THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Madrasah Taleemuddeen Islamic Institute v Chandra Giri Ellaurie and Another (755/2021) [2022] ZASCA 160 (24 November 2022)

The Supreme Court of Appeal upheld with costs, an appeal against the judgment of the KwaZulu-Natal Division of the High Court, Durban, which granted an interdict against the appellant, Madrasah Taleemuddeen Islamic Institute. The interdict application had been brought by Mr Chandra Giri Ellaurie. In terms of the interdict the high court ordered that the sound of the 'Call to Prayer' (the Azaan) generated from the madrasah's immovable property, should not be heard at Mr Ellaurie's property.

The appeal to the SCA therefore concerned the question of when noise emanating from a neighbour's immovable property is actionable in law.

The facts of the matter were as follows. Mr Ellaurie lived about 20 metres from the madrasah's property in Isipingo Beach, South of eThekwini in the KwaZulu-Natal Province. On its property the madrasah conducted a school for Islamic studies. There was a mosque located on the madrasah property. Every day, five daily prayers were performed in the mosque. Each prayer was preceded by the Azaan, which was delivered by a Muadhin, to remind people of the Islamic faith to come to prayer.

Prior to the interdict application, various forms of intervention were undertaken to attempt to resolve the dispute between Mr Ellaurie and the madrasah. These included an unsuccessful attempt by the second respondent, the eThekwini Municipality the city, to mediate in 2003, and another mediation attempt by the South African Human Rights Council.

The SCA found that contrary to the approach by the high court, it was, in fact, Mr Ellaurie who had to satisfy the requirements for the interdict sought, and to prove to the court, in particular, that the interference with his comfort was unreasonable. The madrasah had no responsibility to show that the Azaan was essential to its religious practice, as the high court had found. The SCA held that Mr Ellaurie's application for an interdict failed to meet the legal requirements for the relief he sought.

The SCA found that although Mr Ellaurie explained that the first of five daily Azaans was at 03h30, he did not explain what exactly the nature and level of the noise was, and how long it lasted in each instance. He tendered no evidence of what a reasonable Azaan would be in the circumstances. Instead, the evidence tendered was that of his profound dislike of Islam.

The SCA found further that apart from failing to provide evidence of unreasonable interference in the circumstances, Mr Ellaurie placed himself within the realm of a specially or extraordinarily sensitive complainant. The reasonableness (or otherwise) of the Azaan could not be judged by his standards, the essence of which was a deep aversion to the Islamic faith. It had to be judged by the standard of an ordinary person living in Isipingo Beach. On this, the SCA found that there was, at best, a paucity of evidence.

Notably, the SCA found that the high court erred in its conclusion that the Constitution provided no guarantee for religious practices. The Constitution did not only provide protection for different religious beliefs and affiliation, it also guaranteed the freedom to observe and manifest the different religious beliefs.

In the light thereof, the SCA found that Mr Ellaurie's convictions had no regard for the consideration that the reasonableness assessment had to take into account and balance the countervailing constitutional rights of the respective parties. Having regard to all these factors, the SCA held that the appeal must therefore succeed. It set the interdict aside.

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