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## **WHEN YOU CAN NO LONGER ACT UNDER A POWER OF ATTORNEY**

### Legal incapacity

An adult with full contractual capacity is entitled to make decisions about his/her personal welfare, financial affairs and medical treatment.

Sometimes a person with full contractual capacity may not be able to do something personally (for example sign a document) because that person may, for example, be out of the country or not near the place where the act needs to be performed. In these cases, the person (“the principal”) can execute a power of attorney in favour of a third party (“the agent”), authorising the agent to perform the act on the principal’s behalf. The basic laws of agency apply to this relationship.

An adult who does not have full contractual capacity (whether through mental illness, intellectual disability, physical disability, head injury, an extended period of unconsciousness, stroke or extreme old age) requires assistance to make these decisions. This assistance is often provided by a curator appointed by the High Court.

### What if principal dies or becomes insolvent?

When a principal dies or is sequestrated as a result of insolvency, all powers of attorney executed by him/her lapse.

The power to act on the principal’s behalf shifts on the principal’s death or insolvency from the principal to the Master of the High Court and thereafter, once Letters of Executorship (or Letters of Authority in the case of insolvency) are issued, to the principal’s executor or trustee respectively

It follows that the agent’s power to act in terms of the lapsed power of attorney also ceases on the principal’s death or insolvency.

The rationale behind this is that, since the principal can no longer act personally, the agent can’t act on his/her behalf.

### Incapacity of principal

What happens, however, if, after executing a power of attorney in favour of an agent but before death or insolvency, a principal becomes incapacitated in such a way that the principal can no longer make his/her own decisions? Do the powers of attorney executed by that principal (and the agent’s authority to act on his/her behalf) lapse?

The South African Law Reform Commission has looked into this issue and our law appears to be that a power of attorney terminates on the incapacity of the principal from whatever cause. In other words, when a principal is no longer able to perform the act in question himself, his agent can no longer do it for him. In short, a power of attorney lapses as soon as the principal loses the capacity to act.

Other than potentially being discrimination on the basis of disability (which is unconstitutional), the

lapsing of a power of attorney can create tremendous problems for parties relying on the power of attorney, for example the agent and a bank. If someone does not know the principal personally (and whether the principal has full contractual capacity), how can that person place reliance on a power of attorney presented by an agent?

### Proposed Solutions

In the case of a principal's death or insolvency, the problem of dealing with his/her estate is easily resolved by having an executor or trustee appointed by the Master of the High Court.

In other cases of incapacity, however, the situation is not so simple. One accepted procedure is for affected parties to apply to the High Court for the appointment of a curator to manage the principal's affairs. This procedure is expensive, complicated, publicises the principal's mental incapacity, humiliates the principal, and deprives him/her of a say in the choice of curator. However, the alternative, namely leaving the principal's life and affairs in limbo until s/he dies, is also unsatisfactory.

Two proposed solutions to this problem are:

1. an "enduring power of attorney" which states explicitly that the power of attorney is to remain valid despite a diminution of capacity which a principal may experience in the future; or
2. a "conditional power of attorney" which is signed by a principal when s/he has full contractual capacity but which only comes into force when the principal no longer has that capacity.

It is debatable whether either of these powers of attorney will be accepted in our law because our law of agency is founded on the principle that an agent cannot do that which his principal has no capacity to do himself. Many agents have continued to behave as if a power of attorney granted by a principal who has subsequently lost full contractual capacity, is still valid and have unwittingly exposed themselves to personal liability for any losses which may be incurred by a third party as a result of transactions concluded through the void power of attorney.

The current situation in our law regarding the lapsing of powers of attorney on incapacity of the principal needs to be reviewed. For now any agent acting under a power of attorney on behalf of a principal should ensure that they are familiar with the limitations as regulated in our laws of agency and that they are entitled to rely on a power of attorney before doing so.

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