REPUBLIC OF NAMIBIA **NOT REPORTABLE**

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

JUDGMENT

Case no: I 2397/2011

In the matter between:

TELECOM NAMIBIA LIMITED **PLAINTIFF**

And

ABRAHAM KALIPI
DEFENDANT

Neutral citation: *Telecom Namibia Ltd v Kalipi* (I 2397/2011) [2014] NAHCMD 275 (18 September 2014)

Coram: HOFF, J

Heard: **19-21 May 2014, 16-17 July 2014**

Delivered: **18 September 2014**

Flynotes: Contract – Breach of contract arising from memorandum of agreement between the parties – Defendant committed a breach by resigning before completion of

the training program – Failed to establish that plaintiff waived the duration of the training program – Plaintiff entitled to refund.

ORDER

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1. The defendant is ordered to pay the plaintiff the amount of N$ 157 499.47 plus interest at the rate of 20% per annum calculated from the date of judgment to date of payment.
2. Costs of suit (to be paid by the defendant).

JUDGMENT (REASONS)

Hoff, J: [1] The plaintiff instituted an action against the defendant claiming payment in the amount of N$ 157, 499.47, interest at the rate of 20% per annum calculated from the date of judgment to date of final payment, and costs of suit, in respect of damages suffered due to an alleged breach of contract by the defendant.

[2] The defendant pleaded that he is not indebted to the plaintiff as he has complied with all his obligations in terms of their agreement. The plaintiff also pleaded that his appointment on 1 December 2007 superseded their agreement and that the plaintiff waived the duration of the training programme upon the permanent employment of the defendant.

[3] It is common cause that the plaintiff and defendant entered into a memorandum of agreement on 5 May 2006 in which the plaintiff (as employer) undertook to train the defendant (as trainee) as an internet protocol technician (IP Technician-in-training) within the Human resource and Strategic Training Division of the plaintiff.

[4] The defendant in his plea admitted that in terms of the agreement that the plaintiff undertook to allow the defendant to attend during working hours the training center or such approved training center as the plaintiff may from time to time determine in respect of such courses as the plaintiff may from time to time prescribe; that plaintiff undertook to cover training costs on behalf of the defendant for the normal duration of the training programme; that the plaintiff undertook to give the defendant such practical on the job-training as may be necessary for the completion of his training programme; that the defendant undertook to undergo the training programme and to follow the agreed programme and course content.

[5] Clause 6.2.6 of the agreement provided that the defendant would serve, on successful completion of his full training programme, the plaintiff in any post or capacity in the company for which he qualifies, provided there is a vacancy available, for a period of one year in respect of each year sponsored to a maximum of four years, failing which he shall, when called upon in writing to do so, immediately refund the remuneration, including personal non-pensionable allowances and training costs received each year. The defendant admitted this clause but pleaded that he was in the permanent employment of the plaintiff (as a Infinitum / Telematics / wireless / Metro Specialist) since 1 December 2007 until May 2011.

[6] The defendant further admitted resigning from the plaintiff's employment on 16 May 2011. The defendant further also admitted that a letter of demand was forwarded by the plaintiff to him on 5 July 2011.

[7] Mr Raimo Naanda testified that he has been employed by the plaintiff (a public company) in the division of Human Resources Development for a period of approximately 11 years. His key responsibilities include the management of the overall training function of the plaintiff and to ensure that the plaintiff has the right and sufficient skills and competence within its workforce to achieve its strategic goals and intentions. The plaintiff has been experiencing a shortage of qualified technicians from the labour market and consequently made the decision to introduce the graduate development

programme. The programme is a three year in service training program which enables candidates to get exposure to the plaintiff's network environment. It is intended to attract graduates from institutions of higher learning.

[8] He testified that in terms of an agreement signed by himself on behalf of the plaintiff the training programme of the defendant would start on 8 May 2006 and would expire on 8 May 2009. In addition, clause 9 of the agreement contained a non-variation clause which provided that no amendment, alternations or variations of the terms and conditions of the agreement shall be of any force and effect whatsoever unless amendments, alternations or variations are set forth in writing and signed by or on behalf of the trainee and the employer. The witness testified that he was not aware of any written amendments, alternations or variations to the agreement. It was further testified that in order to evaluate the progress of trainees the plaintiff has constituted an evaluation panel which had to determine every six months whether or not a candidate has achieved the required set of milestones and should the candidate be an exceptional performer the evaluation panel could recommend that the training program be shortened.

[9] The witness testified that he was part of the evaluation panel. The first evaluation report, Exhibit D, (dated 13 September 2007) observed, *inter alia* that it was difficult for the panel to establish what the candidate has learnt during the past few months and recommended that the candidate needed to become more committed to work and tasks assigned to him rather than waiting to be given responsibilities. This report was signed by the defendant but there is no indication whether he accepted it or not. The second evaluation report, Exhibit E, signed by the defendant on 28 November 2007, observed that the candidate demonstrated an 'altitude change and progress' and that the candidate 'was keen to learn and goes an extra mile to achieve just that'. The recommendation by the panel was that the candidate was ready for permanent appointment and for training as 'per IDP's'. It was explained by the witness that the abbreviation 'IDP's' stands for Individual Development Plans. The overall

recommendation of the panel was that the panel was satisfied with the development demonstrated by the candidate and he was recommended for permanent appointment as technician on IP installations.

[10] In a letter dated 18 January 2008, Exhibit F, the defendant was informed that subject to 'an assessment and evaluation session' on 7 November 2007 he has been appointed as infinifum / telematics / wireless / metro specialist with effect from 1 December 2007. The appointment was subject to *inter alia* the condition that on the successful completion of his training program his grade (Patterson Grade) would be adjusted from C2 to C3.

[11] Mr Naanda further testified that the training program consisted of a theoretical part and a practical part. The candidates were required to attend classes at the training Centre in respect of the theoretical part and in respect of the practical training the candidates would be rotated within the organization as part of the IP technician training. Mr Naanda explained that in terms of the agreement, the defendant had been appointed at Grade C2 and that the reference to Grade C3 simply informed the defendant that on completion of his training programme his grade would be adjusted to C3 but that at the time the letter was drafted the defendant was still undergoing training.

[12] In an evaluation report, Exhibit G, dated 16 June 2008 (period under evaluation November 2007 to April 2008), it was observed inter alia, that the candidate cannot work independently as some supervision is required at all times. The recommendation of the panel was that the defendant should attend a time management course and also attend the Aironet Wireless Fundamentals and Site survey course as part of his specialization courses. The overall recommendation was that the panel is satisfied with the development demonstrated by the candidate hence recommended a salary allowance adjustment as per policy provisions and further recommended that he be appointed permanently as Grade C3 as a technician within the NP+A upon completion of the wireless and site survey course. This report was signed and accepted by the defendant.

[13] A letter dated 25 November 2008, Exhibit O, was introduced in evidence in terms of which the defendant was informed that subsequent to an interview held with the defendant on 19 September 2008 the defendant has been appointed and transferred to the TMN environment as technician – in –training subject to his successful completion of his training contract and training program. It was stated that upon completion of the new development program in the TMN environment within a year or shorter depending on the defendant's performance his grade would be adjusted to that CU (C upper). His salary would similarly be adjusted to that level.

[14] In a letter dated 3 August 2010, Exhibit H, the defendant was informed after his completion of one year development program in the TMN environment as stipulated by his previous appointment letter, that he has been fully appointed as TMN technician with effect from 1 March 2010 on condition inter alia that he satisfactorily complete a probation period of 3 months, which period may be extended in the event of his performance being unsatisfactory. The defendant was requested to indicate whether or not he accepted this offer. The defendant duly accepted this offer on 9 August 2010. Mr Naanda testified that in terms of this appointment the defendant was not subject to any further condition of training and that the defendant would in terms of this letter be substantively appointed in that position after a probationary period of three months i.e from 1 June 2010. As indicated (supra) the defendant resigned on 16 May 2011. According to this witness the defendant had to remain in the employment of the plaintiff until June 2013.

[15] In the letter of demand, Exhibit J , the defendant was informed that 357 days are unredeemed in terms of the contract and that an amount of N$ 157 499.47 was due by the defendant to the plaintiff.

[16] Exhibit M, introduced in evidence by the defendant as the salary advice of the defendant on 25 December 2007 indicates the position of the defendant as that of trainee. Mr Naanda testified that the salaries of the trainees were paid out from the trainee budget. Exhibit L as introduced in evidence is an internal memorandum

addressed to the acting Human Resource Manager from the Chairperson of the evaluation panel, indicated that during an evaluation session conducted on 28 May 2008 the evaluation panel found that certain candidates were ready for permanent appointment subject to successfully completing the Aironet Wireless course. The defendant was one of the candidates mentioned. It was further recommended that the candidates be appointed permanently as IP technicians with effect from 2 January 2009.

[17] The defendant testified that his training started in May 2006 and underwent an induction course. He received two evaluation reports during the period May 2006 until November 2007 (Exhibit D+E). After the second evaluation report he was permanently employed as IP Technician Specialist as from 1 December 2007. This was after he had been in training for 17 Months. With reference to the training as per IDP's referred to in Exhibit E the defendant testified that it is time management as well as a code of conduct-training which all permanently employed staff of the plaintiff must go through. He was no longer required to write reports to be presented to the evaluation panel but his performance would be determined on the work that he did.

[18] The defendant testified that while he was still in training he worked under a supervisor, an IP technician, when they did projects out of town but that this changed after his permanent appointment when he got a username and could access the systems of the plaintiff and went alone to do the work out of town (Windhoek). With reference to the overall recommendations in Exhibit G the witness testified that the whole infinitum department was required to undergo a wireless and site survey course and that it was not applicable only to himself. He testified that on the day of his resignation, went to the different departments as he was required to do and all departments informed him that he owed nothing to the plaintiff. It was only subsequently when he made enquiries regarding certain monies due to him, inter alia, his pension, that he was informed that he was indebted to the plaintiff.

[19] One of the defendant's pleas was that the plaintiff waived the duration of the training program upon the permanent appointment of the defendant on 1 December 2007.

[20] In order to decide this defence in my view, one must in the first instance decide whether or not the defendant was in fact permanently employed by the plaintiff on 1 December 2007. It is common cause that the plaintiff and defendant entered into an agreement that the defendant be trained as an IP technician. It is not disputed that in an internal memorandum (Exhibit E), the evaluation panel has recommended the defendant for permanent appointment as technician on IP installations. It is also not disputed that the defendant was notified that he had been appointed as infinifum / telematics / wireless / metro specialist with effect from 1 December 2007. This appointment was however subject, inter alia, to his successful completion of this training program. This appointment and the terms thereof was accepted by the defendant and signed on 7 March 2008. On a proper reading of Exhibit F it should be apparent that nowhere does it state that the appointment is a permanent one. In fact it was clearly a conditional appointment. It is also apparent that inspite of the fact that there was a recommendation (Exhibit E) for a permanent appointment, the Human Resources Managers and the General Manager of the plaintiff who both signed Exhibit F did not follow this recommendation.

[21] It would further appear if one has regards to Exhibit O, dated 28 November 2008, that the defendant was at that stage still regarded by the plaintiff as an IP technician in training and was informed in that document that on the successful completion of his training contract and training programme his job grade would be adjusted to grade C3. The defendant was further informed that upon completion of the development programme in the TMN environment which may take a period of one year to complete his grade would be adjusted to CU (C upper) and the defendant would then be appointed as TMN technician. The defendant was therefore duly appointed as TMN technician in a letter dated 3 August 2010 with effect from 1 March 2010. This

appointment did not refer to a condition that defendant should successfully complete the training program. In fact the only condition referred to in Exhibit H was that he should successfully complete the probationary period of three months. This appointment as stated (supra) was accepted by the defendant.

[22] The answer to the aforementioned question as well as the plea of the defendant is in my view, based on the evidence presented, that the defendant was never permanently appointed by the plaintiff as IP technician on 1 December 2007. It follows accordingly that there is no proof that the plaintiff waived the duration of the training programme in respect of the defendant.

[23] It is trite law that the onus rests on the party relying on a waiver to prove the waiver on a balance of probabilities and that in assessing the probabilities, the factual presumption that a party is not lightly deemed to have waived his or her rights should be borne in mind. The defendant also had to prove that the decision to waive it's rights by the plaintiff had been conveyed to the defendant. Clearly on the evidence presented the defendant failed to prove these prerequisites.

[24] In *Traub v Backlays National Bank Ltd* 1983 (3) SA 619(A) at 634H Botha JA said the following in respect of a waiver:

> 'It is clear, in my opinion, that a creditor's intention not to enforce a right has no legal effect unless and until there is some expression or manifestation of it which is communicated to the debtor or in some way brought to his knowledge'

The plaintiff denied that it has waived any right in this regard.

[25] In my view the plaintiff succeeded in proving that it has complied with all its allegations in terms of the memorandum of agreement.

[26] The defendant admitted that a special condition of the agreement was that should the defendant leave the plaintiff's employment for whatever reason prior to fulfilling his obligations in terms of that agreement, but after successfully completing the

training programme, the defendant shall, when called upon in writing to do so, immediately refund the plaintiff the amounts of indebtedness to the plaintiff provided that the amounts calculated shall be reduced on a pro rate bases for each full years that the defendant served the plaintiff from the date of his termination of contract.

[27] The submissions by Mr Elago who appeared on behalf of the defendant that if one has regard to the essentialia of the agreement, that it governed an employee-employer relationship is gainsaid by the evidence presented, and in addition, this was never pleaded as a defence by the defendant. It was argued on the basis of the existence of an employer- employee relationship that the plaintiff acted unlawfully and contrary to legislation (The Labour Act) by claiming the repayment of remuneration by the defendant.

[28] This, as I indicated, is not supported by the evidence.

[29] I am satisfied that the defendant by resigning on 16 May 2011 indeed committed a breach of contract which entitled the plaintiff to claim a refund in terms of the provisions of the contract. I am further satisfied, on the evidence, that the plaintiff has proved the indebtedness by the defendant in the amount of N$ 157 449.47 and that judgment should be granted in favour of the plaintiff.

[30] In the result, the following order is made:

1. The defendant is ordered to pay the plaintiff the amount of N$ 157 499.47 plus interest at the rate of 20% per annum calculated from the date of judgment to date of payment.
2. Costs of suit (to be paid by the defendant).

EPB Hoff

Judge

APPEARANCE:

PLAINTIFF	M HANGULA
OF	SHIKONGO LAW CHAMBERS
DEFENDANT	PS ELAGO
OF	TJOMBE ELAGO LAW FIRM