

ILLEGAL CONTRACT: What is it and how to spot one?

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A contract or alternatively, an agreement is an understanding between two or more parties on a common subject matter that creates a legal obligation between them. The said contract can either be written or oral in nature. However where parties intend to create a legally firm relationship, written contracts are usually preferred than oral contracts, nevertheless, both can be entered into.

Some contracts must be written in order for them to be valid and enforceable, such as contracts that involve a sale of immovable property (land). Contracts are part of everyday dealings in all aspects of life. Therefore, it is crucial to understand the rules governing them to ensure you have a valid contract.

Let us consider a simple example of a contract which may well be in writing or oral in nature. X offers to pay Y, R 5 000.00, for Y to bake two (2) caramel flavoured wedding cakes with chocolate icing and deliver the cakes to X in three weeks' time. At the eventual conclusion of the contract in the aforesaid example, one would be able to point out the following elements of a contract:

- An offer (X will pay Y R 5 000.00 for two wedding cakes);
- And acceptance of the offer presented with (Y accepts R 5 000.00 for two wedding cakes);
- A promise to perform (Y says he/she will perform);
- A valuable consideration (R 5 000.00);
- A time or an event of when the performance must be made (two wedding cakes to be delivered exactly 3 weeks from now);
- Terms and conditions for the performance (The wedding cakes must be caramel flavoured and have chocolate icing); and
- Performance (The two wedding cakes are delivered and the Y is paid R 5 000.00)

Considering the above, it is thus prudent for everyone who intends to enter into a contract for anything under the sun to at least know the fundamental requirements of a valid contract. This will curtail the unfortunate events wherein a party or both parties unknowingly contract on invalid terms.

REQUIREMENTS FOR A VALID CONTRACT

For an agreement to serve and to be recognized as a valid and binding contract, it must meet the following requirements which are discussed in point form. :

- Consensus: the parties' intent in their minds must match (or at least appear to match) on all material aspects of their agreement. This rather important requirement commands that the parties entering into a contract must have the same understanding regarding the subject on which they are contracting. Parties entering into a contract of sale of a cell phone must all understand or at least seem to understand that the cell phone is not leased but being completely sold.
- Capacity: the parties must have the necessary legal capacity to contract. A person entering into a contract must have the legal power to enter into that said contract. A motor vehicle can only be sold by the lawful owner of that motor vehicle except when such an owner gives clear authority to an agent or someone else to act on their behalf and sell the car. Other capacity consideration include age and the mental status of the parties involved.
- Formalities: where in exceptional cases, require that the agreement should be in a certain format (for example, in writing and signed), these formalities must be respected. A clear example of this requirement is when parties enter into a contract of sale of land, such a contract always has to be in writing.
- Legality: the agreement must be lawful – in other words it cannot be prohibited by law or common law. We all live and exist under the rule of law. Parties have the freedom to contract on any subject they so wish, however, such freedom is limited to what is lawful and legal.
- Possibility: the undertaken commitments must be performed when the agreement is entered. Entering into a contract for something which may then prove to be impossible for one or more parties to perform or deliver essentially renders that contract void. Nothing can come out of that contract in any event.
- Security: the agreement must have definite or determinate content, so that the commitments can be enforced.

An absence of either one of the requirements when entering into a contract will not strictly mean that the particular is void or invalid. Depending on the subject matter, a contract in which one of the requirements is missing may only be voidable and not completely void. With a void contract, the contract cannot become valid just by both parties agreeing, as you cannot commit to doing something illegal. Voidable contracts can be made valid if the party who is not bound agrees to give up their rights

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to rescission. Examples of void contracts could include prostitution, drug dealing and contract-killing agreements.

WHAT IS AN ILLEGAL CONTRACT?

Considering the above, one can deduce that a contract is considered an “illegal contract” when the subject matter of the agreement relates to an illegal purpose that violates the law. Basically, contracts are illegal if the formation or performance of the agreement will cause the parties to participate in illegal activities. The illegality must relate directly to the contents of the contract and not some other intervening force.

An example may be where D enters into a contract with E. D would provide E with cocaine and tik sachets for E to sell and/or distribute same to designated areas. The proceeds of the sales would go to D and he would then pay E R 10 000.00 every month end. From this example, the parties may well be in the same understanding and have the intention to enter into a contract and perform. However performance under such a contract contravenes Sections 3, 4(a)(b) and 5(a)(b) of the ***Drugs and Drug Trafficking Act 140 of 1992***. The contract is thus illegal and unenforceable by a court of law. It will be considered as if the contract never existed even after one party had performed. It must be noted that entering into illegal contracts that contravene the law can attract criminal sanctions to both contracting parties.

There is one useful purpose for illegal contracts though and that is when they are used as a defense against a breach of contract claim. This is known as the “defense of illegality.” For instance, if one party tries to sue the other party for breach of contract, but the court finds that the contract is illegal for some reason, then the party bringing the suit will not receive any damages and the breaching party will not be held liable for a breach because the agreement itself is prohibited by law.

WHAT HAPPENS IF A PARTY BREACHES AN ILLEGAL CONTRACT?

As discussed above, when a contract is deemed illegal, then the contract will become void (unenforceable) and it will be as if it was never formed. The court will normally leave the parties in the same condition as they were at the time of the breach. Neither party will be able to recover losses because again, the court is essentially stating, “No contract exists here.”

Going back to the seller and distributor of cocaine and tik example, if D who employs E fails to pay him/her for the work that he/she did as a cocaine and tik dealer, then the dealer will have no means to recover their lost wages for the work because the entire employment contract is illegal. The employer will be off the hook for the breach of contract and payment to the worker, and the cocaine and tik dealer will have no available remedies. Additionally, illegal contracts also prevent recovery for more than

just monetary damages. Recovery will not be permitted for contract rescission (i.e., cancelling the contract), restitution, or specific performance as well

WILL A LEGAL PRACTITIONER BE ABLE TO ASSIST IF YOU ARE FACED WITH AN ILLEGAL CONTRACT ISSUE?

Parties to an illegal contract may face some challenges when trying to enforce it or recover damages. If the court finds that the contract is void due to illegalities, then neither party will receive protection under the contract. Therefore, if you are having issues that might involve an illegal contract, you may contact a contract attorney immediately.

In addition, you should also consult an attorney who deals with contracts or contractual law before entering into any type of contract or agreement. An experienced attorney will be able to draft, review, and ensure that the contract is legally enforceable and that your rights under the contract are adequately protected.