "The Act's purpose is to prevent the depraving and corrupting of men's minds by certain types of writing; it could never have been intended to except from the legislative protection a large body of citizens merely because, in different degrees, they had previously been exposed, or exposed themselves, to the 'obscene' material. The Act is not merely concerned with the once for all corruption of the wholly innocent, it equally protects

the / ....

> the less innocent from further corruption, the addict from feeding or increasing his addiction. To say this is not to negate the principle of relative 'obscenity'; certainly the tendency to deprave and corrupt is not to be estimated in relation to some assumed standard of purity or some reasonable average man. It is the likely reader. And to apply different tests to teenagers, members of men's clubs, or men in various occupations or localities would be a matter of commoh sense.

In this scheme of legislation the rhetorical questions put to the jury in the case of Martin Secker and Warbury, (1954) 2 All E.R. 683 (at 686), by STABLE J - viz.

> "Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort

of books that one reads as a child in the nursery?"

- are quite out of place. Dealing with STABLE J's directions to the jury, Smith and Hogan (Criminal Law, 2nd ed. p. 489-90) write :-

"Other directions to juries in recent times, however, have been a good deal less liberal and it has been suggested that STABLE, J's is not the typical judicial attitude. Nor is it so clear that the law does not require us to take our standards from 'the decently brought up young female aged fourteen'. The article is obscene if it has a tendency to deprave 'persons who are likely ..... to read, see or hear the matter contained or embodied in it'. It would not, apparently, necessarily be sufficient that there existed two persons who were likely to read the book and who might be depraved by it. It is obscene only if it has a tendency to deprave 'a significant proportion' of those likely to read it. It

would / ....

would not be obscene, simply on the ground that it might tend to deprave 'a minute lunatic fringe of readers'. If, however, a significant, though comparatively small, number of the likely readers were decently brought up fourteen year-old girls, then whether the book was obscene would turn on whether it was likely to deprave them.

The questions for the jury are of a highly speculative nature. How, for example, is the jury to say whether a significant proportion of the readers will be fourteen year-old girls? The answer seems to depend on all kinds of matters of which the jury can, at best, have imperfect knowledge. The same article may or may not be obscene depending on the manner of publication. If it has a tendency to deprave fourteen year-old girls, a bookseller who sells a copy to a club for fourteen year-old girls is obviously publishing an obscene article; but if he sells the same book to the Conservative Club or a working men's club, this may not be so. The fact that the publisher (in the sense of the producer) of the book is acquitted of publishing an obscene libel, does not mean, then, that

other subsequent 'publishers' of the book do not commit an offence."

On the other hand, as said by LORD SIMON of Glaisdale in Whyte's case (supra, p. 23 g-h), "a defence is available not merely that the likely exposé is too aesthetic, too scientific or too scholarly to be likely of corruption by the particular matter in question, but also that he is too corrupt to be further corrupted by it". Another consequence of the relative concept of obscenity is that the defence of "aversion" is available (R. v. Anderson and Others, (1971) 3 All E.R. 1152).

From the aforegoing it should be clear that there is a great similarity between the concept of "likely readers or viewers" as understood by the majority of this Court in the Heinemann case (supra) in respect of our Publications Act, and that accepted in England in respect of the Obscene Publications Act,

1959. It has also been mentioned above that the test of obscenity in paragraph (a) of sec. 6 (1) of our Publications Act, relating to a "tendency to deprave or corrupt the mind", is derived from the English case of R. v. Hicklin, supra (as also appears to be the case in respect of the definition in the English Act). The concept of a "tendency to deprave or corrupt the mind" is, however, deceptively simple. Referring to the English Act LORD WILBERFORCE points out in Whyte's case (supra, p. 18 j - 19 a) :-

> "No definition of 'deprave or corrupt' is offered - no guideline as to what kind of influence is meant. Is it criminal conduct, general or sexual, that is feared (and we may note that the articles here treated of sadistic and violent behaviour) or departure from some code of morality, sexual or otherwise, and if so whose code, or from accepted or other beliefs, or the arousing of erotic desires 'normal' or

'abnormal' / ....

> 'abnormal', or as the justices have said 'fantasies in the mind'. Some, perhaps most, of these alternatives involve deep questions of psychology and ethics; ....."

In respect of our Act the majority in Heinemann's case cut the Gordian knot and accepted that one of the ways (thus recognizing that there could be others) that a publication could "tend to deprave and corrupt by rendering the person so affected more prone to immoral behaviour" was "by exciting sexual desires and lascivious thoughts" (p. 151 B-D). It is true that this approach is basically the same as that adopted in Hicklin's case and that some would consider it antique - being more than a hundred years old - but, on the other hand, it does appear to not differ, essentially, from one of the main elements of the Roth test adopted in the U.S., viz. "whether the dominant theme of the material taken as a whole appeals to prurient interest",

being / ....

being "material having a tendency to excite lustful thoughts", i.e. lust for sex. (Cf. the definition of the American Law Institute, Model Penal Code § 207. 10 (2) of the Tentative Draft No. 6, 1957: "(a) thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters").

It is clear that paragraph (a) of sec. 6 (1) of our Publications Act reflects the relative concept of obscenity and there can be little doubt that the concept of "likely readers or viewers" must be the same in paragraph (b). This would, in any event, be in accord with the recognition of the diversity of our heterogeneous population, which has been remarked upon above in relation to sec. 5 (2) of the Publications Act.

In the / ....

In the light of the aforegoing observations we may now again turn to Naked Yoga. Who are the likely readers or viewers? Bearing in mind that CNA is one of the largest distributors and purveyors of popular publications in the Republic, with branches and sub-agents throughout the country, one may safely accept that large numbers of every section of the population would have the opportunity of seeing Naked Yoga and at least paging through it. It must be remembered that the book could not be displayed without disclosing to the world the front or back cover, and the nature of the title and covers would immediately attract attention.

Whether Naked Yoga would tend to deprave or corrupt a substantial number of the likely readers or viewers is a question of great difficulty. However, as the publication appears to fall under paragraph (b) of sec. 6 (1), it is unnecessary to express any view on this aspect.

In / .....

~~[redacted]~~

In Mame Enterprises v. Publications Control Board (1974 (4) SA 217 (W), 226 A-D) NICHOLAS J had occasion to remark :-

> "The test of whether any of the photographs are 'offensive to public morals' is, in terms of sec. 6 (1) (b), whether 'in the opinion of the court it is likely to be outrageous or disgustful to persons who are likely to' see them - in other words, the test is not whether the Court itself considers them 'outrageous or disgustful' but whether in its opinion a substantial number of likely viewers would so consider them. It cannot be disputed that there is a substantial number of South Africans who regard the publication of representations of the female nude as desecration per se, and who regard the commercial exploitation of woman as a sex-object to be a violation of her honour and dignity (see the views expressed in the Report of the Commission of Enquiry in regard to Undesirable Publications,

U.G. 42/1957, pp. 52-53 - views which are still widely held today). It must therefore be accepted that many South Africans would be outraged or disgusted by the treatment of the nude female in the photographs under consideration."

In my opinion this is a valid observation, and the acceptance of its truth appears to underlie the later decision of this Court in Mame Enterprises Bpk. v. Raad van Beheer oor Publikasies (1976 (1) SA 429 (A)). (at 435 A)
In the course of his judgment, VAN BLERK ACJ said :-

"Dit is soos namens appellant betoog dat algemeen gesproke, naaktheid per se nie aanstoot gee nie, aan die anderkant is daar mense vir wie die publikasie van die naaktheid van die vrou skokkend is omdat dit 'n ontering is van die liggaam wat die mens baar."

This appears to be the primary consideration. It is true that the learned ACTING CHIEF JUSTICE did add the following (p. 435 C-D) :-

"Die / ....

> "Die liggaamlike houding van die modelle op die kalender prostitueer die liggaam van die vrou; die gelaatsuitdrukkinge van sommige, gepaard met die liggaamshouding, is uitlokkend, en dit uiter behaagsug met n beloering van wulpse wellus."

But this does not appear to be the basis of the decision - but only to add point to the approach of some that "die publikasie van die naaktheid van die vrou skokkend is omdat dit n ontering is van die liggaam wat die mens baar".

In the present case it may be inferred that a substantial number of the likely readers or viewers of Naked Yoga - those that inspect the publications displayed and browse through them - will be persons of the category mentioned by NICHOLAS J. They will undoubtedly find what they see "outrageous or disgustful". The covers of Naked Yoga have been described above; it has been mentioned that the back

cover / ....

cover displays a side view of the model, exposing the mons veneris covered with pubic hair. And if anyone were to page through the book he or she would find other photographs equally candid. The photographs certainly do not depict nudity in demure artistic poses. In particular the first photograph of the Gomukhasana (Cow Herd Posture) and the photograph of the Urdhva Dhanurasana (Raised Bow Posture) may attract the attention. The former shows a front view of the model sitting upright on the carpet, thighs apart, lower legs folded under, the mons veneris with its hair clearly visible, except for a shadow obscuring its lower extremity. The latter shows a side view of the model, positioned according to the following instructions :-

> "Lie on your back with your legs drawn up so that your heels are touching your buttocks. Place your hands, palms down, on the floor behind your shoulders.

Pressing down with your hands and feet, raise your body up until it forms an arch".

The photograph is taken from almost floor level and the left knee and left breast are highlighted by light falling from left and right. The upper arch of the figure - from left ankle to knee, to tufted white mound of mons veneris, to nipple of left breast to left elbow and forearm - is in contrast to the dark background, every detail being sharply silhouetted. To that section of the population to which NICHOLAS J refers, this would indeed be outrageous and disgustful.

I would allow the appeal with costs (including the costs of two counsel) and alter the judgment of the Court below to dismiss the appeal with costs.

E.L. JANSEN,
Judge of Appeal.

Rabie JA) concurs.