

Short notes on:

MEMORANDUM OF UNDERSTANDING – IS IT BINDING?

Introduction

Whether you are looking to purchase a new company or enter into a joint venture, there needs to be an understanding before there can be any agreement. Discovering a new venture or simply pursuing something you are passionate about can be quite exciting. It is, however important to know what exactly it is you are getting yourself into before entering any binding agreements. In order to pursue your new venture, whether it is partnering with another individual or business or acquiring a managing share in a different company, this process is going to involve many complex arrangements. This is why it is important to encapsulate the important points of your understanding regarding your new venture.

What is a Memorandum of Understanding (“MOU”)?

A Memorandum of Understanding outlines and describes an agreement reached between two or more parties. The MOU also conveys the expectations that have been mutually accepted by all the parties involved in the negotiation process. The existence of a MOU is usually an indicator that a binding contract is soon to follow. Although the MOU may contain all the salient terms of the agreement and may be signed by all parties involved, is this document legally binding?

Can an MOU be legally binding?

MOUs are in most cases always considered to be non-binding. However, there are some instances where an MOU can be partly binding. It depends on whether the MOU is drafted poorly and whether the document may contain certain binding provisions.

Be that as it may, the courts have been clear on the legally binding status of MOUs because in *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd*¹ it was stated as follows:

“An agreement that parties would negotiate to conclude another agreement is not enforceable, because the absolute discretion vested in the parties to agree or disagree.”

Additionally, in *Southernport Developments (Pty) Ltd v Transnet Limited* [2004] JOL 13030 (SCA)² the court of First Instance found that a MOU did not constitute an agreement between the parties but that it merely conferred and obligation on the parties to conduct negotiations in good faith.

MOUs aren't a prerequisite to entering into agreements and can at times cause delays in settling terms. Furthermore, the non-binding nature of these agreements leave the parties open to exploitation.

Conclusion

It is crucial to consult with a legal professional before entering into any agreements of this nature. In saying that however, it would probably best to sign the final agreed terms between the parties and keep on going negotiations to just that, negotiations. This will prevent any unwanted consequences as a result of relying on a non-binding agreement.

Contact an attorney at SchoemanLaw for your legal needs!

¹ *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd*. (548/98) [2000] ZASCA 28; 2000 (4) SA 413 (SCA)

² *Southernport Developments (Pty) Ltd v Transnet Limited* [2004] JOL 13030 (SCA)