

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO C535/2001

In the matter between:

TANIA BEZER (née JAUCH)
Applicant

and

CRUISES INTERNATIONAL CC
Respondent

JUDGMENT

TIP AJ:

1. The applicant was employed by the respondent from 1 May 1998 to sell international cruises. She was paid a basic salary plus commission on the sales achieved by her. In August 2000 the parties signed an agreement

purporting to be an agency agreement. Its effective date was recorded as 1 December 1999. By then the applicant had formed a close corporation styled Cruise Promotions CC ("the CC"), of which she was the sole member. On the face of it, the agency agreement was entered into between the CC and the respondent and it is common cause that the applicant signed the agreement on behalf of the CC.

2. In the course of March 2001 the respondent implemented a restructuring program, which resulted in the services of four people being terminated. One of them was the applicant. Pursuant to this she has sought to claim certain relief *qua* employee in a context of retrenchment. The respondent denies any obligation to meet her claims. It does so on the basis that she is not an employee and that the relationship between the parties as at the date of the restructuring was one of agency.
3. This contention has accordingly given rise to a preliminary hearing in relation to whether or not the agency agreement was a *bona fide* one and, hence, whether or not the applicant is to be treated as an employee within the meaning of that term in the Labour Relations Act of 1995. If she is, this Court will have jurisdiction over the merits of the dispute and *vice versa*.
4. Two witnesses were called in support of the applicant's case. The first and principal witness was the applicant herself, Ms Jauch. Ms Jauch began employment with the respondent in March 1998. She had previously been employed by a travel operator with an extensive business connection with the respondent. Ms Jauch was in effect recruited to the respondent by Ms Jann Porter, who was then the respondent's sales representative. Ms Jauch worked as the latter's assistant, dealing with individual travel, while Ms Porter dealt with group transactions.

5. Ms Jauch's terms and conditions of employment were initially concluded by way of an oral agreement. Subsequently, a written employment contract was signed. Although a copy of that agreement is no longer available, a version of it incorporating some variations was signed on 12 July 1999. This agreement stipulated that it was to be effective as from 1 January 1999. That date coincided with the departure from the respondent of Ms Porter. The applicant was then responsible for both individual and group bookings. Included among the terms that were recorded in the agreement are the following:

- 5.1. a basic salary of R3500 per month;
- 5.2. the applicant received R1000 per month as a contribution 'towards office expenses';
- 5.3. a commission of 1% on all bookings made by the applicant was payable in arrears in the month of travel;
- 5.4. all business telephone calls made by the applicant would be paid by the respondent;
- 5.5. expenses related to the service, maintenance and petrol of the applicant's vehicle would be paid by the respondent through its Nedfleet system;
- 5.6. the respondent undertook to contribute 50% of the applicant's vehicle repayments up to a maximum of R600 per month;
- 5.7. leave pay of 15 days for each completed period of 12 consecutive months of employment was provided for;

5.8. there was a provision for sick leave to be accrued at one day per month in a three-year cycle;

5.9. medical aid was provided for;

5.10. the respondent contributed R165 per month towards a pension fund.

6. According to Ms Jauch, the amount of R1000 for office expenses and the facility of the Nedfleet card were added to her remuneration package because she was after Ms Porter's departure utilising her own home in order to conduct the business of the respondent. This was the only business site for the defendant in Cape Town. Previously, the work had been carried out from the home of Ms Porter, where one of the bedrooms had been used as an office.

7. As an employee, Ms Jauch was reimbursed for all business related expenses. She would forward the vouchers to the respondent's head office in Johannesburg on a monthly basis and a composite transfer would be made into her banking account comprising her salary, the office expenses amount, the travel allowance and the reimbursement of additional expenses.

8. The applicant had learned from Ms Porter that the latter had formed a close corporation and that she put expenses through it. Once Ms Jauch became the sole consultant for the respondent in Cape Town, she was advised in a telephone call with Mr Argyropoulos, the managing member of the respondent, similarly to set up a close corporation. Greater detail was given to her about this step by Mr Jaco van Schalkwyk, the general manager. So ran the evidence of Ms Jauch on this aspect of the case. Although it was disputed in cross-examination, no witness was called to

testify on behalf of the respondent and I must accordingly accept the applicant's version that the initiative for the formation of a CC came from her employer and not from herself.

9. Ms Jauch sought the advice of an accountant, Mr Jeff Pulker, in relation to the formation of a CC. She met with him on 18 February 1999 and, with his assistance, the CC was registered and incorporated in due course, on 8 April 1999. I will deal later in this judgment with the question of what Ms Jauch had in mind at the time that the CC was formed and thereafter. It will be convenient first to complete the narration of the events.
10. Ms Jauch testified that, once the CC had been established, she was thereafter paid by the respondent on presentation of invoices that were prepared and submitted on a monthly basis in the name of the CC. It is however clear from the documentation that this became the system only from December 1999, when invoice number 001 was drawn up in the name of the CC. This was the first such invoice. Until that month, Ms Jauch continued to be paid in the usual way against salary advices prepared by the respondent.
11. In the meantime, the employment agreement to which I have already referred was signed, on 12 July 1999. It follows that the parties were certainly *ad idem* at that stage that the relationship between them was one of employment. By then, the CC had been in existence for some three months. That fact *per se* had not altered the status of the applicant. She was still an employee and, on the face of it, she continued to be paid as one.
12. The change came with the introduction of the agency agreement. The written version was signed on 20 August 2000. It had however been

discussed well before then. Its effective date was 1 December 1999 and there is no suggestion that what was *de facto* put into place as from that date was in any significant way at variance with the terms of the later written agreement. This agreement is clearly based on the previous employment contract, with textual amendments purporting to describe an agency relationship in the place of one of employment.

13. With the advent of this agreement, monthly invoices in the name of the CC were prepared and submitted to the respondent for payment. Until March 2001, these invoices were of the same form. Items included an amount for R3,500 that was described as 'earnings' in the first month of December 1999 and in the months thereafter as 'consultancy fee'. There was a 'travel allowance' of R600 and 'office rental' in the amount of R1,000. Each invoice also included items that were apparently reimbursement charges for a variety of expenses such as 'cruise photographs', 'refreshments', 'parking' and the like. Copies of the vouchers for such charges accompanied the invoice. After March 2001 the invoices from the CC comprised only one class of charge, being a fee at a fixed hourly rate for training services rendered to the respondent.
14. With effect from 1 December 1999, the respondent no longer paid for Ms Jauch's medical aid. It also stopped paying its contribution to her pension plan. Save for that, her day-to-day working arrangement did not change at all. She had no client other than the respondent and marketed tours solely on its behalf. She was not entitled to do work for any other enterprise. Her working hours did not change.
15. The close correspondence between the position before and after 1 December 1999 is reflected in the extent of the similarity between the two written agreements. Illustrative of this are the following aspects of the

‘agency agreement’:

- 15.1. whereas the previous agreement provided for a basic salary of R3,500, an office expenses allowance of R1,000 and vehicle expenses of R600, there was now a single equivalent amount of R5,100 for agency expenses;
 - 15.2. as before, Ms Jauch was required to devote the whole of her time and attention to the respondent during its working hours and overtime, described as ‘additional time’, when required;
 - 15.3. previously, holiday leave was provided for at 15 days per 12 months; there was now provision for 30 days per 2-year cycle described as a contribution “to your agency expenses while you are on leave”;
 - 15.4. the respondent undertook to pay “its contribution to the running of your agency” in the event of ill health, at a maximum of 36 days per 3-year cycle, which was effectively the same as had previously been the position;
 - 15.5. the commission structure remained unchanged.
16. According to Ms Jauch, she did not understand anything to have been changed with the new arrangement. All that had happened, in her view, was that there were now invoices from her in the name of the CC. Notwithstanding that she had signed a document headed ‘agency agreement’, she did not consider that she had become an agent, but that she remained and had always been an employee of the respondent. Had it been explained to her that she would no longer be an employee, she would not have gone along with the new arrangement.
17. Ms Jauch learned that her relationship with the respondent was to end on

12 March 2001. On that day she had a telephonic discussion with and received a fax from Mr Argyropoulos announcing that the respondent contemplated dismissals based on operational restructuring. It was addressed to 'all employees'. Ms Jauch telephoned Mr Argyropoulos, who confirmed that the notice applied to her also.

18. On the following day, Ms Jauch received a payout proposal set out in a notice headed 'retrenchment package proposal'. This *inter alia* included the breakdown of the respondent's proposed 'retrenchment package'.
19. On the same day, 13 March 2001, Mr Argyropoulos supplied a letter of reference, which included the statement: "*This letter serves to confirm that Tania Jauch has been an employee of Cruises International since March 1998 to date*".
20. On 15 March 2001, Ms Jauch put in her own proposal "*regarding the redundancy of my position*". The response from Mr Argyropoulos was *inter alia* that the discussion on 12 March had related only to the training and motivation that Ms Jauch could in the future provide, but that her redundancy proposal had in any event been referred to the respondent's labour lawyer.
21. About a week after the communication of 12 March 2001, Mr Argyropoulos indicated to Ms Jauch that the respondent was treating her in the same way as the others who were being retrenched, but 'from a different angle' as she wasn't an employee.
22. On 28 March 2001 Mr Van Schalkwyk sent an email to Ms Jauch in which he referred to the agency agreement and observed that it did not contemplate pay out of a leave amount, but that the respondent would pay

an amount for this item '*for the sake of good order*'. On the same day, Mr Argyropoulos sent a proposal '*in order to finalise your retrenchment package*'.

23. On 18 April 2000 the respondent, under the signature of Mr Van Schalkwyk, provided a letter which was to be lodged by Ms Jauch with a banking institution in support of an application for a housing bond. It included the statement that: "*This letter serves to confirm that Tania Jauch is employed by Cruises International as an agent in Cape Town...She has been with Cruises International for over two years and presently earns a basic salary of R10 970,17. This amount includes commission ...* " Although it has some ambiguity, the terms of this letter were clearly calculated to bring the bank under the impression that Ms Jauch was a salaried employee. The letter was provided as a result of a specific request from Ms Jauch in order to assist her. By that date, of course, she was no longer an employee on either party's version.
24. Whether or not Ms Jauch was indeed an employee until March 2001 must be examined also in the light of her reasons for setting up the CC. Her evidence on this aspect is unsatisfactory and, frequently, evasive. She attempted, unsuccessfully, to portray herself in relation to this step as a naïve employee who had simply carried out a suggestion made by her employer. Ms Jauch did not appear to me to be a passive and hapless person. To the contrary, she impressed me as an articulate and capable manager of her affairs. I have no doubt that she acted *vis-à-vis* the formation of her CC in a witting and deliberate manner.
25. Ms Jauch was pertinently asked in her evidence-in-chief what the purpose was of forming the CC. Her answer was that she was to speak to a tax

consultant and get advice. Although she avoided, in that answer, directly identifying the purpose, it is clear that the primary if not only reason for setting up the CC was to obtain a tax advantage. As set out in the applicant's further particulars, the respondent had suggested the formation of a CC because it would be 'more tax efficient'. Ms Jauch had considered this to be 'a valid reason'.

26. Notwithstanding this, Ms Jauch's evidence on the question was persistently vague and, in my view, distinctly less than candid. For instance, having described how she consulted her accountant about forming the CC, she maintained that she had not been informed of the tax implications of setting up a CC. Mr Pulker had merely told her what he needed and she typed up the information every month, put everything in an envelope, and handed it over to him at the end of the financial year.
27. Somehow, nevertheless, Ms Jauch had come to understand that the CC had better tax implications for her and that she would "save a bit every month". She wouldn't pay PAYE and she would put through a portion of her office expenses every month. Inconsistently, she testified also that there would in fact be no benefit to her from a tax point of view and that her tax position would be exactly the same.
28. Ms Jauch's evidence on this aspect of the case became no more satisfactory during cross-examination. The following succession of answers illustrates this:
 - 28.1. when she initially spoke to Mr Pulker, she did not tell him why she wanted to form a CC;
 - 28.2. asked what, then, she did tell him, Ms Jauch testified that she thought that

she had told him that it was for submitting claims for tax;

28.3. she went on to confirm that she had indeed received advice, after which she thought that it was a good idea to form a CC for the purpose of tax benefits;

28.4. Ms Jauch nevertheless disputed the proposition that she wanted the tax benefit of a CC, stating that she didn't know initially that there would be a tax benefit; indeed, she said, there was in fact no such benefit.

29. The evidence that there was in fact no tax advantage is, on the face of it, somewhat startling. The CC was incorporated on 8 April 1999. In that financial year, ending on 28 February 2000, all Ms Jauch's remuneration from the respondent was put through the accounts of the CC. The total income was reflected as R121 175. Total expenditure amounted to R121 511. The CC therefore ran at a loss of R336. It accordingly attracted no tax liability.

30. Likewise, Ms Jauch personally enjoyed a tax-free year. The total expenses of the CC includes an item for 'members remuneration' in the sum of R31 000. The precise basis for the determination of that amount is unclear. Be that as it may, that figure was set out in Ms Jauch's personal return as her only income. After deductions and rebates, there was zero tax payable. As an employee of the respondent, Ms Jauch would have earned more. *Prima facie* she would have paid a significant amount of income tax.

31. The lack of candour of Ms Jauch in relation to the issue of her tax was underlined in her response to a summary proposition put to her by Mr Landman, who appeared for the respondent, being that neither she nor the

CC had paid tax. Her answer was to the effect of: "*As discussed today, it seems that way*". She went on to state that she had been unaware of this before. Ms Jauch's financial and tax matters are far from elaborate and I have no doubt that she was well aware – at the time - that she was paying no tax.

32. The 2001 tax year yielded the same picture. The total revenue of the CC was R175 371. Apart from an insignificant item for interest, all of that represented income from the respondent. Total expenditure was shown as R177 944, with a net loss of R2 573. Members remuneration was set out in the amount of R33 000. Carried forward to Ms Jauch's personal return, she once more had a zero tax assessment. When it was put to her that this was the benefit of the CC, Ms Jauch again sought to suggest that she had not been aware of it at the time. Her reply was in this vein: "*Yes, now I see; I didn't pay anything*".
33. Ultimately, Ms Jauch conceded, as she had to, that she had used the CC to save tax and that she had done so on the basis that the respondent would have an agreement with the CC and not with her.
34. Although the CC is still in existence, it is dormant and nothing goes through it. Ms Jauch did not open a separate banking account for the CC. *Prima facie* its functioning was co-extensive with the work performed by the applicant for the respondent.
35. Mr Pulker was called as a witness in support of the applicant's case. He met with her on 18 February 1999 to discuss the formation of the CC. He became familiar with her tax matters and had arranged for Ms Jauch to be registered as a provisional taxpayer. As he understood the position, she had not previously been a taxpayer. He referred to a salary statement for

March 1999, apparently prepared by the respondent, which reflects that there was a tax directive that Ms Jauch should pay no PAYE. I should add that Ms Jauch herself testified that she knew nothing about a tax directive.

36. Mr Pulker was shown an IRP5 form for the 1999 tax year, which indicates that employee tax had in fact been deducted for that year in relation to Ms Jauch. He had not previously seen that document and nor had Ms Jauch. No evidence was presented by the respondent concerning it and the document's status remains uncertain. In view of the conclusion that I have reached that this matter should be referred to the Receiver of Revenue for investigation, I do not propose to venture any finding concerning it.
37. Similarly, I refrain from any finding in relation to the view expressed by Mr Pulker that the State had suffered no fiscal prejudice during the 2000 and 2001 years, notwithstanding the fact that it had received no tax revenue whatsoever for those years from either the CC or Ms Jauch. Indeed, Mr Pulker went on to testify that the treasury had actually 'done better' in those years and, as a corollary, that Ms Jauch had enjoyed no tax benefit as a result of setting up the CC. Whether or not these propositions can be demonstrated I will leave to the Receiver to determine.
38. Mr Pulker testified also that Ms Jauch was not knowledgeable about tax matters, although he tried to explain them. He had also explained in detail to her what a CC was.
39. As had been Ms Jauch, Mr Pulker too was vague in his evidence concerning the setting up of the CC. When asked in cross-examination what Ms Jauch had told him in February 1999 about the reason for forming a CC, he answered that she had come to him through a friend. Although he had advised her that she would "*technically*" be employed by the CC,

he said that he couldn't now recall whether she had understood it.

40. Mr Pulker was asked crisply what the purpose was of the CC. Initially, he replied somewhat blandly that it was "*to receive remuneration through the CC*". He was nevertheless clear that the contractual relationship was between the two Close Corporations, that this was a legitimate way of contracting, that the applicant was employed by her CC and that she was no longer an employee of the respondent. Although he then added that he could no longer recall the details of his conversation with the applicant, I have no hesitation in concluding that these were matters that had been discussed with Ms Jauch and that they were by no means too complex for her to fully appreciate.
41. Mr Pulker was asked about a particular item in the CC expenses for the 2001 year in an amount of R23 645, which had been described as '*advertising, marketing and promotions*'. In fact, this claim related exclusively to the wedding expenses of Ms Jauch. That sum represented the full amount of the invoice from the hotel where the reception had been held. Ms Jauch was aware that the full amount of the wedding had been claimed as a tax deductible expense. She had been informed by him of the implications of certain claims and that there might be queries from the Receiver concerning them. However, the Receiver was not informed that this claim related solely to a wedding. Again, I express no view on this claim save that it is *prima facie* one of the items that should be considered by the Receiver. I may add that this issue was not traversed with Ms Jauch in the course of her evidence. I should add also that it is apparent that the full amount of Ms Jauch's income was put through the books of the CC for the 2000 year and, likewise, that her deducted expenditure aggregate spanned the full tax year. However, the CC came into the

picture only on 1 December 1999, once the agency arrangement became operative. Before that, as outlined earlier in this judgment, Ms Jauch had been an employee of the respondent. *Prima facie*, it would appear that the CC accounts should have related to only 3 months and not the full year.

42. On behalf of the applicant, Mr Sarantos submitted that her duties were precisely the same after the conclusion of the CC as they had been before. Save in respect of medical aid and the pension fund, the duties of the respondent *qua* employer had similarly remained unchanged. In these circumstances, ran the argument, the true relationship between the parties continued to be one of employer and employee. That was the reality and the substance and, argued Mr Sarantos, it is to those that the greater weight should be given and not to the nominal form. Mr Sarantos went on to submit that the agency agreement was a sham and, as part of the scheme required by the respondent, that the CC was similarly a sham.
43. Mr Landman contended the reverse, that neither the agency agreement nor the establishment of the CC involved any sham or deception on the part of the respondent. He pointed out that Ms Jauch had been given ample opportunity to read and consider the agency agreement and that, on her own version, the respondent had advised her to obtain the professional assistance of her own tax consultant. It was common cause that the applicant had been placed under no duress to enter into the agency relationship and that she was aware that the purpose of the CC was to improve her position in relation to tax. He argued further that the applicant couldn't on the one hand take the tax benefits arising out of the CC and, on the other, re-assert the rights of an employee in order to gain additional advantage in the context of a retrenchment.

44. The submission by Mr Sarantos that the agency/CC arrangement amounted to a sham runs somewhat beyond the applicant's case. It was not the evidence of Ms Jauch. It was also not pleaded. In its request for further particulars, the respondent unambiguously asked whether it was alleged by the applicant that the agency agreement was a sham. It is clear from the reply that Ms Jauch was making no such allegation. Her case was identified in this manner: *"The agreement was entered into on the suggestion of Van Schalkwyk and Argyropoulos of the respondent as it would be a more tax efficient structure with regard to the applicant's remuneration. It reflected the terms and conditions of the applicant's employment at the time but allowed the applicant to attend to her own tax obligations."*
45. In short, it appears to be the case of Ms Jauch that she could simultaneously secure the labour rights of an employee and enjoy the tax advantage of being an independent contractor. That is not a combination that the law recognises. What arises is the particular and only question that I must determine, namely whether the applicant was an employee of the respondent at the time of its restructuring exercise.
46. A useful departure point for this enquiry lies within the parameters of the agreement itself. Cf *Niselow v Liberty Life Association of Africa Ltd* 1998 (4) SA 163 (SCA) at 166A-B. *Niselow* identifies a key criterion for differentiating between an employee and an independent contractor or agent, being whether or not the respondent acquired through the agreement the fruits of the applicant's labour rather than the labour itself (at 166H and 168D-E).
47. In *Niselow* that enquiry led to the conclusion that the appellant was an

independent contractor, despite his having undertaken to canvass contracts of insurance on a full-time basis and exclusively for the respondent. The Supreme Court of Appeal had regard to *inter alia* the following factors:

47.1. The appellant's remuneration was in the form of commission on contracts effected through him (at 166B) and he was accordingly entitled to remuneration only for the result of his labour and not for the time spent by him canvassing for contracts of insurance (at 167F-G).

47.2. The appellant was not prohibited from employing other people to assist him in achieving the desired result and he in fact employed a secretary and from time to time paid commission to people who assisted him (at 167A).

47.3. The appellant was not subordinate to the respondent and he was not obliged to comply with any instructions as to how the desired result was to be achieved; he was free to choose his working hours and to adopt the means that he thought appropriate to bring about new business, free of control and supervision (at 167H).

48. The factual position in the present case is different:

48.1. The respondent undertook to pay a fixed basic amount of R5 100 per month towards agency expenses, an amount that was in substance no different from the salary that she had previously been earning.

48.2. Commission was payable over and above the basic sum. Such commission was to be calculated as an agreed percentage of the value of all bookings effected by Ms Jauch.

48.3. The agreement contemplated that, at least initially, the agency would consist only of Ms Jauch. In fact, Ms Jauch employed no assistants and there is nothing to indicate that any such arrangement was even remotely in the offing.

48.4. Ms Jauch was not at large to determine her own working hours. The agreement provided: *"The company's normal hours of work are from 08h00 to 17h00 daily with an hour for lunch. Your business is expected to operate the same hours."*

48.5. The provision for overtime was identical with that in the employment agreement: *"You undertake to work overtime when both the exigencies of the Company business require it and it is reasonably convenient for you to do so."*

48.6. Ms Jauch was subject to control and supervision. She was not free to decide when and how she would produce the fruits of her labour, for which she would then be rewarded. Thus, the agreement stipulated that: *"You will report to either George Argyropoulos and/or Jaco van Schalkwyk who will determine your agency duties and responsibilities from time to time."* It provided further: *"You undertake to: Carry out all such functions and duties as are from time to time assigned to you and as are reasonable and/or lawful; Obey and comply with all lawful and reasonable instructions given to you by the company;"*. Again, despite some minor textual modifications calculated to reflect an agency relationship, the substance of these provisions was identical with the obligations that Ms Jauch had previously undertaken as an employee.

49. What these considerations amount to is that the substantive terms of the

agency agreement might on balance be construed as pointing to an employment relationship rather than one of independent service provision. Had this agreement been entered into by Ms Jauch personally and if the only issue in this case were one of interpretation, that may well have been the finding. In this regard, it is pertinent that the analysis set out in *Niselow* concerned a contract entered into by Niselow himself.

50. However – critically – the agency agreement in this case was not subscribed to by Ms Jauch in her personal capacity. It was concluded by her on behalf of Cruise Promotions CC, a distinct juristic entity. Although she carried out the work, she was not the contracting party. Payment from the respondent went into the accounts of the CC and her personal income was treated as a derivative of the financial structure of the CC, not as a direct receipt from the respondent. I have already outlined that the applicant did not define or conduct her case on the basis that this arrangement was a sham.
51. In *Callanan v Tee-Kee Borehole Casings (Pty) Ltd* (1992) 13 ILJ 1544 (IC), Bulbulia DP had to draw a line in a comparable case, where an employee had established a CC in order to secure a tax advantage and then sought to prosecute a claim for unfair dismissal as an employee. The Court there held that the applicant was not an employee but an independent contractor, observing that an applicant ‘cannot have his proverbial cake and eat it’, by saying that he is not an employee for purposes of taxation, whilst simultaneously claiming that he should be regarded as an employee for the purposes of the Labour Relations Act. That approach is appropriate to this case also, notwithstanding that the CC in *Callanan* derived the greatest part of its revenue from sources other than the respondent company in that case.

52. The Labour Appeal Court has considered a matter with a number of parallels to the case before me. In *CMS Support Services (Pty) Ltd v Briggs* (1998) 19 ILJ 271 (LAC) the respondent had set up a CC ('MCS') with the express purpose of reducing her tax burden. A 'consultancy contract' had been entered into between the appellant company ('CMS') and MCS in terms of which the CC undertook to provide the services of the respondent at an agreed hourly rate. Invoices were submitted on a monthly basis in the name of the CC. The respondent held out to the Receiver that she was a 'freelancer' and that her remuneration consisted of 'fees'. Had she informed the Receiver that she was an employee, her tax liability would have been higher. When the company terminated the consultancy contract, the respondent claimed that she had been unfairly dismissed.
53. In the Industrial Court her claim was successful, it having been held that the consultancy agreement was a 'farce' and a 'sham' and that the true intention of the parties had been to conduct an employment relationship. The Labour Appeal Court reversed that decision, holding that the respondent had made an intelligent and deliberate election to enjoy the advantages of a contractual arrangement through a CC and to forfeit the advantages of an employee (at 277A-H).
54. To some extent, the facts before the Labour Appeal Court were more stark than those in the present case:
- 54.1. the respondent had previously been employed by CMS, until her resignation in 1998;
- 54.2. she had by then established MCS with herself as the sole member;

54.3. in January 1991 a contract had been entered into between the Johannesburg Stock Exchange and MCS for the rendering of services at an hourly rate;

54.4. in early 1992 CMS offered the respondent a position 'as an ordinary employee' but, at the insistence of the respondent, the consultancy contract was entered into instead;

54.5. in addition to the pursuit of a tax advantage, the respondent did not wish to be part of the company's medical aid and pension schemes;

54.6. the agreement contemplated that there might be contracts between MCS and other parties, but it was stipulated that the supply of services to CMS was to have priority;

54.7. the respondent was to be available for consultation during the normal office hours kept by CMS and to consult outside such hours by mutual consent.

55. The position of Ms Jauch has some differentiating features. For instance: she set up the CC at the suggestion of the respondent; this was done whilst she was a full-time employee and the working arrangements and benefits remained largely unaltered; the agency agreement provided that she would have no other clients; she was subject thereafter to controls typical of an employment relationship; unlike Mrs Briggs, Ms Jauch has squarely contended that she was at all times an employee.

56. The question that arises is whether such differentials are enough to bring about a different result. In my view, they are not. None of them is of sufficient weight to disturb the indicated answer to the central question: did

Ms Jauch deliberately enter into an arrangement in terms of which she would establish a CC with herself as the sole member and, as the necessary corollary, that she would conclude an agency agreement between the respondent and the CC?

57. I am satisfied that the evidence as a whole yields a clear answer to that question. Ms Jauch was fully aware of the tax benefits that she anticipated would flow from the introduction of the CC. Those advantages were attractive enough for her to conclude an agency agreement in substitution of the existent employment agreement. She had ample opportunity to consider and obtain advice on the relative advantages and disadvantages. In those circumstances, the election made by her was one of consequence. She cannot now seek returns on both sides of the cut. As in *Briggs*, the current agreement is between the respondent and a distinct entity, the CC. That agreement explicitly brought to an end all previous contracts, including the employment agreement that had previously been in place between the applicant personally and the respondent.
58. One of the considerations that was given considerable weight by the Labour Appeal Court in *Briggs* was the consistent representation on the part of Mrs Briggs to the Receiver of Revenue that she was not an employee. Mr Sarantos submitted that policy perspectives of that sort do not arise in this case, because Ms Jauch did not go into the arrangement in order to circumvent tax legislation. *Prima facie* I am unpersuaded by this argument. For the reasons already set out in this judgment, I do not accept that Ms Jauch was as naïve and uninformed as she sought to portray. However, in view of my intention to refer this case to the Receiver for investigation, I make no direct finding on this aspect of the case.

59. In the course of argument, I was referred to the decision by Landman J in *Hunt v ICC Car Importers Services Co (Pty) Ltd* (1999) 20 ILJ 364 (LC). I need not recite the facts of that case. They clearly demonstrate a collusive and patently false scheme for the presentation of invoices for 'financial consulting services', coupled with the compilation of entirely fictitious expenses. The learned Judge concluded on those facts that there was indeed a scam and that the case of *Briggs* was therefore distinguishable. That result does not lend itself to the facts before me.
60. I was referred also to the case of *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & another* [2001] 3 BLLR 329 (LC). In that case the Court held that 'humble' employees had been induced by their employer to enter into contracts that purported to transform them into 'independent contractors'. On the facts, it was concluded that the employer had perpetrated a cruel hoax on its employees by persuading them to sign such contracts. The facts in the present case are not comparable with those. Ms Jauch can in no sense be described as the victim of a hoax. To the contrary, she is a willing co-author of an arrangement that has taken her out of the realm of employee.
61. In reaching that conclusion, I have not lost sight of the fact that the day-to-day interaction between the applicant and the respondent changed not at all after the conversion to the agency/CC arrangement. I have taken into account also that Ms Jauch was treated as though she were an employee during the initial phase of the respondent's restructuring program.
62. By the same token, I have regard to the fact that two employment benefits came to an end when the agency agreement came into operation, namely the medical aid and pension payments that the respondent had until then

made. Ms Jauch testified that she had been quite willing to give those up, as an employee, because that loss was offset by an increase in her salary and the allocation to her of a petrol card. That explanation is unimpressive. Apart from the perspective that it would be very unusual conduct on the part of an employee, the facts do not support it. Ms Jauch did not receive an increase with effect from 1 December 1999, but from 1 January 1999. The use of a fleet card also came into the picture on 1 January 1999. Both of those terms are recorded in the employment agreement signed on 12 July 1999. I think it far more probable that Ms Jauch was willing to relinquish the medical aid and pension benefits because of the prospect of substantially greater advantage through the new agency and CC arrangement.

63. Ultimately, as is common cause, the applicant bears the onus of proving that she was an employee as at March 2001. She shoulders that burden in the face of a written agreement that says she was an independent agent and in the face of the fundamental restructuring of her remuneration and related matters through a close corporation. I am satisfied that it is a burden that the applicant has failed to discharge.

64. I make the following order:

- 1 The point *in limine* is upheld with costs.
- 2 The Registrar of this Court is directed to refer this judgment to the Receiver of Revenue at Cape Town for further investigation.

K S TIP

ACTING JUDGE OF THE LABOUR COURT

DATES OF HEARING: 4, 5 NOVEMBER 2002

DATE OF JUDGMENT:

FOR APPLICANT: ADV A M SARANTOS
Instructed by IRISH ASHMAN ATTORNEYS

FOR RESPONDENT: ADV A LANDMAN
Instructed by THOMPSONS ATTORNEYS