



Is a “gentlemen’s agreement” a valid contract in South Africa?

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1 Introduction

Contracts are entered into and created every day in South Africa. Most transactions like buying a soft drink at your local supermarket will be regarded as a contract in terms of our law. You are entering a consumer contract with the relevant retailer for the purchase of goods. No matter how big or small, contracts are a daily occurrence. Even though most daily contracts are not written, they are still regarded as being binding in terms of our law. When you purchase a product from a retailer, there will almost always be no written contract. However, a consumer will be protected by the Consumer Protection Act 68 of 2008 for any faulty behavior on the retailer’s side where you as a consumer will be protected with rights you may not even be aware of. But what happens when small business owners make day-to-day undertakings with each other? What legal mechanisms are there to protect business owners from such transactions?

2 Gentlemen’s Agreement v Binding Contract

A “gentlemen’s (or gentleman’s) agreement” is an oral agreement entered into by two or more parties. These agreements are generally entered into by business men or women for a mutually beneficial purpose. There are no formalities governing the agreement and therefore the agreement will not be legally binding. An agreement of this sort will be linked

with an 'integrity principle', due to no formal obligation put upon a party to uphold their end of the agreement. When you enter a valid a formal agreement, known as a contract in South Africa, there are certain requirements that have to be met in order to make it a legally binding instrument. The requirements for a legally binding contract (verbal or written format) are as follows:

1. The agreement must obviously be legal;
2. Consensus: the parties must be in agreement regarding the matter;
3. Capacity; the parties must have the legal capacity to act and enter into agreements;
4. There are certain formalities that need to be complied with in terms of specific legislation, for example for the transfer of immovable property there must be a written agreement in place;
5. The agreement must be possible to perform and the parties must be certain of the contents thereof.

In today's fast-paced society, business partners sometimes neglect to have a written agreement put in place to legally bind their so-called "gentlemen's agreement." You can opt to have a formal oral agreement put in place, but a party can try and escape the agreement and his/her obligations they can prove the formalities as indicated above are not met. If formalities are not complied with, you will have a non-legally binding informal agreement in place, and will not be able to assert your rights to enforce the agreement. You will then be dealing with a typical "he said, she said" scenario.

3 Conclusion

Considering the above, from a business perspective, it would be wise to have most agreements written. When you have a written agreement in place, there can be more clear evidence that the requirements as mentioned above has been met to create a legally binding contract. To simply rely on an oral "gentlemen's agreement" conducted between you and your business partner will not be enforceable, unless you can prove that the requirements for a valid and legally binding agreement have been met in oral form.

In light of this, it is recommended to have a written contract in place. A written contract does not need to be lengthy, it can have simple terms put down on paper to secure and make your rights enforceable in terms of the contract.

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