

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 363/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CARAMELLOS TRUST IT 730/2004

Applicant

and

MASTER RECYCLERS BFN (PTY) LTD

1st Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

2nd Respondent

HEARD ON: 12 MAY 2022

CORAM: MATHEBULA, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 13 SEPTEMBER 2022. The date and time for hand-down is deemed to be 13 SEPTEMBER 2022 at 09H30.

Introduction and Parties

[1] In the present proceedings the applicant ostensibly applies for a relief to compel the respondents to comply with the by-laws for waste disposal and recycling. The applicant is the registered owner of a property known as 5 Mannion Road, Bloemfontein. The first respondent is its neighbour who occupies an adjacent property at 5a Mannion Road, Bloemfontein from which premises it operates and does the waste recovery and recycling business. The second respondent is the municipality established in terms of the Municipal Structures Act 117 of 1998 and other related legislations governing local authorities. There are no papers nor appearance made on behalf of the second respondent.

Brief litigation history

[2] The applicant issued and served an application against the two (2) respondents under case number 1755/2021. The orders sought were couched in the following terms: -

1. Ordering the first respondent to conduct his business in terms of the applicable laws and regulations for waste disposal and recycling;
2. Ordering the second respondent to apply the above mentioned laws and regulations to the business of the first respondent and ensure compliance thereof;
3. Prohibiting and interdicting the first respondent from performing and/or conducting any of its business activities outside its premises;
4. Prohibiting and interdicting the first respondent to cause:
 - (a) a health risk to the public in general and neighbouring properties/businesses;

(b) a nuisance to the applicant's property and/or tenants of the said property by blocking access to the applicant's property and prohibiting the applicant the full use and enjoyment of its property

[3] On 7 October 2021, Van Rhyn AJ (as she then was) granted an order per agreement between the parties which read as follows: -

Having considered the notice of motion and the other documents filed of record and having heard the Legal Practitioner for the applicant,

IT IS ORDERED THAT:

1. As between Applicant and First Respondent:

1.1 By agreement between Applicant and First Respondent, prayer 1 of the Notice of Motion is granted.

2. As between Applicant and Second Respondent:

2.1 Prayer 2 of the Notice of Motion is granted.

3. Each party to bear its own costs.

BY ORDER OF THIS COURT

[4] This, in part, explains the absence of the second respondent in the proceedings before me. The applicant, in my view, seeks substantially the same order which it sought under case number 1755/2021.

Applicant's submissions

[5] The key challenge of the applicant is against the defence of *res judicata* raised by the first respondent. The first attack is that there is no substance in the defence as the order was granted by agreement. The cornerstone of this submission is that there is no final decision whether the first respondent is conducting its business in a lawful manner. The alternative argument is that when the order was granted, it was underpinned by fraudulent misrepresentation on the part of the respondents. The applicant was led to believe that the first respondent was compliant with the relevant by-laws regarding waste recycling. The hard fact is that the permit was only issued on 17 November 2021.

[6] Counsel pointed out that the second respondent does not oppose the relief sought. He lamented the fact that there was no explanation from the second respondent on what basis was the business of the first respondent allowed to be conducted before the permit was issued. Pertinently he buttressed the point that there was silence as to when did the first respondent apply for the necessary permit. Overall he submitted that the applicant has made out a proper case for the order sought with costs.

Respondent's submissions

[7] The essence of the case for the first respondent is that the court on 7 October 2021 has already handed down a Court Order. The aforementioned Court Order, it was argued, did not have a date on which it will lapse. It was not granted pending a certain relief or the like.

[8] On the question that the order was obtained on the back of a fraudulent misrepresentation, counsel argued that it was of no concern to the matter before me. If it is, he drew attention to the explanation contained in the opposing affidavit filed under case number 1755/2021 that it was not necessary to be issued with a licence because the first respondent is a waste collector not a waste recycler. Furthermore, at that time the second respondent was no longer issuing such licences.

Discussions

[9] In general terms *res judicata* denotes a principle that a cause of action may not be litigated more than once after a judgment on the merits has been handed down. A party relying on the defence of *res judicata* must allege and prove all the elements underlying the defence.

[10] The apex court in **Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others** explained the elements as follows: -

“The requirements of *res judicata*, although trite, can be summed up as follows: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) with respect to the same subject-matter, or thing. In a Lesotho case, *Masara v Tsepong (Pty) Ltd* [2015] LSLC 59 at para 14, the Court of Appeal stated that the defence of *res judicata* requires that a party must establish that the present case and the previous case are based on the same set of facts that have been finalised by a competent court or tribunal by the same parties on the merits of the same cause of action.”¹

[11] It is primarily on this aspect that the two (2) parties part ways. The fact of the matter is that the first respondent is before this court seeking the same orders that were granted on 7 October 2021. I agree with counsel for the first respondent that the issue whether that order was granted as a result of fraudulent misrepresentation or not is not an issue before me. The order was final in effect and could not be altered by the court that granted it.

[12] It is not the case of the applicant that the order was ever set aside, amended or abandoned. It was granted not pending anything. It means that it brought finality to the matter between parties. It was also definitive of the rights of the parties. Undoubtedly it disposed the substantial portion of the relief claimed.²

[13] It will not make sense and also not be in accordance with our law that I proceed to make an order while there is a similar order in place. Whether the first respondent is compliant or not is not a good enough factor for this court to override

¹ 2020 (1) SA 327 (CC) at para 71.

² *Zweni v Minister of Law and Order* 1993 (1) SA 523 (AD).

an order granted on 7 October 2021. The requirements that must be met for this defence to stand are present in the dispute between the parties.

[14] For the foregoing reasons, I conclude that the application has no merits and it should not succeed. The successful party is entitled to the costs.

[15] In the circumstances, I make the following order: -

15.1. The application is dismissed with costs.

M.A. MATHEBULA, J

On behalf of the applicant:

Instructed by:

— Adv. J. Lubbe SC

Van Der Merwe & Sorour

BLOEMFONTEIN

On behalf of the first respondent:

Instructed by:

Adv. S.J. Reinders

Hendre Conradie Incorporated

(Rossouws Attorneys

BLOEMFONTEIN

On behalf of the second respondent:

No appearance.