CONTRACTUAL CAPACITY OF NATURAL PERSONS

A natural person over the age of 18 years has full legal capacity and as a general rule has full contractual capacity and may enter into contracts unassisted. Various categories of individuals and their respective capacities are set out below.

Unmarried adults
This term describes any person who is single, divorced and/or widowed. An unmarried adult (i.e. 18 years or over) does not need any assistance when contracting.

Persons married out of community of property
A person is married out of community of property when s/he signs and registers an antenuptial contract before the date of marriage. It does not make a difference for conveyancing purposes if the ante nuptial contract was with or without the accrual system.

Either party to the marriage may contract without the assistance of the other party. In practical terms if one spouse owns property (i.e. the full share owner) s/he may sell that property or bond the property without the help of the spouse.

Persons married in community of property
A person is automatically married in community of property if s/he does not sign and register an ante nuptial contract at the time of marriage.

One spouse requires the assistance of the other spouse when contracting to buy or sell property. In practical terms both spouses must sign the agreement of sale and the property will be registered in both names.

Persons married according to Muslim/Hindu customary law
For conveyancing purposes, the parties are described as being married according to Muslim / Hindu rites, or as being unmarried.

Either party to the marriage may contract without the assistance of the other party. i.e. they have full contractual capacity.

Persons married under the law of any other country
The Deeds Registry treats all foreign marriages as potential “in community of property” marriages. This means that where there is a potential effect on the potential joint estate, one spouse must assist the other spouse. In practical terms, when dealing with immovable property the following rules apply:

Selling:
If the property is registered in only one spouse’s name, the other spouse will have to assist the selling spouse. i.e. the spouse who does not own the property will also have to sign the transfer documents required to sell the property. It is preferable that they also sign the agreement of sale.

Note that this does not mean that the assisting spouse is entitled to any of the proceeds of sale but rather that the assisting spouse is made aware of the sale.

Buying:
No assistance is required where the property is purchased for cash (i.e. no bond is taken up).
Where the purchasing spouse purchases property and wishes to take a bond to pay the purchase price, the non purchasing spouse will have to assist the purchasing spouse in taking the bond. Note that this does not mean that the non purchasing spouse becomes a co-owner or becomes liable under the bond but rather means that the non purchasing spouse signs documents to show s/he is aware the bond is being taken out.
Non Residents
A person who is a non resident has full capacity and can purchase property in South Africa and have the Property registered in their name in the Deeds Registry.

There are certain restrictions in regard to the obtaining of mortgage bonds for finance.

Customary Marriages – Marriage entered into before 15 November 2000
Black persons married before 15 November 2000 have full contractual capacity and are deemed to have the same status as persons married out of community of property. i.e. they can contract without the consent of their spouse.

Customary Marriages – Marriage entered into after 15 November 2000
Black persons married after 15 November 2000 are married in community of property unless they have entered into and registered an ante nuptial contract.
This is subject to the proviso where the Seller or Purchaser has more that one wife, the relationship and contractual capacity will be governed by an order of court specifically related to that person and his wives.

Minors
A minor is a person younger than 18 years of age. A minor must always be assisted by his parents or guardian to enter into a contract related to property.

Where a minor sells immovable property:
- the Master of the High Court must authorise the sale if the property value is less than R250 000.00 and
- the High Court must authorise the sale if the property is valued at more than R250 000.00

Where a minor buys immovable property:
- No consent of the Master of the High Court is necessary, provided that the purchase price is paid in cash (without a bond).
- Where the minor needs a bond to finance the purchase of the property:
  - the Master of the High Court must authorise the bond if the bond value is less than R250 000; and
  - the High Court must authorise the bond if the bond is valued at more than R250 000.

Insolvents
According to the Insolvency Act, an insolvent’s estate is vested in the name of his trustee. However any immovable property acquired by an unrehabilitated insolvent must be transferred to him personally and not to his trustee.

As a general rule, an insolvent is not deprived of his contractual capacity. However, an insolvent may not without his appointed trustee enter into a contract in which he disposes or acquires any property. This includes immovable property.
In practical terms this means that an unrehabilitated insolvent needs his appointed trustee to assist in the sale or purchase of immovable property.