IN THE INCOME TAX COURT OF THE FREE STATE
HELD IN BLOEMFONTEIN ON 11 OCTOBER 2004

Appeal No. : 11244

In the appeal between:

EDBEL VYF (PTY) LTD	APPELLANT
and	
SOUTH AFRICAN REVENUE SERVICE	RESPONDENT

HEARD ON:	11 OCTOBER 2004
CORAM:	RAMPAI J
ASSESSORS:	MR A J KOCH *et* MR G DE WAAL
JUDGMENT:	RAMPAI J
DELIVERED ON:	27 JANUARY 2005

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[1] The matter came before me sitting with two assessors. It came by way of an appeal against the decision of the South African Revenue Service Commissioner. The appeal is aimed at the reversal of the commissioner's assessment of

the appellant's normal tax liability for the fiscal year ending on 29 February 2000.

[2] At all times material to this dispute the appellant carried on a money-lending business in the micro lending sector. In short the appellant operated as a bank. Its operational business activities consisted of long-term loans for study and housing purposes.

[3] As the provider of those financial services, the appellant in the course of his business, concluded various written agreements with a number of persons whose duty it was to market such financial products. As on 29 February 2000 there were fourteen such individuals. I shall call them marketing agents. The total commission the appellant paid to the marketing agents for the financial year ending on 29 February 2000, was R1 158 784,55. See p 35 of the red bundle.

[4] The appellant submitted its annual income tax returns form IT14 2000, together with the supporting financial statements for the fiscal year ending 29 February 2000. The appellant indicated that it had incurred certain expenses in the sum of R1 159 084,00 as marketing costs. The marketing costs included the aforesaid total commission the appellant had paid to the marketing agents. Seeing that the appellant

regarded the marketing agents as independent contractors and not as part of its ordinary employees, the appellant did not deduct any employee tax from the amounts it paid to such marketing agents to be paid over to the South African Revenue Services.

[5] In determining the appellant's tax liability for the aforesaid year of assessment, the respondent rejected the appellant's claim that the marketing agents were independent contractors. The respondent held the contrary view that the marketing agents were employees of the appellant and not independent contractors. Consequently the respondent classified the marketing agents accordingly and recovered from the appellant the sum of R289 694,14 as employees' tax which according to him was payable to the South African Revenue Service on the remuneration of R1 158 784,55 paid to the marketing agents by the appellant.

[6] The appellant lodged an objection against this assessment. However, the respondent dismissed the appellant's

objection. Now the appellant comes to this special tax court on appeal against the respondent's decision relating to the status of the marketing agents.

[7] A concise exposition dated 3 August 2004 of the grounds of appeal in terms of rule 11 of the Tax Court Rules as promulgated in the Government Notice No. R467 of the Government Gazette No. 24639 of 1 April 2003 was then given. It boiled down to the contention that the marketing agents were independent contractors exempted from the payment of employees' tax in terms of the exclusion contained in the definition of the word remuneration - *vide* paragraph 2(1) Fourth Schedule Act No. 58/62.

[8] On 28 August 2004 the appellant amended its aforesaid grounds of appeal in terms of rule 13 Tax Court Rules as follows:

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Ad Kort uiteensetting van Appèlgronde (Para 1)

Die boete en rente, gehef ingevolge Para 6(1) van die Vierde Bylae en rente, ingevolge art 89 *bis* van die Wet, is nie regtens hefbaar nie, omrede dit slegs gehef kan word in gevalle waar ‘n werkgewer versuim het om teruggehoue werknemersbelasting oor te betaal, binne 7 dae na die einde van die maand, waartydens die bedrag afgetrek, of teruggehou is.

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<u>Ad</u> Feitelike- en regsgronde van Appèl

Die onderhawige werknemersbelasting is nie deur die Appellant teruggehou van die bedrae wat aan die betrokke persone uitbetaal is nie en dus was daar geen versuim om dit binne 7 dae na maandeinde aan die Respondent oor te betaal nie.”

[9] Before the appeal was argued, counsel for the appellant informed the court that the appellant intended calling two witnesses to give *viva vace* evidence. Counsel for the respondent confirmed that it was so agreed *inter partes*. He further indicated to the court that the respondent intended calling no witnesses.

[10] Johan Vorster was called as appellant’s witness number one. He testified that he was one of the directors of the appellant.

He was the chief executive officer of the company. He gave a history of the appellant's company, its workforce, its financial products, its fertile marketing grounds, its custom recruitment strategies, its financial products providers or marketing agents. He described its marketing agents as independent service providers with their own autonomous business enterprises, offices, equipment and own employees.

His company used a separate and a different standard agreement in respect of a marketing agent which was distinct from the standard agreement used in respect of an ordinary employee. For instance, the former provided among others: that a marketing agent would act as an independent service provider towards the appellant; that the provisions of the Labour Relations Act No. 66/1995 as amended would not apply or govern such relationship; that a marketing agent was not subject to the control or supervision of the appellant at all in respect of the manner in which he executed his duties or arranged his working hours. He also said that although marketing agents were entitled to have their commission paid to them monthly the less industrious of them did not always get commission every month. Quite often such marketing agents received nothing for a particular month and that no employee tax was deducted from the commission earned by any marketing agents, retained and paid over to the South African Revenue Service since the appellant was of the opinion that the marketing agents were not its employees in any sense.

[11] During cross examination he answered that one of the indicators of the marketing agents' independence was the completed application form. However, he conceded that a completed application form for a loan as such was of no value to the customer since it could not immediately be regarded as a complete product. The complete form only became a meaningful document to the customer upon the approval of the loan application by the appellant's head office and not upon its mere submission to the appellant by the marketing agents. He also conceded that as a rule the

marketing agents were not expected independently to make enquiries from the credit bureau concerning the creditworthiness of the applicants for financial aid. He testified that such credit checks were matters which the appellant had jealously reserved unto itself. He was positive that the final powers of approving a loan application vested in the appellant and not the marketing agents. He confirmed that the marketing agents were not allowed to market any other money-lending products other than those of the appellant.

However, he denied the suggestion that none of the control mechanisms as insinuated by counsel for the respondent, indicated lack of the necessary independence on the part of the marketing agents but rather an overwhelming degree of contractual independence. He maintained that the marketing agents were never appointed or treated as ordinary employees of the appellant.

[12] Derek Gerhard Botha was called as appellant's witness number two. He testified that he was an entrepreneur of Polokwane in Limpopo. He acted as a marketing agent of the appellant prior to 29 February 2000. Before he entered into a marketing service agreement with the appellant, he

was already an established farmer and funeral undertaker. He carried on with those businesses even after his appointment as the appellant's marketing agent. He had offices at Louis Trichardt, Giyani, Lebowakgomo and Pietersburg. He had a number of fieldworkers or sub-agents who worked as his employees in order to market the appellant's money-lending products. His mandate entailed recruiting customers, completing loan forms and submitting such loan forms to the appellant. He was appointed as an independent contractor and treated as such. He never regarded himself as a subordinate employee of the appellant. It was not his obligation to ascertain the creditworthiness of a prospective applicant before he completed and forwarded the loan application to the appellant. Notwithstanding this fact, sometimes he did so on his own accord. From what Vorster told him, he was aware that the appellant did such credit cheques on its own in any event. The amounts he received from the appellant varied from month to month because his sub-agents did not constantly work hard.

[13] Nothing new and significant emerged during his cross examination. The appellant's case was then closed. So was the respondent's.

[14] On the one hand Mr. van Breda, counsel for the appellant, submitted that the appellant had made out a case which showed on a balance of probability that the marketing agents were independent contractors and not ordinary employees. He contended on this basis that the additional employee tax in the amount of R289 696,00 together with the penalty plus interest in the extra sum of R103 483,00 in respect of the tax year which ended on 29 February 2000 were not really legally leviable since such alleged additional employees' tax was incorrectly assessed on the payment which the appellant had made to individuals who were independent contractors and thus exempted from employee tax in terms of the exclusionary clause (ii) relating to the definition of the word "remuneration" in paragraph 1 Fourth Schedule to the Income Tax Act No. 58/62. He argued that additional tax in terms of section 89 *bis* Act No. 58/62, penalty and interest in terms of paragraph 6(1) Fourth Schedule to Act No. 58/62 can only be levied in cases where an employer has failed to

pay over to the South African Revenue Services within seven days from the end of the relevant month employee tax deducted from employee' remuneration and retained for the purpose of meeting and employees' tax obligation.

Therefore he urged me to grant the appeal and to direct the respondent to withdraw the assessment made in terms of section 89 *bis* and paragraph 6(1).

[15] On the other hand, Mr. Stephens, counsel for the respondent, submitted that the appellant had failed to discharge the onus in accordance with section 82 Act No. 58/62 by showing on a balance of probability that the appellant was not liable for the payment of employees' tax in respect of the individuals concerned in this dispute. He singled out seven specific clauses of the standard independent marketing contract which he contended justified the respondent's classification of the marketing agents as employees of the appellant because, as he argued, such clauses were clear indicators that in relation to the appellant's enterprise, the manner in which the marketing

agents executed their duties was subject to the control and supervision of the appellant. Therefore, he urged me to dismiss the appeal and to confirm the respondent's assessment.

[16] The real issue which the court is called upon to determine in the instant case is the true status of the marketing agents. The appellant's case is that the marketing agents were genuine independent contractors whose remuneration does not attract employees' tax. The respondent puts up the defence or argument that the marketing employees were disguised ordinary employees whose remuneration attracts employees' tax. These two divergent viewpoints concerning the status of the marketing agents make it necessary to explore the true nature of the bilateral relationship between the marketing individuals and the appellant.

[17] In order to succeed, the appellant has to show on a balance of probability that a marketing individual who is involved in the appellant's operational activities, quite independent of the appellant's control and supervision, conducted his or her own autonomous trade anchored on two cornerstones, namely:

17.1 The manner in which such an individual does his marketing work on behalf of another, in other words the appellant, should not be subject to the superior whims and dictates of the mandator often expressed in the statutory phrase "control and supervision" *vide* the first inclusionary proviso (aa) in respect of the definition of the word remuneration in paragraph 2(1) of the Fourth Schedule.

17.2 The amount paid by the appellant to such an individual for the promotion of the former's products was no fixed remuneration payable at any regular intervals e.g. daily, weekly, fortnightly, monthly or any other periodic interval *vide* the second inclusionary proviso (bb) in the definition of the word remuneration in paragraph 2(1) of the Fourth Schedule.

[18] The dispute has its origin in the legislative definition of the word remuneration in the Fourth Schedule Act No. 58/62. The definition recognises two distinct categories of earners,

namely: The category of ordinary employees and the category of independent contractors. Somewhere between those two legitimate categories an unrecognised and illegitimate category of earners is sometimes found. There is a tendency by this category of ambivalent characters to cosmetically project itself as independent contractors whereas in substance and in truth it is a group of ordinary workers.

[19] Whenever the status of an earner of remuneration is challenged, as in this instant case, such an individual should be placed in the middle position of ambivalent earners. It seems to me that the correct approach to be adopted is to accept albeit provisionally the taxpayer's claim that such an individual, whose status is in doubt, is an independent contractor.

[20] The first leg of the enquiry must entail scrutinising the relationship between the taxpayer and the ambivalent earner by applying the rigor of the primary inclusionary proviso (aa)

to determine whether on that primary basis an individual concerned qualifies to be classified as an independent contractor. If the primary basis of inclusion disqualifies such an individual then the individual concerned must be excluded from a category of independent contractors and included in a category of dependent employees and has to be classified as an employee within the extended meaning of the word remuneration as defined by this particular legislation. Whatever peculiar characteristics of an independent contractor such individual might have exhibited until now, are disregarded and such individual becomes an employee extraordinaire liable to pay employees' tax. This will be the end of the enquiry.

[21] The second leg of the enquiry entails scrutinising the relationship between the taxpayer and the ambivalent earner by applying the rigor of the secondary inclusionary proviso (bb) to determine whether on this secondary basis an individual concerned, qualifies to be classified as an independent contractor. In a case where the secondary

basis of inclusion disqualifies such an individual then the individual has to be classified as an ordinary employee notwithstanding any features which may tend to suggest contractual independence.

[22] Where the ambivalent earner cannot be disqualified as an independent contractor by virtue of either the primary inclusionary rule or the secondary inclusionary rule, then and only then does such an individual qualify to be classified as an independent contractor.

[23] It follows from the aforegoing approach that where the outcome of the primary inclusionary rule and the outcome of the secondary inclusionary rule differ, an individual concerned must be classified as an employee within the special meaning of the word employee as defined in the legislation we are dealing with. Put differently, the taxpayer has to prove that both inclusionary rules are inapplicable to the case at hand in order to succeed on appeal.

[24] The definition of the word remuneration has a bearing on the words employee and trader or independent contractor. The word remuneration is defined as any amount of income which is paid or is payable to any person by way of any salary, wages, bonus, commission, fee, allowance and so on … whether in cash or otherwise and whether or not in

respect of services rendered … but not including:

(ii) any amount paid or payable in respect of services rendered or to be rendered by any person in the course of any trade carried on by him independent of the person by whom such amount is paid or payable or of the person to whom such services have been or are to be rendered: Provided that for the purposes of this paragraph a person shall not be deemed to carry on trade independently as aforesaid – (aa) if he is subject to the control and supervision of any other person as to the manner in which his duties are performed or are to be performed or as to his hours of work; or (bb) if the amounts paid or payable for his services consist or include earnings of any description which are paid or payable at regular daily, weekly, monthly or other intervals - v*ide* paragraph 2 (1) Fourth Schedule Act No. 58/62.

These two deeming inclusions apply to persons who would otherwise have been classified as independent contractors. By deeming them as no independent contractors or traders they are effectively relegated to the category of employees. In this way the word employee is given two extended dimensions.

[25] Before an employees' tax is deducted from the earner's remuneration certain elementary rules have to be borne in mind. In the first place the general rule is that an employee is liable to pay employees' tax. In the second place it is the statutory obligation of an employer to deduct employees' tax in a specified way from an employee's remuneration and to pay it over to the South African Revenue Service on behalf of an employee concerned. In the third place the general norm is that a genuine independent contractor, in other words the earner of remuneration who autonomously execute his mandate without the prescriptive and authoritative instructions from an employer, is not liable to pay employees' tax. In the fourth place an ambivalent independent contractor, in other words an individual who projects himself as an independent contractor but earns fixed remuneration at

regular intervals under such pretext but executes his mandate or rather more appropriately his duties in accordance with the prescriptive and authoritative control and supervision of an employer, is liable to pay employees' tax just like an ordinary employee.

[26] The position of an independent contractor *vis-a-vis* the position of an ordinary employee in the situation of master and servant from common law perspective was thoroughly elucidated in **SMIT v WORKMEN'S COMPENSATION COMMISSIONER** 1979 (1) SA 51 AD, **LIBERTY LIFE ASSOCIATION OF AFRICA LTD v NISELOW** 1996 (7) BLLR 825 LAC and **NISELOW v LIBERTY LIFE ASSOCIATION OF AFRICA LTD** 1998 (4) SA 163 SCA.

[27] From these decisions it emerges that in a service contract – *locatio condictio operarum* the one person who performs the task, surrenders his productive capacity completely to the other person he serves who demands that he be served through the rendering of the service in a way he wants it

rendered. This is the scenario which pertains to a dependent ordinary employee. Here the parties envisage a long term relationship. The one party is a dominant master, the other a subordinate servant. The fixed wages are paid at defined regular intervals. The dominant party decides and dictates the manner in which the work must be done by the subservient party. A typical ordinary worker is normally under a contractual obligation to serve his employer and him alone. Another important feature of this type of relationship is that a compulsory notice is required to terminate the service contract. This then is a service contract. It is by its very nature a very personal service.

[28] As regards a mandate contract – *locatio condictio operis*, the person who executes the mandate does not surrender his productive capacity to the one who gave him the mandate. The manner in which he executes his mandate is characterised by a great measure of independence or degree of freedom. His hands are not exclusively tied to a particular mandatory who engaged or mandated him. He is

at liberty to attend to two or more mandates at a time. He is not bound to one mandate only at any given time. Here the contractants usually envisage a short-term relationship rather than a long-term relationship. The emphasis is to deliver a fine finished product chiselled and shaped by independent use of unbridled or free productive capacity. This then is a work contract.

[29] However, it has to be borne in mind that in adjudicating tax dispute, the current legislative definitions of concepts such as independent contractor or ordinary employee should prevail over the conventional definitions wherever any discords may exist. However helpful such common law definitions or expositions may be, the tax legislation must be consulted as the primary source of guidance in order to ascertain the tax position of an individual. *Vide* Meyerowitz: **MEYEROWITZ ON INCOME TAX** 2003 – 2004 edition Chapter 1 paragraph 1.2:

> "It is therefore clear that the concept of 'employee' can neither be equated with nor is it completely congruent with the

> common law definition of employee as is known in our contracts of master and servant."

per Davis J in **ITC** 1695: 63 SATC 133 at 136 H.

[30] Davis J went a step further and said the following op.cit. p 137 F – G:

> "Therefore, where a person is in a relationship which exhibits independent characteristics; that is characteristics which would not in the ordinary course be classified as employment relationship, but is paid regularly on a defined basis, whether daily, weekly, monthly or other defined intervals, such a person receives remuneration."

[31] The next quotation by Davis J is also instructive. He observed as follows op.cit. p 139 I – J:

> "When the legal edifice described above is taken into account, it must be remembered that contractors who are neither employees *strictu sensu* and are not independent fall within the scope of the Fourth Schedule, notwithstanding that for all other purposes they are not employees. To put it differently, great care has to be taken by those who wish to change their operations from that of employment to subcontracting to ensure that on the extended

> approach of the Fourth Schedule they fall outside of its scope."

I share the sentiments expressed by Davis J in the three passages I quoted above. Javerso J in **ITC** 1718: 64 SACT 42 expressed herself in an affirmative mood.

[32] There are certain specific clauses in the standard independent marketing agreement signed by the marketing agent which according to Mr. Stevens submission negatived the appellant's claim of the alleged contractual independence of the marketing agents but affirmed the respondent's determination that the marketing agents lacked the requisite contractual independence and that these clauses indicated that they were controlled and supervised by the appellant in providing the marketing services. I shall deal with them seriatim. The legal relationship between the parties must be gathered from the terms used in the written contract **NISELOW v LIBERTY** *supra* p 166 A SCA decision.

[33] The first ground is clause 4.03 which reads as follows:

> "In respect of D G Botha:
> The PROVIDER acknowledges and agrees that the marketing of loan products of the COMPANY is limited to

the province and area of Pietersburg and Northern Province and that should the PROVIDER render his services outside the borders of this area it is by choice of the COMPANY not to remunerate the PROVIDER for approved loan applications, either in total or in part.

In respect of C H Pitchers:

The PROVIDER acknowledges and agree that the marketing of loan products of the COMPANY is limited to the province and area of Bloemfontein and Free State Province and that should the PROVIDER render his services outside the borders of this area it is by choice of the COMPANY not to remunerate the PROVIDER for approved loan applications, either in total or in part."

It seems to me obvious that before the marketing agents were appointed the appellant had identified certain areas that had the potential of being fertile grounds for marketing its money loan products for consumption. When D G Botha was appointed the Northern Province, now Limpopo, with Pietersburg, now Polokwane, as his base, was assigned to him alone to exploit its potential. His marketing operations were restricted to this particular province. But the clause did not only prohibit Botha from exceeding the boundaries of his recruitment domain, it also prohibited other marketing agents from entering the same area to market the same money loan products on behalf of the appellant.

[34] It appears that the underlying purpose of the clause was to give each marketing agent absolute independence within a specific area, and to prevent conflict or unhealthy competition between two or more marketing agents recruiting customers in the same area for the same company. There is no evidence to the effect that Botha previously marketed money loan products, for instance in Mpumulanga Province as well as in Limpopo Province and that he was subsequently forced to pull out of Mpumulanga as a result of some powerful pressure brought to bear by the appellant.

[35] In my view the clause represents an ordinary term of the agreement between the two contractants and was not designed to diminish the contractual trade independence of a marketing agent in marketing the appellant's money loan products or touting interested individuals to consume such products. Therefore the respondent erred in using this clause as a factor justifying its determination.

[36] The second ground is clause 5.02 which reads as follows:

> "the PROVIDER shall market the microlending and/or

> other financial products of the COMPANY in the Republic of South Africa to the best of his ability and that it would be done in proper, trustworthy, honest and adhere to a high moral and ethical standard."

See also clause 5.08 and 5.12 which are to the same effect:

> "to trade to high moral, legal and ethical standards and to uphold the good name of the COMPANY.
>
> he shall not employ unlawful and/or unethical business practices to entice or lure clients and/or prospective clients."

My comments in respect of clause 5.02 will therefore apply equally well to clause 5.08 and clause 5.12.

[37] The question of good corporate governance and good work-ethic are the buzz words in the business world today. Now and then we read about the business conferences held to discuss the topical matters such as good governance, code of conduct, ethical standards and so on. Quite often the business leadership both private and public has openly expressed some concern that the monster of corrupt business practices was threatening to tear the ethical, legal and moral fibre in our business community.

Throughout the country serious captains of the various industries are determined to eradicate unworthy corporate and individual practices so as to improve the images of their companies. The public images of the money lending enterprise for instance has been so severely dented in this country that the small money-lenders like the appellant are often derogatively referred to as the loan sharks or "bo-matjhonisa" meaning the impoverishers.

[38] The appellant operates in a notorious industry and is obviously aware of this problem. The purpose of the clause was to protect its image by extracting a contractual obligation from those that it has business dealings with that they were obliged to market its products in a proper manner untainted with untrustworthy, dishonest, unethical, immoral or unlawful acts. In my view the clause is about good governance. It is not about limiting the contractual independence of the marketing agent. No marketing agent can ever claim having any independence to indulge in such unworthy practices.

Therefore the respondent erred in using this clause against the appellant.

[39] The third ground is clause 5.03 which reads as follows:

> "The provider … undertakes to market ONLY the microlending and financial products of the COMPANY."

Mr. Stevens submitted that this restrictive clause alone was fatal to the appellant's case. Mr. van Breda disagreed. He submitted that the clause was inserted in order to obviate problems which often arise when similar loan applications are simultaneously marketed to other rival financial institutions, a practice which often causes problems to money lenders on the market.

It is important to note or to stress that the clause does not preclude a marketing agent from marketing any dissimilar financial product by other financial institutions.

There is yet another evil which the clause seeks to prevent besides preventing a marketing agent from presenting one and the same loan applicant to two different banks in order to obtain financial aid for one and the same need. Had this clause not been inserted, a marketing agent would have been free to overreach the appellant by, for instance, concluding secret deals with other rivals or competitors and diverting some loan applicants to such rival competitors who would offer him say R400,00 instead of R250,00 per each loan application presented and approved.

[40] It seems to me that the primary objective of the clause was

the appellant's natural instinct for self preservation or survival in the highly competitive and tough sphere of money-lending. Again it has to be mentioned that some marketing agents were novices in the fields the appellant wanted to explore. They were unskilled. They were unskilled and like franchisees they were schooled or trained and skilled in the business of marketing the appellant's loan products. For instance Botha was not a experienced and skilled marketing agent who had to abandon his existing mandates in order to execute the sole mandate newly found. Therefore I cannot be persuaded that the restrictive clause was a fatal indication that the marketing agents were subject to the control and supervision of the appellant.

[41] The fourth ground is clause 5.05 which reads as follows:

> "The provider states that …. he might come to information regarded as confidential trade secrets and that should it be disclosed and come to the knowledge of competitors or related third parties that it might be to the financial detriment of the COMPANY and therefore the PROVIDER undertakes non-disclosure for the duration of this agreement and for a period of

> at least 36 (thirty six) months after termination of this agreement."

This contention is flawed. A restraint of trade clause in a contract is not *per se* an indication that the person against whom the clause operates was a subordinate to the person in whose favour the clause operates. Such clauses can also be found, for instance, in a contract where a lawyer sells his lawfirm to another, or a doctor sells his medical practise to another or a butcher sells his butchery to another.

See DE WET & YATES: **KONTRAKTEREG** 4TH edition p 308.

[42] The contract restrains the marketing agent from divulging to the appellant's rival competitors or related thirds sensitive information relative to confidential trade secrets imparted by the appellant and acquired by the marketing agents by virtue of their business dealings founded on the bond of trust. Both parties acknowledged through this clause that left unregulated, disclosed confidential trade secrets could lead

to the financial detriment if not the downfall of the appellant. Mr. Stevens' contention that the restraint entails limitation of the marketing agent's future productive capacity which amounts to a form of control over an employee by an employer overlooks the real purpose of the restrained in these circumstances. The clause protects confidential trade secrets but limits no productive marketing activities at all, of the individuals concerned in the future. From day one after termination of the independent marketing agreement the marketing agent is at liberty to continue with his marketing activities on behalf of any other mandatory provided he does not disclose the confidential trade secrets of the appellant. Therefore, this factor alone cannot be a decisive indicator that the marketing agents we are here concerned with were ordinary employees of the appellant or could be equated to special employees as contemplated by the deeming inclusion rule (aa) paragraph 2.1 forth schedule.

[43] The fifth ground is clause 5.13 which reads as follows:

> "The provider …. agrees that he shall adhere to proper

> administrative requests and compliance requested or instructed by the COMPANY."

Counsel for the respondent contended that an independent contractor would not accept this sort of restriction on his mandate or services. However, counsel for the applicant argued that:

> "Dié klousule het geen betrekking op die wyse waarop die lashebber sy opdrag moet uitvoer nie (naamlik om leningsapplikante te werf) en is ingevoeg bloot om effektiewe administrasie en kommunikasie daar te stel, tot voordeel van leners. Dit is 'n erkende verpligting by lasgewing dat die lashebber rekenskap van sy bewindvoering aan die lasgewer moet voorlê.
>
> Sien: DE WET & YATES – KONTRAKTEREG - bl 308."

[44] It seems that an example or two will clarify the matter. Suppose a marketing agent successfully recruited customer X to apply for a study loan. He then submitted the required application form to the appellant for consideration. Upon perusing the application form, the appellant discovers that no copy of X's identity document was annexed and that a page of the application form which deals with the loan applicant's

trade references was not completed at all. The appellant returns the loan application form to the marketing agent, say Pitchers, for further attention. But Pitchers simply ignores the appellant's administrative request to complete the loan application form fully and to attach the required copy of the identity document. The appellant again writes one more letter and request Pitches to comply with the previous administrative request. Again Pitchers does nothing despite the fact that he had received numerous letters, faxes and calls from the appellant and from the said X. Five weeks later the appellant sends a fax message instructing Pitchers to comply within seven days.

I hold a firm view that such requests, demands or instructions to comply do not entail by any serious stretch of imagination any superior authoritative or prescriptive control and supervision of a marketing agent. Similarly any instructions by the appellant to any marketing agent demanding lawful compliance with the terms of the independent marketing agreement cannot be said to be limiting the manner in which the loan products have to be marketed.

[45] The sixth ground is clause 7.02 which reads as follows:

> "The company agrees: That the remuneration in 7.1 above be paid by the COMPANY to the PROVIDER on a monthly basis

> and in such a manner and on such a date that it is available to the PROVIDER before that last day of the specific month."

Clause 7.01 referred to in this passage provides that the company, in other words the appellant, undertakes to remunerate the provider, in other words the marketing agents, with the amount of R250,00 for every loan product submitted by the provider provided certain conditions are met.

[46] The first crucial question here is whether the marketing agents received fixed remuneration. The marketing agents were remunerated at the rate of R250,00 per each loan product marketed and approved. But there were no prescribed minimum or maximum targets of loan products a marketing agent was obliged to meet a month. The remuneration earned by a particular marketing agent in a particular month depended on the industry of such a marketing agent. It probably fluctuated from time to time and differed from marketing agent to marketing agent.

Notwithstanding the wording of the independent marketing agreement clause 7.01 does not stipulate the fixed remuneration but a formula at which the marketing agents were to be remunerated.

[47] The second crucial question is whether the marketing agents were remunerated at the regular defined periodic intervals. It is also conceivable that the not-so-industries were not regularly remunerated every month when they had not submitted any loan product as the witnesses Vorster and Botha said. This much Mr. Stevens conceded. He said:

> "Dit word aan die hand gedoen dat daar heel moontlik gevalle kon voorkom waar werkers nie op 'n maandelikse basis besoldig is nie."

But he went on to say:

> "Hierdie feit is egter neutraal, aangesien die Appellant in sy kontrak met die werkers die reg voorbehou het om hierdie werkers maandeliks te besoldig en hierdie reg kon uitoefen soos hy inderdaad in die twee gevalle op rekord gedoen het."

[48] Although the appellant had remunerated two marketing

agents, namely Pitchers and Botha, every month during part of the year under review, such payments did not offend the tax rule against regular remuneration for independent contractors. In other words remunerating those two marketing agents regularly on a monthly basis or fortnightly basis did not have an adverse impact on the entrepreneurial autonomy of the marketing agents as independent contractors. The bottom line of the matter is that each marketing agent was entitled to be paid per loan product marketed and approved which loan product he was at liberty to submit at any irregular intervals during the month. For instance, a marketing agent could lodge three claims during the first week, seven during the second week, twenty during the third week and zero during the fourth week. On behalf of the respondent it was contended that seeing that the appellant had the right to remunerate the marketing agents monthly according to their contracts in the docket which right the appellant enforced as evidenced by the testimony of Vorster, the appellant squarely falls within the second inclusion (bb) of the Fourth Schedule on this technical point alone. The following passage by Traverso J in **ITC** 1718: 64 SATC 43 at par 12 on p 47:

> "Even if it is found that Mr. B was carrying on an independent trade he is disqualified because his earnings were payable on a regular monthly basis subparagraph (bb) of the definition of remuneration."

[49] Where a marketing agent is found to be remunerated periodically on, say monthly basis, then his claim of autonomous trade status is nullified by the second inclusion (bb) definition of the word remuneration in par 2.1. Where, however, the frequency at which the earnings are payable is occasionally interrupted, as *in casu*, by one or more unpredictable events the trade independence of such a marketing agent cannot be ensnared by the second proviso (bb) in par 2.1), in other words a marketing agent cannot be disqualified as an independent trader. An individual remunerated does not become an independent contractor because the contract labels him or her so. By analogy the frequency of payment does not become a regular frequency merely because the contract described it as such. The

words used in the contract must be scrutinised in order to find their true meaning. To do other words would be to prefer form to substance.

[50] The underlying idea of the clause was influenced by considerations of sound financial management and pragmatic dictates of administrative convenience. It made a perfectly sound financial proposition from an accounting perspective to draw up one composite cheque each month or each fortnight in favour of the marketing agent concerned in order to avoid a multiplicity of numerous small cheques of R250,00 each drawn in favour of one and the same marketing agent by the same drawer. Though the remuneration was to be paid monthly, no fixed and precisely determined date such as the 25th of each month was agreed upon for the payment of remuneration. The remuneration could be paid on any day other than the last day of any particular month. For instance, one marketing agent was paid twice per month despite the provisions of the standard independent marketing agreement. Such date could vary

from month to month and from marketing agent to marketing agent. It follows that no remuneration would be paid for a loan product lodged on the last day of the month. All these various aspects show that the concept of defined regular intervals was not violated on the facts of the instant case.

[51] The seventh ground was clause 8.04 which reads as follows:

> "The agreement can be cancelled by either party with 30 (thirty) days written notice to the other."

This clause must be read together with clause 8.05 which empowers the appellant to resile from the contract on 24 hours notice if it suspects that a marketing agent has breached the provisions of clause 6.

Now counsel for the respondent contended that by reserving unto itself the drastic power to terminate the independent marketing agreement at such a short notice, was indicative of a master and servant relationship instead of a bond underpinned by contractual independence between autonomous contractants e.g. a marketing agent and a mandatory.

[52] I am not persuaded. The appellant has the right to expect honest information, clean dealings, right morals and lawful practises on the part of any marketing agent. Every banker expects the same from an independent broker who markets it financial products. It cannot be argued with serious conviction that one contractant who is required by another contractant to pursue those business virtues is subordinate to the one seeking no dishonest information, underhand dealings, wrong morals or any illegal practices. Should a marketing agent violate such contractual obligation in the course of marketing the appellant's loan products, he will obviously be in breach of the independent marketing agreement. Prohibiting a marketing agent from acting unlawfully can hardly be described as exercising oppressive employeral authority or restrictive supervision. If we accept this proposition then there can be no logical reason for rejecting termination of the contractual relationship as a remedy for putting an end to an agreed wrong method of

marketing a product. Doing so cannot be seen as controlling or supervising the manner in which a product has to be marketed. It boils down to virtually stopping the entire business of marketing itself. Logically there can be no controlling or supervising of the product when a marketing process itself has been done away with.

[53] Having said all that I have to hasten to add that there are a number of features which seem to have a negative effect on the alleged contractual trade independence of the marketing agents. I propose dealing with them one by one.

[54] The first factor is the employee computer code. The appellant used the so-called pastel computer program. This program is apparently a user-friendly system concerning the creation of accounts. Vorster did not think so. But I accept that the program is supposed to help management to quickly obtain the necessary financial information from the computer program and to preserve it for the purpose of drawing up the required annual financial statement of a program user such

as the appellant. After all buying a computer program which does not serve one's particular needs makes no sense at all.

[55] In normal circumstances one would expect management of a company the size of the appellant to draw up a clear distinction especially in its annual financial statements between its dependent ordinary workers and its independent special traders in order to have the necessary information readily available for decision-making by management. For instance, ordinary employees could be given code 340 and special traders' code 440. It was never done in the instant case. Instead one and the same code 440 was used in respect of both categories whose earnings were decoded as salaries, wages and commission. As the situation stood on 29 February 2000 the total number of special traders, in other words independent contractors if any, was not separately and distinctly reflected in the annual financial statements. In turn the omission to distinguish them obscured the alleged marketing costs.

The fact that Edbel Five (Pty) Ltd had employed a full-time bookkeeper as an ordinary employee and also had at the helm of its echelons of power Vorster who was not just a director but a director who was a chartered accountant by profession deepens the omission problem and raises some worrying questions about the alleged marketing costs and the status of the individuals involved.

[56] The marketing agent 440/307 C H Pitchers independent marketing agreement which endured from 9 June 2000 was belatedly signed on 12 June 2000. The strange feature of this marketing agent is that he was remunerated from 23 July 1999 almost a year before the independent marketing agreement became operative. It seems to me that the independent marketing agreement in respect of Pitchers which appears on p 76 – 82 of the red bundle has no bearing on the year of assessment we are here dealing with. Clause 9.01 thereof suggests that there could have been an earlier independent marketing agreement which preceded the 2000 agreement. But no such earlier written agreement forms part of the docket before me.

[57] Pitchers was remunerated twice a month as from 23 July 1999 despite the wording of the standard independent

marketing agreement. An analysis of the transactions recorded in his general ledger account shows:

- That during a period of about eight months immediately preceding the year of assessment (29 February 2000) he received from the appellant a turnover of R703 374,00;
- That this sum included six months commission of approximately R605 995,00;
- Refund of rent of approximately R28 700,00;
- As well as various payments of debts which Pitchers owed to his apparent sundry creditors.

It is unusual for a company to pay such expenses on behalf of an independent trader contracted to it. Moreover, Pitchers was not reflected as a debtor to the appellant. There is no evidence that the moneys were loaned to him. The rest of the marketing agents did not earn as much income as Pitchers did. The second highest earner was Botha. But even he lagged far behind by a substantial amount. Botha earned R275 124,55 less than Pitchers. The third highest earner was Le Grange with a modest commission of R6

500,00. These strange features and the vast earning disparities raise some questions about the alleged trade independence of the marketing agency system in this case.

[58] Mr. Stevens submitted that:

> "Dit word ten slotte aan die hand gedoen dat ten beste vir die Appellant se saak die werkers hulle in 'n niemandsland tussen 'werknemer' en 'onafhanklike kontrakteur' bevind het en daarom as 'werknemers' geklassifiseer moet word in terme van die Vierde Bylae en dat die Appellant gevolglik werknemersbelastng van hulle besolding moes afgetrek het of teruggehou het:
>
> ***Vide*** **ITC 1695** ***supra*** **te 139"**

[59] Mr. van Breda submitted that:

> "4.2.1 Uitsluitingsbepaling (aa) geld nie daar die betrokke bemarkers nie aan enige beheer en toesig onderworpe was, met betrekking tot die wyse waarop hulle hul pligte moes uitoefen, of hul werksure nie;
>
> 4.2.4.1 Hierdie bepaling (inclusion (bb) in other words) geld ook nie omrede die kontrak in die onderhawige saak, nie voorsiening maak vir

> gereëlde en vaste maandelikse betalings nie, maar slegs vir betalings as daar 'n eis is. (K17 – Dossier bl 72).

The words in brackets are mine.

[60] One of the obstacles on the road of the appellant to success is that it bears the onus of proof. The issue on which the onus falls to be discharged by the appellant was whether the appellant was liable upon proper and correct classification of the marketing agents, to have employees' tax deducted from the sum of the various payments it made to them.

It would appear that the appellant intended using independent outsiders to market its loan products to public consumers. Now the crucial question is whether the intended relationship was so structured that it attained that objective or not. In other words whether the appellant has discharged the onus of showing that it had been done. I am inclined to conclude that the appellant has discharged the onus.

As regards the primary inclusion (aa) my findings are that each marketing agent acted towards the appellant as an independent service provider and was treated as such by the appellant in keeping with the independent mandate agreement; that the parties stipulated in the relevant independent mandate agreement that their relationship would not be governed by the provisions of the current legislation relating to labour relations; that no marketing agent was a member of the appellant's pension fund, provident fund or medical aid society; that all the marketing agents carried on with their own autonomous trades subsequent to their appointment as the marketing agents of the appellant's loan products; that a marketing agent could not contractually bind the appellant to the third parties; that the appellant was not vicariously or delictually liable for the civil wrongs committed by a marketing agent himself or his employee and that the appellant did not control or supervise any marketing agent's productive capacity or manner in which he executed his duties or regulated his working hours.

As regards the secondary inclusion (bb) I could find no conclusive evidence that the marketing agents were routinely paid at defined periodic intervals irrespective of their performances; that they always received fixed payments or that they received one payment every month. I accepted the evidence of the appellant's two witnesses. No real evidence was tendered on behalf of the respondent to discredit them in any manner. The respondent called none of the marketing agents or obtained any sworn statements from them.

[61] Having considered the pros and cons of the appeal both ways I have come to the conclusion that consideration of the factors the dominant impression created by the facts is:

- That the marketing agents were not disqualified as independent contractors in terms of the primary inclusionary hurdle (aa). The appellant has established on a balance of probabilities that it exercised no control and supervision over the marketing agents;
- That the marketing agents were also not disqualified as independent contractors in terms of the secondary inclusionary hurdle (bb). The appellant has, in my

view, also shown on a balance of probabilities that it paid no fixed remuneration at defined regular periodic intervals to the marketing agents;

[62] In the circumstances I have come to the conclusion:

- That the marketing agents were independent contractors and not employees in an ordinary or extended sense of the word employee;
- That their proven contractual trade independence or status demands that they be classified as independent contractors and not employees;
- That the respondent's claim or decision which led to their classification as employees was not justified by the facts;
- That the appellant was, therefore not liable to deduct any amount in the form of employees' tax from the amounts it paid to the individuals concerned.

In the case of **NISELOW v LIBERTY** *supra*, in terms of a written contract, the appellant, a marketing agent of the respondent, undertook to canvass insurance applications on a fulltime basis exclusively for the respondent. His remuneration was paid in a form of a commission on insurance contracts canvassed by him and of course approved by the respondent. In court he claimed he was a *locator operarum* – in other words – an employee to the respondent. The Labour Appeal Court in **LIBERTY v NISELOW** *supra* held that he was not. On appeal the Supreme Court of Appeal confirmed the decision of the Labour Appeal Court that the appellant was a *locator operis* – in other words – an independent contractor. By analogy I am satisfied that the marketing agents *in casu* were indeed independent contractors.

I would therefore uphold the appeal.

[63] Paragraph 5(5) of the Fourth Schedule Act No. 58/62 provides that the sort of employees' tax that we are concerned with if proven, is deemed to be a penalty due and payable by an employer concerned to the South African Revenue Service.

Paragraph 6.1 of the Fourth Schedule Act No. 58/62 provides that where an employer deducts employees' tax from the earnings of an employee, but fails to pay it over to the South African Revenue Service on behalf of an employee within seven days from the end of the month within which such employee tax was deducted and retained, such defaulting employer shall be liable to pay a further penalty of 10% on such employees' tax to the South African Revenue Service.

Section 89 *bis* Act No. 58/62 provides that after the expiry of a prescribed seven day period referred to in paragraph 2 the Fourth Schedule Act No. 58/62 interest at the prescribed rate shall become payable by the employer to the South African Revenue Service for the full period during which such employee tax remains unpaid.

Since there is no employees' tax which the appellant deducted or retained but failed to pay over to the South

African Revenue Service the provisions of paragraph 6.1 relative to additional penalty and those of section 89 *bis* relative to interest do not apply. There is no deemed capital penalty as paragraph 5(5) envisages.

[64] Section 87(17) Act No. 58/62 empowers the court to make an order in favour of an aggrieved party where the assessment of the respondent is found to be unreasonable or where the hearing of an appeal was postponed at the request of one of the parties. It has been held that the respondent commissioner's claim was unreasonable if it rested on a decision which no reasonable person could have come to.

See **<u>ITC</u>** 945: 24 SACT 455 on p 457 and **<u>ITC</u>** 1703: 63 SACT 247 on p 257 – 258.

In the former case Williamson J observed that the commissioner was not to be ordered to pay the cost in a case of a successful appeal against his decision merely because his decision was wrong. Something more was required. That is still the position today in the Income Tax Law. The commissioner could also be directed to pay the cost should the court find that his claim was obviously frivolous or where the court finds that his claim was manifestly futile.

See **ITC** 1316: 42 SATC 229 and **ITC** 1703 *supra* at 258.

However, I am of the view that in a scenario where a marketing agent's landlord is paid by a tax payer a company whose products he was appointed to market. On that ground alone if the commissioner suspects that the alleged independent marketing contract was probably a disguised master and servant contract camouflaged as independent mandate contract it cannot be said that the commissioner's claim was so unreasonable that no reasonable person would have come to such a decision on the facts.

[65] The hearing of the appeal was postponed to 11 October

2004 not at the request of the respondent as Mr. van Breda would want us to have it. The fact of the matter is that the appeal simply had to be postponed. The postponement was due to the lateness of the hour.

[66] In the circumstances I cannot accede to the appellant's request for a cost order against the respondent. The case presented by the commissioner was very plausible. Although the appellant has suffered financial prejudice, the respondent is not to blame. Such financial loss as the appellant might have incurred, is squarely attributable to the dubious or ambivalent dealings he had with its marketing agents, especially Pitchers.

[67] Accordingly I make the following order:

67.1 The appeal succeeds.

67.2 The respondent is directed to withdraw the assessment in question.

M.H. RAMPAI, J

I concur.

A.J. KOCH

I concur.

G. DE WAAL

On behalf of the appellant:	Adv. C van Breda Instructed by: PriceWaterhouseCoopers
On behalf of the respondent:	Adv. G Stevens Instructed by: SARS

/sp