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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. 3848/2019

In the matter between:

CHANDRA GIRI ELLAURIE

APPLICANT

and

MADRASAH TALEEMUDDEEN ISLAMIC INSTITUTE
ETHEKWINI MUNICIPALITY

FIRST RESPONDENT
SECOND RESPONDENT

ORDER

I, accordingly, grant the in the following terms:

1. The first respondent is ordered to ensure that Calls to Prayer made from its property, to wit, Lots 703, 704 and 705 Isipingo Beach, are not audible within the buildings in the applicant's property at [...], Isipingo Beach, Durban.
 2. Prayer 2 in the Notice of Motion is refused.
 3. No order as to costs.
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JUDGMENT

Delivered on:

Mngadi J:

[1] The applicant seeks an order, firstly, interdicting the first respondent from emanating Calls to Prayer that can be heard beyond the boundaries of its

property in Isipingo Beach. Secondly, that the first respondent ceases its operations in the area, and its property in the area be sold to the State or to a non-Muslim entity.

[2] The applicant is Chandra Giri Ellaurie, an adult male of Isipingo Beach, Durban. The first respondent is the Madrasah Taleemuddeen Islamic Institute (the Madrasah), an association incorporated under s 21 of the repealed Companies Act 61 of 1973. The second respondent is the EThekwini Municipality (the Municipality), a local authority. The applicant conducted the litigation in person. The Madrasah opposed the granting of the relief sought. The Municipality did not participate in the litigation.

[3] The applicant owns and resides at [...], Isipingo Beach. The Madrasah's property and the applicant's property are about 20 metres apart from each other with another dwelling in between. The Madrasah houses in its property, a teaching institution for Islamic religious studies with about 340 students, with a mosque and accommodation for staff and students. The properties are in a residential suburb within the jurisdictional area of the second respondent. The Madrasah also owns an unimproved second property about 200 metres away from the applicant's property. The Municipality has granted the Madrasah approval for a cluster residential development in the second property.

[4] The applicant is Hindu and is unashamedly opposed to the Islamic faith, which is propagated by the Madrasah. The applicant regards Islam as a false religion that discriminates against non-Muslims as non-believers. He contends that the Koran, a Bible on Islam, refers to unbelievers as the worst creatures; ignorant, unclean, wrongdoers; persons that should not be trusted, and who should be slandered and fought, whereas it regards members of the Islamic faith as the best people. The applicant holds the view that Islam promotes cultural racism, does not uphold the divinity of man, and lacks commitment to truth and the pursuit of truth. Islam, he contends, also regards women as inferior to men. It prefers Islamic law of inheritance to the law of the land. In his view, Islam is not a religion protected by the Constitution of the Republic of South Africa, 1996, (the Constitution) as everything it stands for is contrary to the Constitution.

[5] The applicant states that his family moved to Isipingo Beach in 1966. The Madrasah acquired a large property with a dwelling on it in the area in 1999, and

began to develop the property. The title deed provided that no building of any kind other than private dwelling houses shall be erected on the property. The Madrasah continued overtime to develop its property contrary to the restrictions in the original title deed by rezoning its properties, in collusion with the Municipality, and the Municipality continuously fails to enforce its by-laws. The applicant states that Isipingo Beach was a diverse , peaceful residential suburb, but the Madrasah has turned it into a Muslim enclave. He seeks the relief to reverse the trend.

[6] The applicant states that the Call to Prayer by the Madrasah is made five times a day. A person standing outside, in the premises of the Madrasah makes the first call at 03h30 in the morning. The applicant further states that the Call to Prayer is a foreign sound, which invades his private space. It bears down over to him. It deprives him of the enjoyment of his property and interrupts his peace and quiet. It further disrupts his sleep, listening to music and meditation.

[7] The applicant contends that the Call to Prayer gives the suburb a distinctly Muslim atmosphere. It attracts those of the Islamic faith and keeps non-Muslims away. The Muslim community in the area has increased by 30 percent in the past 15 years. The dominance of one group has resulted in arrogance and domination by the dominant group.

[8] The applicant states that he wrote to the Municipality complaining about the Call of Prayer in 2003. On 15 December 2003, the Municipality held a meeting with interested parties. The meeting was however, disrupted when someone drove through the area at high speed, discharging a firearm. There was also around that time severe hooting in the early morning before sunrise and not long after the first Call to Prayer. The Municipality took no further steps. On 28 July 2004, the applicant reported the Call to Prayer in the area to the South African Human Rights Commission (the SAHRC). The SAHRC conducted mediation and recommended the following:

'1. That the mosque administered by the Isipingo Beach Muslim Association desist from using the external sound amplifier system during the first Call of Prayer of each day.

2. That in respect of the other four Calls of Prayer the head of the mosque in

consultation with a Latchiah or another Council representative will determine the appropriate level of amplification, and

3. That once the level of amplification is decided upon, it would be fixed at that point and not left to the discretion of the person calling others to pray and,

4. That each call of prayer to last no longer than three minutes,

5. That the person calling other to prayer to use properly the equipment and to be one metre from the microphone

6. That the siren attached to Madrasah Taleemudeem to remain its location within the building. that whilst the amplifier system at the mosque being operated by the Isipingo Beach Muslim Association is operational, the Madrasah Teleemudem would not use its facilities to call people to prayer through the sound 3mplifier outside the mosque'.

The mediators , as recorded in the SAHRC report and recommendation, were Professors Karthy Govender and S. Dangor of the Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities. Hoosen Moala, the Chairperson of the Isipingo Muslim Association, and Mohammed Illyas Patel (Patel) who is the Moulana at Madrasah Taleemuddeen, were some of the participants in the mediation and they both stated that, subject to approval by the community, they found the recommendation reasonable and supported it. In the interim, they agreed to suspend the Call to Prayer for three days.

[9] In his founding affidavit, the applicant expanded in detail, referring to the scriptures, the basis of the aspects of the Islam religion he found objectionable. He also explains in detail the engagement he had with the Municipality relating to the Madrasah's rezoning applications and approval of building plans, as well as the frustrations that he had with the Municipality refusing to furnish him with information. It is not necessary, in my view, to burden this judgment with those details. They are irrelevant in relation to the relief the applicant is seeking. The Madrasah, in its answering affidavit , states that the applicant's averments are liable to be struck out as vexatious and irrelevant. The Madrasah, however, responded and rejected the applicant's doctrinal averments by referring to the

scriptures and stating what the Islam religion stands for. Likewise, the Madrasah's averments in the answering affidavit in answer to the applicant's vexatious and irrelevant averments have not been included in this judgment. The details relating to the applicant's understanding and interpretation of the Islam religion, which formed the basis of his objection, have already been referred to and are incorporated to understand better the reasons motivating the relief sought.

[10] The applicant states that, in particular, relating to the drastic relief sought in the banning of the Madrasah from the area, he was acting on behalf of himself as well as in the public interest. He, however, had no answers when asked which public he was acting on behalf of, or who had given him authority to act. In my view, there is no evidence as to which members of the public share the applicant's sentiments relating to Islam. On an issue where the public is divided, an individual cannot claim to act on behalf of the public. Further, when the applicant was asked what the Madrasah had done to him that entitles him to ask that it be banned from the area, he had no answer. He did however say that he wanted the area to be restored to its former glory. In my view, the applicant has no locus standi to seek the order banning the Madrasah from the area. He has not made out a case for the relief banning the Madrasah from the area in the papers. In *Erasmus Superior Court Practice 2 ed vol 2 at RS 13, 2020* , D1-186 it is stated:

'As a general rule the requirements for *locus standi in judicio* are as follows:

- (a) the plaintiff/applicant for the relief must have an adequate interest in the subject matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;
 - (b) the interest must not be too far removed;
 - (c) the interest must be actual, not abstract or academic;
 - (d) the interest must be a current interest and not a hypothetical one.'
- (Footnote omitted).

[11] The applicant's attempt to show, by referring to scriptures, that Islam is an invalid religion, which misleads the community and should be banned, is

misguided. There is no doubt that Islam is a religion. The Constitution guarantees freedom of religion. There is no law of general application envisaged in s 36 of the Constitution, which outlaws Islam. Further, in *S v Lawrence; S v Negal; S v Solberg* 1997 (10) BCLR 1348 (CC) para 92, it was held:

'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.' (Footnote omitted).

[12] The court is not in a position to analyse the scriptures and make a decision whether Islam is a false religion or not. In *De Lange v Presiding Bishop, Methodist Church of Southern Africa & another* 2015 (1) SA 106 (SCA) para 39, it was held: 'A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement.'

In my view, expert evidence needs to be led to assist the court on the issue of doctrinal interpretation.

[13] In *Prince v President, Cape Law Society, & others* 2002 (2) SA 794 (CC) para 42, it was held:

'Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith.'

The applicant's attempt to have the Madrasah banned on religious doctrinal grounds is, in my view, doomed to fail. Further, it is common cause that there are other Muslim mosques in Isipingo Beach. To ban only the Madrasah is a futile exercise.

[14] Patel, who resides diagonally across the road from the applicant, deposed to the Madrasah's answering affidavit. He states that the Madrasah runs a

Madrasah (school for Islamic religious studies) on the property, which it owns. Five daily prayers are made from the premises. No external sound amplification is used in making the Call to Prayer. There is another larger mosque slightly further away from the applicant's property belonging to the Isipingo Beach Muslim Association.

[15] Patel explains that the Madrasah does not transmit its Calls to Prayer by radio or television. The Madrasah, therefore, does not broadcast its Calls to Prayer. The Madrasah notes that 'the applicant does not simply request that the Call to Prayer sound be at a level which he cannot hear from his residence, but at a level which does not carry beyond the boundaries of the Madrasah property even if he cannot hear it and even if those immediate neighbours desire to hear it'. Patel states that the Madrasah has no intention of using external sound amplification in the future. He states that the Madrasah objects to being interdicted from using the Call to Prayer on a matter of principle. He claims that the Madrasah cannot pander to such bigotry, to do so would be a disservice to the founding principles of the Constitution of the Republic. It means, in my view, a relief that the Madrasah must ensure that its Call to Prayer be not at a level audible within the house of the applicant will not affect negatively the Madrasah in the manner it practises its religion. However, the Madrasah says it objects to the granting of such a relief because not to oppose it, would be to pander to bigotry and a disservice to the founding principles of the Constitution.

[16] Section 15(1) of the Constitution provides that '(e)veryone has the right to freedom of conscience, religion, thought, belief and opinion'. The provision guarantees freedom of religion, it does not guarantee practice or manifestations of religion. The Call to Prayer, is a manifestation of the Islam religion, it is not Islam itself.

[17] The applicant is entitled to enjoy the use of his residential property. It is part of his private space. Others are obliged to respect the applicant's right to the use and enjoyment of his property. The applicant's averment that the individual designated to make the Call to Prayer stands outside the building, in the premises of the Madrasah is not disputed. The location of the applicant's residence is near the spot where the Call to Prayer is made. The affidavits of

three witnesses for the Madrasah that state that if the Call to Prayer is made inside the building, it cannot be heard by nearby neighbours and is of no assistance to the Madrasah. The Madrasah does not deny that the Call to Prayer is meant for the neighbourhood of the Madrasah. The Call to Prayer is made five times during the course of the day every day. Some Calls to Prayer are at odd hours. Unfortunately, the applicant finds the Call to Prayer particularly offensive due to his views towards Islam.

[18] *Chalalia et al* Fundamental Rights in the New Constitution (1994) at 51 quotes the Canadian Supreme Court case *R. v. Big M Drug Mart Ltd.*, 18 DLR (4th) 321 para 123, where Dickson C J said:

'The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.'

[19] The Madrasah does not contend that it is essential, in order to practice its religion, that the Call to Prayer be made in such a way that it interferes with the applicant's use and enjoyment of his private space, or that the current interference interferes least with the applicant's private space. In the circumstances, the applicant must prove interference and nothing more.

[20] I am aware that an interdict is an extra-ordinary remedy, which is not granted lightly. The requirements necessary for a final interdict are a clear right, an act of interference and no other remedy. The applicant has, on a balance of probabilities, established a right to the use and enjoyment of his property. The applicant resides in his property. The proximity of the applicant's property to that of the Madrasah and the overwhelming evidence of the making of the Call to Prayer and the purpose thereof, create probabilities that favour the applicant's version that the Call to Prayer interferes with his private space. The interference

constitutes an injury and it is a continuous injury. In my view, the applicant has established on a preponderance of probabilities that the Call to Prayer interferes with his private space. Lastly, the applicant seeks to put a stop to the interference with his private space. It could be argued that he moves away from the area, but in my view, this is extreme and does not constitute an alternative legal remedy. There is no other adequate alternative legal remedy available to the applicant.

[21] I, accordingly, grant the order in the following terms:

1. The first respondent is ordered to ensure that Calls to Prayer made from its property, to wit, Lots 703, 704 and 705 Isipingo Beach, are not audible within the buildings in the applicant's property at [...], Isipingo Beach, Durban.
2. Prayer 2 in the Notice of Motion is refused.
3. No order as to costs.

Mngadi J

APPEARANCES

Case Number	:	3848/2019
For the Applicant	:	In person
For the first respondent	:	Mr. D.W. Aldworth
Instructed by	:	Shaukat Karim & Co. Durban
Matter heard on	:	14 August 2020
Judgment delivered on	:	21 August 2020