

# STRONGER TOGETHER

## LEGAL CHAT WEBINAR 20 APRIL 2020 - Q & A

- 31** From Dalrae Ali Mohamed to All panelists : how does it work with a trust?
- 13:26:25** From Glynis Terblanche to All panelists: how do we sell a property out of the Trust... what must we be aware of?
- 13:27:31** From Andries Odendaal to All panelists : Regarding the trust - Can the purchaser that purchase the property sign the OTP with the trust name and provide all the Trustee information BUT with a condition that the sale will proceed when the trust is formed. Then only the Trust number needs to be entered and not a second contract be agreed upon?
- 13:31:27** From Andries Odendaal to All panelists : And if it is cash? Whether the transaction is a cash purchase or not does not impact the legal requirements for a trust to purchase or sell a property.

### ANSWER:

1. As with all contracts of purchase and sale in respect of land the provisions of Section 2 of the Alienation of Land Act, 1981 apply in that the deed of sale has to be in writing and the parties thereto or their agents have to be legally authorised to enter into the transaction concerned at the time of signing the contract.
2. The only persons who can purchase an immovable property on behalf of a trust are trustees who have been issued with Letters of Authority by the Master of the High Court.
3. The purchase of immovable property by trustees who have been nominated in terms of a trust deed which has not been registered with the Master or have been nominated by resolution of existing trustees but have not been issued with Letters of Authority, or on the other hand a transaction entered into by any party who purports to purchase immovable property on behalf of a trust to be formed is void ab initio and cannot be ratified.
4. This is in contrast to the situation with close corporations and companies where a pre incorporation contract can be ratified and consequently an immovable property can be purchased on account of such an entity still to be formed.
5. The trust deed or will must specifically authorise the trustees to sell, purchase and/or mortgage immovable property as the case may be.
6. Either all the trustees must sign the contract or a resolution which is fully compliant with the procedure and formalities laid down in the founding document must be passed prior to the deed of sale being signed authorising the transaction concerned and nominating a trustee or trustees to enter into the contract on behalf of the trust. Any deed of sale entered into by one trustee purporting to act on behalf of the trust but without a valid resolution having been passed authorising him to do so will be void ab initio for lack of compliance with Section 2 of the Alienation of Land Act and incapable of ratification.
7. Any person responsible for ensuring the validity of a deed of sale or mortgage to which a trust is a party should in the light of the above have sight of the following documents:
  - a copy of the trust deed
  - a copy of the most up to date Letters of Authority issued by the Master of the High Court
  - the authorising resolution
  - copies of the identity documents of all of the trustees to establish that they are one and the same persons as the trustees reflected on the Letters of Authority. In family trusts father and son may have similar names. A utility bill for each of the trustees should also be requested.



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**13:20:41** From Jodi Shapiro to All panelists : What happens in a Deceased estate if the trust is a beneficiary of the property?

### ANSWER:

The conveyancer's will transfer the property to the trust as the beneficiary in terms of the will. The Trust will have to pay all transfer fees related to the transfer but no transfer duty will be payable as transfers in terms of an inheritance is exempted from Transfer Duty.

**13:22:31** From Allie Reid to All panelists : With a testamentary trust do you need the trust beneficiaries approval to sell a property in the trust, or only the executor, trustee and masters approval?

### ANSWER:

If the property is sold directly from the deceased estate and the Trust is the heir, then the executor is the only person who can act on behalf of the deceased estate. The heirs (the Trust) will have to consent to the sale of the property and the Master's approval of the sale must be obtained if all heirs consent.

**13:32:13** From Inge Loesch to All panelists : Marital status of individual trustees also to be checked on? Especially if any of the trustees is married COP?

### ANSWER:

Trustees act in a representative capacity on behalf of a trust and not in their personal capacities. Their marital status is thus not relevant. They do not acquire any rights in their personal capacities.

**3:35:43** From Nicolene Hamaty to All panelists : what happens in a gay marriage? Who is considered husband?

### ANSWER:

In South Africa, same sex couples can conclude either a marriage or a civil partnership in terms of the Civil Unions Act of 2006. If they conclude a civil partnership, you will refer to them as partners. If they choose to enter into marriage, the correct reference to each party to the marriage will be spouse.

**13:37:30** From Austen Gibbs to All panelists : Is the person who is designated to sign - is this equal to a power of attorney?

### ANSWER:

A person can be authorised to sign on behalf of an entity (Trust, CC or a company) via a resolution by the Trustees, members or directors. A person who is authorised to sign on behalf of another person (for whatever reason) will be authorised in terms of a general or special power of attorney.

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**13:47:23** From Rayizah Hattia to All panelists : in terms of a developer property? the OTP was signed a day before lockdown but the seller has not accepted yet? can we add an addendum?

### ANSWER:

The seller can confirm acceptance of the offer to purchase via email. The offer to purchase can then be signed by the Seller when he attends the conveyancer's office to sign the transfer documents. In the Manna and Lotter case, court found that the acceptance period is for the benefit of the purchaser. Therefore as a result of late acceptance, only the Purchaser can decide to withdraw from the contract and not the Seller.

**13:58:36** From Yvette Wallace to All panelists : What would you need to do if the Power of Attorney is no longer valid if parent is not lucid?

**13:59:03** From Charlene Athinault-Thompson to All panelists : What do you do in the case where the parent is no longer lucid?

**13:59:05** From Carol-Ann kotze to All panelists : How does the home then get sold

**14:00:24** From Vivienne Francois to All panelists : what do you then do with a parent that has no contractual capacity? and is the sole owner of a property

**14:00:56** From Caroline Franks to All panelists : thank you. is there another SPOA that can be used when parents do not have mental capacity?

**14:02:11** From Ryno Kohn to All panelists : Question: how do you deal with a power of attorney of the parent has for example alzheimer's

**14:02:24** From Taryn Minihold to All panelists : If an elderly parent is no longer lucid, how do you obtain permission? As the power of attorney no longer applies.

From Gail Henning to All panelists : What will happen if the elderly parent is no longer lucid and therefore has no contractual capacity, Who will sign on their behalf

**14:02:37** From Alana Britz to All panelists : so if parent knows they will be incapacitated at some point in the future (like alzheimer) how do they appoint someone to look after their affairs in the time when they can't?

### ANSWER:

A person has full contractual capacity if he or she can conclude a legally binding contract. A party's contractual capacity may be affected by mental illness, intellectual disability, physical disability, head injury, an extended period of unconsciousness, stroke or extreme old age, etc. If you execute a special (for limited purposes) or a general (an all-encompassing) power of attorney in favour of someone (called your agent) the agent's authority to act under that power of attorney ends on your death, insolvency or incapacity (where you are unable to make rational decisions or are incapable of managing your own affairs). If the value of the person's estate exceeds R 200,000 and their annual income is more than R 24,000, then application must be made to the High Court for the appointment of a curator bonis or curator ad personam, to manage their affairs. This is a hugely expensive business. If their estate is less than R 200,000 and their annual income is below R 24,000, their family can apply to the Master of the High Court in terms of the Mental Health Care Act, firstly to declare that the affected person is mentally ill, and then for the appointment of an administrator (usually an attorney) to care for and administer the property of the mentally ill person. This is a simpler and cheaper process.

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**13:58:51** From Hussain Noorbhai to All panelists : Q: Can the docs be sent via courier for signatures if client is overseas ?

### ANSWER:

Yes, documents may be couriered. Alternatively the documents may also be e-mailed to the client. All documents will however have to be signed with a notary public or official from the Embassy, depending on which country the client is in.

**13:58:52** From Andries Odendaal to All panelists : if the person left the country for a short while but is now 'stuck' in another country due to lockdown? Does the same rule apply? Regarding power of Attorney.

### ANSWER:

Yes, the person will have to sign the power of attorney in front of a notary or official from the embassy for it to be used in South Africa. Furthermore a power of attorney signed (in South Africa) before he left the country will still be valid as long as the principal still has contractual capacity to act.

**14:04:00** From Hans Kugler to All panelists : is it 50% or 80% sale of assets requiring shareholder involvement by special resolution?

### ANSWER:

A special resolution by shareholders will be required if the Company disposes of all or the majority (i.e. more than 50 %) of the assets of the Company.

**14:04:27** From Rhonda Williams to All panelists : What happens if the Seller had a name change prior to sale of the property and the correct process was not followed. Would this delay the Transfer Process

### ANSWER:

The Sellers auditors would have to attend to the name change of the company which shouldn't cause too much of a delay. The conveyancers will then effect an endorsement to reflect the name change simultaneously with the transfer of the property.

**14:06:16** From Berenice Maans : Excellent ! thankyou. I have a current situation where the will of the mother is in favour of Mr X. Mr X passed on before he could transfer the property into his name. He is married in community of property and his wife is the executor of his estate. The will states that the sister have right to the property until she gets married. She do not give us any info and is there any way we can find out if she is married or not?

### ANSWER:

The executor of the deceased estate of the mother will have to confirm that the sister is not married. Alternatively, you could contact the transferring attorneys attending to the transfer of the property to conduct a person search to determine if the sister may have registered an ante nuptial contract with the registrar of deeds.

