INVESTMENT REPORT

SEPTEMBER 2023 • ISSUE 555

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EVERYTHING YOU NEED TO KNOW ABOUT POWERS OF ATTORNEY

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We are often requested to assist clients in drafting a power of attorney (POA) and, usually, it is followed by a myriad of questions which range from what it may be used for, when it may be used and whether it remains valid after death or lack of mental capacity. As these questions have become more frequent, I felt pressed to write an educational article dealing with every element pertaining to powers of attorney; the practicalities of utilising them and at what stage a POA no longer is regarded as valid.

It's important to note that a POA is not a contract, but rather a declaration by the principal who has appointed a designated person (also referred to as an agent) and assigned them the legal capacity to make decisions and take actions on their behalf.

Therefore, the POA allows the agent to perform various legal and financial activities on behalf of the principal, which includes, but is not limited to, entering into contractual agreements, buying/selling/mortgaging and managing properties, attending on and signing off on matters pertaining to financial affairs, etc.

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PARTIES INVOLVED IN A POA

> THE PRINCIPAL/GRANTOR/DONOR

This person empowers another to perform actions on his/her behalf and in his/her name. Not only do they empower a person to act, but they also assure third parties that such person acting and making decisions on their behalf has the legal authority to do so.

A principal cannot grant power of attorney to execute a will or institute divorce proceedings on his/her behalf.

> THE AGENT/GRANTEE/ATTORNEY-IN-FACT

This is a person who receives legal authority to act and decide on the principal's behalf. An agent who is legally and properly authorised will be legally protected from any liability arising from contracts or agreements/ actions performed on behalf of the principal.

However, if an agent is not authorised correctly and mislead a third party to believe they have such authority, the third party can hold the agent personally liable for breach of "warranty of authority". Further to this, an agent acting on an invalid power of attorney is committing fraud, which leads to legal consequences.

TYPES OF POA

1. GENERAL POWER OF ATTORNEY

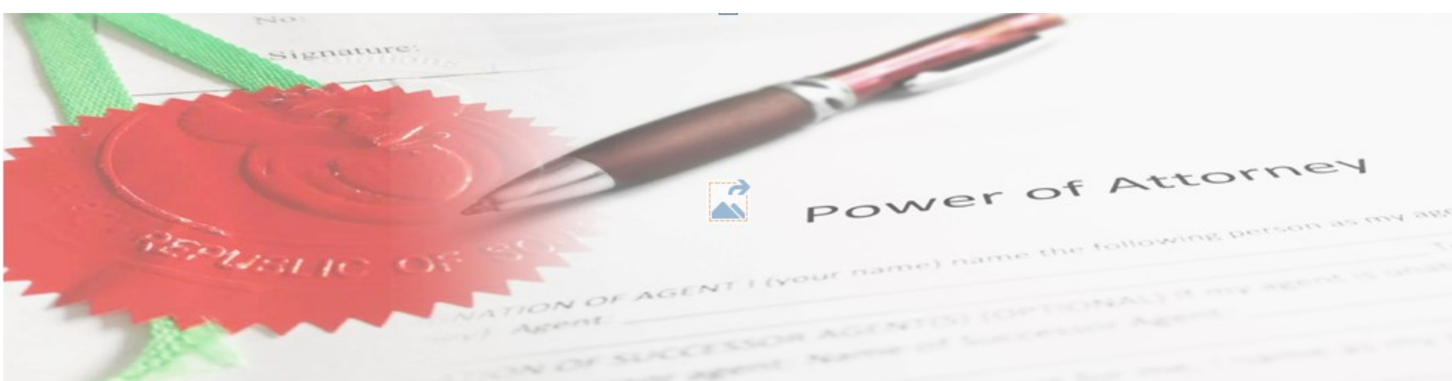
This allows an agent to perform a collection of specific acts on behalf of the principal, and unless a determinable term is specified, the validity of this POA normally terminates on insolvency, mental incapacity or death of the principal.

2. SPECIAL POWER OF ATTORNEY

This power of attorney limits the agent's powers to perform a specific act explicitly detailed by the principal. Once successfully executed, the POA will lapse and be of no further force and effect.

3. POWER OF ATTORNEY FOR BANKING PURPOSES

Generally speaking, a general power of attorney would make provision for an agent, for example, to open, close or transact on the principal's bank account. However, it would appear that South African banking institutions will not accept general powers of attorney that are drafted externally. Banks require that an account holder visit one of their nearest branches in person to sign a POA drafted by the bank itself. The powers with respect to this type of POA will always be restricted to allow the agent to perform limited acts on a specific account of the principal.



REASONS WHY A POA MAY BE REQUIRED

- **EMIGRATION –** South Africans who have left the country before wrapping up financial and other affairs usually sign a POA for someone residing in South Africa to take care of their outstanding matters.
- **OUT OF THE COUNTRY FOR EXTENDED PERIODS**
- **ASSISTANCE FROM EXPERTS IS REQUIRED –** Examples: managing bank accounts and money, handling and filing of tax matters, entering into contracts, buying/selling/mortgaging and managing properties, etc.
- **SPECIFIC TASKS TO BE PERFORMED –** Examples: collecting pension, paying bills, renewing vehicle license.
- **WHERE A PERSON IS TEMPORARILY INCAPACITATED –** Unable to perform daily tasks due to illness, injury or hospitalisation.
- **FRAGILITY –** Where one may be too weak to physically sign documents.

REQUIREMENTS FOR A VALID POA

- It must be reduced to writing and clearly describe and identify the principal and the agent and the extent of the powers granted to the agent.
- The principal must be 18 years of age or older and have the capacity to perform and enter into legal and binding contracts. In other words, they must be adults who can manage the principal's affairs; they may not be sequestrated or under curatorship.
- **Must be signed by the principal and the agent. When signing the POA, the principal must be mentally competent to fully understand the nature and extent of the powers being granted. The agent, too, has to be 18 years or older and competent and trustworthy when it comes to making financial and legal decisions and signing legal documents on behalf of the principal.**
- Although not prescribed in South African law, ideally have the POA witnessed by two witnesses – these witnesses must be 14 years or older and capable of giving evidence in court. The witness signatures will enhance the validity of the POA. Witnesses are not allowed to gain any benefit from the POA. Alternative to witnesses is having a POA signed before a Commissioner of Oaths, Magistrate, Justice of the Peace or Notary.
- Concerning property transactions, the signed initial power of attorney, accompanied by the relevant documents, must be registered in the Deeds Office under the Deeds Registries Act 47 of 1937.
- Powers of attorney executed outside South Africa for use in South Africa must be executed in the presence of a Notary Public. It must also be sufficiently authenticated, depending on the country in which it is executed.
- **This capacity to act must also be present during the full period of the validity of the POA. As soon as a principal's mental capacity diminishes (dementia or Alzheimer's disease) to the extent that they are no longer able to make sound decisions, the POA terminates (as soon as a positive diagnosis has been made by a medical professional).**

TERMINATION OF A POWER OF ATTORNEY

The principal may cancel POAs at any time. However, a POA will automatically terminate should one of the following incidents happen to the principal:–

- **Death**
- **Becomes insolvent and the estate is sequestrated**
- **Becomes mentally impaired resulting in them no longer being able to manage their affairs and make their own decisions. Mental incapacity can arise from any one of the following incidents: mental illness (dementia or Alzheimer's disease), stroke or coma following an accident.**

Should any one of the above-mentioned incidents occur, the POA will become void and the agent no longer has the power to act on the principal's behalf, and may under no circumstances thereafter attempt to make use of a POA. Should an agent act on the authority of a lapsed POA, they may become personally liable for damages suffered, if any, due to them having no legal authority to act.

OPTIONS AVAILABLE IN THE EVENT OF MENTAL INCAPACITY

It seems illogical that POAs are essentially given to an agent to manage financial and personal affairs where the principal is unable to do so, yet when mental incapacity comes into play the POA is no longer regarded as valid and fails to endure.

Unlike with some other countries, South African law does not provide for an enduring power of attorney, which remains valid despite the principal's mental incapacities. Whilst proposals and recommendations have been made over the years to improve our laws to allow for an enduring POA, nothing has come into effect as yet, nor do we foresee this coming into effect any time soon.

THEREFORE, WHERE ONE SUSPECTS THAT A PERSON IS NO LONGER OF SOUND MIND AND NO LONGER ABLE TO MAKE SOUND DECISIONS, NOR TAKE CARE OF THEIR PERSONAL WELL-BEING, THE FOLLOWING OPTIONS ARE AVAILABLE TO THE PERSON SUFFERING FROM MENTAL INCAPACITY:

1. CURATORSHIP

This is an application that is brought before the High Court by an attorney in order to have a curator appointed. The process requires affidavits to be signed by relatives, as well as the appointment of specialised medical practitioners to conduct medical and mental assessments from which to compile and submit a medical report for the court's consideration. If all the requirements are met and prove mental incapacity, the court may then appoint a **curator bonis,** who is normally a legal representative, that will be tasked to manage the finances, property and estate of the person suffering from mental incapacity.

Under more severe circumstances, the court may also appoint a **curator ad personam** who will take on the responsibility of looking after the mentally incapacitated person's physical welfare, such as their accommodation, health and day-to-day care.

The curator will be responsible for performing a number of acts, such as handling financial affairs, submitting annual reports to the Master and giving consent for medical treatment. This process is both lengthy and costly.

2. ADMINISTRATORSHIP

This is an application that is brought before the Master of the High Court and executed by the Master in terms of the Mental Health Care Act. It is, by far, a much cheaper and less arduous process.

This process requires an affidavit justifying why a person needs to be placed under administratorship and why the party making such application should be appointed as the administrator. This needs to be accompanied by supporting documentation (medical reports) to confirm mental incapacity. Thereafter, the Master will conduct an investigation (taking approx. 60 days) which will result in the application being accepted or rejected. It must be noted that the Master will allow an administrator temporary administration rights. Further to this, the administrator will only be allowed to deal with the person's property and not their personal affairs.

3. SPECIAL TRUST

This may be a more appropriate solution to address the financial aspects of a person who may become mentally incapacitated. This trust can be set up while the person in question is still mentally sound, but it is important that these trusts are drawn up by a trust specialist, as they can become quite complex and careful considerations need to be made in respect to tax consequences.

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GENERAL MANAGER l WILLS AND ESTATES, LEGAL ADVISOR AND COMPLIANCE

Malissa is the General Manager of Brenthurst Wealth, head of our Fiduciary Services Department in the Western Cape and acts as Brenthurst's internal legal advisor and compliance officer.

She is a qualified attorney, admitted as such in the High Court of South Africa (Western Cape High Court), having obtained a B.Com Law degree from the University of Johannesburg, an LLB degree from the University of South Africa (UNISA), and a further certificate in estate planning from Milpark. Malissa also successfully passed her FISA examination in 2017 which awarded and assigned her with the professional designation – Fiduciary Practitioner of South Africa® and since 2018 been an accredited member of the Fiduciary Institute of South Africa (FISA).

MALISSA joined the Brenthurst Team in July 2014. She was promoted to her position as General Manager of Brenthurst in 2021 and is responsible for general oversight and management functions for Brenthurst as a whole. Additionally, as a Fiduciary Specialist, Malissa is also involved with estate planning, will consulting and drafting and the handling and administering of deceased estates. Malissa also plays a key role in all matters of a legal, compliance and human resource nature.

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