

Ensuring legality of contract

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One of the fundamental pillars of the law of contract and by extension commerce is that once parties enter into a valid agreement, they will be legally bound to carry out the terms of the contract. This finds expression in the principle of sanctity of contract (*pacta sunt servanda*). With the rise of the informal sector and the casualization of doing business there has been a rise of “contracts” which parties conclude without necessarily abiding to or paying attention to requirements that are supposed to be met in order to conclude a legally binding contract.

It has become common for parties to enter into these “contracts” without worrying about enforcement in cases of default by the other party. It seems parties rely mostly on the goodwill they have with the other party as a guarantee for performance rather than the binding aspect of the contract.

Examples of these contracts include the day to day contracts under which people are buying consumer products in United States Dollars despite the dictates of Statutory Instrument 212 of 2019. If one was to question the enforceability of these contracts, it is not unusual to be told it is the way things are.

The casualization has also seeped into more serious contracts that deal with high value products. This mostly manifests itself in parties not paying attention to one of the most important requirements of a valid contract, legality.

Most often than not, when it comes to concluding a contract parties think they are acting in isolation from the rest of the world. People often make a mistake of thinking that as long as the parties involved agree, to anything really, they will be covered.

The beauty of contracting lies in enforceability. If one makes a simple promise, and refuses to act on it, the person to whom the promise was made has to beg the person who made the promise to fulfil it. This is different from a valid contract. Once a person has a valid contract, if the other person does not perform, he can be forced at law to perform or pay damages for non-performance. This takes away the need to beg or implore the other party to perform.

However, for this to happen parties have to pay attention to the requirement of legality. This requires a contract to be legal in principle for it to be enforceable. At law there is common law illegality and statutory illegality.

Agreements can conflict with either the common law or statutes in many different ways. The common ones being; either the conclusion of the agreement itself, its performance or the reason for its conclusion could be illegal.

The dictates of the common law and/or statutes are always at play when parties conclude agreements. Drafters of contracts have to pay particular attention to the principle of legality in order to protect the interest of the parties.

When looking at statutory legality, it is not enough to simply look at the immediate Acts and Regulations that cover the area in which the parties seek to contract. It has now been accepted that all laws stem from the Constitution and anything contrary to it cannot stand. With the advent of the Constitution of Zimbabwe, 2013, it is important for drafters of contracts to pay attention to the dictates of the constitution.

It is also equally important to look at the common law to ensure compliance.

As stated above, one of the most important facets of agreements in general is their ability to be legally enforceable. The requirement of legality has to be met in order for this to happen.

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