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Judgment No. HB 25/07
 Case No. HC 3793/04
 Xref HC 8044/00
 (HH 115-02)

NKULULEKO MABHENA

Versus

P.G INDUSTRIES (PVT) LTD

And

P.G ZIMBOARD PRODUCTS

And

GERALD JAILED MUTATI

And

E D CHIURA

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 9 DECEMBER 2005 AND 15 FEBRUARY 2007

Advocate P. Dube for the applicant

K Phulu for the respondent

Opposed Application

NDOU J: The applicant seeks an order compelling the respondents to render an account of his salary and benefits from 1 June 2000 to date of reinstatement. This order is sought following an order given by the High Court, sitting in Harare in the matter between the parties in HC 8044/02 as reflected in a judgment HH 115-02. It is common cause that the operative part of the said judgment is as follows:

- “1. The Respondent’s decision to terminate applicant’s contract of employment be and is hereby declared null and void.
2. The applicant be reinstated without loss of benefits from 1st June 2000 to date of reinstatement.”
 The order currently sought is one compelling Respondents, to render an account of applicant’s salary and benefits from 1 June 2000 to date of reinstatement. The applicant has sought to be included in the order, such details, job title, all increases awarded by the first Respondent from the date of applicant’s dismissal to date, as a schedule of benefits due and

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their monetary value and so on. It is clear that the order sought is one to gauge whether there has been compliance within order in HC 8044/02 as reflected in judgment HH115-02, *supra*. And it also to ensure that there is infact compliance with the said order. In simple terms the applicant seeks an order to lay foundation for the determination of whether or not there has been compliance the order of this court in HC 8044/02. This is necessary because the parties are not agreed as to exact content and extent of the salary and benefits due. On the one hand respondents contend that they have paid the amount which they consider is due in terms of the decision of the High Court whilst applicant' contents that he has been grossly abused by deliberate omission by Respondents. Ms Dube, for the applicant, brought it to my attention that just some minutes before this hearing, she was given a schedule showing how the figures were arrived at. She was not sure this schedule met the requirements of the applicant's claim. In any event the matter had to be argued because the Respondents were not necessarily withdrawing their application.

The applicant emphasised in his papers and his legal practitioners also submitted that the court is not at this stage being asked to decide how much was due to the applicant. All the applicant seeks is order requiring the Respondents to render accounts that will be debated to determine the issues. In a nutshell the issue is one of a duty to account. I will revert to this issue in detail but I propose to deal with the point in limine raised by the Respondents on the citing third and fourth Respondents. There can be no doubt about the futility of citing third and fourth Respondents in their personal capacities. Fourth Respondent had retired as Chairman of first Respondent at the time of the filing of the application whilst third Respondent has retired since. The personal capacities of third and fourth Respondents have nothing to do whatsoever with the relief sought by applicant. The relief which the applicant is seeking in his papers does not call upon the third and fourth Respondents to do anything in their personal capacities. Applicant cannot compel compliance with order sought from them – *Wilson v Minister of Defence and Others* 1999(1)

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ZLR 144 (H). To that extent, the application as against third and fourth Respondents must fail.

Accordingly I dismiss the application against third and fourth Respondents with costs. Coming back to the issue between the applicant and first and second Respondents, it is trite that a duty to account does not arise in vacuo. It only arises where any of the following is present:

- (a) a fiduciary relationship between the parties.
- (b) A contractual obligation, or
- (c) A statutory duty – see “Amlers Precedents of Pleadings” (5th Edition) at p 5 and *Rectifier and Communications Systems (Pty) Ltd v Harrison and Others* 1981(2) SA 283 (CPD). In the *Rectifier* – case, supra, the law is extensively set out at 286 D-G as follows:-

“The action for an account is well known to our law and the circumstances in which it can be claimed have been laid down in a number of cases. In *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 Millin J at 19 said:-

‘Nobody is entitled to sue at common law for an account unless the person sued stands in a fiduciary relationship to him, or some statute or contract has imposed upon him the duty to give an account’

Likewise in *Victor Products (SA) Pty Ltd v Lateulere Manufacturing (Pty) Ltd* 1975(1) SA 961 (W) at 963 Moll J said:-

‘The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegation in support thereof makes it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give a debtor and creditor relationship would not justify a claim for a statement of account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account —

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Erasmus v Slomowitz (1) 1938 TPD 236 at 239; *Maitland Cattle Dealers (Pty) Ltd v Lyons* 1943 WLD 1 at 19. See also *Dyle and another v Fleet Motors P E (Pty) Ltd* 1971(3) SA 760 (A) where Holmes JA at 762 discusses what the practice should be not only in regard to what either side must prove in an action for a statement thereof and payment of the amount found to be due, but also in regard to what degree of accounting is required and whether the debate of an account must be in the first instance take place between the parties.’

The effect of the order in HH 115-2002, is that purported termination of the contract of employment between the parties, by the Respondents is null and void so the parties are still bound by the contract of employment. This contract of employment would justify a claim for a statement of account. In the alternate it seems that applicant is seeking a declaratory where there is no dispute yet before the court. Is that permissible? It is provided for in Section 14 of the High Court Act [Chapter 7:06] which provides: -

“The High Court may, in its discretion at the instances of an interested party, inquire into determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such declaration”

- See *Munn Publishing (Pvt) Ltd v ZBC* 1994(1) ZLR 337(S); *Johnson v AFC* 1995(1) ZLR 65 (H) and *Kayira and Another v Trust Insurance Brokers (Pvt) Ltd and Another* HB 49-06. This all encompassing provision of the Act would cover such an application. This is an alternative reason in the event that I am wrong on the main one that the applicant is entitled to the statement of account in order to facilitate the debating of the same. To buttress my main reason, it is clear that the contract of employment between the parties is still in existence. The Respondents failed to validly terminate it according to the order in HH 115-02.

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In terms of Section 125 of the Labour Relations Act [Chapter 28:01] which was the governing Act at the time of the dispute between the parties, the Respondents were required to keep records of the kind that the applicant is requesting from them.

My reading of the Act is that the Respondents have, in addition to any contractual obligations, statutory obligation to render a statement of account. Section 125(4) imposes on the employer the duty to produce such record “on demand made at any time during that period” [period of three years]. In the circumstances, the application was not made in vacuo.

Accordingly it is ordered that:

1. first and second Respondents be and are hereby directed to render a statement of account of applicant’s salary and benefits within seven (7) days of this order, showing applicant’s salary and benefits from 1 June 2000 to date reinstatement for purpose of debate by the parties..
2. first and second Respondents bear costs of this application.

Webb, Low and Barry, applicant’s legal practitioners

Atherstone and Cook C/o Coghlan and Welsh, 1st and 2nd respondents’ legal practitioners