REPORTABLE

IN THE KWAZULU-NATAL DURBAN AND COAST LOCAL DIVISION

REPUBLIC OF SOUTH AFRICA

CASE NO: 953/2010

In the matter between:

GAAP POINT OF SALE (PTY) LTD	Applicant
and	
NASH SURESH VALJEE N.O.	First Respondent
NALAINDA JAMNADAS VALJEE N.O.	Second Respondent
ARUSH VALJEE N.O.	Third Respondent
SURESH MOHANLAL VALJEE N.O.	Fourth Respondent
PRADIP LAXMAN POPAT N.O.	Fifth Respondent

Delivered:

JUDGMENT

HUGHES-MADONDO AJ

In these motion court proceedings the applicant seeks a declaratory order to the effect that its right of occupation of the premises at 34 Essex Terrace, Westville, is in terms of a monthly tenancy. The Respondents on the other hand contend that the applicant's

occupation of the premises is subject to a written lease agreement which expires on the 31 January 2014.

The applicant is an incorporated company duly registered with its principal place of business at 4, Constantia Park, 526-16th Road, Midrand, Gauteng. The respondents are trustees of the Suresh Mohanlall Valjee Family Trust ("the Trust"). It is common cause that the applicant leased the first and second floors of 34 Essex Terrace, Westville ("the property") from the previous landlord (the details of the previous landlord and lease agreement are not pertinent to this application). The aforesaid tenancy was subject to a written lease agreement that terminated on the 31 January 2009. It is further common cause that the Trust is the successor in title having become the new landlord of the property. The parties entered into negotiations in order to conclude a new lease agreement.

The applicant contends that no further lease agreement was concluded between the parties and its occupation of the property was on a month to month tenancy. According to the applicant the reason why the parties could not reach consensus was because they could not agree on whether the applicant was required to pay a deposit in respect of the lease of the premises. The applicant was of the view that it should not pay a deposit whilst the respondents insisted that the applicant pay a deposit.

The applicant's case is that it did not conclude a lease agreement with the respondents.

The applicant states that it received a lease agreement from the respondents for signature. On receipt the applicant signed it and made alteration in respect of the paragraphs dealing with the payment of a deposit. The lease agreement was then returned to the respondents. The applicant then sought to cancel the lease agreement. The respondents said that they had already accepted the applicant's amendments to the agreement and have duly signed the agreement.

The respondents on the other hand contend that after the expiration of the previous lease, the applicant continued to occupy the property on a month to month basis. This monthly tenancy was in place whilst the parties negotiated the terms of the new lease agreement. Once the negotiations were complete a written lease agreement was drawn up by the respondents and sent to the applicant for signature. The applicant signed the lease agreement, however deleted the clause pertaining to the payment of a rental deposit. The amended agreement was then sent back to the respondents' attorney who was acting on their behalf.

From the documents on file, there was an exchange of numerous correspondences between the applicant, respondents and their respective representatives. It transpires that the applicant signed the lease agreement with the amendments mentioned above on 22 June 2009. On 13 August 2009 the respondents sent an email to the applicant, to the effect that the applicant's legal representative had agreed to the applicant paying a deposit of 4 months rental. The applicant responded on the same day, saying that it had made

them aware from the beginning that it was not prepared to pay a rental deposit and reiterated that they were not going to pay such deposit.

On 31August 2009 the legal representative for the respondents sent a letter to the applicant in which it was recorded that the respondents were "*adamant that the lease document must be re-signed, and the rental deposit clause left unaltered..., and until such time as the fresh lease has been entered into you are no more than a 'monthly tenant'.*
In the circumstances, we request that you furnish your indication in writing by return that you are willing to enter into a lease as drafted by our client, specifically including the rental deposit clause.
We await to hear from you ...by no later than close of business on the 3rd September 2009."

The applicant responded on 1 September 2009 reiterating that at no time had it agreed to pay a rental deposit.

On 18 September 2009 the respondent's attorney sent further correspondence to the applicant. The applicant was advised that the respondents were now prepared to "accept one month's rental deposit". They requested that the applicant respond if it was acceptable in order for the lease agreement to be signed. No response was forthcoming of the applicant even though the respondent had requested same.

On 16 October 2009 the applicant's representative sent a letter to the respondents, in

which it was stated:

"*We have now received formal instructions to withdraw our client's offer to lease the lease premises on the terms as set out in the proposed new lease which was signed and amended by our client but not signed by your client."*

A response was received from the respondents on the 20 October 2009 via its representative, stating that "unbeknown" to him his client had accepted and signed the lease amended by the applicant on 21 September 2009. The respondents contend that as they have accepted the lease as amended and signed by the applicant, a binding written agreement existed between the parties.

That amounts to a synopsis of the sequence of the events leading up to this dispute.

The issue to be determined is whether there is a written lease agreement between the parties. A further issue is whether the applicant can seek a declarator, in light of the facts as they appear in the papers. A further issue is whether on the facts before this court the applicant is entitled to the grant of a declaratory order.

The applicant seeks an order in terms of Section 19(1) (a) (iii) of the Supreme Court Act No. 59 of 1959, in essence it seeks a declaratory order from this Court that its right to occupy the premises in question is on a monthly tenancy. The respondents allege that the applicant's tenancy is subject to a lease agreement which terminates on 31 January 2014.

To my mind there clearly exists a dispute of fact between the parties as to whether the tenancy was month to month or was for a fixed period up until 31 January 2014. In motion proceedings when a dispute of fact exist, relief may only be granted if those facts averred by the applicant that have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order, see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd* **1984(3)623(A)** at **634H-I.**

The admitted facts are that: (1) the applicant occupies the premises in question; (2) prior to this dispute the applicant's occupation of the property was on a monthly tenancy; (3) negotiations took place between the parties in order to conclude a five year lease agreement; (4) the applicant signed a lease agreement on 22 June 2009 which had been presented to it by the respondent. (5) the applicant effected an amendment to the paragraph dealing with the payment of a rental deposit on the said agreement before transmitting it to the respondents.

The respondents allege that it accepted the aforesaid amendment and duly signed the lease agreement on the 21 September 2009 and therefore an agreement was concluded by the parties. The respondents further allege that according to the lease agreement, the applicant's occupancy of the premise will come to an end on 31 January 2014. The applicant disputes that an agreement exists between the parties and avers that its tenancy is on a month to month basis.

I am of the view that no lease agreement was concluded and existed between the parties and I set out my reasons below.

The applicant's amending and signing of the agreement on the 22 June 2009 amounts to the applicant having advanced a counter-offer to the respondents. It is trite that an acceptance of an offer must be clear, unequivocal or unambiguous and correspond with the offer made.

Once there are variations to the terms of an offer while purporting to accept the offer, this will destroy the validity of the offer and is interpreted as a counter-offer- *Jones v Reynolds* **1913 AD 366 at 370-371.**

The effect of a counter-offer is that it constitutes a rejection of the original offer and therefore destroys the original offer; see the English case of *Hyde v Wrench* **(1840)49 ER 132**

"*Wrench offered to sell a farm to Hyde for 1 000 pounds. Hyde counter-offered 959 pounds, which Wrench rejected. Hyde then purported to accept the previous offer of 1000 pounds. The counter-offer amounted to a rejection of the previous offer, which was therefore no longer open for acceptance".*

On the facts of this matter, the counter-offer was rejected by the respondents by way of

their correspondence of the 31August 2009. In this document they indicated that they were adamant that the applicant re-sign the lease agreement which they had prepared with the rental deposit clause left unaltered. This clearly indicated the respondents' rejection of the applicant's counter-offer.

The situation was now as follows, the counter-offer of the applicant had destroyed the original offer of the respondents and in turn the respondents' rejection of the applicant's counter-offer created a situation where there was no longer an offer for the respondents to accept and thus no agreement existed between the parties.

In my view the respondents, having rejected the applicant's counter-offer created a situation where there was no longer a counter-offer open for acceptance; ***Hyde*** case above. Therefore the respondents' contention accepted the applicant's counter-offer on 21 September 2009 cannot be correct because by then there was no longer a counter-offer open for acceptance.

An applicant who seeks a declaration of a right has to set out what that alleged right is. He or she further has to set out that he or she has an interest in the aforesaid right and that the said interest is a real one and not merely an abstract intellectual interest, see *Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa)(2)* **1980 (2) SA 516** at **519H-520B.**

In the present matter the applicant is seeking a declaration on a fact "that its tenancy to the premises is monthly". I say a fact because as established above there is no lease

agreement between the parties. It is common cause between the parties that prior to this dispute, the applicant was occupying the premises on a monthly tenancy because of the fact that the parties were in the process of negotiating the terms of a proposed lease agreement. The applicant, during these negotiations cannot ask this court to issue a declarator in respect of its tenancy of the premises at this stage. The applicant clearly has no clear right as yet due to the ongoing negotiations.

Regarding the issue of costs, costs are awarded to the respondent. The applicant knew that a dispute of fact existed between the parties but still proceeded with this application.

The following order is made:

The applicant's application seeking a declaratory order is dismissed with costs.

HUGHES-MADONDO AJ

(i)

APPEARANCES:

Attorneys for Applicant: CHAMBERLAINS ATTORNEYS

Counsel for the Applicant: ADV. L.M. MILLS

Attorneys for Respondents: ATKINSON TURNER & DE WET

Counsel for the Respondents: ADV. S. M. SHEPSTONE

Heard on: 12 OCTOBER 2010

Delivered on: 1 NOVEMBER 2010