

continue to deposit future rent regularly in Court and any failure in this regard shall entail their eviction even before six months from today."

Petition dismissed.

1985 PSC 342

[Supreme Court of South Africa]

Prezent : Williamson J.

AHMADIYYA ANJUMAN-A-ISLAM LAHORE (SA)
and another

versus

THE MUSLIM JUDICIAL COUNCIL and others

Case No. 10058 of 1982 decided on 20th November, 1985.

(a) Ahmadis (Lahori)

—Held : Ahmadis are Muslims.

(Para 67, 68, 83)

(b) Ahmadis

—Mirza Ghulam Ahmad—Founder of Ahmadi sect of Muslim—
Held : Mirza Ghulam Ahmad was Wali" or "Mujadid" and not the prophet.
(Para. 27)

(c) Ahmadis (Lahori)

—Muslim Mosque—Admittance of—Entitlement of—Ahmadis (Lahori)
—Held : Ahmadis (Lahori) are entitled to admittance to Muslim mosque
held under deed of Transfer dated 11-2-1881.
(Para. 83)

(d) Ahmadis (Lahori)

—Muslim cemetery—Burial—Right of—Ahmadi (Lahori)—Held :
Ahmadi (Lahori) has right of burial in Muslim cemetery as another Muslims
have.
(Para. 83)

(e) Ahmadis (Lahori)

—Muslims—Right of propagation against Ahmadis—Muslims restrained
from disseminating, Publishing or otherwise Propagating false, harmful
malicious and defamatory matter of and concerning members of the
Ahmadiyya Anjuman Ashati Islam Lahore South to wit, that such mem-
bers are non-Muslims disbelievers 'Kafir, apostates, murtads' that
they are non-believers.
(Para. 83)

(f) Ahmadis

—Founder of Ahmadi Sect—Claims of—Stated :—

- (i) He denied receiving *wahy nubuwwat* (Prophethood) and affirmed receiving *wahy wilayat* (sainthood).
- (ii) He denied the use of prophet (*nabi*) in its technical sense and affirmed the use of the term in its literal sense.
- (iii) He denied that the term *muhaddas* could be applied to him in its literal sense and affirmed that he was a *muhaddas* in the technical sense.

(iv) He denied being an actual or real prophet and affirmed being a metaphorical prophet.

(g) Supreme Court of South Africa

—Jurisdiction of—Dispute before Court whether Ahmadis are Muslims or not—Contention that decision as to Ahmadis are Muslims is a writ involve determination of a number of doctrinal and religious questions which are purely ecclesiastical in nature and in appropriate for a Secular Court to attempt to resolve such question—Repelled—Held: Courts of South Africa never lacked courage to deal with doctrinal dispute where some has been necessary nor have they shirked an obligation to do so when faced therewith. (Para. 8)

(h) Supreme Court Rules Act (South Africa)

—S. 19(1)(a) (iii)—Supreme Court—Jurisdiction of—Declaratory order—Question whether Ahmadis are Muslims or not—Held: Resolution of the question whether Ahmadis are Muslims or not may well be more fairly and dispassionately decided by a secular Court such as this than by some other tribunal composed of theologians. (Para. 8)

Long v. Bishop of Cape Town, 4 Searle 162; *Jan & others v. Ismail and others* 1866(5) Searle 102; *Hessen and others v. Daout*, 6 SC 372; *Behardien v. Intillah*, 6 CTR 41; *Du Toit and others v. Domingo*, 7 CTR 134; *Doble and others v. Salle and others*, 1900(7) SC 552; *Salle v. Connelly and others*, 1908 EDC 97; *Omar Raffie and others v. Behardien Jappie and another*, 1891(6) EDL 169; *Jamila and others v. African Congregational Church*, 1971(3) SA 836(d) at 840(E) and *Allen & others Nao v. Gibbs and others*, 1977(3) SA 212 SECLD; *Innes CJ in Siffman v. Krstel* 1909 TS 538; *Shenker Bros. v. Baster*, 1952(3) SA 655 AD *Greenberg JA* 670 (G); *Narastakath v. Parakkal* (1922) 45 Indian Law Reports Madras 926; *Muslims and Auo v. Marrikan*, Case No. 531/1925; *Hakim Khalil Ahmad and others v. Malik Israfil and Orders* 1917 Vol 37 *Indian Cases* (Patna High Court) P. 302 *St. Edward Chemler CJ and. Roe J.* 302/1917 Ind.; *Airyashu Keresht v. Hlsnatullah Koresht* /1972; Vol XXIV All Pakistan Legal Divisions Kar. P. 653. *Imdadally H Agha J. Queen Empress v. Remazan and others* (1885) ILR 7 All 462 *Asa Ullah v. Azim Ullah* (1889) 12 ILR 694 *Malik Ahmad v. Israfil* 1917 Ind. AIR (1955) All. 68; *Mulla on the Principles of the Muhammedan Law* (Pak Ed. 223/1980) and *Fyzee, Outlines of Muhammedan Law* pp 319; *In re Consistory of the Dutch Reformed Church, Cape Town* (1897) 13 SC 5, 9-10 and also *Honore The South African Law of Trust* (2nd ed) PP 36-37; *Noardien v. Moslem Cemetery Board* 1965(3) SA 174 (C); *Levy v. Moltke* 1934 BDL 296, 324; *SA Associated Newspapers Ltd. and another v. Estate Palsar* 1975(4) SA 787 (AD); *Knupfer v. London Express Newspaper Ltd.* (1944) 1 All ER 494 (HC) 497 8; *Levy v. Von Moltke* 1934 EDL 296, 315, and also *Gayley on Libel & Slander* (6th ed) P. 141, Note 30. ref.

D to of hearing : 20th November, 1985.

JUDGMENT

Wallamson, J.—Originally two plaintiffs sued in this action. They were, as first plaintiff the Ahmadiyya Anjuman-Islam Lahore (SA), a voluntary association of Muslims constituted in terms of a written constitution whose members are commonly known and referred to as Ahmadis and

second plaintiff one Ismail Peck. Ismail peck is a member of the first plaintiff association and sued in his individual capacity as well as in his capacity as a member of such association,

2. The defendants are, firstly, the Muslim Judicial Council (Cape) described as a voluntary association of certain Sheikhs, Imams and theologians; secondly, the trustees of a mosque situated at the corner of Long and Dorp Streets, Cape Town, to which I shall refer as the mosque and; thirdly, the trustees of the Malay portion of the vygekraal Cemetery, Athlone, Cape.

3. Briefly stated the plaintiffs' cause of action is that there are certain fundamental doctrines and principles upon which Islam is founded; that the plaintiffs accept these fundamental doctrines and principles and are Muslims; that all mosques are dedicated to Allah and every Muslim, irrespective of sect or movement, has the right of admittance to any mosque no matter where it is situated for the purpose of prayer and other religious functions and that the first defendant published certain false and defamatory matter of and concerning the plaintiffs, to wit, that all Ahmadis are non-Muslims and are apostates and disbelievers and as such should be denied admittance to all mosques and also should be denied the right to bury their dead in any Muslim cemetery.

4. As against the second defendant the plaintiffs allege that it wrongfully refused, despite requests, to concede the right of members of the first plaintiff and the right of second plaintiff to admittance to the mosque. This, they said, was contrary to certain conditions contained in an annexure to a deed of transfer passed on 11 February 1881.

5. As against the third defendant the plaintiffs allege that it refused to recognise the right of members of the first plaintiff to have their dead buried in the Malay portion of the Vygekraal Cemetery. This cemetery is held in terms of a deed of grant dated 18 December 1908. This refusal, so it is alleged, is contrary to the express terms of this deed of grant.

6. The plaintiffs, on the above-stated facts, claimed:

- (a) Against all three defendants an order declaring that members of the first plaintiff and second plaintiff are Muslims and as such are entitled to all rights and privileges as pertain to Muslims.
- (b) Against the first defendant an order interdicting it from disseminating, publishing or otherwise propagating the defamatory matter complained about.
- (c) Against second defendant an order declaring that members of the first plaintiff and the second plaintiff are entitled to admittance to the mosque and against the third defendant an order declaring that members of the first plaintiff and second plaintiff are entitled to the same rights of burial in the cemetery as pertain to all Muslims.

7. At an earlier stage in the proceedings defendants excepted to first plaintiff's claim against them on the ground that first plaintiff had no *locus standi* to bring such claims. The exception was upheld and the particulars of claim, in so far as they related to the first plaintiff, were set aside. Thereupon the action was continued by second plaintiff only.

3. Also at an earlier stage defendants gave notice of their intention to apply at the hearing of the trial for the determination *in limine*, separately from the merits of the action and in terms of Rule of Court 33(4), of certain legal issues and for the stay of all proceedings in the action until such issues had been disposed of. One of the questions raised was formulated thus :

".....Whether or not the Court should decline to entertain on its merits the dispute as to whether Ahmadis are Muslims or not..."

Accordingly when the matter was originally set down for hearing no evidence was led. It was confined to legal argument on the questions raised. Judgment was delivered on 24 July 1985 by *Berman J.* In his judgment the learned Judge said as follows :

"Peck seeks against all three defendants a declaratory order that he is a Muslim and thus entitled to the rights and privileges pertaining to Muslims. He founds his right to claim this relief upon the provision of section 19(1) (a)(iii) of the Supreme Court Act No. 59/1259 which empowers the Court, in its discretion, to enquire into and determine at the instance of any interested person any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. It was Mr. Muhamed's contention that this Court should not entertain Peck's application for such an order because it involves a decision as to whether or not Ahmadis are Muslims, a decision which will involve determination of a number of doctrinal and religious questions which are purely ecclesiastical in nature and it is inappropriate for a secular Court to attempt to resolve those questions, and further, that the relief sought by Peck is of an academic nature and not *bona fide*. With regard to the exercise or other wise of the Court's discretion in favour of Peck Mr. Muhamed invited the Court to take into account the undesirability of a secular tribunal concerning itself with matters of spiritual faith to the inordinate length of a trial on this aspect of the matter, and to the difficult and complicated nature of the doctrinal questions involved. Indeed, he raised the question preliminary even to that of whether or not the Court should exercise its discretion in favour of Peck as to whether a declarator can ever be granted where the claimant therefor can obtain consequential relief, for example, an order directing that he be permitted to pray in the mosque."

"I am furthermore not persuaded by Mr. Muhamed that this Court should exercise its discretion against the grant of a declaratory order such as the one sought as a preliminary matter so as to avoid embarking on the treacherous waters of religious disputes. Our Courts have never lacked the courage to deal with doctrinal disputes where this has been necessary, nor have they shirked an obligation to do so when faced therewith. Moreover, to the submission that it is undesirable that this Court be required to decide a matter involving a determination of a number of doctrinal and religious questions, purely ecclesiastical in nature, the short answer is that most litigation, if not all litigation, is undesirable. Once the matter raised by a citizen (in this instance, Peck) is one which he is entitled to lay before this Court for decision, and it is one which this Court is competent to deal with, and if the issue (s) thereby raised is or are within this Court's jurisdiction, mere dictates of convenience or inconvenience, desirability or

undesirability cannot disentitle him to a hearing and a decision. And further, the discretion vested in the Court in terms of section 19(1) (a)(iii) of Act 59/1959 should not be exercised against a claimant for a declaratory order on the ground that the issue to be decided on is a theological rather than a secular one. Indeed it appears to me that the resolution of the question whether Ahmadis are Muslims or not may well be more fairly and dispassionately decided by a secular Court such as this than by some other tribunal composed of theologians. Certainly when regard is had to the considerable number of experts to be called and the considerable volume of testimony to be given by them, this Court may well be the most suitable forum to deal with them and with their evidence"

The Court accordingly answered the question in favour of the plaintiff and the matter then proceeded to trial in the ordinary course.

9. When the trial in this matter commenced on 5 November, 1985 Mr. Desai, on behalf of the three defendants, informed the Court that his clients no longer wished to participate in these proceedings and that they accordingly withdrew their defence. In doing so he explained that no disrespect was intended towards the Court but his clients felt that as Muslims they could not in conscience submit to the jurisdiction of this Court, which is the ordinary secular Court of this country, to decide who is a Muslim. Be that as it may there is no doubt that where civil rights are in issue our Courts have never refused to hear the matters because the resolution of the disputes about those rights may also involve decisions as to doctrinal matters of other issues of a religious or theological nature. As long ago as 1862 in the case of *Lang v. Bishop of Cape Town* 4 Searle 162 Lord Kingsdown, in delivering the judgment of the Privy Council, referred at page 179 to the plaintiff's right of ;

"...recorting to a civil Court for the restitution of civil rights and thereby giving to such Court jurisdiction to determine questions of an ecclesiastical nature essential to their decision".

Thus in *Jan and others v. Ismail and others*, 1866(5) Searle 102, we find the Court being called upon to decide upon the rights of appointment to official positions in a mosque. It is perhaps not out of place to note that in this case we see two contending groups of Muslims approaching a secular Court to decide matters of Muslim law and practice. Indeed over the years there are many instances of our Courts applying Muhammadan law and Muslim usages and customs without the point being taken that it is inappropriate for a secular Court to decide matters of this nature. (See in this regard the article in the 1907 *Cape Law Journal* at page 176 entitled *Muhammadan Law in South Africa* and also *Hassen and others v. Daout*, 6 SC 372; *Behardien v. Intillah*, 6 CTR 41; *Du Toit and others v. Domingo*, 7 CTR 134; *Doble and others v. Salla and others*, 1950(7) SC 552; *Salle v. Connelly and others*, 1908 EDC 97; *Omer Ruffie and others v. Behardien Japple and another*, 1981(6) BDL 169; *Jamille and others v. African Congregational Church*, 1911(3) SA 836(d) at 840 (B) and *Allen and others v. Nna v. Gibbs and others*, 1977(3) SA 212 SECLD).

10. It is abundantly clear both from the pleadings and from the evidence that what second plaintiff as a citizen of this country is really trying to do is, firstly, to enforce his civil rights not to be defamed; secondly, to establish his right to attend a mosque from which he says

he is wrongfully denied entry and, thirdly, to establish his right to burial in a cemetery established by grant of the Governor of the Cape. In order to succeed on the above claims plaintiff has to establish that he is a Muslim and this is where the claim for a declaration to that effect becomes relevant. It is a claim which does not exist *in vacuo*, nor is it one which is of merely academic interest. It is, in my view, an appropriate kind of order to grant in the circumstances of this case for it is inextricably linked with the other orders which involve the civil rights of a citizen. Indeed it is the foundation upon which the right to those orders rests. A Court of law therefore has no option but to enquire into the issue as to whether or not second plaintiff is a Muslim and it would be failing in its duty to a citizen of this country were it to decline to do so. This falls fairly and squarely within the principle enunciated by the Privy Council in *Long's case* well over a century ago, a principle which has been consistently applied by our courts right up to the present day.

11. After explaining his clients' attitude Mr. Desai and his clients then left the Court and played no further role in the proceedings.

12. I turn then to a consideration of the merits of second plaintiff's claims which were now advanced on an unopposed basis. Because evidence is uncontradicted it does not follow that it must be accepted by a Court of law. As pointed out by *Innes CJ* in *Siffman v. Kriel* 1909 TS 538:—

"It does not follow because evidence is uncontradicted that therefore it is true.....The story told by the person on whom the *onus* rests may be so improbable as not to discharge it".

So too in *Shenker Bros v. Bester*, 1952(3) SA 655 AD, *Greenberg JA* at page 670 (G) observed:

"Similarly, the circumstance that evidence is uncontradicted is no justification for shutting one's eyes to the fact, if it be a fact, that it is too vague and contradictory to serve as proof of the question in issue".

I have not been unmindful of these considerations when assessing the evidence placed before me.

As already indicated the principal thrust of second plaintiff's cause of action is that Islam is founded upon certain fundamental doctrines and principles. Second plaintiff placed before this Court the evidence of one Hafiz Sher Muhammad, an Ahmadi theologian and missionary and a scholar and a person learned in matters concerning the Muslim faith and religious practices. I am satisfied that he is an expert in this field and able to speak with authority on it. Before dealing with these matters the witness gave a brief historical perspective of the Ahmadiyya movement. The movement, in the main, revolves around the life of its founder, one Mirza Ghulam Ahmad who was born about the year 1835 in what is now Pakistan and who died in 1908. During the years 1880 to 1884 he wrote his first treatise in four volumes known as the *Barahin-i-Ahmadiya*. The evidence was not only that in a revelation God had entrusted to him a special mission but that he claimed to be the Mujaddid (reformer) of the 14th century. The movement itself was named in 1900 after the name of the Holy Prophet. This was necessitated by the requirement that Muslim

"sects" were required to be identified in a census which was held in 1901. After the death of Mirza in 1908 the leadership fell to one Nur-ud-din who led the movement until 1914. In that year certain differences arose between two groups within the movement. This culminated in a split within the movement. One group became known as the Lahoris and the other group became known as the Qadianis. It is to the first of these groups that second plaintiff belongs. After the split in March 1914 the leadership of the Lahori group passed to one Muhammad Ali who retained it until 1951 when Sadr-ud-din assumed the leadership. In 1981 the present leader Dr. Saeed Ahmad Khan assumed office. In 1974 the constitution of Pakistan was amended and as a result the Ahmadis were declared to be non-Muslims. Finally, in April 1984, a presidential ordinance was promulgated which stipulated certain penalties if an Ahmadi called himself a Muslim. Whatever the position may be according to Pakistani law the matter which falls to be determined by this Court in accordance with South African law is whether plaintiff is entitled to the relief he has claimed. This brings one to the evidence of Hafiz Sher Muhammad.

13. He dealt in the first place with what constitutes "Islam" and "Muslim" by examining meticulously the Holy Qur'an, the Hadith (i.e. the sayings of the Holy Prophet Muhammad) and the views of a number of Muslim scholars. The crux of this aspect of his evidence was that the religion of Islam could be summarised in the two phrases: "...*la ilaha ill-Allah*" (there is no God but Allah) and "Muhammad-ur rasul Allah" (Muhammad is the messenger of Allah). By affirming these two precepts a person enters the fellowship of Islam. This is known as the Kalima.

14. While the cardinal aspect of the religion of Islam is a recital of Kalima it is quite clear that according to the teachings of the Holy Prophet a Muslim is to be recognised by his practical behaviour. According to the Hadith, the Holy Prophet is recorded as having said:

"Islam is that you should worship Allah alone and do not associate anyone with Him, keep up prayer, give to charity (Zakaat) perform the pilgrimage (Hajj) to Mekka and fast during Ramadaan."

According to the evidence placed before the Court, and in particular, the writings of the Hadith, there is no need to investigate deeply into the beliefs held by a person to determine whether he is a Muslim. One need only look at some aspects of his apparent conduct. If he is seen praying in the manner of the Muslim prayer, praying in the direction in which Muslims pray, or if he is heard proclaiming the Kalima, for example, then he is a Muslim.

15. Moreover, according to the sayings of the Holy Prophet, as recorded in the Hadith, it does not lie in the mouth of one Muslim to condemn another Muslim as a *kafir* or unbeliever. Indeed *takfir* or the condemnation of a Muslim by another Muslim as a *kafir* is strictly prohibited. This principle goes as far as to say that if a person's faith is only one percent in extent, it does not make him a *kafir*, i.e. —

".....if there are ninety-nine reasons for considering someone a *kafir* and only one reason against it, the *mufti* and the judge is bound to act according to that one reason for negating the *kafir*....."