

Reconstruction of the Law of Agency in the light of Artificial Intelligence: Towards Legal Certainty for the Private Sector

Abstract. Agency law, a bedrock of commercial legal systems globally, facilitates commerce by enabling individuals (agents) to act on behalf of others (principals). This doctrine encompasses a wide range of applications, from employer-employee relationships to complex supply chains and is a tool used to achieve commercial convenience. Yet, with the increasing deployment of artificial intelligence (AI) agents, particularly machine learning systems acting autonomously in data-driven environments, the traditional application of the doctrine of agency faces unprecedented pressure. In South Africa, commercial law frameworks have yet to adequately account for the functional implications of AI systems acting in place of human agents. As these technologies become entrenched in private-sector decision-making from smart contracts and procurement systems to customer service bots and autonomous trading, they reveal structural ambiguities in the legal rules regarding agency.

1 Introduction

From a legal perspective, the law of agency has long suffered from fragmentation and conceptual ambiguity.¹ This has resulted in a doctrinal mess.² Despite its central role in facilitating commercial transactions, agency doctrine lacks a consistent and universal framework across legal systems.³ Its foundations are drawn from diverse sources, including common law, civil law, and mixed legal traditions,⁴ resulting in inconsistencies in definitions, scope, and underlying principles.⁵ This is especially so for South Africa, as the country's hybrid legal system renders the doctrinal ambiguities surrounding

¹ Powell "Contractual Agency in Roman Law and English Law" 1956 *Butterworths S. Afr. L. Rev.* 41.

² Dalley "A Theory of Agency Law" 2010 *U. Pitt. L. Rev.* 495.

³ Dawood "Understanding the Law of Agency: A Comprehensive Student Guide" 2023 *Available at SSRN 4792415* 1.

⁴ Zimmermann "Roman-Dutch Jurisprudence and Its Contribution to European Private Law Symposium: Relationships Among Roman Law, Common Law, and Civil Law" 1991 *Tul. L. Rev.* 1701.

⁵ Johnston "Limiting Liability: Roman Law and the Civil Law Tradition Symposium on Ancient Law, Economics & Society Part I: The Development of Law in Classical and Early Medieval Europe" 1994 *Chi.-Kent L. Rev.* 1516.

agency particularly precarious,⁶ as it must navigate the tensions between Roman-Dutch and English legal traditions without a unified or robust conceptual framework. This doctrinal divergence undermines commercial certainty, particularly in cross-border contexts where clarity and predictability in legal relationships are essential.⁷

Despite these doctrinal issues, the law of agency in South Africa faces a new nemesis: artificial intelligence (AI) agents. Modern artificial intelligence (AI) agents are capable of carrying out highly complex tasks independently. They can make decisions, exercise choice, and even initiate and finalise contract negotiations without their operator's awareness that such interactions are taking place.⁸ In many cases, AI agents are not merely transmitting a party's declaration of intent to contract but are also formulating it themselves.⁹ In practice, they often determine the actual terms of the agreement, with the human user of the AI system sometimes having no knowledge of the specific provisions contained in the contract that the AI has concluded.¹⁰ The current reality is that "automated electronic systems have become a regular occurrence in electronic contracting,"¹¹ and companies are already utilising AI capabilities to execute commercial activities where advanced AI systems have functionally concluded contracts or made binding commercial decisions.¹²

This is alarming, as it indicates that we are at a point where private entities are utilising advanced technologies,¹³ even though the law has not yet fully caught up. Although alarming, it is not surprising.¹⁴ This is because, typically, novel and innovative technology advances so fast that the current legal framework is unable to keep up,¹⁵ giving birth to the general rule that law lags behind technology.¹⁶

⁶ Chopra "Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis" 2009 *U. Ill. J.L. Tech. & Pol'y* 363, Asaro "The Liability Problem for Autonomous Artificial Agents" 2016 *AAAI Spring Symposia* 190.

⁷ Muller-Freienfels "Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty" 1964 *Am. J. Comp. L.* 196.

⁸ Dahiyat "Law and software agents: Are they "Agents" by the way?" 2021 *Artificial Intelligence and Law* 59, Teubner "Digitale Rechtssubjekte? Zum privatrechtlichen Status autonomer Softwareagenten" 2018 *Archiv für die civilistische Praxis* 35 45.

⁹ Lerouge "The Use of Electronic Agents Questioned Under Contractual Law: Suggested Solutions on a European American Level, 18 *J. Marshall J. Computer & Info. L.* 403 (2000)" 1999 *UIC John Marshall Journal of Information Technology & Privacy Law* 406.

¹⁰ Coeckelbergh "Artificial intelligence, responsibility attribution, and a relational justification of explainability" 2020 *Science and engineering ethics* 2061.2061.

¹¹ van Eck and Agbeko "Electronic persons in contracts" 2023 *Obiter* 809.

¹² Business "Future of procurement with AI: Using artificial intelligence to simplify the procurement process." <https://business.amazon.com/en/blog/procurement-future-with-ai> (2 August 2025), Cortical.io "Automate Your Business Processes With High-Efficiency AI" <https://www.cortical.io> (1 August 2025).

¹³ Davenport and Ronanki "Artificial intelligence for the real world" 2018 *Harvard business review* 112.

¹⁴ Croson and Jacobides "Agency Relationships and Monitoring in Electronic Commerce" 1997 *International Journal of Electronic Commerce* 65.

¹⁵ Brownsword *Rights, regulation, and the technological revolution* (2008) 162.

¹⁶ Fenwick *et al* "Regulation tomorrow: what happens when technology is faster than the law" 2016 *Am. U. Bus. L. Rev.* 561.

While the law of agency has evolved to accommodate corporate structures and electronic communication, it has not adapted to agents that lack consciousness or intent,¹⁷ learn and evolve beyond initial programming,¹⁸ or operate based on probabilistic data-driven inferences rather than strictly following predetermined, human-defined instructions (whether embedded in code or provided as a direct operational directive) thereby creating the potential to act outside the precise scope of those original instructions.¹⁹ It is understood that key components for the doctrine of “human” agency include authority,²⁰ intention, consent, control, and attribution.²¹ This means that, traditionally, an agent’s actions are attributable to the principal only if they are authorised or ratified.²² However, with the advent of AI systems,²³ will it look different,²⁴ and where do clarifications need to be set in terms of AI applications to contractual agency? Further, unlike natural persons or certain legal entities such as corporations, AI agents lack legal personality and legal capacity.²⁵ Consequently, they cannot be parties to legal transactions.²⁶ Even if advanced AI agents were granted legal personality, it remains uncertain whether they would possess the capacity to enter contractual relationships, as they are incapable of contracting voluntarily.²⁷ As a result, any acts or decisions made by AI agents cannot be attributed to the agents themselves. This raises the question: to whom should these actions be attributed, and by what legal mechanism?

South African commercial law, sourced in both common law principles and statutes, accommodates electronic agents to a limited extent, yet avoids confronting deeper questions of AI autonomy and private liability. Section 20 of ECTA refers to automated message systems that act without human intervention, but provides no framework for addressing misrepresentation, overreach, or harm caused by AI agents. The law remains silent on whether the use of AI constitutes delegation, substitution, or an entirely novel form of action beyond human agency. This is understandably so

¹⁷ Kerr "Spirits in the material world: intelligent agents as intermediaries in electronic commerce" 1999 *Dalhousie LJ* 209.

¹⁸ Oliver "On artificial agents for negotiation in electronic commerce" 1996 *Proceedings of HICSS-29: 29th Hawaii International Conference on System Sciences* 344.

¹⁹ Nwana *et al* "Agent-mediated electronic commerce: Issues, challenges and some viewpoints" 1998 *Proceedings of the second international conference on Autonomous agents* 191.

²⁰ Camelia "THE LEGAL SIGNIFICANCE (IMPORTANCE) OF THE AGENCY CONTRACT" 2010 3.

²¹ Müller-Freienfels "Law of Agency" 1957 *The American Journal of Comparative Law* 165.

²² Jurkevičius and Bublioniė "Towards sustainable business relationships: ratification doctrine in the case of unauthorised agency" 2017 *Entrepreneurship and Sustainability Issues* 74.

²³ Deng *et al* "AI agents under threat: A survey of key security challenges and future pathways" 2025 *ACM Computing Surveys* 182:2.

²⁴ Furnari "Are Traditional Agency Principles Effective for Internet Transactions, Given the Lack of Personal Interaction Comment" 1999 *Alb. L. Rev.* Ye *et al* "Agents in electronic commerce" 2001 *Electronic Commerce Research* 9, Moses "Agents of change: How the law “Copes” with technological change" 2011 *Griffith Law Review* 766.

²⁵ Weitzenboeck "Electronic agents and the formation of contracts" 2001 *International Journal of Law and Information Technology* 210.

²⁶ Chopra (n 18) 365.

²⁷ Kerr (n 34) 210. Aksoy "AI as Agents" 2022 *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* 147.

because at the time when the ECTA was promulgated, AI was not in the contemplation of the drafters. It is thus expedient that the statute is amended to reflect current realities.

The following questions guide this paper: What are the ambiguities regarding liability in the law of agency in light of increasingly autonomous AI agents used in the private sector? What legislative, contractual, or regulatory measures can be implemented to increase legal certainty, accountability, and support for “human-in-the-loop”²⁸ mechanisms in commercial AI deployments?

Due to the fragmented and often inconsistent treatment of agency across jurisdictions and legal traditions, this study limits its scope to agency in the commercial context, with a particular focus on the conclusion of contracts with the use of AI systems. This dimension is chosen because it sits at the core of commercial transactions and highlights the legal tensions that AI systems introduce, particularly in terms of liability as a result of representation through contracting with an agent. The methodology for this paper is a critical doctrinal examination, with a focused analysis on South African agency law in commercial contexts. It draws from primary legislation such as the ECTA and relevant case law.

This paper argues that the traditional application of the law of agency in South Africa is insufficient to regulate AI systems acting as commercial agents, and that there is a fundamental lack of systemic robustness. Without clear, legally binding frameworks and demonstrable reliability, traditional application of the law of agency risks creating a legal vacuum and eroding public confidence rather than fostering it. There is a need for more rigorous, verifiable, and legally defensible processes. However, rather than granting AI legal personhood,²⁹ a proposal fraught with ethical and normative concerns,³⁰ this paper proposes reconstructing agency doctrine by expanding its principles to address AI-specific challenges while preserving human accountability through legislation, such as the Electronic Communications and Transactions Act 25 of 2002 (ECTA). This doctrinal renewal must integrate legal certainty with the realities of distributed, probabilistic decision-making and functional machine autonomy, without sacrificing core values of commercial law such as trust, liability, and party protection.³¹

This paper discusses the current law of agency in South Africa to present the current situation before we invite the “trouble” of AI. This paper is divided into four parts, with part one serving as the introduction. Part two delves into the doctrinal ambiguities in agency, and part three is our proposed recommendations, followed by the conclusion in part four.

²⁸ Crootof "Humans in the Loop" 2023 *Vand. L. Rev.* 429, Chiodo *et al* "Formalising Human-in-the-Loop: Computational Reductions, Failure Modes, and Legal-Moral Responsibility" 2025 *arXiv preprint arXiv:2505.10426* 1.

²⁹ Ribeiro *et al* "Metacognition, Accountability and Legal Personhood of AI" 2024 *Multidisciplinary perspectives on artificial intelligence and the law* 182, Chopra and White "Artificial agents-personhood in law and philosophy" 2004 *ECAI* 1.

³⁰ Solum "Legal personhood for artificial intelligences" 1992 *North Carolina Law Review* 1231 1244.

³¹ Enarsson *et al* "Approaching the human in the loop – legal perspectives on hybrid human/algorithmic decision-making in three contexts" 2022 *Information & Communications Technology Law* 124.

2 Ambiguities in the age of AI

With agency, early South African judges found the Roman-Dutch law of agency insufficient to address practical needs and thus drew significantly from English law.³² However, the legal development has largely retained a preference for the Roman-Dutch framework, with no wholehearted reception of the English system.³³ Consistent with Roman law, the principal-agent relationship in South African law remains rooted in contract, specifically *mandatum*,³⁴ which notably does not require consideration.³⁵ The approach taken is rather problematic because the two differing legal systems use different reasoning that yield different outcomes and generate doctrinal ambiguity.³⁶

2.1 Current Doctrine of Agency in South African Contract Law

To prevent confusion surrounding legal origins, a good place to start is by revisiting the basics and understanding the general concept of agency in law. The idea of agency is not new or foreign. It essentially represents the situation where one acts on behalf of another concerning a third party.³⁷

The entire mechanism of the principal-agent relationship has been aptly captured by Verhagen in the following words: "The possibility that someone (the principal) may become legally bound and entitled by the acts of someone else (the agent) is now fully recognised in modern civil law and common law systems. The normal legal consequence triggered by the mechanisms of representation and agency is that the main operation (i.e. the juridical act executed by the agent on the principal's behalf) is 'attributed' to the principal. Where the main operation is a contract entered into with a third party, the contractual relationship is established directly between the principal and the third party. To a very large extent, this relationship is identical to the relationship that is created when both parties to a contract conclude it personally. The agent usually (though by no means always) incurs neither rights nor liabilities under the main operation: he 'drops out'."³⁸

³² Powell (n 42) 41.

³³ Powell "The Law of Agency in South Africa. By J. E. De Villiers and J. C. Macintosh, Advocates of the Supreme Court of South Africa. Second edition, by D. B. Knight, Advocate of the Supreme Court of South Africa. [Cape Town: Juta & Co., Ltd. 1956. xxx and 336 pp. and (index) 47 pp. £4 15s. 6d.]" 1957 *International and Comparative Law Quarterly* 190.

³⁴ Van den Bergh "A rule must arise from the law as it is-and it is not cast in stone" 2014 *Fundamina: A Journal of Legal History* 966. Meant a contract in which one party (*mandatarius*) promised to gratuitously carry out the order of another party (mandator).

³⁵ Powell (n 43) 190.

³⁶ Muller-Freienfels (n 37) 194. This article ends at page 188 per the original article so the reference to page 194 is unclear.

³⁷ Bester "The Scope of an Agent's Power of Representation" 1972 *S. African L.J.* 49.

³⁸ Verhagen "Agency and Representation" in Smits (eds) *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (2006) 33 33.

Traditional “Human” Agency. Agency functions as a juridical tool,³⁹ developed by the law to meet the practical demands of an increasingly specialised division of labour, enabling the delegation and distribution of functions across assistants, clerks, managers, and other intermediaries.⁴⁰ In traditional South African legal practice, ‘agency’ signifies “(a) the contractual relationship between Principal and Agent (the contract of agency); or (b) the phenomenon of Agent’s representation of Principal (agency as a function); or both (a) and (b) – in the sense of ‘the law relating to agency’.”⁴¹

Distinction is made, however, in South Africa with representation, which is not a contract but a legal phenomenon whereby an agent concludes a juristic act in the name and on behalf of the principal.⁴² The aim is to ensure that the legal consequences arising from a juristic act are placed on the principal as though the principal had personally concluded the act.⁴³ This can only take place if the agent possesses the necessary authority or power to represent the principal.⁴⁴ Such authority may be conferred by law itself, typically in situations where the principal is a juristic person or an individual incapable of managing their own affairs.⁴⁵ These instances, where the power to represent arises directly from the law, are known as “juristic representation”.⁴⁶ However, the power to represent might be granted directly by the principal to the agent, usually under some contract between the two of them, and this is known as “conventional representation”.⁴⁷ There lies a presumption under such ‘conventional representation’⁴⁸ that the agent is human. Under such conditions, power or authority to represent often arises from a contract of mandate.⁴⁹ The mandate is a contract in terms of which the agent executes instructions of the principal.⁵⁰ It is only when the contract between the principal and agent includes, or is coupled with, a power on the part of the agent to represent the principal, in the strict sense of concluding a juristic act on the principal’s behalf, that we are dealing with agency. The legal consequences of the act of agency will be attributed to the principal and not the agent, provided that the agent was properly authorised to perform the relevant act and did so within the ambit of the authority granted to him.⁵¹ Moreso, the agent occupies a highly fiduciary position and is thus obliged to

³⁹ Reynolds "Agency Reasoning - A Formula or a Tool?" 2018 *Sing. J. Legal Stud.* 44.

⁴⁰ Muller-Freienfels (n 37) 193.

⁴¹ Hutchison; *et al* *The Law of Contract in South Africa 4e* (2022) chapter 9, Beuthin "Law of Agency" 1965 *Ann. Surv. S. African L.* 177.

⁴² *Totalisator Agency Board OFS v Livanos* 1987 3 SA 283 (W) at 291.

⁴³ Van Huyssteen *Contract: General Principles* (2020) 295.

⁴⁴ Van Huyssteen (n 56) 296.

⁴⁵ Hutchison; *et al* (n 31) chapter 9.

⁴⁶ Hutchison; *et al* (n 31) chapter 9.

⁴⁷ Hutchison; *et al* (n 31) In this paper, we are concerned about “conventional representation”.

⁴⁸ Hutchison; *et al* (n 31) , Bester (n 9) 49.

⁴⁹ Van Huyssteen (n 56) , Hutchison; *et al* (n 31) .please kindly check the cross referencing of Hutchinson et al. it is not coherent.

⁵⁰ Van Huyssteen (n 56) , Hutchison; *et al* (n 31) .

⁵¹ Barnard and Botha (eds) *Nagel’s Commercial Law* (2024) 147-148.

act entirely in the interest of the principal.⁵² Consequently, “the contract of agency” entails both mandate and a power to represent the mandator or principal.”⁵³

Since agency in the law of contract contains important elements concerning the phenomenon of representation, it is thus important to expand on what representation legally entails: there are four requirements.⁵⁴ First, the party or parties performing the juristic act must intend that the legal consequences of the act will accrue to the principal rather than to the representative. Second, the representative is required to inform the other contracting party that she is acting on behalf of a principal, though disclosure of the principal’s identity is not mandatory. This disclosure may be conveyed by any effective means that clearly demonstrates the intention to represent the principal. Third, the representative is required to have the requisite authority to act on the principal’s behalf. Lastly, the principal must be in existence at the time the contract is concluded. A contract entered into on behalf of a non-existent principal cannot be ratified if the principal comes into existence later. However, an exception to this rule allows for the subsequent ratification of a contract concluded on behalf of a company that is yet to be formed.

Concept of Authority. The concept of authority is pivotal to the law of agency.⁵⁵ Authority refers to the power to perform a juristic act on behalf of another.⁵⁶ For the agent to bind his principal to the juristic act performed by the agent, the latter must have acted following lawful authority.⁵⁷ Authority can derive from a contract between an agent and a principal (expressly or tacitly), but it can also be derived from other sources, such as ratification (expressly or tacitly),⁵⁸ estoppel or by operation of law (implied authority).⁵⁹ Determining whether a person has actual authority is a question of fact.⁶⁰ Authority is typically derived from authorisation granted by the principal. Authorisation is a unilateral juristic act through which one person empowers another to act on their behalf.⁶¹ The capacity to act is a prerequisite for valid authorisation. Unlike an agreement, authorisation does not require acceptance by the person being authorised. Even when authorisation is incorporated into a contract, as frequently occurs, its essential character remains that of a unilateral act.⁶² An agent must act in good faith⁶³ and with the sound

⁵² *Wholesale Monitoring Services (Pty) Ltd v WM Digital Solutions (Pty) Ltd and Others* [2022] ZAGPJHC 121

⁵³ *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 (ZASCA) par 883, Hutchison; *et al* (n 31) .

⁵⁴ Van Huyssteen (n 56) 297.

⁵⁵ Nagel *Commercial Law 7th Ed* (2025) 148, Boberg "Law of Agency" 1970 *Ann. Surv. S. African L.* 124.

⁵⁶ Van Huyssteen (n 56) 298.

⁵⁷ Nagel (n 39) 148.

⁵⁸ *Northern Metropolitan Local Council v Company Unique Finance (Pty) Ltd* [2012] 3 All SA 498 (SCA); *Neugarten v Standard Bank of South Africa Ltd* [1989] 2 All SA 90 (A).

⁵⁹ Nagel (n 39) 148.

⁶⁰ Van Huyssteen (n 56) 298.

⁶¹ Van Huyssteen (n 56) 298.

⁶² Van Huyssteen (n 56) 298.

⁶³ *Robinson v Randfontein Estates GMC* 1921 AD 168 217.

judgment of a reasonable person.⁶⁴ Even if an authorisation is for a specific task, it's generally understood to include any other actions necessary to complete that task efficiently and properly.⁶⁵ Generally, authorisation usually does not require any special formal procedures to be valid.⁶⁶

Subsequent questions which arise are then, what is the legal position when an agent acts on behalf of a principal without express or implied authority, but the principal has created the appearance that the agent possesses such authority?⁶⁷ This is known as ostensible authority.⁶⁸ Traditionally, if a third party reasonably believes that the agent is duly authorised and relies to their detriment on the principal's representation, the principal may be estopped from denying the agent's authority.⁶⁹ Consequently, the principal will be bound as if the agent had proper authority to act.⁷⁰

However, in the case *Makate v Vodacom (Pty) Ltd*,⁷¹ the constitutional court took a different approach under the influence of English law and held that although ostensible authority and estoppel have at times been treated synonymously by South African courts, they are not one and the same thing.⁷² According to the apex court, apparent authority is established if it is shown that "a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required".⁷³ This was established by the principal's words or conduct, which created the impression that the agent had the power to act for them. A significant aspect of this decision was the finding that the principal's representation did not have to be communicated directly to the specific party asserting the agent's apparent authority.⁷⁴ This shows the absence of the elements of estoppel.⁷⁵ Thus, significantly, the effect of the judgment of the apex court is that ostensible authority is now regarded as a form of actual authority, whereas estoppel (provide the relevant requirements are met) is only available as a defence that prevents an alleged principal from relying on the fact that there was no actual authority at all.⁷⁶

2.2 Reconciling with Artificial Intelligence Agency.

Now that the foundational principles of South African agency have been outlined, we need to proceed to look at ways to align these principles with AI systems.⁷⁷ The

⁶⁴ *Mouton v Die Mynwerkersunie* [1977] 1 SA 242 (A).

⁶⁵ Van Huyssteen (n 56) 299. *Nel v South African Railways and Harbour* 1924 AD 30 42; *Dicks v South African Mutual Fire and General Insurance Co Ltd*. 1963 4 SA501 (N).

⁶⁶ Nagel (n 39) 153.

⁶⁷ Van Huyssteen (n 56) 299.

⁶⁸ See *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA).

⁶⁹ Pretorius "The Basis of Contractual Liability in South African Law (2)" 2004 *THRHR* 391.

⁷⁰ Pretorius "The Basis of Contractual Liability in South African Law (1)" 2004 *THRHR* 189.

⁷¹ *Makate v. Vodacom (Pty) Ltd* 2016 (ZACC) par 44.

⁷² *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13 par 44.

⁷³ *Makate v. Vodacom (Pty) Ltd* (n 2) par 47.

⁷⁴ *Makate v. Vodacom (Pty) Ltd* (n 2) par 47, Van Huyssteen (n 56) 300.

⁷⁵ *Makate v. Vodacom (Pty) Ltd* (n 2) par 47.

⁷⁶ Barnard and Botha (eds) *Nagel's Commercial Law* (2024) 148.

⁷⁷ The OECD defines AI systems as follows: "An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such

primary point of distinction is that the principles of agency discussed above applied to humans acting as agents, and now we have to consider AI systems as agents. This paper posits that the best way to integrate existing principles into the new age of AI agents is by approaching it from a clear, uncomplicated viewpoint. This is achieved by consistently emphasising that AI is merely a tool which we can synthesise with agency in terms of function, with clarification on liability.

Fundamentally, AI systems remain as products that will be used by people to optimise commercial activities, no different to a lawnmower that is bought and used. It also happens that agency is a tool to achieve commercial convenience, and AI systems can enhance such convenience and increase efficiency. Nevertheless, comprehensively clear and robust rules are essential to offer concrete guidance on the use of AI agents. When individuals or companies choose to utilise AI systems to conclude commercial contracts, they need to understand the extent of this choice. The reason for this is that AI agents can most definitely act as agents by function alone, whereby the AI agent implements and executes legally binding agreements between parties engaged in business or trade. Such AI agents can represent the individuals or companies that use them.⁷⁸

The question is how to align existing principles of agency in South Africa with AI agents. Since representation is a phenomenon which can apply to AI agents,⁷⁹ it is important to delve into what the requirements of representations are for AI agents and what the consequent liability considerations are. First and most importantly, consideration must be made of the fact that individuals or companies using the AI agent would have to either buy from or subscribe to an AI system platform company so that they can use the product. This conduct alone is noteworthy, especially in terms of the notion of the contract of mandate found in agency principles. Since AI systems are products and cannot enter into contracts, they are, however, coded in a certain way, either generally or specifically, depending on the context and purpose of the AI system being developed. This coding can be considered as the instruction of mandate for AI agents. Furthermore, there is also the prompt function for AI systems, where individuals and companies will have to interact with the AI system.

The reconciliation of AI agents with current requirements for representation needs to be looked at. Technically, all four requirements can be applied to AI agents as well. The acquisition of AI agents for individuals or companies clearly indicates that these entities intend that the legal consequences of the acts carried out by AI agents will accrue to them as principals. It is also easily achievable to disclose that AI agents are being utilised with other contracting parties through various forms such as shrink-wrap, click-wrap, web-wrap, scroll-wrap, multi-wrap and sign-in-wrap agreements.⁸⁰

as predictions, content, recommendations, or decisions that can influence physical or virtual environments". See OECD "EXPLANATORY MEMORANDUM ON THE UPDATED OECD DEFINITION OF AN AI SYSTEM" (March 2024) https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/03/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_3c815e51/623da898-en.pdf

⁷⁸ Andrade *et al* "Contracting agents: legal personality and representation" 2007 *Artificial Intelligence and Law* 367.

⁷⁹ Bester (n 9) 58.

⁸⁰ Van Eck and Agbeko "The Recognition and Regulation of Smart Contracts in South Africa" 2024 *Potchefstroom Electronic Law Journal (PELJ)* 2.

Clarification concerning authority is required to provide lucidity on the legal consequences that result from using AI agents.

Since authority requires authorisation, which is a unilateral juristic act carried out by the principal. In instances of AI agents, it would be better if such authorisation is expressed and made clear through other means, such as a prompt or additional conduct that makes it clear that such an AI agent has been given authority to carry out certain legally binding functions. Such additional conduct would be indicative that a go-ahead has been triggered for the AI agent. This would be particularly helpful when it comes to liability, as it would be easier to identify if there was a malfunction, which the AI system service provider would be liable for. Implied authorisation is also possible by the mere fact that an AI agent (a product) is being used, which requires some sort of monetary transaction for the product.

In terms of liability, by honouring the simplistic approach adopted in this paper, liability should fall on principals that choose to use AI agents to conclude commercial contracts. The new age of advanced technologies highlights the functional attributes of agents as tools more prominently, and principles of agency should become easier and not more complicated. Regulation should also follow this ease, but by being clearer and robust through legislation, more specifically through ECTA. Thus, in the next part of the paper, we provide our recommendations.

3 Proposed recommendations

AI systems interact with both natural and legal persons, as well as with other AI agents, to carry out actions that have legal consequences, such as concluding contracts. However, AI agents are not recognised as legal persons and, therefore, cannot create their own declaration of intent or be held liable for it. Since they cannot express their own will,⁸¹ it becomes necessary to determine how the declaration produced by an AI agent can be legally attributed to the human or entity operating the system. This section will therefore make proposals that underpin how the concept of agency needs to be reconstructed with the advent of AI systems and with the South African legal system in view.

One of the recommendations is to treat the AI agents as ‘tools’ or ‘instruments’ of their operators. In this manner, the AI agents are not treated as a separate entity. Consequently, the acts and actions of AI agents will be deemed to come directly from the person or corporation owning, programming, controlling or instructing them. Since the person or corporation already has the status of legal personhood, it will be held liable for the actions of the AI agents. This approach makes the liability of the person or corporation very strict than using humans as agents in the sense that the operator bears the risk of undesired, unforeseeable or unplanned consequences of the actions of the AI agents. Stated differently, as seen from the earlier discussion, where humans are agents, with the application of the doctrine of authority, the principal is bound only if the agent has acted within the scope of authority it was granted. However, with this

⁸¹ Schulz *Verantwortlichkeit bei autonom agierenden Systemen* (2015) 102–103.

approach, the person or corporation using the AI agent is at all times responsible for the actions of the AI agent.

The Electronic Communications and Transactions Act⁸² (ECTA) recognises that electronic agents are limited to a tool function. The ECTA does not focus specifically on AI agents, but defines the term ‘electronic agent’. Per the ECTA, an electronic agent is “a computer program or an electronic or other automated means used independently to initiate an action or respond to data messages or performances in whole or in part, in an automated transaction”.⁸³ The statute goes further to define an automated transaction as “an electronic transaction conducted or performed, in whole or in part, using data messages in which the conduct or data messages of one or both parties are not reviewed by a natural person in the ordinary course of such natural person’s business or employment”.⁸⁴

Section 20 further throws light on the legal implications of using electronic agents in the conclusion of contracts. The Act recognises that an agreement or contract may be concluded where an electronic agent performs an action required by law for agreement formation.⁸⁵ The parties permit either of the parties to use an electronic agent in contracting,⁸⁶ and this leads to the conclusion of a valid agreement. This means that there can be a scenario where both parties use AI agents for the purpose of contracting, and it will still be deemed to be a valid agreement or contract. Of great importance for the purpose of liability, the Act provides that if a party uses an electronic agent to conclude an agreement, there is a presumption that that person is bound by the terms of the agreement even if he did not review the actions of the electronic agent or the terms of the agreement.⁸⁷ This means that the party that employs the AI agents for contracting purposes is liable for the intended and unintended consequences of the actions of the AI agent.

With respect to the other party, the Act provides that such a person will not be bound by the terms of the agreement unless those terms could be reviewed by a natural person representing the other party prior to the conclusion of the agreement.⁸⁸ If a natural person interacts directly with an electronic agent of the other party, there will be no agreement if the natural person made a material error and: the electronic agent did not provide that person with an opportunity to prevent or correct the error; that person notifies the other person of the error as soon as practicable after that person has learned of it; that person takes reasonable steps including steps that conform to the other person’s instructions to return any performance received, or, if instructed to do so, to destroy that performance; and that person has not used or received any material benefit or value from any performance received from the other person.⁸⁹

⁸² No. 25 of 2002

⁸³ s 1 of the ECTA.

⁸⁴ S 1 of the ECTA.

⁸⁵ S 20(a) of the ECTA.

⁸⁶ S 20(b) of the ECTA.

⁸⁷ s 20(c) of the ECTA.

⁸⁸ S 20(d) of the ECTA.

⁸⁹ S 20(e) of the ECTA.

From the definition above of electronic agents, the AI agents are deemed as a computer program; and if deemed to be a computer program, it endorses a theory of machines as a 'tool' of the company or the individual using it. This formulation brings it in line with other approaches already taken on the international plane. According to the *Restatement (Third) of Agency Law*,

"A computer program is not capable of acting as a principal or an agent as defined by the common law. At present, computer programs are instrumentalities of the persons who use them. If a program malfunctions, even in ways unanticipated by its designer or user, the legal consequences for the person who uses it are no different from the consequences stemming from the malfunction of any other type of instrumentality. That a program may malfunction does not create capacity to act as a principal or an agent".⁹⁰

Thus, AI objects, as instrumentalities, should not be construed as agents. This is also corroborated by the Uniform Electronic Transactions Act (UETA).⁹¹ Also, the UNCITRAL Model Law on E-Commerce, per article 2, regards software agents as mere communication tools:⁹² "Data messages that are generated automatically by computers without direct human intervention should be regarded as 'originating' from the legal entity on behalf of which the computer is operated".⁹³ A major drawback with this proposition, which is hinged on the ECTA, is its emphasis on automated transactions. As seen from above, there are instances where an AI agent can autonomously enter into transactions. Under such situations, it will not be catered to under the ECTA. It is thus suggested in this regard that the ECTA should be amended to cater for situations where the AI agent is involved in autonomous transactions. In that situation, the operator or the person or corporation that is employing the AI agent still remains responsible for the actions of the AI agent.

In the alternative, the AI agents should be deemed as agents in the legal sense. This recommendation justifies attributing the acts and actions of AI agents to their operators by relying on the principles of agency law.⁹⁴ The starting point is the recognition that AI agents can negotiate, conclude, and perform contracts on behalf of a legal person. Unlike an automated system, which merely conveys an existing declaration of intent, an autonomously functioning AI system generates its own declaration.⁹⁵ These systems are designed to replicate the abilities of human agents to act as

⁹⁰ RESTATEMENT (THIRD) OF AGENCY S 1.04 cmt. e (AM. LAW INST. 2006).

⁹¹ S 2(6) of the UETA. The comment on section 2 of the UETA provides as follows: "An electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. As a general rule, the employer of a tool is responsible for the results obtained by the use of that tool since the tool has no independent volition of its own. However, an electronic agent, by definition, is capable within the parameters of its programming, of initiating, responding or interacting with other parties or their electronic agents once it has been activated by a party, without further attention of that party": UETA, Comments to Section 2, p. 8.

⁹² Balke "'Entity' and 'Autonomy'—The Conclusion of Contracts by Software Agents in the Eyes of the Law" 2010 *A software agent definition-based analysis*. RIA 403.

⁹³ Article-by-Article Remarks for Article 2 (UN, 1996, Article-by-article remarks) 27.

⁹⁴ Chopra and White *A Legal Theory for Autonomous Artificial Agents* (2011) 23.

⁹⁵ Specht and Herold "Roboter als Vertragspartner" 2018 *Gedanken zu Vertragsabschlüssen unter Einbeziehung automatisiert und autonom agierender Systeme*, MMR 43.

representatives.⁹⁶ Accordingly, AI agents fulfil the same role as human agents and may be regarded as “agents” in the legal sense. As a result, the principles of agency law should govern the relationship between the operator, the AI agent, and third parties dealing with the AI agent.⁹⁷ This would mean that the acts and decisions of the AI agent are binding on the principal, generally the system’s operator, provided the AI agent has acted within the scope of the authority granted to it. Conversely, the operator would not be bound by transactions where the AI agent has exceeded its authority.

A major flaw with this proposal also occurs when the principal is not to be held liable for instances when the AI agent acts outside the scope designated to it. It is submitted that such a rule in the law of agency should be reconstructed when dealing with AI agents. This is because if this rule of agency is maintained, it will leave victims without redress, which creates an unjust situation. Thus, the rule should be reconstructed to cater for the situations where the AI agents act outside its intended scope. There should be an implied ratification of the actions by the AI agents in such situations. Per this formulation, the principal or operator will be responsible for the actions of the AI agents. The advantage of this formulation is that with the AI operators knowing that they can be held liable for any malfunction of the AI system will take extra care in its safeguards to ensure that AI agents, even when acting autonomously, will not act to the extreme.

4 Conclusion

The advent of artificial intelligence agents in commercial transactions demands a recalibration of South Africa’s law of agency to maintain legal certainty, accountability, and the protection of commercial trust. While the traditional doctrine of agency was built on the premise of human agents acting with authority, intention, and consent,⁹⁸ AI systems challenge these foundations by operating autonomously,⁹⁹ without consciousness¹⁰⁰ or legal personality, yet still producing legally significant outcomes.¹⁰¹ The absence of a clear framework for attributing liability in such contexts risks creating a dangerous legal vacuum, undermining not only private redress mechanisms but also public confidence in commercial law.

This paper has demonstrated that, although the Electronic Communications and Transactions Act offers a partial regulatory anchor for electronic agents, it remains inadequate for the complexities of AI-driven contracting, particularly in autonomous transactions. Two viable pathways emerge for reform: the first is to treat AI agents

⁹⁶ Chopra and White (n 17) 7.

⁹⁷ Smed "Intelligent software agents and agency law" 1998 *Santa Clara Computer & High Tech. LJ* 504.

⁹⁸ Müller-Freienfels (n 38) 165.

⁹⁹ Weitzenboeck (n 58) 209, Ayres "The Law of AI Is the Law of Risky Agents without Intentions Essay" 2024 *U. Chi. L. Rev. Online* 1.

¹⁰⁰ Weitzenboeck (n 58) 212, Bathae "The Artificial Intelligence Black Box and the Failure of Intent and Causation" 2017 *Harv. J. L. & Tech.* 890.

¹⁰¹ Aksoy (n 3) 147.

strictly as instrumentalities or “tools” of their operators, thereby imposing strict liability on the human or corporate principal for all acts and consequences; the second is to adapt the law of agency principles to recognise AI agents as functional equivalents of human representatives, but with reconstructed liability rules that ensure operators remain responsible even when AI acts beyond its intended scope.¹⁰² Both approaches preserve the centrality of human accountability and ensure that victims are not left without remedy.

The reconstruction of agency doctrine in this way must be coupled with statutory reform, most urgently, amendments to the ECTA, to explicitly cover autonomous AI transactions, clarify representation and attribution rules, and codify operator liability. A forward-looking, technology-neutral approach will enable the law to adapt not only to current AI capabilities but also to future iterations that will inevitably push the boundaries of autonomy and decision-making. Ultimately, the integration of AI into commercial agency relationships should not erode foundational principles of trust, liability, and fairness that underpin commerce. Rather, with careful doctrinal reconstruction and legislative alignment, South Africa can ensure that the law of agency remains a reliable instrument for regulating both human and technological intermediaries, fostering innovation while safeguarding legal certainty and public trust.

¹⁰² Chopra and White (n 17) 44, Chopra (n 18) 393.

References

1. *The Firs Investment Ltd v Levy Bros Estates (Pty) Ltd* 1984 (ZASCA).
2. *Makate v. Vodacom (Pty) Ltd* 2016 (ZACC).
3. Aksoy P "AI as Agents" 2022 *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics*
4. Andrade F, Novais P, Machado J and Neves J "Contracting agents: legal personality and representation" 2007 *Artificial Intelligence and Law*
5. Asaro PM "The Liability Problem for Autonomous Artificial Agents" 2016 *AAAI Spring Symposia*
6. Ayres IB, Jack M. "The Law of AI Is the Law of Risky Agents without Intentions Essay" 2024 *U. Chi. L. Rev. Online*
7. Balke T "'Entity' and 'Autonomy'—The Conclusion of Contracts by Software Agents in the Eyes of the Law" 2010 *A software agent definition-based analysis. RIA*
8. Bathaee Y "The Artificial Intelligence Black Box and the Failure of Intent and Causation" 2017 *Harv. J. L. & Tech.*
9. Bester DH "The Scope of an Agent's Power of Representation" 1972 *S. African L.J.*
10. Beuthin RC "Law of Agency" 1965 *Ann. Surv. S. African L.*
11. Boberg PQR "Law of Agency" 1970 *Ann. Surv. S. African L.*
12. Brownsword R *Rights, regulation, and the technological revolution* Oxford University Press (2008).
13. Business A "Future of procurement with AI: Using artificial intelligence to simplify the procurement process." <https://business.amazon.com/en/blog/procurement-future-with-ai> (2 August 2025).
14. Camelia CI "THE LEGAL SIGNIFICANCE (IMPORTANCE) OF THE AGENCY CONTRACT" 2010
15. Chiodo M, Müller D, Siewert P, Wetherall J-L, Yasmine Z and Burden J "Formalising Human-in-the-Loop: Computational Reductions, Failure Modes, and Legal-Moral Responsibility" 2025 *arXiv preprint arXiv:2505.10426*
16. Chopra S and White L "Artificial agents-personhood in law and philosophy" 2004 *ECAI*
17. Chopra S and White LF *A Legal Theory for Autonomous Artificial Agents* University of Michigan Press Ann Arbor, UNITED STATES (2011).
18. Chopra SW, Laurence "Artificial Agents and the Contracting Problem: A Solution via an Agency Analysis" 2009 *U. Ill. J.L. Tech. & Pol'y*
19. Coeckelbergh M "Artificial intelligence, responsibility attribution, and a relational justification of explainability" 2020 *Science and engineering ethics*
20. Cortical.io "Automate Your Business Processes With High-Efficiency AI" <https://www.cortical.io> (1 August 2025).
21. Crotofof RK, Margot E. Price, W. Nicholson II "Humans in the Loop" 2023 *Vand. L. Rev.*
22. Croson DC and Jacobides MG "Agency Relationships and Monitoring in Electronic Commerce" 1997 *International Journal of Electronic Commerce*
23. Dahiyat EAR "Law and software agents: Are they "Agents" by the way?" 2021 *Artificial Intelligence and Law*
24. Dalley PJ "A Theory of Agency Law" 2010 *U. Pitt. L. Rev.*
25. Davenport TH and Ronanki R "Artificial intelligence for the real world" 2018 *Harvard business review*
26. Dawood S "Understanding the Law of Agency: A Comprehensive Student Guide" 2023 *Available at SSRN 4792415*
27. Deng Z, Guo Y, Han C, Ma W, Xiong J, Wen S and Xiang Y "Ai agents under threat: A survey of key security challenges and future pathways" 2025 *ACM Computing Surveys*

28. Enarsson T, Enqvist L and Naarttijärvi M "Approaching the human in the loop – legal perspectives on hybrid human/algorithmic decision-making in three contexts" 2022 *Information & Communications Technology Law*
29. Fenwick M, Kaal WA and Vermeulen EP "Regulation tomorrow: what happens when technology is faster than the law" 2016 *Am. U. Bus. L. Rev.*
30. Furnari NR "Are Traditional Agency Principles Effective for Internet Transactions, Given the Lack of Personal Interaction Comment" 1999 *Alb. L. Rev.*
31. Hutchison; D, Pretorius; C, Plessis; Jd, Eiselen; S, Floyd; T, Hawthorn; L, Kuschke; B, Maxwell; C, Naude; T and Stadler Ed *The Law of Contract in South Africa 4e* Oxford University Press South Africa (2022).
32. Johnston D "Limiting Liability: Roman Law and the Civil Law Tradition Symposium on Ancient Law, Economics & Society Part I: The Development of Law in Classical and Early Medieval Europe" 1994 *Chi.-Kent L. Rev.*
33. Jurkevičius V and Bublienė R "Towards sustainable business relationships: ratification doctrine in the case of unauthorised agency" 2017 *Entrepreneurship and Sustainability Issues*
34. Kerr IR "Spirits in the material world: intelligent agents as intermediaries in electronic commerce" 1999 *Dalhousie LJ*
35. Lerouge J-F "The Use of Electronic Agents Questioned Under Contractual Law: Suggested Solutions on a European American Level, 18 J. Marshall J. Computer & Info. L. 403 (2000)" 1999 *UIC John Marshall Journal of Information Technology & Privacy Law*
36. Moses LB "Agents of change: How the law ‘Copes’ with technological change" 2011 *Griffith Law Review*
37. Muller-Freienfels W "Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty" 1964 *Am. J. Comp. L.*
38. Müller-Freienfels W "Law of Agency" 1957 *The American Journal of Comparative Law*
39. Nagel *Commercial Law 7th Ed* LexisNexis SA [Place of publication not identified] (2025).
40. Nwana HS, Rosenschein J, Sandholm T, Sierra C, Maes P and Guttmann R "Agent-mediated electronic commerce: Issues, challenges and some viewpoints" 1998 *Proceedings of the second international conference on Autonomous agents*
41. Oliver JR "On artificial agents for negotiation in electronic commerce" 1996 *Proceedings of HICSS-29: 29th Hawaii International Conference on System Sciences*
42. Powell R "Contractual Agency in Roman Law and English Law" 1956 *Butterworths S. Afr. L. Rev.*
43. Powell R "The Law of Agency in South Africa. By J. E. De Villiers and J. C. Macintosh, Advocates of the Supreme Court of South Africa. Second edition, by D. B. Knight, Advocate of the Supreme Court of South Africa. [Cape Town: Juta & Co., Ltd.1956. xxx and 336 pp. and (index) 47 pp. £4 15s. 6d.]" 1957 *International and Comparative Law Quarterly*
44. Pretorius C-J "The Basis of Contractual Liability in South African Law (1)" 2004 *THRHR*
45. Pretorius C-J "The Basis of Contractual Liability in South African Law (2)" 2004 *THRHR*
46. Reynolds FT, Cheng Han "Agency Reasoning - A Formula or a Tool?" 2018 *Sing. J. Legal Stud.*
47. Ribeiro BA, Coelho H, Ferreira AE and Branquinho J "Metacognition, Accountability and Legal Personhood of AI" 2024 *Multidisciplinary perspectives on artificial intelligence and the law*
48. Schulz T *Verantwortlichkeit bei autonom agierenden Systemen* Nomos Verlagsgesellschaft mbH & Co. KG (2015).
49. Smed S "Intelligent software agents and agency law" 1998 *Santa Clara Computer & High Tech. LJ*
50. Solum LB "Legal personhood for artificial intelligences" 1992 *North Carolina Law Review* 1231.
51. Specht L and Herold S "Roboter als Vertragspartner" 2018 *Gedanken zu Vertragsabschlüssen unter Einbeziehung automatisiert und autonom agierender Systeme, MMR*

52. Teubner G "Digitale Rechtssubjekte? Zum privatrechtlichen Status autonomer Softwareagenten" 2018 *Archiv für die civilistische Praxis*
53. Van den Bergh R "A rule must arise from the law as it is-and it is not cast in stone" 2014 *Fundamina: A Journal of Legal History*
54. van Eck M and Agbeko F "Electronic persons in contracts" 2023 *Obiter*
55. Van Eck M and Agbeko F "The Recognition and Regulation of Smart Contracts in South Africa" 2024 *Potchefstroom Electronic Law Journal (PELJ)*
56. Van Huyssteen LF *Contract: General Principles* Juta & Company, Limited Cape Town, SOUTH AFRICA (2020).
57. Verhagen H "Agency and Representation" in Smits JM (eds) *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (2006) 33
58. Weitzenboeck EM "Electronic agents and the formation of contracts" 2001 *International Journal of Law and Information Technology*
59. Ye Y, Liu J and Moukas A "Agents in electronic commerce" 2001 *Electronic Commerce Research*
60. Zimmermann R "Roman-Dutch Jurisprudence and Its Contribution to European Private Law Symposium: Relationships Among Roman Law, Common Law, and Civil Law" 1991 *Tul. L. Rev.*