Dispute Resolution
ALERT

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CDH
CLIFFE DEKKER HOFMEYR

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Loadshedding causing nuisance (in more ways than one)

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For the past several years South Africans have, unfortunately, had to endure and experience the struggles brought about by loadshedding. While some sit without electricity for up to 10 hours a day, others have decided to utilise the many products available on the market that provide houses with power when Eskom is not.

Due to the substantial costs involved in installing an inverter or solar panels, many are sticking to their trusty generators. However, as people are getting more and more frustrated with loadshedding over time, we have seen a rise in nuisance complaints to local municipalities from neighbours who simply cannot stand the noise and the fumes emanating from generators next door. Some of these generators start up early in the morning and may run till late at night, causing "*sleepless nights*" for the neighbours.

The Supreme Court of Appeal (SCA) in the case of *Madrasah Taleemuddeen Islamic Institute v Chandra Giri Ellaurie and Another* (755/2021) [2022] ZASCA 160 considered a scenario where a religious institute was accused of causing noise nuisance to its next-door neighbour through its religious practices. Essentially, the SCA dealt with the age-old question of: When is noise emanating from a neighbour's property actionable in law? Although the facts of this case are entirely different, the principles in regard to nuisance considered by the SCA are directly relevant.

Principles regarding nuisance

Mr Chandra Ellaurie, who lived about 20m from the Madrasah Taleemuddeen Islamic Institute (Institute), approached the High Court in Durban claiming relief on various grounds. Of importance to this discussion, Ellaurie sought an interdict to prohibit the Institute's call to prayer, also known as the *Azaan*, from being audible from his property. Ellaurie contended that the *Azaan* was causing a noise nuisance and was negatively impacting his right to use and enjoyment of his property. Ellaurie argued, *inter alia*, that the *Azaan* invaded his personal space and happened at "*unearthly*" times, the first being around 3:30am in the summer.

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The High Court granted the interdict against the Institute in terms of which the Institute was ordered to ensure that the sound of the *Azaan* not be audible at Ellaurie's property. The Institute appealed this order.

The SCA highlighted that the main principle of our neighbour law is that the right to undisturbed use and enjoyment of property, while important, is not unlimited. A limited interference by neighbouring properties is expected and is in fact accepted in law. The court stated that mutual tolerance is a civic value, on the condition that the tolerance must also be reasonable. In this regard, the SCA referred to the judgment of *Holland v Scott* (1881-1882) 2 EDC 307, where the court held that for nuisance to be actionable it had to interfere seriously and materially with the complainant's ordinary comfort and existence.

The SCA further stated that the following factors had to be considered when determining whether tolerating the interference would be reasonable: the seriousness of the interference, the time and duration of the interference, the possibility of avoiding the harm, and, importantly, the applicant's sensitivity to the interference. In relation to the last factor, the test is whether a reasonable man would tolerate the interference. This means that if the complainant has a special or extraordinary sensitivity towards the interference, the interference will not necessarily be regarded as unreasonable.

In consideration of the case made by Ellaurie, the SCA highlighted that his claim for an interdict failed to meet the legal requirements. When applying for a final interdict, the applicant has to establish a clear right. Thereafter, the applicant would have to demonstrate that the nature or level of the interference unreasonably interferes with their established right, as well as that there are no other satisfactory alternative remedies. The SCA held that Ellaurie had to satisfy the requirements for the final interdict, in particular, Ellaurie had to make a case that the *Azaan* interfered with his comfort and was unreasonable.

In the end, the SCA found that Ellaurie did not adequately explain the nature and level of the noise nuisance or the duration thereof, nor did he tender evidence of what a reasonable *Azaan* would be in the circumstances. Accordingly, the SCA upheld the appeal and dismissed the High Court's order, with costs.

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Factors to consider for generators

While the noise and fumes from your neighbour's generator may be frustrating, there are multiple factors that a court would consider in order to determine whether, under the circumstances, a reasonable person would tolerate the nuisance.

South Africans cannot be faulted for trying to lessen the discomfort and safety concerns caused by loadshedding in their homes. However, if the noise or the fumes stemming from the generator are excessive, the question is whether a neighbour would be entitled to apply for an interdict to stop a neighbour from using a generator and, if so, whether an interdict would be granted in that regard. Based on the *Madrasah* case it is safe to say that over and above fulfilling interdict requirements, the court will also look at whether or not a reasonable person would be sensitive to the amount of noise and fumes emanating from the specific generator. It would be interesting to see whether any of the complaints that the local municipalities have been receiving on this issue will ever make it to court for adjudication.

Muwanwa Ramanyimi and Claudia Grobler

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