

**ZIMBABWE NATIONAL WRESTLING
AMATEUR ASSOCIATION**

And

KALBRO (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 11 JULY 2002 & 13 MARCH 2003

Mrs N Moyo for the plaintiff

Mrs H Moyo for the defendant

Judgment

CHIWESHE J: The plaintiff association sued the defendant for payment of the sum of \$11 220,00 being the purchase price of a wrestling mat which the defendant had been contracted to manufacture for the plaintiff.

According to the plaintiff the parties entered into this contract in or about December 1994. In pursuance of that contract the plaintiff paid the sum of \$11 220,00 after which the defendant sought to vary the contract price. In so doing the defendant had in effect repudiated the contract and plaintiff had accepted the repudiation. Alternatively, so argues the plaintiff, the defendant failed to supply the mat timeously as a result of which plaintiff cancelled the contract. The plaintiff now claims the return of the purchase price, interest a *tempore morae* plus costs of suit.

The defendant's response is two fold. Firstly the defendant raises a plea in bar arguing that the plaintiff was not party to the contract as it was a mere agent or facilitator acting on behalf of the All Africa Games 1995 and in particular its organising committee referred to as COJA. Further, that the said committee did pay the shortfall on the original price of \$11 220,00 by paying the extra \$2 842,23 making

a total of payment of \$14 062,00.

Secondly the defendant queried the *locus standi* of Dr J C Muchenje challenging him to produce the resolution in which the board of the plaintiff had authorised him to represent the plaintiff in these proceedings.

Although the court indulged the plaintiff the benefit of a full trial in spite of these special pleas the defendant did not either during the pleadings or during the trial discharge the onus placed on it to show to the satisfaction of this court that it had acted in its own right in entering into the contract and that for the purposes of these proceedings its President, Dr Muchenje had been authorised to represent it. The plaintiff could have solicited evidence from the All Africa Games 1995 Committee or COJA defining the relationship that existed between it and the said committee more so as it is accepted by both sides that the cheques tendered in payment of the contract price were drawn from that committee's account. Such a course of action would also have shed light on why COJA despite plaintiff's attitude towards the revised contract price nonetheless paid the defendant the difference between the original price and the new price. Given these circumstances there is room for the argument proffered by the defendant that in fact the plaintiff was, acting as a mere facilitator on behalf of COJA. The plaintiff has not led any evidence to the contrary from the appropriate body.

More significantly however was the failure by the plaintiff's President Dr Muchenje at any stage to produce any written authority from either the plaintiff or the All Africa Games committee or COJA that he was authorised to represent the plaintiff in these proceedings. The plaintiff's counsel attempted to argue that Dr Muchenje was acting merely as the plaintiff's witness and not in any other capacity. If that were

the case, who then was representing the plaintiff? On that basis the special plea must succeed.

Having nonetheless heard the matter on the merits it is my view that the plaintiff's case is weak. There is uncontroverted evidence to the effect that the mat in question was duly manufactured and an attempt to deliver it made. The defendant said the mat could not fit into the lifts at the plaintiff's premises. Thereafter numerous attempts were made to contact Dr Muchenje including various fax messages. Dr Muchenje did not respond. Neither himself nor anyone from his association followed up the matter. On the other hand COJA had paid the defendant "behind" Dr Muchenje's back. Clearly the defendant's version of what transpired is more probable than the version given by the plaintiff.

Accordingly it is ordered that the plaintiff's claim be and is hereby dismissed in its entirety. It is further ordered that the costs of this suit be met by Dr Muchenje personally.

Moyo-Hara & Partners plaintiff's legal practitioners
Joel Pincus, Konson & Wolhuter defendant's legal practitioners