

What you need to know about powers of attorney

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There's something unsettling about being told, "We can't proceed without the right authority". It usually happens at the worst time – when someone's in hospital, overseas, or no longer able to sign for themselves. Suddenly, simple decisions become tangled in red tape.

As someone who works closely with families during some of life's more difficult moments, I can tell you: A Power of Attorney (POA) is one of the most misunderstood tools in South African law. Families often assume it will protect them in the event of mental decline – but in reality, it is not the case.

Understanding what a POA can and cannot do is essential for proper planning.

First, what exactly is a power of attorney?

A power of attorney is a legal document that allows one person (the *principal*) to authorize another (the *agent*) to act on their behalf. This may include signing documents, managing finances, buying or selling property, and handling tax matters.

A POA is not a contract. It is a unilateral declaration: "*I trust this person to act in my name.*"

But here is the critical limitation, it only works while the principal still has *mental capacity*. Once mental capacity is lost, the POA automatically becomes invalid.

South African courts have repeatedly confirmed that a POA cannot survive the loss of mental capacity, because its authority depends entirely on the principal's ability to make decisions. This is supported in the *Becker v Firstrand Bank Ltd 2011 (5) SA 227 (SCA)* where the Supreme Court of Appeal held that a POA terminates when the principal becomes unable to manage their own affairs. Also, in *Burnside v Protea Property Holdings 2013 (2) SA 466 (SCA)* the court confirmed that incapacity ends the agent's authority, even if a POA was validly signed beforehand.

The bottom line, there is no such thing as an "Enduring Power of Attorney" in South Africa.

Different types of POA and why that matters

Not all POAs are the same. Choosing the right one for your situation is essential. Let me break down the options:

1. General Power of Attorney

This gives your agent broad authority to act on your behalf in areas including finances and administrative actions. This is useful when travelling or have emigrated, are unwell, or just want help with property or SARS matters.

But it ends the moment you:

- lose mental capacity,
- are declared insolvent, or
- pass away.

2. Special (or Limited) Power of Attorney

This is narrower. It grants your agent authority for a specific task, like selling your house or renewing your vehicle licence, on your behalf. Once the task is complete, the POA ends automatically.

This POA is ideal when you know exactly what needs to be done and want to keep powers limited.

3. Bank-specific Power of Attorney

Here's something that catches many people off guard. Even if you have a properly drafted POA, most South African banks won't accept it for account access. They want their own version in place and it must be signed in person at a branch.

So, if your goal is to allow someone to manage your bank account, know this: you'll have to go to the bank with them to set it up, while you still have full capacity.

Why people commonly put POAs in place

A POA is not only for the elderly or wealthy. There are real-life, everyday reasons why clients set up POAs:

- **Emigration:** You've left South Africa while assets remain here.
- **Travelling for long periods:** You want someone to manage tax filings or renew licences while you're away.
- **Short-term incapacity:** You have been hospitalised or are recovering from surgery and are unable to deal with paperwork.
- **Physical fragility:** You are mentally sharp but unable to physically sign documents.
- **Need for expert assistance:** Your financial life is complex, and you want someone qualified to step in as needed.

For all these scenarios, a POA is a powerful administrative tool – but only temporarily.

But remember, there are limits

This is the part that often causes distress: a POA does *not* survive mental incapacity.

In South Africa, there is no such thing as an “Enduring Power of Attorney”. Once the principal is no longer able to make decisions, the POA ends no matter how well-intentioned or carefully it was drafted.

At that point, if decisions still need to be made, there are only three legal alternatives available:

1. **Curatorship (High Court):** A court-appointed person manages the individual’s affairs. While it carries strong legal authority, is more suited to large and complex estates and covers both financial and personal decisions, it is also time-consuming, expensive and intrusive.
2. **Administratorship (Master of High Court):** A simpler process through the Master of the High Court, typically used when a person is no longer able to manage their financial affairs due to mental disability. This alternative is a lot faster, less expensive and intrusive. However, it only applies to financial decisions and there are reporting obligations to the Master.
3. **Special trust:** Set up in advance and before mental incapacity planning for future incapacity. The trust can hold and manage assets for their benefit in the event of incapacity, has a strong long term structure and receive potential tax benefits. Trusts however are not for everyone, they need to be carefully considered, set up and Trustees carefully chosen due to the need for ongoing and accurate administration.

A trust is then the closest South Africa has to an Enduring POA.

So, what should you do now?

If you’re reading this and wondering whether your family would be caught unprepared, now’s the time to act.

- Think about your circumstances. Are you managing financial affairs across borders? Facing health uncertainties? Relying on others for admin?
- Review your existing POAs. Are they still relevant? Are they bank-specific where needed?
- Consider speaking to a professional. Someone who can draft the right POA for your needs and flag where it won’t be enough.

A POA is not just about bureaucracy - it’s about protection. It ensures that your affairs remain manageable when life becomes unpredictable.

However, a POA has limits. When mental incapacity is lost, families must turn to curatorship, administratorship or Special Trusts to keep things moving. Planning early avoids crisis decisions later.

If you need advice on drafting the right power of attorney or navigating incapacity options, we’re here to help.

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