

IN-DEPTH OTP TRAINING

SESSION 1

OTP TRAINING NOTES

- NB Ensure you record that you are registered with the PPRA and in possession of a valid FFC.
- NO DIGITAL or VIRTUAL SIGNATURES ARE ALLOWED of ANY KIND!

1. PARTIES TO A CONTRACT

1.1. TRUSTS

1.1.1. In order for a Trust to transact, it must have a resolution in place *before the transaction*, signed by either:

1.1.1.1. If the Trust Deed allows for a quorum of trustees to agree to any decision, then that number of Trustees;

or if no such clause is to be found,

1.1.1.2. Then ALL the Trustees need to sign one.

1.1.1.3. If there is no resolution, then the required quorum/all the Trustees must sign the actual mandate/OTP.

1.1.1.4. Failure to apply this will result therein that the mandate/OTP is null and void, and unenforceable.

1.1.1.5. It cannot be fixed by a later resolution or signing the mandate/OTP after the fact at all.

1.1.2. To determine who is authorized to do this, you will have to get a copy of the:

1.1.2.1. Trust deed;

1.1.2.2. Letter of Authority.

1.1.2.3. NB – Trustees have NO POWER TO TRANSACT until a LoA has been issued by the Master of the High Court of South Africa.

- 1.1.3. NB – if you are dealing with a foreign Trust then the Trust MUST first be registered in SA and LoAs must be issued, and then the same principles apply as set out above.
- 1.1.4. You cannot buy, *on behalf of a Trust to be formed*.

1.2. MARRIED PEOPLE

- 1.2.1.1. Under SA law, for the sake of buying/selling property, you can only be married:

- 1.2.1.1.1. IN; or
- 1.2.1.1.2. OUT of Community of Property.

- 1.2.1.1.2. If not married under SA law, then you are married according to Foreign Law.

- 1.2.1.1.3. These are the only 3 ways to be described when buying/selling property if legally married.

- 1.2.1.1.4. You must therefore be able to produce a marriage certificate issued by Home Affairs/a foreign country (Certificates issued by the Muslim Judicial Council are excluded) before you can claim to be married for purposes of property transfers in SA, and then you are either IN or out of COP or foreign law – NOTHING ELSE.

1.3. MARRIED IN COMMUNITY OF PROPERTY

- 1.3.1. NB You must be married under SA law to be described as such.

- 1.3.2. It means that no antenuptial was registered at the deeds office.

- 1.3.3. Even if the parties concluded one at a Notary but he forgot to register it they are still married IN COP.

- 1.3.4. Both must sign the OTP, when selling with two witnesses.

- 1.3.5. When buying either one can sign ALONE if buying cash, and no witness is required – ILL ADVISED THOUGH because both will still have to sign the transfer documents!

- 1.3.6. If buying with a bond BOTH will have to sign as you need the spouse's consent to apply for a loan.

1.4. MARRIED OUT OF COMMUNITY OF PROPERTY

- 1.4.1. The only way to check that someone is married out of community of property is to obtain a copy of the registered antenuptial contract, or a deeds office printout which reflects the registered antenuptial agreement on both of their names.

- 1.4.2. NB – if your client tells you he/she is married out of community of property, and we are unable to find a registered ANC in any deeds office in SA, then it means he is married IN COP.

- 1.4.3. If the ANC was not actually registered at the deeds office, then the parties are married in COP and not OUT OF COP.
- 1.4.4. Regardless of whether the parties are married with accrual or without, each party can buy or sell without any assistance from the other spouse.
- 1.4.5. No witnesses are needed by law.

1.5. MARRIED ACCORDING TO FOREIGN LAW

- 1.5.1.1. Once you have determined that the parties are married, then REGARDLESS OF WHERE THEY GOT MARRIED, and if there is no trace of a registered ANC in a SA deeds office, then the person can only be married either in COP or by foreign law.
- 1.5.1.2. THE ONLY WAY TO DETERMINE which applies (i.e. whether in COP under SA law or under foreign law) is by asking the parties. "Where was the husband domiciled at the time of marriage?" i.e. what was the husband's actual, usual/permanent place of residence / citizenship. Where is "home" really in other words? You cannot say that Dubai is your domicile simply because you have worked there for 20 years, but know, that at some point, you will have to return to SA. Then you are actually domiciled in SA. Do not confuse temporary residence with domicile!
- 1.5.1.3. The HUSBAND's domicile at the time of marriage will then determine which country's legal system applies to the marriage.
- 1.5.1.4. Then you describe the person as being married according to the laws of England; Germany; France – whatever and the following rules will apply:
- 1.5.1.5. NB: There is a difference between BUYING and SELLING when married according to foreign law.
- 1.5.1.6. When BUYING - either spouse can buy on his or her own – no consent from the other spouse is required. However, if the one party intends to take out a bond, then the spouse will have to consent to the bond application.
- 1.5.1.7. When SELLING - where the property is registered on only one party's name then the other spouse MUST consent to the transfer (not the sale, the TRANSFER).
- 1.5.1.8. Even if they are separated, or even if they are divorced but the property was acquired during the marriage UNLESS the divorce order specifically allows the one party to deal with this property on his/her own.
- 1.5.1.9. The other party need not sign the OTP / mandate but must sign some transfer documents with the conveyancer.
- 1.5.1.10. Ensure therefore, when taking a mandate from a person married under foreign law, that the other spouse will consent.
- 1.5.1.11. NB – with same sex marriages this "domicile" test provides an obstacle if the parties cannot agree on which country will apply, since you will either have 2 husbands or no husband. Then it is literally a case where you ask them to pick a country and from that day forth, that's the way it will be!
- 1.5.1.12. NB – Many agents mistakenly describe parties married under foreign law as being married IN COP. *The reason for this is possibly the following:* In terms of the deeds office's practice, they always treat sellers who are married by FOREIGN LAW, AS IF

THEY ARE married in community of property because the deeds office insists upon written consent from the spouse, who is not party to the sale.

- 1.5.1.13. Why do we do this? Because we do not know what the consequences are of being married according to each and every other country in the world, and whether it has the same consequences as being married in community of property, we play it safe and demand consent to ensure that the other spouse is not cheated out of anything.

1.6. ISLAMIC / CUSTOMARY MARRIAGES

- 1.6.1. Such parties are not considered to be legally married (i.e. in or out of COP) unless you have also concluded a marriage in terms of either the Marriage Act of the Civil Union Act.
- 1.6.2. Your client must therefore be able to produce a marriage certificate issued by SA Home Affairs or another country which is not Islamic, before they can claim to be “married” for purposes of property transfers.
- 1.6.3. If they cannot produce such a document, then we describe them as being married under Islamic Law OR we may even refer to them as being UNMARRIED.
- 1.6.4. Recent planned changes to the DIVORCE ACT which recognized Muslim marriages are NOT RELEVANT to the sale or purchase of land, so nothing changes until the MARRIAGE ACT has been amended.

1.7. CLOSE CORPORATIONS and COMPANIES

- 1.7.1. If the entity wishes to dispose of more than half of its assets, you need a resolution signed by members/shareholders who have 75% voting power.
- 1.7.2. Check registration status of the entity that it is still in business.
- 1.7.3. If the entity has been re-registered it needs to be re-registered else it cannot trade at all.

1.8. DECEASED ESTATES

- 1.8.1. Letter of Executorship MUST be issued.
- 1.8.2. The executor has NO POWERS to bind the estate until the LoE has been issued.

1.9. SIGNING IN TERMS OF A POWER OF ATTORNEY

- 1.9.1. Find out why the client has POA: When the grantor becomes incapable of managing his affairs the POA LAPSES and he needs a court appointed curator.
- 1.9.2. Only valid as long as the person giving is capable of managing his own affairs.

1.10. FOREIGN BUYERS

- 1.10.1. Section 42 of the Immigration Act makes it an offence for anyone to aid an illegal foreigner in obtaining residence whether you knowingly do this or when you SHOULD HAVE KNOWN
- 1.10.2. Always therefore look at the original passport and/or VISA to check whether it has expired.

DOES A SPOUSE HAVE TO ALWAYS SIGN OR EVEN BE REFERRED TO? If they are not a party to the sale, then there is no need at all to always refer to a spouse!

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