HH 96-03
HC 6911/02
AIR ZIMBABWE CORPORATION
DAIRIBOARD ZIMBABWE LIMITED
HUNYANI PAPER & PACKAGING (1997)(PVT) LTD
ZIMNAT LION INSURANCE COMPANY LIMITED
COTTON COMPANY OF ZIMBABWE LIMITED
DANDY ZIMBABWE (PRIVATE) LIMITED
CHIPS COMPUTING SERVICES (PVT) LTD
BP & SHELL MARKETING SERVICES (PVT) LIMITED
CASTROL ZIMBABWE (PVT) LTD
ECOMARK ZIMBABWE (PVT) LTD
RECKEITT BENCKISER ZIMBABWE (PVT) LTD
versus
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 17th June, and 9 July 2003

A P de Bourbon SC **for the applicants**
P Nherere **for the respondent**

CHINHENGO J: The applicants are all limited liability companies incorporated and carrying on business in Zimbabwe. They all are obliged, from time to time, to pay dividends and/or interest and/or fees and/or royalties to non-resident persons in terms of ss 26, 29, 30 and 32 and the schedules thereto of the Income Tax Act (Cap 23:06) ("the Act"). The dividends, interest, fees and royalties are subject to withholding taxes payable in terms of the schedules to the above mentioned sections of the Act - Schedules 9, 16, 17 and 19. Over the years from 1998 to 2000 the applicants failed to pay withholding taxes to the respondent. The respondent assessed that the applicants were each liable to pay penalties

and interest in respect of withholding taxes which they did not pay or which they paid late. In this application the applicants are concerned only with the demand by the respondent that they pay interest on the withholding taxes from the date(s) on which they should have been paid. They contend that the respondent is not entitled to claim interest on those amounts at all. From my quick addition of the amounts claimed by the respondent, the applicants would owe, by way of interest, a total of $85 011 844,14. The amounts owed by each of the applicants appear in the founding affidavit. The applicants' contention is that no provision is made in the Act for interest to be paid on the amounts concerned.

The respondent avers that it is entitled to charge interest on withholding taxes that are not paid on due date. The due date in terms of schedules 9, 16, 17 and 19 of the Act is thirty days of the date of distribution of the dividend or the payment of the fees, interest or royalties. It is not in dispute that the applicants failed to pay the withholding taxes within the prescribed period. The respondent contends that at common law *mora* interest starts to run as soon as a debt is due and payable and that the taxes that remain outstanding have become debts owed to the State. The respondent says that it

is entitled to *mora* interest because there is no statutory provision to the contrary.

There are certain contentions made by the parties which have become irrelevant because of concessions made at the hearing. One such contention was that whereas the respondent purports to have claimed from the applicants *mora* interest in terms of the common law, it had in fact claimed statutory interest in terms of the Act at the rate prescribed in the Income Tax Regulations. At the hearing Mr *Nherere* conceded that the claim as originally made by the respondent was indeed for statutory interest at 35% *per annum.* He said that the opposing affidavit, however, clearly indicates that the claim is for *mora* interest in terms of the common law at the prescribed rate of interest of 30% *per annum* in terms of the Prescribed Rate of Interest Act (*Cap 8:10*). The other contention was whether the respondent was entitled to charge statutory interest on unpaid withholding taxes. It became common cause at the hearing that he was not entitled to charge such interest at all. The issue before me, therefore, is simply whether the respondent is entitled to charge *mora* interest in terms of the common law on overdue payments of withholding taxes.

At the hearing the applicants amended the order which they seek. The amended order reads:

"It is ordered:

1. That it is declared that the Respondent is not entitled to charge interest on the late payment of withholding taxes that was payable by the applicants.
2. That the Respondents pay to the Applicants any amounts received by or paid to the Respondent in respect of interest charges allegedly due to the Respondent by the Applicants in respect of the Applicants' failure to pay withholding tax on dividends and/or interest and/or royalties and/or fees paid to non-resident persons.
3. That the Respondents pay interest at the prescribed rate from the date of receipt to the date the amount is refunded in full.
4. That the Respondent pay the Applicants' costs".

The deponent to the applicants' founding affidavit is a tax director of Ernst & Young, a firm of Chartered Accountants, which was employed to assist the applicants with their tax affairs. Ernst & Young had dealt with the respondent on behalf of the applicants in respect of their withholding tax assessments and alleged liabilities. Ernst & Young had negotiated with the respondent with regard to those matters. It had written letters of objection to the respondent on behalf of some of the applicants. It had obtained the details of the amounts claimed as interest by the respondent from the respondent. It had therefore acted on behalf of the applicants in its dealings with the respondent. The respondent however challenged, in this application, the applicants' deponent's authority to represent the applicants averring that no resolution or supporting affidavit by any of the applicants was attached to the founding affidavit to show that the deponent to the founding affidavit was authorised to make the application on behalf of the applicants. The respondent relied

on several cases as supportive of its challenge of the authority of the deponent to the applicants' affidavit - *Direct Response Marketing (Pvt) Ltd* v *Shepherd* 1993(2) ZLR 218 (H); *Mall (Cape) (Pty) Ltd* v *Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) and also on *Prosser and Others* v *Zimbabwe Iron & Steel Co Ltd HH201/93, Gudza v University of Zimbabwe* HH 85/95 and *Mashave & Ors v Zupco & Anor* 2000(1) ZLR 478 (S). *Kadir & Sons (Pvt) Ltd v Panganai & Anor* 1996(1) ZLR 598 (S) was also cited as supportive authority. Nowhere in *Kadir & Sons* does the judge deal with the *locus standi* of any of the parties. It is quite possible that counsel for the respondent picked on that case simply because it is referred to (albeit in a different context) in the *Direct Response* case above.

It is accepted that a company does not function on its own but through an agent authorised by it to do so and that where there is nothing before the court to show that an artificial person has duly authorised the institution of a court application, the respondent may take objection to the agent's authority. The agent's authority is proved by a resolution passed by the company which he represents and if challenged in that regard the agent should produce it. In *Mall (Cape) supra* WATERMEYER J in this regard said at 351G-352B:

> **"There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the Company to do so (see for example *Lurie Brothers Ltd v Arcache*, 1927 NPD 139, and other cases mentioned in Herbstein and van Winsen, *Civil Practice of the Superior Courts of South Africa* at pp 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence must be placed before the court to show that the applicant has**

> **duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from the applicant (*cf Parsons* v *Barkly East Municipality* [1952(3) SA 595 (E)]; *Thelma Court Flats (Pty) Ltd* v *McSwigin* [1954(3) SA 457 (C)]".**

This passage was quoted with approval in *Direct Response* (*supra).* In all the cases referred in the respondent's heads of argument the emphasis is placed on the *quantum* of evidence placed before the Court to show that the applicant has resolved and authorised to institute the proceedings. The emphasis is not on the fact to be proved. In the present case the deponent averred that Ernst & Young have acted as agents for the applicants in negotiations with the respondents on their tax affairs and that it obtained all information it required to help the applicants in these affairs from the respondents. It averred that the respondents became aware that Ernst & Young was acting for the applicants and would thus have no legitimate reason to object to their representative capacity or their authority to institute the present proceedings on behalf of the applicants. That averment would appear to have been

weakened to some extent by the sixth respondent which dissociated itself from the application. Significantly though the sixth respondent did not allege, as one would have expected, that it had not authorised Ernst & Young to institute the proceedings on its behalf. The dissociation was made by counsel orally at the hearing. In the answering affidavit the applicants' deponent undertook to produce affidavits from each of the applicants if the respondent persisted in its objection. Indeed at the hearing of the application Mr *de Bourbon* was in possession of affidavits from eight of the applicants to the effect that Ernst & Young was authorised to institute the proceedings. He also indicated that affidavits from the remaining applicants, except the sixth applicant, could be obtained if required. The prior dealings between Ernst & Young and the respondent provides sufficient evidence that when Ernest & Young instituted the present proceedings they were acting on the authority of the applicants. Its authority to do so was also proved by the affidavits from some of the applicants filed pursuant to the undertaking made by the applicants' deponent in paragraph 3.4 of the answering affidavit. I am quite satisfied that the deponent to the applicants' affidavit was, on the evidence placed before me, authorised to make the application on behalf of the applicants. I do not attach weight to the sixth applicant's dissociation because the sixth applicant did not give reasons for doing so nor did it specifically allege that the deponent was not authorised by it to act on its behalf. Its reasons for dissociating itself from the application remained unclear. Evidence was led from the bar as to the sixth respondent's dissociation but I also do not attach any weight to that

evidence. I may in passing observe that it is often that litigants take objection to the other party's *locus standi* to institute proceedings. I do not think that it is proper for any litigant to do so especially where, from prior dealings, he should be aware that the challenge to his adversary's *locus standi* will not succeed.

I now proceed to deal with the merits of the issue arising for determination in this application. I must first note that the issue as identified by the applicants in their founding affidavit was whether the Commissioner is entitled to charge interest on unpaid withholding taxes where he has not notified the applicants of the due date of the taxes as required s.71 of the Act. In para 16.2 of the founding affidavit it is stated:

> "The Applicants contend that the Respondent is not entitled to claim interest at all because it is common cause that the Respondent did not notify any of the Applicants of the date that the tax became due and payable as required by Section 71 of the Act. The applicants contend that failure to notify them of the said date prevents the Respondent from recovering interest."

This averment would be a concession that the respondent was otherwise entitled to claim interest on the unpaid taxes if only he had notified the applicants about the date when the taxes became due and payable. That this was the issue as perceived by the respondent is reflected in para 1 of the draft order where the relief originally sought was:

> **"That it is declared that the Respondent is not entitled to charge interest on the late payment of withholding taxes that was payable by the applicants <u>because of the</u>**

> **Respondent's failure to notify the Applicants and specify in that notification a date on which the taxes became payable." (emphasis is my own)**

In the opposing affidavit in para 22 the respondent correctly pointed out that s 71(2) has no application to the withholding taxes claimed by the respondent. He also pointed out that his failure to give notification was irrelevant to the charging of interest. He further correctly pointed out that the withholding taxes become due and payable in terms of para 2(1) of each of the relevant schedules as read with s. 71(1) of the Act. The respondent then went on to give the legal basis on which he purported to claim interest. He stated in para 22.8 of the opposing affidavit that-

> **"From the foregoing, it is quite clear that withholding taxes become due and payable as per the schedules and a notification from the Commissioner is not necessary or required to make the withholding taxes due and payable. Once they are due and payable the withholding taxes become a debt owed to the State. At common law, *mora* interest starts running as soon as a debt is due and payable. Notification by the Commissioner is not necessary in order for interest to start running. There is a presumption in our law that the legislature is taken not to intend to alter the Common Law unless this emerges quite clearly from the legislation"**

In the answering affidavit the applicants pointed out that the respondent had not claimed *mora* interest in terms of the common law but statutory interest in terms of the Act and the regulations made thereunder.

The parties to this application do not appear to have thought through the relevant issues from the very beginning. The respondent does not dispute that its claim as originally

made against the applicants in respect of interest was for interest at the rate prescribed by the Act. Yet in its answering affidavit it states that it was claiming *mora* interest in terms of the common law and gives the impression that that had been its claim right from the beginning. It is significant, however, that it was the respondent who brought to the fore the question whether or not the respondent is entitled to claim *mora* interest in terms of the common law.

The applicants also changed course when in their heads of argument and at the hearing they conceded that the position which they had adopted in their affidavits was not correct. They submitted that the issue was not whether the respondent was disentitled from claiming interest on withholding taxes not paid because he did not notify the applicants about the dates when those taxes became due and payable: it was that the respondent is not entitled to charge interest at all whether under the Act because no provision is made to that effect, or under the common law. As I have already stated, the issue before me turned out to be this: whether the respondent is entitled to charge *mora* interest at common law when there is no provision for him to do so under the Act.

Counsel for the respondent submitted that the applicants had abandoned the cause of action as set out in the founding affidavit and the relief as set out in the draft order and for that reason their application must be dismissed. For this submission respondent's counsel relied on the following cases - *Coffee, Tea and Chocolate Co Ltd v Cape Trading Co*. 1930 CPD 81 at 82; *Mobil oil Zimbabwe (Pvt) Ltd v Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (HC) at 69-70 and *Bopoto v Chikumbu & others*

1997 (1) ZLR 1 (H). Indeed these cases lay down the principle that an applicant stands or falls on his or her founding papers and may not raise a different cause of action in his or her answering affidavit. In *Mobil Oil supra* REYNOLDS J said at 70 C-E:

> **"It is a well established general rule of practice that new matter should not be permitted to be raised in an answering affidavit: the cause of action must be fully set out in the founding affidavit. This has been the settled practice of our courts at least since the matter was adverted to in *Coffee, Tea and Chocolate Co Ltd v Cape Trading Co*. 1930 CPD 81 at 82. As remarked by SAMATTA J, however, in *Milton v Alcock N O & Ors* HH 21-87 at p 7 of the cyclostyled judgement: "It is, like other procedural rules, subject to the overriding discretion of the Court." In the exercise of such discretion, the court would, obviously, only sanction a departure from the general rule on good cause shown."**

The position of the applicants in this case would appear to be worse than the position in the cases cited above, because unlike in the cases cited above where new matter was introduced or the cause of action was changed in the answering affidavit, in the present case the new cause of action was not at all raised in the answering affidavit but only in the heads of argument. This would provide a point of distinction between this case and those referred to above. The case which the applicants made in the heads of argument and in the submissions to the court was different from the case which they had made in the affidavits. I do not however think that the application should be dismissed for this reason. The respondent is the one who brought to the fore the real issue for determination in this application. Having done so it would,

in my view, be an improper exercise of the discretion reposed in me to dismiss the application for the reason that the applicants argued a different case to the one made in their affidavits. I am satisfied that the proper exercise of discretion calls for a determination of the issue not only as placed before me by the respondent himself by way of the opposing affidavit but also as canvassed in the heads of argument by the parties and argued by them in court.

It was conceded by both parties that s 71(2) of the Act is not **applicable to this case. I agree. The issue for determination is whether the respondent is entitled to charge *mora* interest in terms of the common law where this is not provided for in the Act. The issue was dealt with from a different angle in *Commissioner of Taxes v F Kristiansen* (Pvt) Ltd 1994 (1) ZLR 412 (S) where the court decided that whilst under the common law there is no immunity for the fiscus from payment of interest, the legislation relating to income tax in Zimbabwe imposed an obligation on a taxpayer to pay interest on unpaid tax but did not impose an obligation on the Commissioner of Taxes to pay interest on refunds. The court (per GUBBAY CJ) disapproved of the reasoning of the judge in the court *a quo* and said at 419 C-G:**

> **"The learned judge *a quo* reasoned as follows. Under the common law interest is payable where there is an agreement to pay it or if there is a default or *mora* on the part of the defendant; the sections of the Income Tax Act which make provision for the repayment of excess tax, and in particular s 37(1) pursuant to which the Commissioner repaid the amount of $12 535,70, are silent on interest payable to the taxpayer; and if the lawmaker had intended that the taxpayer should be deprived of the payment of interest, which constitutes an alteration of**

the common law, it would have done so expressly and not relied upon implication. Cited in support of the well accepted rule that a legislative intention to amend or modify the common law must not be presumed but must be obvious from the plain words used, were the cases of *Johannesburg Municipality* v *Cohen's Trustees* 1909 TS 811 at 823; *Seluka v Suskin* 1912 TPD 258 at 263; *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in Liq)* 1981(1) SA 171(A) at 181H-182D.

The difficulty with that line of reasoning lies in the existence of a clear distinction in the Income Tax Act between the provisions of s.60(2), which expressly states that interest on unpaid tax shall be payable by the taxpayer, and the provisions in ss 37 and 39 and elsewhere in the Act, which provide for the refund to the taxpayer by the Commissioner of overpayments.

The omission of any mention of interest in the latter two sections in is thus not colourless, as otherwise it might be. The fact that one of the two parties in the tax relationship, i.e. the taxpayer, is required to pay interest, while there is no reference to the other party, the Commissioner, having to do so, is *prima facie*, a strong indication that it is not intended that the Commissioner be liable to pay interest on overdue refunds".

The learned Chief Justice then traced the history of tax legislation in this country. He observed that The War Taxation Ordinance 20 of 1918 made no provision for the payment of interest by either the taxpayer or the Commissioner of Taxes. Ordinance 12 of 1922 altered the position by amending s 58 of the 1918 Ordinance to allow the Commissioner of Taxes to charge interest at eight *per centum per annum* on unpaid or overdue tax but it did not change the position to provide for the payment by the Commissioner of Taxes of interest on the refund due by him on the overpayment of tax. The 1938 legislation [*Chapter 134* of the 1939 Edition of Statutes] maintained the distinction. The Federal Income Tax Act, 16 of 1954 also maintained the distinction. The present Act maintained the same distinction. He then said at 420 H-421 B:

> "Thus, for the last 72 years the income tax legislation in this country has consistently differentiated between the obligation of the taxpayer with regard to interest, and the obligation of the Commissioner in that regard.
>
> The differentiation was specifically introduced in 1922. If it had been assumed that by common law both the fiscus and the taxpayer were liable to pay interest, it would not have been necessary to make the amendment. It must have been considered that neither party was liable to pay interest under the 1918 Ordinance. So the amendment was introduced for the purpose of making the taxpayer liable. The failure to make any similar provision in relation to the Commissioner was thus pointed and manifestly deliberate."

The decision in *Kristiansen's* case on this point was based on an interpretation of legislative enactments since 1918. The position, as it emerges from this case is, therefore, that under the tax legislation of this country the taxpayer was required from 1922 to pay interest on unpaid overdue tax whereas the Commissioner was not required to pay interest on the refund due on the overpayment of tax. It also emerges that since that time it has been accepted that neither the Commissioner of taxes nor the taxpayer was required to pay *mora* interest in terms of the common law on any amount due by him to the other. Mr *de Bourbon* relied on *Kristiansen's* case, above, for the contention that the question of interest has always been dealt with in terms of the Act to the exclusion of the common law and that, as such, there was no basis for the same reasoning not to be applied to the present case. He submitted that if the common law applied and the taxpayer was required to pay *mora* interest then it would not have been necessary for the taxpayer's liability for interest to be expressly set out in ss 71(2), 72(6), 73(3) and Schedule 27 of the Act. He also submitted that if it had been intended that

the taxpayer should pay interest on unpaid or overdue tax in other cases where the time for payment is fixed by the Act then that should have been specified.

Mr *de Bourbon* also submitted that the legislature, except in very specific instances, such as provided in para 8(1) of Schedule 27, imposes either a penalty only or interest only in respect of unpaid or overdue tax and not both. He cited s 71, 72 and 73 of the Act as specific instances where no penalty is provide when interest is.

Mr *Nherere* submitted is that *mora* interest in terms of the common law is due and payable on any debt from the time that such debt become due and payable and that in this case *mora* interest is payable from the time that the withholding taxes were not paid after they became payable. He countered Mr *de Bourbon's* argument about s 71(2, 72(6) 73(3) and para 8(1) of Schedule by saying that those sections are concerned with statutory interest as fixed by the Minister by Statutory Instrument. That he says does not exclude *mora* interest in those cases where no rate of interest has been fixed by statute.

In my view, I do not think that Mr *Nherere* fully appreciate the basis of the decision in *Kristiansen's* case above. From the passages I have quoted in this judgment it is clear that the Supreme Court approached the matter in this way: Before the enactment of the 1918 Ordinance the position was that both the Commissioner and the taxpayer were, or may have been, required to pay *mora* interest at common law. On its enactment, the 1918 Ordinance did not provide for the

payment of interest either by the taxpayer or the Commissioner. The 1918 Ordinance was amended in 1922 by Ordinance 12 of 1922 and it disregarded the position a common law. It , as it were, proceeded on the assumption that *mora* interest at common law was not payable by either the taxpayer or the Commissioner of Taxes. From then on the question of interest has been dealt with exclusively in terms of the tax legislation of this country. In terms of that legislation the taxpayer has been required to pay tax on unpaid or overdue tax in specified instances. Where the legislaiton has not specifically required the taxpayer to pay interest the position remains what it has been since 1918, i.e. that the taxpayer does not pay *mora* interest at common law.

The whole matter therefore must be viewed against the analysis of the tax legislation made in *Kristiansen's* case *supra* and the decision reached therein that "If it had been assumed that by common law both the fiscus and the taxpayer were liable to pay interest, it would not have been necessary to make the [1922] amendment. It must have been considered that neither party was liable to pay interest under the 1918 Ordinance. So the amendment was introduced to make the taxpayer liable."

It is logical then to say that after the 1992 amendment the taxpayer became liable to pay interest only in those instances where he is specifically required to do so by legislation. I am satisfied that if the common law were to apply then it wold not have been necessary for liability for interest to be expressly provided for in section 71(2), 72(6), 73(3) and Schedule 27 of the Act, albeit that this liability is for statutory interest.

An additional comment which supports the view that I have taken of this matter is that the amendment to s. 71(1) which was introduced by s 15 of the Finance Act, 18 of 2000 only dealt with the question when tax becomes due and payable. That section now provides that tax become due and payable on a date as may be fixed or prescribed under the Act or on a date as may be notified by the Commissioner. In ss (2) of s 72 provision is made for a taxpayer who is in default of payment of tax to pay interest at the statutory rate but only in the situation where he had been notified by the Commissioner about the tax having become due and payable. It seems to me that the legislature may have inadvertently omitted to carry through the purpose of the amendment to s 71(1) of the Act when it did not amend s 71(2) to require the taxpayer to pay interest at the statutory rate on unpaid or overdue tax where that tax becomes due and payable by operation of law. If that was not an inadvertent omission, then quite clearly the legislature did not intent that a defaulting taxpayer should pay interest, whether at common law or under statute, on late payments.

At the hearing of this matter I invited counsel for both parties to make additional submissions on the point as to whether there were any instances in which the respondent was entitled to levy penalties as well as to charge interest in respect of unpaid or overdue taxes. The only instances that were brought to my attention were those provided in sections 71 and 73 as read with para 10 of the 13th Schedule and para. 8 of the 27th Schedule to the Act - respectively concerning

unpaid tax where the Commissioner has given notification in terms of s 71(1), employees tax and the demutualisation levy.

It seems to me that the general design under the Act is that a taxpayer who defaults in paying any tax due is subjected either to a penalty or to the payment of interest but not both except in the instances specifically provided for in the Act. It seems to me that this general design seeks to compensate the Commissioner by way of interest only or alternatively by way of penalty only where he has been deprived of the use of money by a defaulting taxpayer. In the case of withholding taxes in respect of dividends, and/or royalties, and or interest and/or fees the Commissioner is limited to compensation for the deprivation of the use of the money by way of a penalty only.

Counsel for both parties did not specifically address the question of interest to he paid on the sums that will be due to the applicants as a result of this judgment. I do not think, however, that it would be fair to order the Commissioner to pay interest on those amounts. The applicants did not advance any good reasons as to why they failed to pay the taxes. They gave various reasons such as inadvertence, ignorance and inability to source foreign currency. I do not think these reasons should in the absence of substantiation be accepted as valid for all the applicants or for any one of them. For this reason I will not order the respondent to pay interest on the amounts which will be due to the applicants as a result of my decision despite the decision in *Ellis N O v Cot* 1994 (1) ZLR 422(5).

In respect of costs, again not much was placed before me on which to make an informed decision. I have noted

elsewhere in this judgment that both the applicants and the respondent altered their cases - the applicants in regard to the cause of action as appears from their affidavits and the respondent in regard to whether what he claimed originally was statutory interest or *mora* interest. The applicants only raised the real issue between the parties in the heads of argument and I think they have sufficiently benefited from my exercise of the discretion reposed in me in their favour. Their papers were also deficient in a number of respect e.g. the failure by the instructing attorney to sign the court application (which did not become a matter of moment hence I have not dealt with it in this judgment and the lack of timeous substantiation of their deponent's authority to institute these proceedings. If the applicants' legal practitioners had attended to these matters with the presence of mind necessary in these matters much of the time devoted to argument on these issues would have been saved and my judgment would not have had to deal with them. I will mark my disapproval of the manner in which they handled this application by denying costs to the applicants even though they have succeeded on the merits.

On the authority of *Kristiansen's* case *supra* and in reliance on what I think is the general scheme of things under the Act and for the reasons I have given I make the following order-

"1. That it is declared that the Respondent is not entitled to charge interest on the late payment of withholding taxes which were or are payable by the Applicants.

2. **That the Respondent pay to the applicants any**

amounts received by or paid to the Respondent in respect of interest allegedly due to the Respondent by the applicants in respect of the Applicants' failure to pay withholding taxes on dividends and/or interest and/or royalties and/or fees paid to non-resident persons. The Respondent shall not be required to pay interest on these amounts unless he fails to pay them within 30 days of the date of this judgement in which event the Respondent shall pay interest on those amounts at the prescribed rate of interest from the date of this judgment to the date the amount is refunded in full.

3. Each party shall pay its own costs."

***Atherstone & Cook*, applicants' legal practitioners**

***Kantor & Immerman*, respondent's legal practitioners**