

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

Case No. 1081/2018

In the matter between:

UNI-SPAN FORMWORK AND SCAFFOLDING (PTY) LTD

Applicant

and

ETHEKWINI SCAFFOLDING (PTY) LTD

Respondent

JUDGMENT

BEZUIDENHOUT J

[1] Respondent sought condonation for the late filing of its heads of argument which were not opposed and such condonation was therefore granted.

[2] Applicant is seeking the return of various goods which it alleges it either sold or leased to respondent. It is common cause that applicant and respondent had business dealings and that a credit agreement had been entered in between them. Various goods were either purchased or leased by respondent and some of it was returned. It is admitted by respondent that it is indebted to applicant in the amount of R55 227.04. Applicant requires the return of the goods as set out in annexure C to the notice of motion and the costs of the application.

[3] Applicant needs to prove that it is the owner of the goods, that they are in existence and that respondent was in possession of the goods at the time that the application was brought which was on 1 February 2019. Goods were either leased or sold to respondent during the period November 2016 to April 2017. It is not in dispute that the goods did belong to applicant. Ownership of the goods and that they are in existence is also not in issue. The issue to be decided is whether respondent was in possession of the said goods at the time that the application was brought. Respondent attached copies of a diary of its driver one Baliram wherein he noted when certain items were returned to applicant. Respondent attached "hire return" documents from applicant which cover a period of from November 2016 to the end of April 2017. This indicates that during the said period goods were returned to applicant.

[4] It is the contention of respondent that when certain goods were returned during July 2017 the driver returning the goods was not given the necessary hire return documents nor was the vehicle weighed as was the normal procedure. Respondent avers that by April 2017 all the goods had been returned and that the application therefore is ill considered as there is nothing to return. There is a confirmatory affidavit from the said Baliram which was handed in at the hearing and which was not objected to by applicant.

[5] It was submitted that a confirmatory affidavit was not sufficient and that an affidavit from the said Baliram should have been attached dealing with the issues set out in the answering affidavit as they were not merely non contentious or

formal evidence but was evidence of a particular witness which was crucial in the circumstances as it relates to the return of the said goods. It was submitted by Mr van der Westhuizen that indeed if there is a dispute of fact in this regard that the matter should be referred for the hearing of oral evidence. There are various documents indicating that goods were indeed returned to applicant which applicant denies. On the papers it would therefore appear that there is a dispute of fact as to whether the goods were returned or not. This may not have been apparent at the time when the application was brought but it became apparent when the answering affidavit was filed together with the “hire return” documents on the letterhead of applicant.

[6] The fact that an amount of plus minus R55 000.00 may still be owing is in my view insufficient proof that the goods were not returned. There are also the diary entries of Baliram relating to the times when goods were returned and no “hire return” forms were provided.

[7] It is therefore impossible on the papers as they stand to establish whether any of the goods were returned or not and whether respondent was in possession of the goods at the time that the application was instituted. If they were not in possession, at the time then that is fatal for applicant’s application. It would therefore appear that the best way to resolve the issue would be that there would have to be evidence and further documentation to establish exactly whether the said goods were indeed returned or not. The matter must either be referred for the hearing of oral evidence or be referred to trial.

[8] In my view considering the facts it would be advisable that the matter be referred to trial.

Order:

1. The matter is referred to trial.
2. Applicant's notice of motion will stand as the summons.
3. Applicant to file a declaration within twenty days of this order.
4. The rules of this court will be applicable to any further pleadings and proceedings.
5. Costs are reserved for determination by the trial court.

BEZUIDENHOUT J

DATE OF HEARING : 24 October 2019

DATE OF JUDGMENT : 11 November 2019

FOR THE APPLICANT : Mr AP van der Westhuizen

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