The Appointment of Conveyancing Attorneys: Rethinking Established Practices

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SUMMARY

It is common for a large number of property transfers to take place daily in South Africa's deeds offices. Most of these transactions are finalised without any real difficulty and without major disputes requiring court adjudication. However, this is not always the case. Disputes do arise, and some must be resolved through litigation. A key issue causing contention is who appointed the conveyancer and who the conveyancer represents in the transaction. There is a school of thought that the party that appoints the conveyancer is regarded as the client, and that the conveyancer owes a duty of care solely to that party. It is also generally accepted that the client's appointed conveyancer is the only person authorised to accept money on their behalf. Given these complexities, it may be time to reconsider the traditional practice of appointing a single conveyancer. Disputes could potentially be avoided in the future if each party had independent legal representation.

Three different scenarios are examined to illustrate the risks involved in the current practice. In one case, a purchaser was ordered to pay the purchase price a second time because the conveyancer was not acting on their behalf and had not been authorised to receive payment. The court held that payment to the seller's conveyancer did not constitute a valid payment, as the conveyancer was not an authorised agent for that purpose. In another matter, the court ruled that the seller had to transfer the property to the purchaser, even though the payment had been made to the seller's conveyancer. In this instance, the conveyancer had indeed been appointed as the seller's agent and was authorised to accept payment. However, owing to theft by the conveyancer, the seller never received the funds. In a third case, the purchaser suffered financial losses amounting to millions owing to a business-email-compromise fraud scam. The court found that the conveyancing firm owed no duty of care to the purchaser, as there was no attorney-client relationship between them. These three cases, *Minister of Agriculture v De Klerk*, *Agu v Krige*, and *ENS v Hawarden*, all highlight a common theme: a party suffers because they do not have a conveyancer acting on their behalf to protect their interests. A brief analysis is undertaken to ascertain how this issue is addressed in other jurisdictions, with a view to identifying lessons that may be learned from them. It is essential to determine clearly who is considered the client of the conveyancer and who is authorised to appoint one. Unfortunately, some legal practitioners are occasionally guilty of misconduct, negligence or even theft. When such misconduct is committed by someone who is not the appointed conveyancer for a particular party, innocent buyers or sellers may suffer significant losses. Considering the substantial amounts

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of money involved in property transfers and the fact that purchasing property is often the most valuable transaction in a person's life, it may be time to reconsider the current system. A more balanced and protective approach would be for both seller and purchaser to have their own legal representatives. Independent legal protection on both sides could help prevent situations where one party suffers financial loss owing to the wrongdoing of a conveyancer. If we want to protect sellers, purchasers and even conveyancers themselves, change is essential. A revised system that ensures independent legal representation for all parties in property transactions could significantly reduce the risk of loss owing to fraud, theft or cybercrime. To improve the legal and financial security of property transactions, all involved parties, especially sellers and purchasers, must be afforded equal protection through independent representation. This could be implemented in one of two ways. Either both parties appoint their own conveyancer; alternatively, each party appoints their own legal representative, who need not be a conveyancer, and these representatives, by agreement, then appoint an independent conveyancer to attend to the transfer. This conveyancer should have no ties to either seller or purchaser.

KEYWORDS: appointing conveyancers, property transfers, seller, purchasers, independent legal representation, protection innocent parties, negligence conveyancers

1 INTRODUCTION

Many property transfers take place daily in South Africa's deeds offices without any real difficulty.[1] Most of these transactions proceed smoothly and without major disputes requiring court adjudication. However, this is not always the case.[2] When disputes do arise and must be resolved in court, one of the key issues is often the appointment of the conveyancer – specifically, who appointed the conveyancer and who does the conveyancer represent in the transaction?[3] The issue is critical because the party that appoints the conveyancer is typically regarded as the client, and the conveyancer owes a duty of care to that party alone.[4] Furthermore, only the client's appointed conveyancer is authorised to accept money on their behalf.

Many typical disputes could be avoided if each party had independent legal representation.[5] This article examines three different cases. In one, a purchaser was ordered to pay the purchase price a second time because the conveyancer was not acting on his behalf and had not been authorised to receive payment from him. The court held that payment to the seller's conveyancer did not constitute a valid payment, as the conveyancer had not been appointed as an agent authorised to accept money on the seller's

1 Hamman and Koen "Cave Pecuniam: Lawyers as Launderers" 2012 15(5) *Potchefstroom Electronic Law Journa*l 85.

2 This article focuses on the transfer of property only and does not refer to situations where a bond is cancelled or a new bond registered over a property.

3 Rodrigues "Homebuyers Should Nominate the Transferring Attorney" (8 September 2020) https://propertyfactor.co.za/blog/homebuyers-should-nominate (accessed 2025-05-28).

4 S 20 of the Deeds Registries Act 47 of 1937. An owner of land usually gives a special power of attorney to a conveyancer to transfer ownership. See Nel *Jones Conveyancing in South Africa* 4ed (1990) 96.

5 Rodrigues "Follow-Up on Transferring Attorney Nomination" (15 September 2020) https://propertyfactor.co.za/blog/follow-up-on-transfering-attorney (accessed 2025-05-28).

behalf. In another matter, the court ruled that the seller had to transfer the property to the purchaser even though the seller had never received payment: payment had been made to the seller's conveyancer, who had indeed been appointed as the seller's agent and was authorised to accept payment but she had stolen the funds. In a third case, the purchaser suffered damages amounting to R5,5 million owing to a business-email-compromise (BEC) scam. The court found that the conveyancing firm had no duty of care toward the purchaser because there was no attorney-client relationship between them.

These cases raise an important question: should the current practice of appointing a single conveyancer in a property transaction be reconsidered?[6] Given the prevalence of fraud and cybercrime in property transactions, is it time to require that both seller and purchaser have separate legal representation to better protect their interests? Three cases are discussed to explore this issue further. In *Minister of Agriculture v De Klerk*,[7] the purchaser had to pay a portion of the purchase price again owing to theft committed by the conveyancer. In *Agu v Krige*,[8] the seller was ordered to transfer the property without receiving payment because of theft by the conveyancer. In *Edward Nathan Sonnenberg v Hawarden*,[9] the purchaser was defrauded and suffered a loss of R5,5 million in a cybercrime incident. In unpacking these cases, the article seeks to determine who is considered the client of the conveyancer, who is authorised to appoint a conveyancer, and whether reforms are needed to better protect innocent parties from suffering losses owing to the misconduct or negligence of conveyancers.

2 APPOINTING A CONVEYANCER

As previously mentioned, the transfer of properties takes place in deeds offices throughout South Africa on a daily basis. In most cases, the interests of the parties involved are protected by competent, prudent and honest conveyancers. Numerous examples in case law highlight the fiduciary duty of conveyancers to act with the utmost good faith towards both seller and purchaser in the execution of their mandates.[10] It can be assumed that many transfers proceed without any real difficulty and without requiring adjudication in a court of law. When transfers are straightforward – and there are probably thousands of such cases across the deeds offices daily – the question of who the conveyancer acts for is not typically an issue. These transfers are usually finalised with no major disputes necessitating legal

6 Rodrigues https://propertyfactor.co.za/blog/follow-up-on-transfering-attorney.

7 [2013] ZASCA 142.

8 [2019] ZAWHC 46.

9 [2024] ZASCA 90.

10 *Nortje v Fakie* 2013 (1) SA 577 (KZP); *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A); *Vaatz v Registrar of Deeds, Namibia: In re Grootfontein Municipality, Vaatz v Registrar of Deeds, Namibia: In re Nöckel's Estate* 1993 (4) SA 353 (Nm); *Joel Melamed & Hurwitz v Cleveland Estates (Pty) Ltd, Joel Melamed & Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A); *Van Vliet v Adler, Kessly & Salomon* 1979 (3) SA 1156 (W); *Van der Spuy v Pillans* 1875 Buch 133; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A); *Margalit v Standard Bank of South Africa Ltd* 2013 (2) SA 466 (SCA); and see the *Guidelines for Conduct of Property Law Matters* published in Circular 9/2006 of the Law Council's resolution taken in terms of rule 2(5)(d) on 25 August 2006.

proceedings. However, when complications arise, matters can quickly become contentious. It is at these times that litigation often follows.

The identity of the party who appointed the conveyancer becomes crucial, as it determines to whom the conveyancer owes a duty and who is authorised to receive money on behalf of their client. This issue has serious consequences, particularly if the conveyancer is guilty of theft and misappropriates the purchase price or a part thereof. In such cases, the question arises whether the aggrieved party can successfully claim money from the person responsible for the theft. The question of who should be entitled to appoint the conveyancer has long been a subject of debate in South African law. Initially, in terms of the common law, *James v Liquidators for Amsterdam Township*[11] established the principle, as per Innes CJ, who stated:

> "[W]hen a person is under a legal obligation to do something to complete a contract, and the circumstances necessitate the appointment of an agent to do it, then that person has the right to appoint his own agent. Both by common law and by statute the seller is bound to pass transfer, as a matter of fact he is the only person who can do so."[12]

Accordingly, it was traditionally regarded as the seller's right to appoint the conveyancer.[13] However, in the Natal case of *Kothandan v Arbuthnot,*[14] the court held differently. It was held that there existed a recognised custom throughout the Natal Province that "in the absence of any special stipulation*",* the purchaser had the right to nominate the conveyancer.[15] This position was later confirmed in *Meyer v Kirner*,[16] where the court noted, without objection, that the ruling in *Kothandan* was correct. Notably, Natal was the only province that granted the purchaser such special powers regarding the appointment of a conveyancer.

According to Van Blommenstein, where the parties agree that the purchaser shall attend to the conveyancing, the conveyancer accepts a mandate from the seller to pass the transfer and therefore becomes the agent of the seller.[17] Kilbourne and Botha state that while a seller has the right to appoint a conveyancer, if the parties agree that the purchaser's conveyancer should handle the transfer, the conveyancer's loyalty is then to the purchaser, not to the seller.[18] Van Blommenstein, Kilbourne and Botha argue that when a purchaser's conveyancer accepts the responsibility to

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11 1903 TS 653.

12 *James v Liquidators of the Amsterdam Township Co supra* 655.

13 Rodriquez https://propertyfactor.co.za/blog/homebuyers-should-nominate.

14 1920 41 NCR 113; Van Blommenstein "Should the Purchaser Choose the Transferring Attorney?" *Property 24* (undated) http://property24.com/articles/should-the-purchaser-choose-the-transferring-attorney/29788 (accessed 2025-05-28) 87.

15 *Kothandan v Arbuthnot supra* 113.

16 1974 (4) SA 90 (N).

17 Van Blommenstein http://property24.com/articles/should-the-purchaser-choose-the-transferring-attorney/29788

18 Kilbourne and Botha *The ABC of Conveyancing* 8ed (2018) 10.52.

pass transfer, they do so as an agent of the seller and are thus authorised to act accordingly.[19]

To illustrate the impact of the identity and appointment of the conveyancer on the outcome of legal disputes, three cases are discussed. These cases demonstrate that the question of who appointed the conveyancer and who is represented by the conveyancer plays a decisive role in determining legal outcomes. In situations where, for instance, the aggrieved party is not the client of the conveyancer or did not appoint the conveyancer to receive payment on their behalf, and theft is subsequently committed by the conveyancer, the party may end up being punished for the crime, financially, despite their innocence. The following section will examine how South African courts have addressed the specific issue of determining who the conveyancer's client is.

3 *MINISTER OF AGRICULTURE v DE KLERK*

In this matter, an agreement was concluded in August 2008 for the sale of a farm in Mpumalanga for R3,7 million.[20] The seller was informed that she was required to use the government's conveyancers to attend to the transfer of the property. In terms of the deed of sale, 50 per cent of the purchase price had to be paid within 30 calendar days of signature of the agreement into the conveyancer's trust account. The conveyancer was then to request an undertaking from the purchaser for the balance of the purchase price once all the transfer documents were ready for lodgement in the Deeds Office.[21] A written undertaking was provided by the Land Claims Commissioner on 9 October 2008, and a deposit of R1 850 000 was paid into the conveyancer's trust account on 10 October 2008.[22] The transfer of the property was registered on 22 May 2009. The seller was supposed to receive the deposit of R1 850 000 upon registration of the transfer. However, she only received R650 000 from the conveyancer on 27 May 2009.[23] The outstanding amount of R3 050 000 of the total purchase price had yet to be received.

Because the seller did not receive the full purchase price on registration, she lodged an objection with the Department of Land Affairs. A meeting was subsequently arranged between the seller, the conveyancer and a departmental official, Mr Sidakala, in early June 2009. At that meeting, Mr Sidakala gave the conveyancer 10 days to pay the outstanding amount to the seller.[24] The balance of the purchase price (R1 850 000) was paid into the conveyancer's trust account on 8 June 2009 and transferred to the seller the following day. A further amount of R178 028.80 was paid to Nedbank to cancel a mortgage bond registered over one of the properties.[25] However,

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19 Van Blommenstein http://property24.com/articles/should-the-purchaser-choose-the-transferring-attorney/29788; Kilbourne and Botha *The ABC of Conveyancing* 10.52.

20 *Minister of Agriculture v De Klerk supra* par 4.

21 *Minister of Agriculture v De Klerk supra* par 5.

22 *Ibid*.

23 *Ibid*.

24 *Minister of Agriculture v De Klerk supra* par 6.

25 *Minister of Agriculture v De Klerk supra* par 7.

the balance of R1 021 971.20 remained unpaid. De Klerk, the seller, then lodged another complaint with Mr Sidakala regarding the outstanding funds. At a second meeting, the conveyancer admitted to having misappropriated the money before registration took place. Despite this, the transfer still proceeded on 22 May 2009. An additional payment of R20 000 was later made to the seller on 19 August 2009.[26] Subsequently, the seller instituted proceedings against the purchaser, the Minister of Agriculture, for the unpaid balance of the purchase price (R1 001 971.50) plus interest and legal costs.

The purchaser contended that it had fulfilled all contractual obligations, having made payment of R1 850 000 on 10 October 2008 and a further R1 850 000 on 8 June 2009, which together constituted the full purchase price of R3,7 million. However, the High Court ruled against the purchaser, ordering payment to the seller of the outstanding balance, interest and costs. The Minister (purchaser) then appealed to the Supreme Court of Appeal (SCA). The central issue before the SCA was whether payment of the purchase price to the conveyancer discharged the purchaser's obligation under the deed of sale. The court identified the key issue to be

> "whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the purchaser. If he was not, the purchaser's defence of payment cannot succeed."[27]

The SCA held that the answer to this question depended entirely on the terms of the deed of sale.[28] Although the conveyancer had received and held the funds, he did so not as a party to the deed of sale.[29] On a proper interpretation of the contract, the court found that the conveyancer had not been appointed as the seller's agent for receiving payment. Since the purchaser had appointed the conveyancer, he was not authorised to receive money on the seller's behalf.[30] Therefore, payment to him as a conveyancer did not constitute a valid performance under the contract. The consequence was that the purchaser was ordered to make payment of the purchase price *a second time*, owing to the theft committed by the conveyancer. Although the purchaser may have had recourse under civil law or through a complaint to the Legal Practice Council, such recourse would involve lengthy legal proceedings and considerable cost.

4 *AGU v KRIGE*

In this matter, the applicant, Agu, sought an order compelling Krige to transfer the property she had purchased from him.[31] The purchase price had been duly paid by Agu to Krige's nominated conveyancer, Swart, who subsequently misappropriated the funds.[32] In July 2017, the parties entered into an agreement in terms of which a sectional title unit in Parklands was

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26 *Minister of Agriculture v De Klerk supra* par 8.
27 *Minister of Agriculture v De Klerk supra* par 15.
28 *Minister of Agriculture v De Klerk supra* par 16.
29 *Ibid*.
30 *Ibid*.
31 *Agu v Krige supra* par 1.
32 *Agu v Krige supra* par 2.

sold for R720 000. The agreement stipulated that the full purchase price was to be paid within three days of acceptance of the offer, and that it would be held by the conveyancer in an interest-bearing trust account.[33] On 31 July 2017, after receiving payment instructions from the conveyancer, Agu paid the full purchase price of R720 000 as well as transfer fees of R16 700 into Swart's trust account. It later emerged that Swart had misappropriated the funds. Following this, Agu issued a letter of demand to Krige requesting the transfer of the property and offering to comply with any remaining obligations.[34] Krige denied liability and submitted a claim to the Attorneys' Fidelity Fund (AFF). The AFF declined to entertain the claim on the basis that the loss had been suffered by Agu, not Krige.[35] Despite Krige communicating the Fund's view to Agu, which she disputed, she continued to insist that Krige transfer the property.[36] The court had to determine whether the payment made by Agu to Swart constituted a valid payment to Krige. The issue was whether Swart had accepted the payment as Krige's agent. If so, Agu's claim for transfer would succeed.[37]

Agu argued that she had complied fully with her obligation under the deed of sale by paying the purchase price to Swart, who had been nominated by Krige as his attorney and agent. She contended that payment to Swart amounted to payment to Krige, and therefore operated as a complete discharge of her contractual obligations.[38] She further submitted that when a seller nominates an agent to receive payment on his behalf, payment to that agent is legally deemed to be payment to the seller.[39] In support of her case, Agu relied on *Verbeek v Maher*,[40] where the court held that the purchaser had discharged his obligation to pay a deposit by paying it to the seller's agent as required under the contract. In that case, the court ordered the seller to pass the transfer, having found that the purchaser had complied with the contractual terms governing payment. On the authority of *Verbeek*, Agu argued that the deed of sale in *Agu v Krige* similarly specified the "mode of actual payment" and that once payment was made, her obligation was fully discharged.[41] Krige did not dispute that Agu paid the full purchase price to Swart, but maintained that, since he did not personally receive the money, Agu had not fulfilled her contractual obligations. The court held that each case must be evaluated on its own facts with particular reference to the terms of the relevant deed of sale and the basis upon which the conveyancer received the payment.[42] It was found that the deed of sale clearly indicated that Swart had been appointed by Krige as the conveyancer.[43] Furthermore, it was noted that Agu had expressed a desire to appoint her own conveyancers during the negotiations, but Krige insisted

33 S 86(4) of the Legal Practice Act 28 of 2014.
34 *Agu v Krige supra* par 4.
35 *Ibid*.
36 *Agu v Krige supra* par 4.1.2.
37 *Ibid*.
38 *Ibid*.
39 *Baker v Probert* 1985 (3) SA 429 (AD).
40 1978 (1) SA 61 (N).
41 *Agu v Krige supra* par 4.1.2.
42 *Ibid*.
43 *Baker v Probert supra* 438 G–H.

on using Swart, citing a professional relationship that spanned over five years.[44]

Francis AJ held that the deed of sale expressly stated that all payments in terms of the agreement were to be made to Swart as the conveyancer. This indicated that Swart had been appointed as Krige's agent for the purpose of receiving payment, and thus payment to Swart operated as a complete discharge of Agu's obligations under the contract. In legal terms, payment to Swart equated to payment to Krige.

This principle was subsequently reaffirmed by the Constitutional Court in *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd,*[45] where it was confirmed that payment into the attorney's account, in accordance with the agreement, is to be regarded as payment to the seller.[46] In both *Minister of Agriculture v De Klerk* and *Agu v Krige*, the purchase price was paid into the trust account of a conveyancing attorney. In both cases, the conveyancer misappropriated the funds. Although remedies were available, such as lodging a claim with the Legal Practitioners' Fidelity Fund or instituting civil proceedings, these options involved additional costs and procedural burdens. Despite the availability of such remedies, the aggrieved parties were forced to bear the consequences of criminal conduct committed by legal professionals. One could argue that this creates an inherently unfair situation where innocent clients are punished for the misconduct of their attorneys. In both cases, neither the purchaser nor the seller was at fault. In the next section, the issue of business email compromise (BEC) is explored. This is a growing threat in real-estate transactions and has led to substantial financial losses for purchasers.

5 *ENS v HAWARDEN*

In *ENS v Hawarden*,[47] the victim, Ms Hawarden, was defrauded of R5,5 million in a property transaction after being tricked into depositing the funds into a scammer's bank account. This occurred as a result of BEC, where emails between her and the law firm, ENSafrica (ENS), were intercepted and manipulated by a cybercriminal. On 23 May 2019, Hawarden made an offer to purchase a property for R6 million through Pam Golding Properties (PGP).[48] She received an email from the estate agency that included a warning about the risks of cybercrime, advising her to call the agency to verify their banking details. Attached to the email was a letter outlining the dangers of email hacking, phishing, and cyber scams. On the same day, Hawarden paid a deposit of R500 000 into the agent's trust account, only after verifying the banking details by phone with an agency employee.[49] The following day, the estate agent emailed ENS (the appointed conveyancers) and copied Hawarden.

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44 *Agu v Krige supra* par 4.1.2.
45 [2014] ZACC 39.
46 *Stopforth Swanepoel & Brewis Incorporated v Royal Anthem Investments 129 (Pty) Ltd supra* par 30.
47 *Supra.*
48 *ENS v Hawarden supra* par 2.
49 *Ibid*.

ENS's secretary, Ms Maninakis, who was handling the transfer, sent an email to Hawarden on 20 August 2019 at 13:24, outlining the requirements for securing registration of the property, including ENS's correct banking details.[50] It was at this point that the BEC attack began. Unbeknownst to both ENS and Hawarden, the email was intercepted by a cybercriminal who had already gained access to Hawarden's email account.[51] The fraudster altered the contents of the email, specifically the banking details, and sent a forged version to Hawarden. Believing the email to be legitimate and a follow-up to her earlier conversation with Maninakis, Hawarden failed to notice the altered sender's email address, from "ensafrica.com" to the fake "ensafirca.com," where the letters "i" and "r" were swapped to appear almost identical to the original.

On 22 August 2019, Hawarden emailed Maninakis to say she would be going to Standard Bank to arrange payment. At the bank, she decided to make an immediate electronic funds transfer (EFT) instead of waiting 14 working days to furnish a guarantee. While still at the bank, Maninakis called Hawarden, who confirmed she had received ENS's banking details via email. Hawarden, assisted by a bank employee, Mr Shabalala, made the payment using the altered details from the scammer's fraudulent email, believing she was transferring the funds to ENS. However, Hawarden did not telephone ENS directly to confirm the banking details before making the payment.[52] At 12:55 on the same day, she sent Maninakis a proof of payment, but this email too was intercepted and altered by the fraudster. At 17:57, the scammer sent a forged email to Maninakis, purporting to be from Hawarden, stating that the payment should reflect within 24 to 48 hours.

Subsequently, ENS issued a statement of account requesting payment. At the bottom of the statement was a warning to verify ENS's banking details by phone, a warning Hawarden claimed was not present in earlier communications. She also did not receive a 23 August 2019 email from Maninakis thanking her for the payment and attaching an investment mandate containing multiple BEC warnings.[53] This email was probably also intercepted by the fraudster. Instead, Hawarden received a fake investment letter on 26 August 2019, which omitted the line: "I will advise when the same is reflected in our trust account." The scammer sent additional forged emails on 26 August 2019 to delay the discovery of the fraud and allow time to withdraw the funds.[54] One such email, received at 11:12 and purportedly from Hawarden, claimed that the funds were still in her account and that she would go to the bank to finalise the transfer. Later that day, at 13:27, another email was sent from the fake "@ensafirca.com" address with the signed mandate, but it never reached Maninakis owing to the incorrect email address.[55]

On 28 August 2019 at 12:38, Maninakis emailed Hawarden to say that no payment had been received. At 16:26, a fraudulent reply was sent, again

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50 *ENS v Hawarden supra* par 4.
51 *Ibid*.
52 *ENS v Hawarden supra* par 7.
53 *ENS v Hawarden supra* par 9.
54 *ENS v Hawarden supra* par 11.
55 *ENS v Hawarden supra* par 10.

impersonating Hawarden, claiming there were problems with the transfer and that she would redo it. The fraud was only discovered on 29 August 2019.[56] Further email correspondence between Hawarden and Maninakis after the payment was made was also intercepted. This included an investment mandate from ENS with several BEC warnings, which Hawarden never received. The funds paid into the fraudster's FNB account were swiftly transferred out, and FNB was unable to recover the misappropriated money. Hawarden maintained that nothing in the emails she received raised suspicions of fraud, and she claimed to have been unaware of the risks posed by BEC. However, during her testimony, she acknowledged that in prior dealings involving large sums of money, such as her divorce proceedings, she had taken cybercrime warnings seriously, including the one from Pam Golding Properties. In this case, however, she stated that she trusted ENS completely and assumed they would ensure the safety of all transactions.[57]

The court *a quo* held that, although Hawarden was not a client of ENS, the firm owed her a general duty of care as a purchaser of property. The court rejected ENS's argument that it was Hawarden, as the debtor, who chose to make an electronic payment and was therefore responsible for ensuring that the funds were paid into the correct account.[58] The court further held that ENS had control over how its banking details were communicated to her, and chose to do so via an unprotected email, attaching its banking details in a PDF document that could be easily manipulated. The judge stated that ENS had failed to communicate its banking details using secure technical measures, and that Hawarden relied at all times on ENS to act professionally. The judge emphasised that the widespread industry practice of sending banking details via email did not excuse the law firm's unsafe conduct, particularly as they were aware of the risks and the need to take precautions.

The judge noted that, viewed objectively, Hawarden could not be faulted for placing her trust in what she believed to be a reputable and established law firm. He further stated that he had no difficulty in concluding that the firm's banking details constituted financially sensitive information, which required appropriate protection. He found that the risk of a BEC attack was foreseeable by ENS, and that sending bank details via email was inherently dangerous. The court concluded that the risk of loss to Hawarden was highly foreseeable by ENS and that the interests of society demanded the recognition of a legal duty in this matter.[59] The court further stated that ENS failed to safely communicate its bank details using technical safety measures and that Hawarden depended at all times on ENS to act professionally.[60] Accordingly, the court held that ENS must pay Hawarden R5,5 million, plus interest, and cover the legal costs of the lawsuit on a punitive scale. ENS then appealed the judgment and order of the Gauteng Division of the High Court.

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56 *ENS v Hawarden supra* par 11.
57 *ENS v Hawarden supra* par 13.
58 *Hawarden v ENS* ZAGPJHC 14 par 122.
59 *Ibid*.
60 *Ibid*.

The main issue that the appeal court had to determine was whether Hawarden could succeed in her delictual claim against ENS, and in particular, whether she had established the element of wrongfulness required for a delictual claim arising from an omission that caused pure economic loss.[61] The court held that, in dealing with the issue of wrongfulness, it found that Hawarden was not a client of ENS at the relevant time and that no contractual relationship existed between Ms Hawarden and ENS. There was no attorney-client relationship between them. Hawarden's loss was not the result of any failure in the ENS system but the result of hackers having infiltrated her email account and having fraudulently diverted the payment meant for ENS into their own account. The interference that caused the loss resulted from her email account being compromised.

It was stated that Hawarden had been warned about this risk in the letter from Pam Golding Properties. In that instance, she heeded the warning of the estate agent and verified the account details. However, she failed to do so three months later with regard to ENS and was unable to explain this failure. It would have been relatively easy for Hawarden to avoid the risk about which PGP had previously warned her. As she had done earlier with PGP, she could have verified ENS's bank account details with the firm's employees when speaking to them at the bank. ENS would no doubt have been reassured by the fact that she was at her bank, Standard Bank. Hawarden could also have enlisted the help of Ms Shabalala, a Standard Bank employee, to assist her in verifying ENS's bank details. She could not explain why she had failed to do so. She therefore had ample means to protect herself.

Moreover, by the time of the payment, any warning by ENS regarding the risk of BEC would have been meaningless, because the cybercriminal was already embedded in Hawarden's email account, and the risk had already materialised.[62] The court held that, if ENS's failure to warn Hawarden were to attract liability, it would have far-reaching implications not only for the legal profession but also for all creditors who send their bank details via email to debtors. The court found the *ratio* of the High Court judgment – that all creditors in ENS's position owe a legal duty to their debtors to protect them from the risk of email account compromise – to be untenable. The effect of the High Court's judgment would be to require creditors to protect their debtors against the interception of payments, a result the appeal court found to be unjustified. The High Court should have declined to extend liability in this case owing to the real danger of creating indeterminate liability. The appeal court held that it was evident that Hawarden could reasonably have avoided the risk by asking either Mr Carrim or Ms Maninakis of ENS to verify the account details. She had previously been made aware by PGP of the importance of verifying banking details and the risks of BEC fraud. She could also have had her bank verify ENS's banking details. She enlisted the help of her bank's staff in making the payment at the desk and using the computer of a bank official, Ms Shabalala. Under these circumstances, it would have been easy to request her assistance in verifying ENS's bank details. There was, therefore, more than sufficient protection available to

61 *ENS v Hawarden supra* par 16.
62 *ENS v Hawarden supra* par 20.

Hawarden.[63] Since she had ample means at her disposal, she must, under the circumstances, take responsibility for her failure to protect herself against a known risk. There was thus no reason to shift responsibility for her loss to ENS. Consequently, the appeal succeeded.[64]

Although this case dealt with BEC fraud, the court made an important ruling regarding the appointment of a conveyancer and to whom an attorney's allegiance lies. In this matter, it was accepted that the seller had appointed ENS as the conveyancing attorney. The purchaser's email account was compromised by a fraudster who intercepted communications, altered the banking details, and caused the purchaser, Ms Hawarden, to deposit funds unknowingly into the fraudster's account. This case presents a situation in which a defrauded individual suffered damages primarily because she had not appointed the attorney herself. Had she been represented by her own attorney, one tasked with protecting her interests, she might have been better safeguarded against the fraud.[65] The court found that ENS owed no duty of care to Hawarden, as there was no attorney-client relationship between them. This ruling confirmed that the conveyancer's professional obligations lay exclusively with the party who had appointed them – in this case, the seller.

6 SEPARATE LEGAL REPRESENTATION IN COMPARATIVE CONVEYANCING SYSTEMS

In contrast to the South African model, a number of jurisdictions adopt a system in which the seller and purchaser are represented by separate conveyancers or legal practitioners, thereby promoting independence and reducing the risk of conflicts of interest. In the United Kingdom, it is standard practice for each party to appoint their own solicitor or licensed conveyancer, who acts exclusively in that party's best interests throughout the transaction. As a general rule, the same practitioner cannot act for both parties, as this would give rise to a conflict of interest, which necessitates separate representation.[66] This approach ensures that contractual terms, title investigations and financial arrangements are examined from opposing perspectives, thereby enhancing procedural fairness. A similar approach is adopted in Australia, where, although it is technically possible for a conveyancer to act for both seller and purchaser, such practice is strongly discouraged owing to the potential for conflicts.[67] In New Zealand, the position is more stringent, with professional rules generally prohibiting dual representation except in very limited circumstances, thereby enforcing the

63 *ENS v Hawarden supra* par 25.

64 *ENS v Hawarden supra* par 26.

65 Rodriquez https://propertyfactor.co.za/blog/homebuyers-should-nominate.

66 RH Solicitors "Conveyancing Explained" (undated) https://www.rhsolicitors.co.uk/explained (accessed 2026-03-17).

67 Atkin and Florance "Law Firms and Conveyancers Warned Against Representing Both Sides in Real Estate Transactions" (17 August 2023) https://www.abc.net.au/news/2023-08-18/real-estate-buyers-sellers-warned-against-using-same-law-firm/102539644 (accessed 2026-03-17). See also O'Dwyer "When Can Solicitors or Conveyancers Act for Both Parties?" (9 April 2020) https://legalwiseseminars.com.au/insights/when-can-solicitors-or-conveyancers-act-for-both-parties (accessed 2026-03-17).

principle of independent legal advice.[68] In Canada, the prevailing practice is likewise for each party to retain separate legal representation. However, limited exceptions exist in the form of a joint retainer, where a single lawyer may act for both the transferor and the transferee, provided strict requirements are met.[69] These include obtaining informed consent from both parties and ensuring that no conflict of interest arises. Notably, dual representation is only permitted in narrowly defined circumstances. In addition, two lawyers within the same firm may represent the respective parties, provided they comply with the applicable professional rules and maintain independence in their representation. This arrangement, often referred to as the "two-lawyer rule", further reflects the cautious approach adopted in safeguarding against conflicts of interest in conveyancing transactions.[70]

7 RECONSIDERING THE APPOINTMENT OF CONVEYANCERS

Looking at the three cases discussed above, *Minister of Agriculture v De Klerk*, *Agu v Krige* and *ENS v Hawarden*, one must ask whether it is time to reconsider the process of appointing conveyancers in property transactions.[71] These cases highlight a recurring issue: where a conveyancer is appointed by one party, the other party may be left without proper legal representation or protection, especially when disputes arise or criminal acts (such as fraud or theft) occur. In both *Minister of Agriculture v De Klerk* and *Agu v Krige*, the courts emphasised that the law of agency and the terms of the sale agreement are crucial in determining whether payment to a conveyancer constitutes payment to the seller. In *Minister of Agriculture v De Klerk*, the court held that the conveyancer was not the seller's agent for receiving the purchase price, meaning the purchaser had to pay again. In *Agu v Krige*, it was found that the conveyancer was the seller's agent, and therefore, payment to the conveyancer equated to payment to the seller, who was then ordered to pass the transfer despite the funds being misappropriated. The *ENS v Hawarden* case further clarified the position. The court held that Hawarden was not a client of ENS, the seller's attorneys, and therefore, ENS owed her no duty of care. The ruling confirmed that no attorney-client relationship existed between a purchaser and the seller's attorney, even if the purchaser relied on the attorney during the transaction. From these cases, a clear principle emerges: the party who appoints the conveyancer is their client and receives the benefit of legal protection and representation, while the other party is often left vulnerable. The courts

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68 S 95(*c*) of the Code of Professional Conduct and Client Care states: "In the case of both lawyers and conveyancing practitioners, the duties imposed on them by their fundamental obligation to be independent in providing regulated services to their clients." See Lawyers and Conveyancers Act, 2006 https://www.legislation.govt.nz/act/public/2006/1/en/latest/#DLM364939 (accessed 2026-03-17).

69 Law Society of Ontario "Practice Support and Services" (2024) https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/the-two-lawyer-rule-in-real-estate-transactions (accessed 2026-03-17).

70 Law Society of Ontario https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/the-two-lawyer-rule-in-real-estate-transactions.

71 Rodrigues https://propertyfactor.co.za/blog/follow-up-on-transfering-attorney.

consistently ruled that outside such an appointment, no fiduciary or contractual duty exists.

This imbalance raises an important policy question: should both buyer and seller have independent legal representation during a property transaction? While sellers traditionally appoint the conveyancer, this arrangement often works smoothly only when no disputes arise. However, as demonstrated in the above cases, when problems do occur – such as fraud, misappropriation of funds or email compromises – it is the unrepresented party that suffers most. In many instances, an estate agent may recommend a conveyancer, and neither party may truly exercise independent choice.[72] Even in those cases, the conveyancer is usually considered to act on behalf of the seller. As seen in *Agu v Krige*, where the seller insisted on using Swart, and Swart subsequently stole the funds, it was the seller who had to bear the consequences of insisting on a specific attorney. There is a compelling argument that each party should appoint their own legal representative, or that an independent third-party conveyancer be appointed to represent the interests of both sides neutrally. While this may increase conveyancing costs, it could help mitigate the significant financial losses that innocent parties may suffer due to fraud or mismanagement. Although separate representation for the seller and purchaser in conveyancing transactions may increase legal costs, it is argued that it is necessary if it can substantially reduce the risk of conflicts of interest and prevent unrepresented parties from receiving an unfavourable outcome. For example, in *De Klerk*, the Minister had to pay a portion of the purchase price a second time after the conveyancer misappropriated the funds. In *Krige*, the seller was forced to pass the transfer despite never receiving the funds, since the conveyancer, appointed by him, had stolen the money. Although remedies exist, such as civil claims or claims against the Legal Practice Fidelity Fund, they require litigation, time and additional expenses. Meanwhile, parties must still comply with court orders, as seen in the examples above. With cybercrime and fraud, particularly BEC, becoming more common in real-estate transactions, it is no longer enough to rely on traditional practices. While the conveyancing fraternity might resist change, arguing that the system has worked for many years, the current landscape demands a reassessment.

The legal profession, particularly conveyancers, should begin proactively exploring solutions. These might include separate representation, more secure financial protocols, independent conveyancer appointments, or even legislative reforms. Such separate representation is neither novel nor unfamiliar. As previously noted with reference to jurisdictions such as Canada, the United Kingdom, Australia and New Zealand, this approach is already well established.[73] South Africa can draw valuable lessons from these systems and consider their adaptation within the local context. Importantly, these jurisdictions do not invariably impose an absolute prohibition on a single conveyancer acting for both seller and purchaser. Rather, where dual representation is permitted, it is subject to strict regulatory safeguards. These typically include the obligation of the

[72] Stelling "The Right to Appoint a Conveyancer" 1993 *Juta's Business Law* 56.

[73] See discussion above under heading 6.

practitioner to declare any actual or potential conflict of interest, obtain the informed consent of both parties, and, where required, disclose such circumstances to the relevant professional regulatory body. The implementation of similar measures in South Africa could enhance transparency, strengthen professional accountability, and better protect the interests of all parties involved in property transactions.

It is time to put in place safeguards to prevent innocent parties from being punished for the criminal conduct of those entrusted with managing property transactions. It is worth considering whether buyers and sellers should each appoint their own legal representative, or whether conveyancers should be appointed independently.[74] Though not a daily issue, the risks and consequences, as shown in *Minister of Agriculture v De Klerk, Agu v Krige* and *ENS v Hawarden*, are too serious to ignore. Legal professionals must lead the conversation in shaping a safer, fairer conveyancing environment.[75]

8 CONCLUSION

Generally, a purchaser who deposits money into an attorney's trust account for the purpose of purchasing property ought to be confident that such money is safe. Similarly, a seller who instructs an attorney to transfer property should be assured that the transfer will be properly executed and the funds will not be stolen. As argued in this article, it may be time to reconsider the current process, particularly owing to the significant amounts of money involved in property transfers and the fact that buying property is often the most valuable transaction in a person's life. As was noted, perhaps a new process should be developed: one in which the seller and the purchaser each have their own attorney, and the conveyancer is an independent third party. Under such a system, each party's attorney could hold their client's funds, and payment would only be effected upon registration in the Deeds Office.

To the ordinary person, it may seem absurd that if an attorney steals the funds, the purchaser could still be held liable to repay all or part of the stolen money. Yet this is exactly what happened in *Minister of Agriculture v De Klerk*.[76] While the court's decision was legally sound and based on the principles of agency, it raises the question of fairness, particularly to a purchaser who has already fulfilled their obligation by paying the purchase price. In *Agu v Krige*, on the other hand, the seller was ordered to pass the transfer to the purchaser even though the seller never received the funds. In both cases, although remedies such as civil claims or claims to the Legal Practitioners Fidelity Fund are available to aggrieved parties, the harm could have been prevented or at least mitigated if each party had had independent legal representation from the outset.

While the courts have consistently applied strict legal principles such as the law of agency, these cases expose the vulnerability of the unrepresented party. A more balanced and protective approach would be to require that

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74 Rodrigues https://propertyfactor.co.za/blog/follow-up-on-transfering-attorney.

75 Rodrigues https://propertyfactor.co.za/blog/homebuyers-should-nominate.

76 *Minister of Agriculture v De Klerk supra*.

both parties, seller and purchaser, have their own legal representatives. This would provide legal protection on both sides and help prevent situations where one party suffers financial loss owing to the wrongdoing of a conveyancer. Furthermore, cybercrime is on the rise, and conveyancing firms, because they handle large sums of money, have become attractive targets for cybercriminals. If we want to protect sellers, purchasers, and even conveyancers themselves, change is essential. A revised system that ensures independent legal representation for all parties in property transactions can reduce the risk of loss owing to fraud, theft or hacking, as was evident in the *ENS v Hawarden* case. In conclusion, while the law as it stands has a sound legal foundation, it may no longer be sufficient in today's risk-prone, cyber-exposed environment. If we are to improve the legal and financial security of property transactions, all parties involved, especially purchasers and sellers, must be afforded equal protection through independent representation. It is therefore recommended that each party appoints their own conveyancer. Alternatively, each party could appoint their own legal representative who need not be a conveyancer. These representatives, by agreement, could then appoint an independent conveyancer to attend to the transfer. This conveyancer should have no ties to either seller or purchaser. It would be prudent to consider the alternative models referred to above and to incorporate some of their underlying principles in order to improve the South African system.