



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 755/2021

In the matter between:

**MADRASAH TALEEMUDDEEN ISLAMIC
INSTITUTE**

APPELLANT

and

CHANDRA GIRI ELLAURIE

FIRST RESPONDENT

eTHEKWINI MUNICIPALITY

SECOND RESPONDENT

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

Coram: DAMBUZA ADP and GORVEN and HUGHES JJA, and MUSI and DAFFUE AJJA

Heard: 19 September 2022

Delivered: 24 November 2022

Summary: Nuisance – the right to undisturbed use and enjoyment of own property is not unlimited – reasonable interference is to be expected depending on the circumstances in a specific neighbourhood – oversensitivity or personal peculiarities do not serve as a standard for reasonableness – the question of whether the interfering conduct is constitutionally guaranteed is a relevant consideration – principles governing interdicts restated.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Mngadi J sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The judgment of the high court is set aside and replaced with the following: ‘The application is dismissed with costs.’

JUDGMENT

Dambuza ADP (Gorven and Hughes JJA and Musi and Daffue AJJA concurring):

[1] When is noise emanating from a neighbour’s immovable property actionable in law? The first respondent in this appeal, Mr Chandra Giri Ellaurie, obtained an interdict in the KwaZulu-Natal Division of the High Court, Durban (the high court) against the appellant, Madrasah Taleemuddeen Islamic Institute (the madrasah)¹, in terms of which 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. Mr Ellaurie had also sought orders that the madrasah cease its operations on the property, that it be divested of the property, and that the property be sold to either a state organ, or a non-Muslim South African, a Non-Governmental Organisation, a Non-Profit Organisation, or

¹ The name ‘madrasah’ in itself signifies a school of Islamic studies.

a Public Benefit Organisation. The high court only granted the interdict in relation to the Azaan – that the madrasah had to ensure that the Azaan would ‘not [be] audible within the buildings on [Mr Ellaurie’s] property’. The madrasah appeals against this order, with the leave of this Court.

[2] Mr Ellaurie lives about 20 metres from the madrasah’s property in Isipingo Beach, South of eThekweni in the KwaZulu-Natal Province. On its property the madrasah conducts a school for Islamic studies. About 340 students live in boarding facilities on the madrasah property, which is spread over three lots. There is a mosque located on the madrasah property. Every day five daily prayers are performed in the mosque. Each prayer is preceded by the Azaan, which is delivered by a Muadhin, to remind people of the Islamic faith to come to prayer. It is the Azaan that had to be inaudible at Mr Ellaurie’s property, in terms of the court order.

[3] Although there is no cross-appeal in respect of the dismissal of the claim for eviction of the madrasah and confiscation of its immovable properties, in his heads of argument, Mr Ellaurie repeated this claim and set out numerous reasons why the madrasah should be driven out of Isipingo Beach. Most of these reasons reveal his abhorrence of the Islamic faith. Not all of these reasons are repeated in this judgment, as no useful purpose will be served by doing so.

[4] Of relevance to the noise nuisance claim, is Mr Ellaurie’s complaint that the Azaans invaded his personal space and that they happened at an ‘unearthly time’, the first being around 03h30 at the start of summer. He complained that they gave a ‘distinctly Muslim atmosphere to the area’, and a lot of non-Muslim people found them repugnant. He lamented the growth of the Muslim community

in Isipingo Beach over the 15 years preceding his application to court, and argued that, as a result of their dominance in the town, Muslim people had become arrogant. He believed that Islam promotes racism, bigotry and sexism, and pays no regard to the Constitution. He blamed the Constitution for affording protection to all religions, and maintained that, in relation to Islam, the protection is undeserved and must have been extended only as a result of unawareness of the inequities ingrained therein.

[5] 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 eThekweni Municipality (the city), to mediate in 2003, and another mediation attempt by the South African Human Rights Council (SAHRC). Mr Ellaurie bemoaned what he considered to be the City's approval of non-compliant building plans and failure to sanction the madrasah for various structures that it allegedly constructed illegally on its properties. However, he did not pertinently challenge the decisions taken by the city in relation to those buildings. His application was only directed at what he considered to be the nuisance caused by the madrasah.

[6] In granting the interdict, the high court found that the freedom of religion guaranteed in the Constitution was no 'guarantee [of the] practice or manifestations of religion'. Therefore, the madrasah had to demonstrate that the Azaan was essential to the practice of its religion. All that Mr Ellaurie had to prove was interference with enjoyment of his 'private space'. I do not agree.

[7] The main principle of our neighbour law is that, whilst everyone has a right to undisturbed use and enjoyment of their own property, such right is not

unlimited. A limited interference with property rights and enjoyment thereof by owners of other properties in the same neighbourhood is expected and acceptable in law.² Mutual tolerance is a civic value that is restricted by the legal yardstick of reasonableness. In *Holland v Scott*,³ one of the earliest South African nuisance cases,⁴ the court stressed the contextual nature of the test into the reasonableness of the interference from a neighbouring property. The court held that for nuisance to be actionable it had to seriously and materially interfere with the plaintiff's ordinary comfort and existence. This remains the test in our law to date.

[8] It has also been expressed as follows:

‘The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm.’⁵

[9] The factors relevant in determining whether the reasonableness threshold has been breached include: the seriousness of the interference; the time and duration of the interference; the possibility of avoiding the harm; and the applicant's sensitivity thereto.⁶ The interference is not considered to be unreasonable when the harm or complaint in respect thereof arises from a special or extraordinary sensitivity of the plaintiff or applicant to the activity complained of.⁷ In *De Charmoy v Day Star Hatchery (Pty) Ltd*,⁸ the court put it thus:

² 31 *Lawsa* 3 ed paras 172 and 174.

³ *Holland v Scott* (1881-1882) 2 EDC 307.

⁴ In which guidance was sought from English case law.

⁵ *Lawsa* fn 2 above para 174.

⁶ *Ibid* para 175.

⁷ *Ibid* para 176.

⁸ In *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D), the court considered whether noise made by chickens on a chicken farm was actionable.

‘The test, moreover, is an objective one in the sense that not the individual reaction of a delicate or highly sensitive person who truthfully complains that he finds the noise to be intolerable is to be decisive, but the reaction of “the reasonable man” – one who, according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the particular noise, would find it, if not quite intolerable, a serious impediment to the ordinary and reasonable enjoyment of his property.’⁹

[10] In *Rogers v Elliott*,¹⁰ the Massachusetts Supreme Judicial Court considered whether the defendant was liable for damages suffered by the plaintiff as a result of noise caused by the repeated ringing of church bells in a Roman Catholic Church located opposite his house. The noise threw the plaintiff, who was suffering from sun stroke, into violent convulsions on each of the eight occasions when the church bells were rung. His claim for delictual damages was founded on the contention that the ringing of the bells was a nuisance. The court held that the interference or harm occasioned to the plaintiff was not unreasonable, because he suffered from a condition that caused him to be extraordinarily sensitive to the noise nuisance on which his claim was founded. In this regard, the court stated: ‘In an action of this kind, a fundamental question is, by what standard, as against the interests of the neighbor, is one’s right to use his real estate to be measured.

...

In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greater disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.’¹¹

⁹ Ibid at 192E-F.

¹⁰ *Rogers v Elliott* 146 Mass. 349, 15 N.E. (768).

¹¹ Ibid at 351.

[11] Mr Ellaurie's application for an interdict failed to meet the legal requirements for the relief he sought. Because he sought a final interdict, he first had to establish a clear right. Then, he had to demonstrate that the nature and/or level of noise unreasonably interfered with his established right. He also had to show that he had no other satisfactory alternative remedy. 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 satisfy 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.

[12] 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. In fact, he would rather have the Azaan banned from Isipingo Beach altogether.

[13] In addition to his assertions as already set out above, Mr Ellaurie took exception to what he considered to be elevation of the Islamic faith above all other religions, which, according to him, were denigrated in the Qur'an. He referred to the Azaan as a 'foreign sound that invades the public and private space', that 'bears down on [him]', over which he has no control, and which robs him of the opportunity 'to the quiet enjoyment of [his] property'. It is apparent from his founding affidavit that he discovered most of the information on which his averments are based from research he undertook after he had resolved to approach the court for an interdict application.

[14] 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 there was, at best, a paucity of evidence.

[15] Given the finding by the high court that manifestation of religious freedoms is not guaranteed in the Constitution, it is necessary to say something on the protection afforded to the interfering conduct by the Constitution. Section 15(1) and (2) of the Constitution guarantees freedom of religion as follows:

- ‘(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state-aided institutions, provided that –
 - (a) those observances follow rules made by the appropriate public authorities;
 - (b) they are conducted on an equitable basis; and
 - (c) attendance at them is free and voluntary.’

[16] The Constitution therefore does not only provide protection for different religious beliefs and affiliation, it also guarantees the freedom to observe and manifest the different religious beliefs. For effective observance or practice of these religious freedoms, the Constitution sets an overarching standard of ‘equitable’ for the different religions, and leaves it to public authorities to regulate, more specifically, such practices. The Constitution then prohibits discrimination on the basis of religious belief, culture or affiliation.¹² Having regard to all these considerations, there can be no room for the conclusion that the Constitution provides no guarantee for religious practices.

¹² Section 9 of the Constitution.

[17] This interpretation of the Constitution is consistent with the findings of the Constitutional Court in *Christian Education South Africa v Minister of Education*.¹³ Therein, the Constitutional Court interpreted s 15 of the Constitution as follows:

‘I will start with section 15 which deals with freedom of religion, belief and opinion. The meaning of a similar provision in the interim Constitution was considered by Chaskalson P in *S v Lawrence*; *S v Negal*; *S v Solberg* where he made the following observation:

“In the [*R v Big M Drug Mart Ltd*] case Dickson CJC said:

‘The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.’¹⁴

[18] Similarly, in *Prince v Law Society of the Cape of Good Hope*,¹⁵ the Constitutional Court confirmed the universal right to a religion of choice, the right to manifest openly that or any other religion, and freedom from restraint when observing or manifesting a religious belief. The submission was well made on behalf of the madrasah that the reasonableness assessment in this case had to take into account and balance the countervailing constitutional rights. There was no room for these considerations in Mr Ellaurie’s convictions. Having regard to all these factors, the appeal must succeed.

[19] As to the costs, in *Biowatch Trust v Registrar, Genetic Resources*,¹⁶ the Constitutional Court outlined, as some of the guidelines for determining costs awards, considerations such as the character of the litigation and the conduct of

¹³ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

¹⁴ *Ibid* para 18. References omitted.

¹⁵ *Prince v President of the Law Society of the Cape of Good Hope and Others* 2002 (3) BCLR 231 (CC); 2002 (2) SA 744 (CC) para 18.

¹⁶ *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

the parties in pursuing it. Of importance is whether a costs award would hinder or promote the advancement of constitutional justice. In this case, Mr Ellaurie did not seek to assert his rights against the State. His motivation for pursuing litigation was not advancement of constitutional justice, but rather his dislike of Islam. The madrasah has no fiscal resources comparable to that of government. There can thus be no reason for costs not to follow the result.

[20] Therefore, the following order shall issue:

- 1 The appeal is upheld with costs, including the costs of two counsel where so employed.
- 2 The judgment of the high court is set aside and replaced with the following:
'The application is dismissed with costs.'

N DAMBUZA
ACTING DEPUTY PRESIDENT

APPEARANCES

For appellant: R Bhana SC and R Itzkin
Instructed by: Abba Parak Inc, Johannesburg
Webbers, Bloemfontein

For first respondent: C G Ellaurie (in person)