

## **To sign, or not to sign, that is the question?**

More often than not, the day to day conduct of every business is governed by multitudes of contracts in all forms and shapes. Some are written, others oral and their complexities differ from one mutual promise given in exchange for other promises, to act in a certain way, or for consideration. However, in the midst of all this, the parties constantly ponder on whether to sign, or not to sign this contracts?

Prior to signing any contract, it is imperative that one consider the following;

- The Definition clause – This should be read and understood first to appreciate what may be implied in the language that otherwise sounds ordinary.
- Does the contract say all that is required of you, and what you will expect the other party to do? If it falls short do not sign and have it amended first.
- Conditions – Certain contracts may provide that something must happen before the contract becomes effective or the other party becomes obligated. If so, are those conditions realistic or do they provide escape clauses?
- Remedies – Does the contract provide for remedies in cases of a breach and if so, is adequate protection provided?
- Authority to sign – It is important to make sure that the party you contracting with actually has the authority to do so. When dealing with companies, check whether a company resolution was resolved authorising the party to sign on its behalf because if not, the other contracting party may not be obliged to honour the terms of the contract.
- Is the entity I am contracting with, in existence? Ensure that the entity you are contracting with is in existence as a contract between an existing entity and a non-existing one was null and void.<sup>1</sup> If all it is a pre-incorporation contract, this must be stated fully in the contract. Company searches can be done at The Companies and Intellectual Property Authority (CIPA).
- Who are the Parties? – It must be clear who the parties to the contract are. Full legal names should be stated. In cases of companies, the company's full legal names, legal status and registration number must be stated. Businesses can change names, but the registration number remains the same and this avoids ambiguity.
- Law and Jurisdiction – It is equally important to note which country will have jurisdiction over the contract and the laws governing it in the event of litigation, lest you sign a contract which in actual fact in the stated country is not legally binding.
- Make certain that the terms of the contract are not against public policy or illegal as this may render the contract null and void.

<sup>1</sup> CEDA v Measurement Park (Pty) Ltd and Others CACGB-090-13

- If the contract is in writing, make sure that all the terms are written. Do not assume that something which is not written will become part of the contract just because you discussed it and agreed to verbally. The Parol Evidence Rule provides that where a contract has been reduced to writing, the written document is to be regarded as the exclusive memorial of the parties agreement<sup>2</sup> if a dispute arises.
- Dispute Resolution – Parties can also regulate how disputes should be resolved should they arise regarding the contract. This can either be through Litigation or Arbitration. Both the two stated resolutions have their own pros and cons depending on the type and content of the contract.

The above pointers are not an exhaustive list of what to consider prior to signing. Contracts have become more sophisticated and more legal issues are encountered beyond this inevitably overly simplified commentary.

In conclusion, it is imperative to read the whole contract. Before signing, ensure that you understand all the terms and it is your intention to be bound by them. For further and better guidance, you should seek the guidance of your legal counsel.

<sup>2</sup> D & S Machinery and Plant Hire (Pty) Ltd t/a Excavator Hire v Zismo Engineering (Pty) Ltd CACCGB-095-12