IN THE LABOUR COURT OF NAMIBIA

In the matter between

VLAD TRAIAN VLASIU	**Applicant**
versus	
THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**First Respondent**
THE MINISTER OF HEALTH & SOCIAL SERVICES	**Second Respondent**
CHAIRPERSON OF THE DISTRICT LABOUR COURT	**Third Respondent**
THE MINISTER OF LABOUR AND HUMAN RESOURCES DEVELOPMENT	**Fourth Respondent**
THE PERMANENT SECRETARY OF LABOUR & HUMAN RESOURCES	**Fifth Respondent**
THE LABOUR COMMISSIONER	**Sixth Respondent**

CORAM: O'LINN, J, PRESIDENT

Heard on: 1994.11.10

Delivered on: 1994.11.17

JUDGMENT

O'LINN, J.: The applicant, Vlasiu applied on notice of motion for the following relief to be granted against 2nd respondent, i.e. The Minister of Health and Social Services:

1. **That the rules of the Labour Court be dispensed with by virtue of the urgency of the matter.**

2 **That the contract attached to**

affidavit and marked VTV 11 declared null and void, alternatively be declared as being effective from 1st July 1994 for a period of two years.

That the applicant be reinstated as a medical practitioner by the 2nd respondent, alternatively the first respondent.

That the relief claimed in paragraph 3 supra, be of full force and effect pending the outcome of the hearing in the District Labour Court in the matter between the applicant and the Government of the Republic of Namibia, which matter is bound to be heard on 8, 9 and 10th February 1995.

Further and/or alternative relief. The Government Attorney gave notice that the second respondent intends to oppose the applicant's application.

Thereupon the government attorney gave notice of the filing on behalf of "applicant" of a replying affidavit by Mr Akwenye, the Deputy Permanent Secretary of the Ministry of Health and Social Services and various supporting affidavits.

The Government attorney could not legally file documents on behalf of applicant, but only on behalf of second respondent. I will assume however that the notice was meant to be a notice on behalf of the 2nd respondent.

A more serious defect in the papers filed by the Government attorney is that there is no affidavit of opposition by the 2nd respondent, being the Minister of Health and Social Services and nowhere in the affidavits of the Permanent Secretary or Deputy Permanent Secretary is there any statement that any of them replies on behalf of the Minister or that any of them are authorized by the Minister to make the affidavits.

It would therefore not have been wrong to disregard the aforesaid affidavits. Applicants' counsel however did not object to the admission of the said affidavits.

In the circumstances I will assume for the purpose of this application that the said affidavits were filed on behalf of 2nd respondent.

Mr Heathcote appeared in this Court on behalf of the applicant and Mr Mouton for second respondent. Counsel for 2nd respondent raised two points in limine which were formulated as follows in his written heads of argument:

"Lis pendens.

7. The respondent has made application on the 13 th September 1994 to have applicant herein evicted from flat No 501, Doctors Flat, Windhoek, State Hospital. The applicant herein duly served and file an answering affidavit and respondent herein replied by filing the appropriate replying and supporting affidavits.

8. The application for eviction as referred to above has been set down by mutual agreement between the attorneys acting for and on behalf of the applicant and the respondent and in conjunction with the Registrar of the High Court of Namibia for hearing on 13th February 1995.

9 . The application on behalf of respondent herein for eviction of the applicant is based on:

9. the same cause of action.
10. between the same parties as the pending proceedings.
11. in respect of the same subject matter and

9.4. are pending in the High Court of Namibia."

Even where the grounds for a plea of lis pendens are established, a Court has a discretion whether or not to allow a Court proceeding, whether in the form of an action or application, to continue.

The present application is by applicant against the 2nd respondent, i.e. the Minister of Health and Social Services. The application relied on by the 2nd respondent in this application is one by the Government of the Republic of Namibia against Vlasiu, the present applicant. The parties in the two applications are therefore not the same.

In the present application the applicant, Vlasiu, claims relief against the Minister, cited as the second respondent. In the former application, the present applicant is the respondent and the Government claims relief.

To allow the present application to be stayed until the first one is decided, will place the present applicant at the mercy of the applicant in the first application. It seems to me that such a situation must be distinguished from one where the same applicant/plaintiff instituted proceedings pending in a Court and subsequently institutes proceedings based on the same cause of action and/or subject matter.

The Courts are also not the same. The present application is pending before the Labour Court and the application relied on by 2nd respondent is one before the High Court.

It is trite law that the plea of lis pendens can succeed where the separate actions are before different Courts. However, in my view, where the Courts are as different as the High Court in comparison with the Labour Court, it is debatable whether such a plea should succeed.

The Labour Court is a specialised Court with its own constitution and jurisdiction. The law it applies is that contained in the first place in the Labour Act 6 of 1992. Its procedure is also contained in the Labour Act and supplemented by its own rules. Its procedure is generally less formal and its rules less stringent. Its objective is to reach decisions in labour or labour related disputes at the earliest possible time.

The present application is one for declaring an alleged contract between the parties invalid and to restore the status quo, pending the adjudication of certain pending disputes before the district Labour Court. The application relied on is an application for ejectment from premises. The latter application was struck off the roll on 23.09.1994 and has thereafter been set down as an opposed application to be heard by the High Court only on 13.02.1995.

The present application is brought before the Labour Court on the basis of urgency, whereas the ejectment application will not be heard as a matter or urgency.

Although partly the same cause of action and subject matter

will be canvassed before the High Court, the relief claimed differs greatly.

Should the applicant in the present application be compelled to await the outcome of the ejectment application, he will be severely prejudiced, inter alia because he is obviously not a person of means, receives no salary and cannot be employed by any other employer, because the applicant is an immigrant and his work permit only allows him to work for the Department of Health and Social Services. His position is weak compared with the power of the State. The Labour Court in such a situation should also aim to give meaning to Article 10 of the Namibian Constitution, i.e. the fundamental right to equality before the law. To stay the present application, would have the effect of enlarging the patent inequality of the parties.

In my view, the requirement for a successful plea of lis pendens have not been established.

In the alternative, even if I am wrong in this conclusion, I should exercise my discretion in favour of the applicant, because in my view, it is more just and equitable or convenient that the present application should be allowed to proceed.

See: **Herbstein and van Winsen, the Civil Practice of the Superior Courts, 3rd ed. 326 and the decisions therein referred to.**

The second point in limine taken by counsel for the

respondent is that the matter is not one of urgency, and therefore should not be heard. The Labour Court will as a matter of course, be more lenient than the High Court on the issue of urgency.

In this case, the parties have placed their respective cases on affidavit and are represented by attorneys and counsel.

The matter is one of urgency, at least of part urgency. The issues can be decided on the papers. There is no good reason why it should not be decided.

The second point in limine must therefor also fail.

I may mention that Mr Akwenye has in paragraph 53 of his replying affidavit suggested that I should join or consolidate the present application with that pending before the High Court.

Counsel for respondent however did not bring such an application.

It seems to me in any event that even if requested to do so, I would have no power to accede to such a request because I have no power to consolidate a proceeding in the Labour Court with one in the High Court. See Rule 12 of The Labour Court Rules.

I can now deal with the merits of the issues to be decided.

Applicant contends that the 2nd respondent has wrongfully-prevented him from continuing his employment with the Department of Health and Social Welfare as from 1st July 1994 and that he is entitled to reinstatement, pending the determination by the District Labour Court on 8 - 10 February 1995 of several issues relating to his employment including the continuation of his employment, now pending before that Court.

Applicant contends that respondent's action is based on a certain written contract between the parties, marked Annexure VTV 11; that this contract is null and void, on the ground of duress, alternatively, that the signing constitutes an unfair labour practice and in the further alternative that there was no "consensus ad idem" between the parties, on the issue relied on by respondent, namely that the agreement was for the period 1 July 1992 - 30th June 1994.

Applicant contends that the term in the contract providing for a duration of two years is consequently invalid and that the respondent cannot rely on this term for its attitude that the contract has expired by effluxion of time on 30th June 1994.

Applicant also contends that the parties never agreed orally and/or by implication that the applicant will be employed only for a period of two years and that that period will be from 1 July 1992 - 30th June 1994.

Respondent in the replying affidavits admits that the written contract Annexure VTV 11 was induced by threats, but counsel for respondent, Mr Mouton contends that respondent does not necessarily rely on the written contract Annexure VTV 11, but on an oral and implied contract, based on a letter of appointment marked OA 25 to respondents reply dated 21.09.1992 and which clearly states that the contract period runs for a period of two years, from 1st July 1992 and ending on 30th June 1994.

The applicant and his counsel denies the receipt of any such letter of appointment and consequently denies that the said term was agreed to by applicant, whether by express oral agreement or by implication from conduct.

It is not disputed that I have the necessary jurisdiction in terms of section 18(1)(b) - (g) of the Labour Act 6 of 1992 to grant the relief claimed by the applicant.

I will now consider whether or not the written agreement should be **declared null and void whether on the ground of duress or any of the alternative grounds.**

The **following facts are not in dispute:**

1. **The applicant was unwilling to sign the aforesaid contract from the beginning and protested right up to the date of placing his signature on the contract VTV 11 and he clearly signed under protest.**

The applicant signed this contract only on 24th

January 1994 and Mr Akwenye signed on behalf of the Government of the Republic of Namibia on 18th February 1994.

Although the contract states that it endures for a period of two (2) years, it is not stated expressly anywhere in the contract from which date the contract will run.

3.1. The date 01.07.1992 written in the margin on the first page by Dr Obholzer after signature by applicant and without his knowledge or consent, is not a term of the contract or a part thereof.

The applicant was employed as a medical officer by the respondent at least as from 01.07.1992 and this was still the position on 30.06.1994.

The respondent only relies on the termination of the employment by effluxion of time in accordance with a contract of employment and not as a consequence of notice given or summary dismissal or any other ground.

The letter of notification of appointment Annexure OA 25 was not handed personally to the applicant.

In the first written communication between Mr Akwenye on behalf of the Ministry of the applicant in a letter dated 03.03.1994, marked Annexure VTV 16, and wherein Mr Akwenye inter alia acknowledges receipt of the contract signed by applicant, the applicant is informed that his services will no longer be required at the expiry of his contract on 30th June 1994. This was therefore the first official response to the receipt of the signed contract and its signature on behalf of the Department on 18th February 1994.

12. **The management of the State Hospital wrote a letter to the Permanent Secretary dated 27.01.1994, marked OA 43, signed by Dr Obholzer, Dr Oosthuizen, Dr Kraus, Dr Smit and two others whose signatures are unclear, to place on record that they do not recommend the extension of Dr Vlasuis's employment after its purported expiry on 30.06.1994.**

13. **The applicant immediately and consistently took steps to demonstrate his opposition to the attitude of the department and persisted with this opposition right up to the present.**

See e.g. VTV 17, VTV 20, VTV 21.

It appears from the above that the insistence by the department on the signing of the written contract by the applicant was at least partly a strategy to get rid of applicant by relying on the expiry clause in the said contract, as soon as the parties have signed it. No wonder that Dr Obholzer made the note "01.07.1992" in the margin of the first page of the contract, and that the department was almost desperate to get the written contract signed.

As indicated supra, it is common cause that the applicant was threatened to sign. What is even more significant, is the reason relied on by respondent for the threats. Mr Akwenye puts this position as follows in paragraph 35.5 of his replying affidavit:

"I admit that the applicant was threatened to sign the contract of employment but as stated in Annexure VTV 7 attached to the applicant's founding affidavit but wish to state that no other avenue was opened to the second respondent in order to persuade the applicant to sign

the written contract of employment for he was requested on numerous occasions to do so but refused and only submitted more demands as to his alleged conditions and terms of employment. I wish to draw the above Honourable Courts attention to Annexure OA 43 hereto setting out one of the reasons why it was essential for the applicant to have signed the written agreement of employment."

Mr Akwenye suggests that there were more than one reason for the threats, but the only one mentioned is, according to him, contained in his Annexure OA 43, already referred to supra.

It is now necessary to quote Annexure OA 43 in full. OA 43 is a letter originating according to the heading from Dr Obholzer and dated 27th January 1994. It is addressed to Dr Amadhila the Permanent Secretary and it reads as follows:

> "Dear Dr Amadhila
> RE EXTENSION OF CONTRACT - DR VLASIU
> The management of the Windhoek State Hospital (WSH) place on record that they do not recommend the extension of Dr Vlasius contract once it expires on the 30th June 1994. Should the Ministry wish to make use of his services outside Windhoek he will have to obtain outside motivation. For future staff planning we would appreciate that this issue be resolved so that we and Dr Vlasiu can plan our respective futures separately. Yours faithfully."

Then follows the signatures of Dr's Kraus, Kennedy, Obholzer, Smit, Oosthuizen and another gentleman whose signature I cannot decipher. There is also a note apparently written under the signature of M Van Zyl marked with a star on the top part of this letter and this note reads as follows:

> **"The PSSC stipulates that it is not necessary that notice of termination of contract be required or given by both the employer or employee. The staff circular 29 of 1993 was sent out to ensure that all foreigners take cognisance of this fact. Each foreigner got a copy of the circular. Signed M Van Zyl."**

When this document on which the respondent relies is properly analyzed, it seems that the reason on which Mr Akwenye relies for the threats to sign is that the management does not want Dr Vlasiu to continue in employment. In other words the reason for threatening him to sign is that they must get this document to be able to rely on the clause that the contract endures for two (2) years. Now if this is to be regarded as the best reason for the threats then there can be little doubt that such a reason cannot be described as reasonable, valid or moral. As a matter of fact it is an indication that the signature obtained in such a way is certainly contra bonos mores.

Some of the threats relied on by the applicant are set out in paragraphs 34, 38, 41, 43 and Annexures "VTV u, " "VTV 5, " "VTV 6," "VTV 10," "VTV 13". Now some of those alleged threats may not be contra bonos mores.

In view of the admission by respondent, that there were threats, I will however only deal with two of the aforesaid annexures, namely Annexure VTV 10 and VTV 13 which I think are clear instances of threats which are contra bonos mores.

Dr Vlasiu to the Permanent Secretary, to the Minister and to the Chief Medical Superintendent Dr Obholzer. The heading of this letter dated 14.01.1994 is "Terms and Conditions of Appointment (matter pending for a solution for about 3 years)."

"Dear Sir

Thank you for your memo Dr Obholzer dated 13.01.1994 sent via Dr Banda and received today 14.01.1994 10 hours in which you request me to sign the said contract before 15 hours today. I would like to inform you once again that the same pending matter for about 3 years is in attention of the Permanent Secretary Dr Amadhila himself that received the complete set of all correspondence on 02.01.1994 personal by hand requesting an urgent written reply from him. Up to date I did not receive such a reply to clarify the whole aspects as indicated by the Prime Minister's Office and an appointment requested numerous times (even in writing 1993) was not granted yet. I'm of the opinion that his still premature to commit myself any further before the said reply will be handed to me. Like usually will be a great pleasure to sign such contract at your earlier convenience in line to my qualifications and my intentions to settle permanent in Namibia as stated previously. Yours sincerely Dr Vlausiu MD Windhoek State Hospital"

Now what is important is that here again there is a note and it is not clear to me precisely who wrote this note but this note reads as follows:

"14.01.1994 Dr Vlasiu has been instructed by the PSC to sign the documents as he has no alternative but to do it. Please convey this to him.

Dr Amadhila."

It seems that Dr Amadhila signed the note. The significance of this note is that it confirms that Dr Vlasiu was instructed by the Permanent Secretary to sign the documents on the purported ground that he had no alternative but to do it. One needs no clearer manifestation of duress and unwillingness, but this is not the end of the matter. In VTV 13, which is a letter by the Permanent Secretary Dr Amadhila, if I identify the signature correctly, to Dr Vlasiu and it is dated 19.01.1994 that is shortly before the applicant signed the contract. That letter reads:

> **"Dear Dr Vlasiu**
> **I acknowledge receipt of your letter dated 14 January 1994 concerning your refusal to sign your contract of employment."**

Again that supports the fact that it was generally acknowledged that he refused to sign this contract. Second paragraph:

> **"I am satisfied that your complaints have been investigated thoroughly and sympathetically by this Ministry as well as the Public Service Commission and that the responses you have received have been in line with and consistent with the existing policy. It is the opinion that more than enough time has been spent on this issue and I have no option but to instruct you to hand the signed contract to the Chief Medical Superintendent before 12 on 24th January 1994. Failure to adhere to this instruction will result in a contravention of the stipulations of Section 17(1) (c) of the Public Service Act No 2 of 1980 as amended and could subsequently lead to the determination of your**

services.

Yours faithfully

Permanent Secretary

Ministry of Health and Social Services."

(The emphasis is mine)

This letter was received by Dr Vlasiu apparently on the 24th January 1994 and on the same day Dr Vlasiu signed the contract. So it is quite clear that the final straw was this threat contained in the letter by the Permanent Secretary of the Minister of Health. Let us peruse section 17(1)(c) of the Public Service Act 2 of 1980 to establish whether the threat in the form of an order plus a threat was a legal order at all. The section reads as follows:

> **"Any officer shall be guilty of misconduct if he (e) disobeys, disregards or makes wilful default in carrying out any lawful order given to him by any person authorized to do so, or by word of conduct is guilty of subordination."**

It is obvious that an order like the one given in VTV 13, is not a lawful order at all.

The lawful orders contemplated in the section certainly do not include an order to sign a contract of employment containing certain terms which are in dispute between employer and employee. It makes no difference to this point that the employer is the Government of Namibia.

There is no doubt that applicant has signed the aforesaid contract under duress.