

# Understanding Powers of Attorney

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## INTRODUCTION

In South Africa, a power of attorney is one of the most frequently used legal instruments in personal and commercial transactions. It is a legal mechanism which allows one person (the Principal) to authorise another (the Agent) to act on their behalf. In practice, powers of attorney are commonly used for the transfer of property, concluding business transactions, or any other legal act (barring marriage or creating a will) which the Principal themselves have the capacity to carry out.

Broadly speaking, there are 2 types of Powers of Attorney: the first is a general power of attorney which allows the agent to act in various ways towards various ends on behalf of the Principal; and the second is a Special Power of Attorney, which only authorises the Agent to act in furtherance of a particular goal (like transferring a property).

Because significant rights and obligations flow from a power of attorney, understanding when it is valid – and when it lapses – is essential.

## VALIDITY REQUIREMENTS

The requirements for a valid power of attorney are derived from the common law and certain statutory provisions.

Although agency can arise informally under the common law (i.e. between spouses), a power of attorney intended for formal or commercial purposes must usually be reduced to writing. The document must:

1. Clearly identify the Principal and the Agent and define the scope of the Agent's authority (what are they authorised to do);
2. Be granted by a Principal who has the necessary **legal capacity** and intention at the time of execution; and;
3. The execution of the power of attorney must be judicially possible (meaning the Principal cannot delegate authority to perform an illegal act or to achieve an objective that is contrary to public policy. Such delegation of authority would be void and unenforceable); and;

4. Be signed by two competent witnesses who are over the age of 14 years old and who do not stand to benefit from the Power of Attorney (i.e. the Agent cannot also be a witness).

Legal capacity is absolutely crucial. In *Pheasant v Warne*<sup>1</sup>, the court confirmed that juristic acts performed without capacity are invalid. A person who lacks the legal capacity to contract cannot validly authorise another to do so on their behalf.

In certain circumstances, additional statutory formalities apply. For example, the **Alienation of Land Act 68 of 1981** and the **Deeds Registries Act 47 of 1937** prescribe specific requirements for powers of attorney used in property transactions. Non-compliance may render the instrument invalid, or void for its intended purpose.

## WHEN DO POAS LAPSE?

A power of attorney does not last indefinitely. It may come to an end in several ways:

### 1. Revocation by the Principal

As a general rule, a Principal may freely revoke a power of attorney at any time, provided that adequate notice is given to the Agent and to any third parties who may rely on it.

### 2. Expiry or Fulfilment of Purpose

Where authority is granted for a specific purpose or a defined period of time, it lapses automatically once the purpose is fulfilled or the period expires.

### 3. Death or Insolvency

A power of attorney ends if the Principal loses control of their estate. Upon death, authority vests in the executor of the deceased estate. If the Principal becomes insolvent and is subsequently sequestered, control of the estate passes to the trustee.

### 4. Loss of Legal Capacity

If the Principal loses legal capacity after granting the power (for example – through serious cognitive impairment), the power of attorney lapses.

This principle was recognised in *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz*<sup>2</sup>, where the court confirmed that agency cannot survive the loss of the Principal's capacity to perform juristic acts.

Once a power of attorney has lapsed, any further acts performed under it may, consequently, be invalid.

### CAN A POA BE IRREVOCABLE?

While a power of attorney is normally completely revocable, an important exception lies where it is granted as security for a debt.

In *Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd*<sup>3</sup>, the Supreme Court of Appeal confirmed that a power of attorney granted as security may be irrevocable for as long as the secured debt remains unpaid. This ensures that the security arrangement cannot be rendered pointless by a one-sided withdrawal of authority.

### WHY PROPER ADVICE MATTERS

Powers of attorney are a powerful legal tool, but they are not indefinite and, importantly, they are not without their challenges. Capacity, compliance with statutory formalities, clear drafting and proper execution are crucial to their effectiveness. Understanding when authority lapses is just as important, especially in matters involving property, insolvency or incapacity.

Careful structuring at the outset can help prevent uncertainty and unnecessary delays, as well as helping to protect both principals and third parties who rely on the instrument.

*Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated herein.*

<sup>1</sup> *Pheasant v Warne* 1922 AD 481

<sup>2</sup> *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz* 1957 (4) SA 354 (W)

<sup>3</sup> *Smit and Others v Origize 166 Strand Real Estate (Pty) Ltd and Others* (ZASCA 132 of 2020)



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