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# **THE REGULATIONS ON CRYPTO ASSETS AND THE IMPACT ON THE SOUTH AFRICAN INSOLVENCY REGIME**

**BY**

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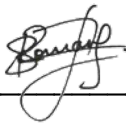
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## CHAPTER 1: INTRODUCTION

### 1.1. Background

*“Though cryptocurrency is a relatively recent phenomenon, the academic literature is already replete with attempts to quantify the radical ways in which this new form of asset will uproot society. Bankruptcy is one area that is beginning to bear out these predictions, as courts respond to new and complex questions relating to assets, liabilities, and contractual obligations involving cryptocurrencies”.*<sup>1</sup>

The 21<sup>st</sup> century has seen an increase in new technological inventions and the law is required to keep up with such innovations. There is no doubt that the absence of legal regulation creates breathing grounds for misuse and abuse. The invention of cryptocurrencies and blockchain technology was initiated by a certain Satoshi Nakamoto in 2008.<sup>2</sup> Nakamoto is an alias, to date, his or her true identity remains unknown.<sup>3</sup>

To understand the difficulties posed by cryptocurrency, it is important to define this technological invention. In short, cryptocurrency was described by Zohuri, Nguyen and Moghaddam as a form of value, which is entirely digital and is not issued by a central authority, however, it is accepted as a form of payment and can be traded and stored electronically.<sup>4</sup> Considering this definition of cryptocurrency and the various forms it may

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<sup>1</sup> McDermott “The Crypto Quandary: Is Bankruptcy Ready?” (2021) *Northwestern University Law Review* 1922 -1923.

<sup>2</sup> Nakamoto “White Paper – Bitcoin: A peer to peer Electronic Cash System”. Available at <https://bitcoin.org/bitcoin.pdf> (accessed 15 March 2023). Watts & Low “The Case of Cryptoassets as Property” (2023) 1. Available at SSRN: <https://ssrn.com/abstract=4354364> or <http://dx.doi.org/10.2139/ssrn.4354364> (accessed 19 March 2023).

<sup>3</sup> Watts & Low (2023) 1.

<sup>4</sup> Zohuri, Nguyen and Moghaddam “What is the Cryptocurrency? Is it a Threat to Our National Security, Domestically and Globally?” (2022) *IJTC Physics* 3.

take, the need for its regulation not only stems from its anonymity<sup>5</sup> and volatile<sup>6</sup> nature, but it has also become a lucrative playground for fraud and criminal activity.<sup>7</sup>

Since the development of crypto assets, South Africans have certainly taken advantage of the lucrative opportunity it presents. In a report issued by Triple A, it has been estimated that in 2022, a total of 5.8 million South Africans own crypto assets, which equates to 9.4% of the South African population.<sup>8</sup> Statistics further indicate that more than 46% of South Africans who own crypto assets hold it in over R10 000.00.<sup>9</sup> Considering these statistics, it is clear that the presence and use of crypto assets in South Africa are steadily increasing, and as such, its regulation has become necessary.

South Africa has finally responded to the call for regulation. On 19 October 2022, the Financial Sector Conduct Authority (FSCA) published the Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act.<sup>10</sup> The Declaration comes as no surprise because South Africa saw its biggest cryptocurrency Ponzi Scheme in 2021 in the Mirror Trading International (MTI) case.<sup>11</sup> The MTI saga included more than 260 000 investors and more than 23 000 known invested Bitcoin.<sup>12</sup> In

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<sup>5</sup> McDermott (2021) *Northwestern University Law Review* 1932.

<sup>6</sup> Babie, Brown, Catterwell, Giancaspro “Cryptocurrencies as Property: *Ruscoe and Moore v Cryptopia Limited (In Liquidation)* [2020] NZHC” (2020) *University of Adelaide Law Research Paper* 3.

<sup>7</sup> Reddy & Minaar “Cryptocurrency: A Tool and Target for Cybercrime” (2018) *Acta Criminologica: Southern African Journal of Criminology* 72.

<sup>8</sup> See <https://triple-a.io/crypto-ownership-south-africa-2022/> (accessed 27 February 2023).

<sup>9</sup> *Id.*

<sup>10</sup> Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act – General Notice 1350 of 2022 available at [https://www.gov.za/sites/default/files/gcis\\_document/202210/47334gen1350.pdf](https://www.gov.za/sites/default/files/gcis_document/202210/47334gen1350.pdf) (accessed 19 February 2023) (hereafter the Declaration).

<sup>11</sup> Staff “Liquidators want More Power in Probe of South African Bitcoin Trader” (15 January 2021) <https://techcentral.co.za/liquidators-want-more-power-in-probe-of-south-african-bitcoin-trader-2/172840/> (accessed 27 February 2023).

<sup>12</sup> *Id.*

addition, the MTI matter marks South Africa's first reported interaction between insolvency and crypto assets. MTI was placed under provisional liquidation on 29 December 2020 and a final order for its liquidation was granted on 30 June 2021.<sup>13</sup>

The South African regulatory authorities have established a basic regulatory framework for using crypto assets. The Declaration correctly refers to a crypto asset rather than cryptocurrencies and defines a crypto asset as:

*“a digital representation of value that is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, applies cryptographic techniques uses distributed ledger technology.”<sup>14</sup>*

This definition is accepted to be broad and it corresponds with the universal definition of cryptocurrency, which incorporates Bitcoin and various other virtual currencies.<sup>15</sup> The effect of the Declaration is that any person who uses crypto assets as a regular feature of business and renders financial services with such crypto assets should be registered to do so in terms of section 8 of the FAIS Act.<sup>16</sup> The Declaration creates a basis for

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<sup>13</sup> See [https://www.investrust.co.za/uploads/1/3/6/4/136485258/mti\\_circular\\_june\\_2021.pdf](https://www.investrust.co.za/uploads/1/3/6/4/136485258/mti_circular_june_2021.pdf) (accessed 19 February 2023).

<sup>14</sup> The Declaration.

<sup>15</sup> Intergovernmental Fintech Working Group (IFWG) Position Paper on Crypto Assets (11 June 2021) available at [https://www.treasury.gov.za/comm\\_media/press/2021/IFWG\\_CAR%20WG\\_Position%20paper%20on%20crypto%20assets\\_Final.pdf](https://www.treasury.gov.za/comm_media/press/2021/IFWG_CAR%20WG_Position%20paper%20on%20crypto%20assets_Final.pdf) (accessed 19 February 2023) (hereafter the IFWG Position Paper).

<sup>16</sup> Financial Sector Conduct Authority (FSCA) – Policy Document Supporting the Declaration of a Crypto Asset as a Financial Product Under the Financial Advisory and Intermediary Services Act, 19 October 2022 available at <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/Policy%20Document%20supporting%20the%20Declaration%20of%20crypto%20assets%20as%20a%20financial%20product.pdf> (accessed 20 February 2023) (hereafter FSCA Policy Document).

regulation and accountability in that any person who acts in contravention of the FAIS Act will be found guilty of an offence and will lead to imprisonment or, a fine, or both.<sup>17</sup>

The FSCA subsequently issued a policy document supporting the Declaration and of particular interest, the FSCA has indicated that the Declaration is an interim step towards regulation and will be expanded on even more in the Conduct of Financial Institutions Bill (COFI Bill).<sup>18</sup> At the time of drafting this dissertation, the draft COFI Bill which was published for comment in September 2020, did not deal with crypto assets explicitly, however, section 4(1) of the COFI Bill, provides that:

*“A financial institution that provides a financial product or a financial service is subject to this Act”.*<sup>19</sup>

Now that the Declaration has declared crypto assets as a financial product, these assets would fall directly under the ambit of the COFI Bill. Further, both the FSCA and the Crypto Asset Regulatory Working Group (CAR WG) are of the view that crypto assets will be included in the COFI Bill, and once enacted, the COFI Bill will repeal the FAIS Act, and all crypto asset-related issues will be addressed, in terms of the COFI Act.<sup>20</sup>

The Declaration is at its beginning stages of crypto asset regulation; however, it remains an open question whether this development addresses the plethora of issues faced by the South African insolvency regime and the associated practical implications. This research will examine the effect of the recent crypto asset regulations in South Africa and the impact thereof on the insolvency regime. The aim of this introductory chapter is to introduce the problem statement, the assumptions, the research questions, the relevance of the research topic, the approach and methodology followed as well as the limitations and delineations.

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<sup>17</sup> FSCA Policy Document 7.

<sup>18</sup> *Id* 2.

<sup>19</sup> S4(1) Conduct of Financial Institutions Bill (hereafter CoFI Bill).

<sup>20</sup> FSCA Policy Document 36.

## 1.2. Problem Statement

The main goal of sequestration and liquidation proceedings is for insolvency practitioners to take possession of the assets that are the subject of an insolvent estate, they should realise these assets to pay the creditors and the costs associated with the insolvency proceedings.<sup>21</sup> The additional duties of an insolvency practitioner include lawful search and seizure of property should the insolvency practitioner believe that property is being concealed.<sup>22</sup> These duties have become extremely difficult to fulfil when considering the extent and nature of crypto assets. Insolvency practitioners are, therefore, required to be extremely alert and innovative when identifying, preserving, tracing and disposing of crypto assets.<sup>23</sup>

It is essential to consider the Declaration's impact on the insolvency regime. Section 2 of the Insolvency Act 24 of 1936 (hereafter the Insolvency Act) defines property as either movable or immovable property situated within South Africa, this property includes contingent interests in property other than the contingent interests of the *fidei commissary* heir.<sup>24</sup> The definition of property insofar as the insolvency law is concerned has a broad interpretation and includes intangible assets such as shares and intellectual property rights.<sup>25</sup> Therefore, even though the definition of property in relation to the Insolvency Act has a wide interpretation, it remains uncertain whether crypto assets fall within the ambit of this definition.<sup>26</sup>

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<sup>21</sup> Smith, Van der Linde, Calitz *Hockly's Law of Insolvency Winding-up & Business Rescue* (2022) 301.

<sup>22</sup> Smith, Van der Linde, Calitz (2022) 158.

<sup>23</sup> Pascoe & Scott "Identifying and Dealing with Cryptocurrency Assets in Corporate Insolvency" (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 19- 20.

<sup>24</sup> S2 Insolvency Act.

<sup>25</sup> Smith, Van der Linde, Calitz (2022) 158.

<sup>26</sup> Naidoo *The Impact of Cryptocurrencies on the General Powers and Duties of Insolvency Practitioners* (2020) LLM thesis University of Johannesburg 2.

To date, South Africa and many other jurisdictions across the world lack guidance on how to treat crypto assets that fall part of an insolvent estate. Liquidators and trustees have constantly sought guidance from the judiciary to assist them with the classification of such assets.<sup>27</sup> In South Africa, crypto assets have not been classified as either legal tender, money, property, currency or commodity.<sup>28</sup> However, on 26 April 2023, the Western Cape Division of the High Court declared that the liquidators of MTI should treat Bitcoin as an intangible asset that constitutes “property” as contained in section 2 of the Insolvency Act.<sup>29</sup>

Insolvency regimes across the globe are highly prejudiced in that insolvency practitioners are unable to readily deal with crypto assets as a result of their volatility<sup>30</sup> and anonymity.<sup>31</sup> The intersection of crypto assets and insolvency presents complicated and new challenges within the insolvency sphere.<sup>32</sup> The value of crypto assets, when compared to fiat currency, can change overnight and this affects an insolvency practitioner's duty to realise such assets.<sup>33</sup>

The presence of crypto assets in an insolvent estate is so volatile that it can change the financial status of a company and revert it back to solvency, thereby creating an inordinate delay in the winding up of an insolvent estate.<sup>34</sup> Additional issues include insolvency

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<sup>27</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 19-20.

<sup>28</sup> Singh & Calitz “The Impact of Cryptocurrencies on the General Powers and Duties of South African Insolvency Practitioners” (2021) *SA Merc LJ* 290.

<sup>29</sup> *Bester N.O and Five Others v Mirror Trading International (Pty) Ltd (in liquidation)* 2024 (1) SA 112 (WCC) (26 April 2023). See detailed discussion at Ch 4, par 4.4.

<sup>30</sup> Babie, Brown, Catterwell, Giancaspro (2020) *University of Adelaide Law Research Paper* 3.

<sup>31</sup> McDermott (2021) *Northwestern University Law Review* 1932.

<sup>32</sup> Shawver “Commodity or Currency: Cryptocurrency Valuation in Bankruptcy and the Trustee’s Recovery Powers” (2021) *Boston College Law Review* 2032.

<sup>33</sup> Singh & Calitz (2021) *SA Merc LJ* 307-308.

<sup>34</sup> Rhooide & Meiring “The Crypto Winter: New Challenges for Insolvency Practitioners” (27 September 2022) available at

practitioners' clawback powers and the effect and interplay of cross-border insolvency laws where crypto assets are situated in other international jurisdictions.<sup>35</sup>

To date, there is one published study regarding the subject matter in South Africa and considering the increased use of crypto assets, further research is necessary. An article by Singh and Calitz addressed the impact of cryptocurrencies on the general duties of insolvency practitioners.<sup>36</sup> The study did not consider the effect of the most recent Declaration regarding crypto assets and the effect on insolvency law. Since the study's publication by Singh and Calitz, there has been much development about the MTI case, which will be incorporated into this study.

In addition, the cross-border insolvency regime itself presents several issues. The UNIDROIT Principles on Digital Assets and Private Law have laid down guiding principles regarding the recognition of crypto assets in an insolvent estate.<sup>37</sup> Crypto assets involve instances where transactions occur in different countries, triggering these cross-border insolvency principles.<sup>38</sup> A classic example of this is illustrated in the *Mt.Gox Co., Ltd*<sup>39</sup> a case wherein the Superior Court of Justice of Ontario had to grapple with the principles

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<https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Dispute/dispute-resolution-alert-27-september-2022-the-crypto-winter-new-challenges-for-insolvency-practitioners.html> (accessed 15 February 2023); Shawver (2021) *Boston College Law Review* 2033.

<sup>35</sup> Singh & Calitz (2021) *SA Merc LJ* 311-312.

<sup>36</sup> *Id.*

<sup>37</sup> Takahashi "Implications of the Blockchain Technology for the UNCITRAL Works'- UNCITRAL Proceedings of the Congress of the United Nations Commission on International Trade Law" (2017) 81- 82.

<sup>38</sup> Udofia "Treatment of Crypto Assets in Insolvency: Lessons from Different Jurisdictions" (2022). Available at SSRN: <https://ssrn.com/abstract=4077707> 1 (accessed 22 March 2023).

<sup>39</sup> *MtGox Co., Ltd (Re)* 2014 ONSC 5811.

of foreign main proceedings as liquidation proceedings had been instituted in Canada and the United States, respectively.<sup>40</sup>

### **1.3. Assumptions**

For purposes of this dissertation, the following assumptions are made (a) the issuance of the Declaration by the FSCA has provided accountability measures for Crypto Asset Service Providers (CASPs), (b) the issuance of the Declaration by the FSCA does not address or regulate persons who trade with crypto assets on a peer-to-peer basis and (c) insolvency practitioners across the world are faced with a plethora of challenges when dealing with crypto assets in an insolvent estate.

### **1.4. Research Questions**

The following key research questions will be addressed for purposes of this thesis: (a) whether the definition of property in the Insolvency Act aligns with the definition of crypto assets, (b) whether the Declaration and the COFI Bill address the complexities faced by the insolvency regime regarding crypto assets, (c) how are the duties of insolvency practitioners affected by crypto assets and what are the practical implications thereof and (d) what are the practical and regulatory solutions that may assist insolvency practitioners as well as the insolvency sphere as a whole?

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<sup>40</sup> Pascoe “Bankruptcy, Recognition Proceedings And Recoveries In A Cryptocurrency World” (2018) *Insolvency and Restructuring International* 6 -7.

## 1.5. Relevance of the Research Topic

Insolvency law has its basis in commercial and financial law.<sup>41</sup> Insolvency law, therefore, plays a crucial role in financial stability.<sup>42</sup> There is no doubt that the increased use of crypto assets across the globe, particularly in South Africa, has caused instability in terms of insolvency laws and its cross-border counterparts.<sup>43</sup> It appears that technological advancements are far out-smarting regulatory authorities, thereby creating a *lacuna* in the law. This research attempts to address this gap within the insolvency regime.

This research will provide both theoretical and practical contributions. First, this research will consider whether the Declaration and its supporting policies have positively impacted the insolvency regime insofar as crypto assets are concerned. This will evaluate whether the Declaration has assisted practitioners in fulfilling their statutory duties and whether the threat to the South African insolvency regime is still looming. Secondly, this research will unpack the Western Cape High Court's decision in which the court declared crypto assets to be property. Thirdly, this research will consider international scholarly articles that lay down guidelines for insolvency practitioners who are faced with crypto assets. This will assist insolvency practitioners in dealing with these assets in a manner that benefits the general body of creditors. Understanding how crypto assets operate and knowing how to deal with them in an insolvent estate will provide insolvency practitioners with much-needed knowledge to execute a successful wind-up and liquidation, therefore this research is of crucial importance to both academics and insolvency practitioners.

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<sup>41</sup> Sandberg *Regulating Cryptocurrencies in the International Insolvency Law* (2020) Master's thesis University of Turku 2.

<sup>42</sup> *Id.*

<sup>43</sup> Udofia (2022) 1.

<sup>43</sup> *Id.*

## 1.6. Approach and Methodology

This study will embark on a desktop literature study. The sources that form part of this research will include local and international case law as well as local and international journal articles. The primary sources that will form part of this research include legislation, books, the Declaration issued by FSCA, and supporting documentation. The absence of coherent regulation of crypto assets and the applicability of insolvency cases in such a context requires reliance on international scholarly articles.

## 1.7. Limitations and Delineation

This dissertation will focus mainly on the complexities faced by insolvency practitioners in relation to crypto assets. It will examine the applicability and effect of the Declaration on insolvency proceedings. This research will not deal with the cross-border insolvency complexities that are at play when dealing with crypto assets. Reference will, however, be made to international and comparative case law regarding insolvency and crypto assets and a discussion on the UNIDROIT Principles on Digital Assets and Private Law.

## 1.8. Summation

In conclusion, the rapid rise of crypto assets and blockchain technology has introduced novel challenges within the South African insolvency regime.<sup>44</sup> This has forced the FSCA to introduce a legal framework to assist in regulating crypto assets.<sup>45</sup> The Declaration adopted by the FSCA is an important step towards regulation, however, the implications thereof are yet to be fully considered, particularly within insolvency law. Insolvency practitioners are also presented with a number of challenges when dealing with crypto assets and this will be dealt with in detail in this dissertation.

This research will address the *lacuna* created by crypto assets with a specific focus on insolvency law. It will consider whether the current regulatory efforts are enough to

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<sup>44</sup> Singh & Calitz (2021) *SA Merc LJ* 290.

<sup>45</sup> The Declaration. FSCA Policy Document. IFWG Position Paper. CoFI Bill.

address the challenges faced by insolvency practitioners. This study will also deal with the practical complications of the recent regulations and it will provide support to insolvency practitioners that are faced with the identification, tracing and realisation of crypto assets. The findings of this dissertation will contribute to a better understanding of how the South African insolvency regime can adapt to the developing presence of crypto assets. Before dealing with crypto assets within the insolvency regime and the complications they present, it is important to outline the nature of crypto assets and to provide an understanding of how crypto assets function in the real world. Chapter 2 of this dissertation will provide an overview of how crypto assets function and the various mechanisms that form part of the novel technologically based system.

## CHAPTER 2: AN OVERVIEW OF CRYPTO ASSETS AND BLOCKCHAIN TECHNOLOGY

### 2.1 Introduction

*“It is often said that there is nothing new under the sun. Nevertheless, now and again something truly unique appears, also in law, which causes challenges regarding how the law should deal with such a new phenomenon”.*<sup>46</sup>

Crypto assets and blockchain technology have seen a dramatic rise since its invention in 2008.<sup>47</sup> Electronic currency dates back to the 1980s, however, Bitcoin is said to be the first decentralised crypto asset that has successfully taken over trading across the world.<sup>48</sup> Crypto assets and blockchain have the potential to create massive fortunes for those who are willing to take a risk on technology, however, it is also seen as a tool to instigate fraud and as such the use thereof requires further regulation.<sup>49</sup>

The definition of crypto assets has been illustrated in Chapter 1<sup>50</sup> of this dissertation, however, for purposes of this chapter, it is important to understand how crypto assets function. The aim of this chapter is to provide a basic overview of how crypto assets function in a practical manner. The chapter will provide a high-level overview of blockchain technology and crypto asset mining. A distinction will be made between private and public keys. Finally, the risks of crypto assets will be outlined, with specific reference to the threat posed by crypto assets to the insolvency regime.

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<sup>46</sup> Eiselen “What to Do with Bitcoin and Blockchain” (2019) *THRHR* 632.

<sup>47</sup> Farell “An Analysis of the Cryptocurrency Industry” (2015) *Wharton Research Scholars* 1.

<sup>48</sup> Farell (2015) *Wharton Research Scholars* 2.

<sup>49</sup> Armstrong, Hyde, Thomas (eds) *Blockchain and Cryptocurrency* (2023) 9.

<sup>50</sup> Ch 1 par 1.1. Crypto assets are defined as “a digital representation of value that is not issued by a central bank, but is capable of being traded, transferred or stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, applies cryptographic techniques uses distributed ledger technology.”

By introduction, cryptocurrency is a virtual currency that acts as a medium of exchange.<sup>51</sup> Nakamoto created this form of exchange to completely remove any trusted third party or central authority and solely rely on peer-to-peer transactions supported by blockchain technology.<sup>52</sup> Cryptocurrencies depend on cryptography to control the invention of new units of a particular cryptocurrency and are used to verify transactions.<sup>53</sup> A unique feature of crypto assets is that the users use pseudonyms and the true identity of the purchaser or seller of crypto assets is unknown.<sup>54</sup>

## 2.2 Blockchain and Mining

Blockchain technology is an essential component of all virtual currencies.<sup>55</sup> Blockchain, in its easiest form, is seen as a 'digital form of a ledger book' on which all cryptocurrency transactions are tracked and recorded.<sup>56</sup> The manner in which blockchain functions is that the technology places a series of transactions into a block and after that, timestamps and incorporates each block in time order into a larger chain of all blocks in the 'ledger'.<sup>57</sup>

Proof of work protocols ensures that every block on the ledger is irreversibly connected and a complex puzzle is used to authenticate every single transaction, which subsequently grows the blockchain.<sup>58</sup> The proof of work and authentication process requires highly advanced computers, commonly known as "mining".<sup>59</sup> This is also commonly referred to as hashes.<sup>60</sup> Blockchain is, therefore, seen to be extremely secure,

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<sup>51</sup> Armstrong, Hyde, Thomas (2023) 17.

<sup>52</sup> Farrell (2015) *Wharton Research Scholars* 2.

<sup>53</sup> Armstrong, Hyde, Thomas (2023) 17.

<sup>54</sup> McDermott (2021) *Northwestern University Law Review* 1932.

<sup>55</sup> Sara & Gullifer (2019) *International Insolvency Review* 235.

<sup>56</sup> Babie, Brown, Catterwell, Giancaspro 2020 *University of Adelaide Law Research Paper* 3.

<sup>57</sup> Shawver (2021) *Boston College Law Review* 2022.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Omlor "Digitization of Money and Currency under German and EU Law" (2018) *Journal of South African Law* 615.

and irreversible and is a tamper-resistant database where people transact in a pseudonymous manner.<sup>61</sup>

Crypto assets like Bitcoin are created by Bitcoin miners.<sup>62</sup> Bitcoin mining can be described as a process of digging for Bitcoin. The process involves a unique software that creates a complex mathematical problem.<sup>63</sup> The mining process is seen as putting new Bitcoins into the digital market.<sup>64</sup> The individual or miner who has solved this complex problem is rewarded with Bitcoin or any other virtual currency, like Ethereum.<sup>65</sup> Bitcoin and Ethereum are seen to be the most successful virtual currencies in the world today.<sup>66</sup> In order to successfully exchange and access virtual currencies, the users make use of public and private keys to access and distribute crypto assets.

### 2.3 Private and Public Keys

To trade crypto assets, an individual is required to have a Bitcoin wallet.<sup>67</sup> A Bitcoin wallet is a “software application in which traders can view their Bitcoin holdings and send or receive Bitcoin”.<sup>68</sup> Every Bitcoin wallet contains an address, which performs a function similar to a financial institution's bank account number.<sup>69</sup> The Bitcoin wallet is controlled by two unique keys, a public and a private key.<sup>70</sup> As the name suggests, public keys are

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<sup>61</sup> Haentjies, De Graaf & Kokorin “The Failed Hopes of Disintermediation: Crypto-Custodian Insolvency, Legal Risks and How to Avoid Them” (2020) *Singapore Journal of Legal Studies* 529.

<sup>62</sup> Gulli “(Un)Sustainability of Bitcoin Mining” (2020) *Rutgers Computer and Technology Law Journal* 109.

<sup>63</sup> Omlor (2018) *Journal of South African Law* 615.

<sup>64</sup> Gulli (2020) *Rutgers Computer and Technology Law Journal* 109.

<sup>65</sup> Omlor (2018) *Journal of South African Law* 615.

<sup>66</sup> Tretina “Top 10 Cryptocurrencies of 2023” <https://www.forbes.com/advisor/investing/cryptocurrency/top-10-cryptocurrencies/> (accessed on 12 June 2023).

<sup>67</sup> Gulli (2020) *Rutgers Computer and Technology Law Journal* 110.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

used to send Bitcoin to a recipient and can be seen by anyone.<sup>71</sup> However, a private key is the recipient's password that is used to access, trade, or spend Bitcoin.<sup>72</sup>

The private key consists of random letters and numbers that are generated when an individual first purchases crypto assets.<sup>73</sup> Crypto assets cannot be accessed without a private key and no one can trade or access crypto assets, thereby making it obsolete and worthless to a third party without a private key.<sup>74</sup> A private key is so cryptic that no known technology can decode it unless the recipient thereof discloses the private key.<sup>75</sup> The consequences of losing or forgetting the private key are disastrous as no one will ever be able to recover the private key and ultimately the crypto asset.<sup>76</sup>

In addition to public and private keys, crypto assets make use of tokens which could be classified into three categories, namely, exchange or payment tokens, security tokens and utility tokens.<sup>77</sup> Exchange or payment tokens are used as a medium of payment, these tokens are used to pay or sell goods and services and this includes investment products.<sup>78</sup> Security tokens provide rights like ownership, which includes rights to claim repayment of a sum of money, shares or profits.<sup>79</sup> Lastly, utility tokens are tokens that are used to redeem access to specific products that are supplied through a distributed ledger technology platform.<sup>80</sup> Crypto assets are purchased for several reasons, however, trading (buying and selling) is the most significant function of crypto assets.<sup>81</sup>

Bitcoin is one of the most common types of crypto assets. Bitcoin is also recorded on a public ledger called the Bitcoin Blockchain and is held on a 'network of communicating

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<sup>71</sup> Gulli (2020) *Rutgers Computer and Technology Law Journal* 110.

<sup>72</sup> *Id.* Armstrong, Hyde, Thomas (2023) 12.

<sup>73</sup> Shawver (2021) *Boston College Law Review* 2023.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> IFWG Position Paper on Crypto Assets (11 June 2021) 15.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* 16.

nodes'.<sup>82</sup> It is said that every transaction can be traced back to 13 January 2009 at 18:15:05, as this was when this blockchain was first created.<sup>83</sup> Armstrong provides the following practical example:

*“To transfer a Bitcoin, Payee X sends a ‘hash’ (the existing chain of signatures in their possession) with their own (X’s) signature (private key) to Payee Z’s public key. This transaction then becomes the new hash. Payee Z signs this new hash with their private key when a new transaction takes place”.*<sup>84</sup>

In summary, crypto assets are decentralised and it does not involve processing by a third party, instead, this takes place on a distributed ledger, referred to as the blockchain ledger.<sup>85</sup> This means that the process of buying and selling crypto assets is regulated and overseen by the people who engage in the process hence it is referred to as peer-to-peer transactions. Further, individuals who make use of crypto assets and blockchain can be situated anywhere across the globe and the only real connection a virtual asset has to the real world is its property law connection to the owner of such assets.<sup>86</sup>

All transactions that take place on the blockchain ledger are entirely anonymous, which makes it challenging to regulate.<sup>87</sup> The process is even further complicated in that a completed transaction cannot be reversed and it is nearly impossible to recover a misdirected payment due to the absence of a central issuing authority.<sup>88</sup>

Since its invention in 2008, almost 16 years have passed and several jurisdictions across the world are still struggling with the legal classification of this invention. Crypto assets

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<sup>82</sup> Armstrong, Hyde, Thomas (2023) 17.

<sup>83</sup> *Id.*

<sup>84</sup> *Id* 18.

<sup>85</sup> Eiselen (2019) *THRHR* 634.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Omlor (2018) *Journal of South African Law* 615.

have taken the world by storm in that many people and entities now see it as a medium of exchange and as an investment vehicle, therefore, regulation is pivotal.<sup>89</sup>

## 2.4 The Risks of Crypto Assets

Crypto assets are, by their very nature, anonymous, volatile, and omnipresent. This creates a breathing ground for criminal activity and a lack of accountability.<sup>90</sup> The anonymity of crypto assets is so extreme that they are not connected with any personal information and a user is only identified through a random computer-generated address.<sup>91</sup> This level of anonymity allows for easier money laundering as there are no checks and balances in place to verify the source of funds. The mere fact that there is no central issuing authority further supports illicit activity and increases the risk,<sup>92</sup> when something goes wrong, there is no recourse for the victim or accountability for the wrongdoer.<sup>93</sup>

The irreversible nature of crypto assets is a stumbling block because once it has been used as a means of payment and data has been posted to the blockchain, no one can change it.<sup>94</sup> Therefore, users of crypto assets need to exercise extreme diligence and caution before trading or making payments for goods or services with crypto assets. Once an individual has become a victim of fraud, like instances that involve Ponzi schemes, there is no overarching authority to ensure protection against loss.

The risks associated with crypto assets are a global issue in that different people across the world can access the virtual platform, thereby resulting in jurisdictional and cross-

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<sup>89</sup> Shawver (2021) *Boston College Law Review* 2018.

<sup>90</sup> de Mink “Dangers Inherent in Bitcoin and Other Cryptocurrencies” (2018) *De Rebus* 33 available at <https://www.derebus.org.za/dangers-inherent-bitcoin-cryptocurrencies/> (accessed 16 July 2023).

<sup>91</sup> de Mink (2018) *De Rebus* 33.

<sup>92</sup> *Id.*

<sup>93</sup> IFWG Position Paper on Crypto Assets (11 June 2021) 9.

<sup>94</sup> de Mink (2018) *De Rebus* 34.

border issues.<sup>95</sup> The user of crypto assets can be located anywhere in the world and merely requires an electronic device to make use of the platform. However, several countries have heeded the call for regulation due to the risks identified above. Different countries have different regulations regarding crypto assets and the classification thereof.<sup>96</sup> This allows people to shop around and set up their crypto asset entities in countries that are most lenient in terms of regulation.

Japan is seen to be at the forefront of crypto asset regulation. Crypto assets have been regulated in Japan since 2017 by the Payment Service Act.<sup>97</sup> Chapter 3 of the Japanese Payment Services Act provides that “...no person may engage in the Virtual Currency Exchange Service unless the person is registered with the Prime Minister”.<sup>98</sup> The Japanese authorities have also characterised crypto assets as property,<sup>99</sup> however, in order for a business to use crypto assets, it must register with the competent local authority.<sup>100</sup> Japanese authorities have clearly taken a regulation-based approach regarding crypto assets, however, other jurisdictions have opted for a more liberal approach.

Switzerland, on the other hand, is one of the countries that have adopted a liberal approach to the regulation of crypto assets. Switzerland's regulatory authorities have classified crypto assets as a commodity.<sup>101</sup> The Swiss do not have any specific laws that relate to crypto assets; however, it is subject to tax and other money laundering

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<sup>95</sup> Armstrong, Hyde, Thomas (2023) 61.

<sup>96</sup> Armstrong, Hyde, Thomas (2023) 61.

<sup>97</sup> *Id* 69.

<sup>98</sup> Article 63-2 Payment Services Act (Act No. 59 of 2009). See English version available at <https://www.japaneselawtranslation.go.jp/en/laws/view/3078/en> (accessed 19 July 2023).

<sup>99</sup> Armstrong, Hyde, Thomas (2023) 70.

<sup>100</sup> *Id*.

<sup>101</sup> *Id* 71.

legislation.<sup>102</sup> These types of jurisdictions are often referred to as crypto havens and the Cayman Islands form part of this group.<sup>103</sup>

South Africa has recently developed a level of regulation by declaring crypto assets to be a financial product.<sup>104</sup> These developments, to a certain extent, provide for crypto asset regulation despite all the uncertainty that comes along with it.

## 2.5 Summation

This chapter dealt with the operational framework of crypto assets with a focus on blockchain technology, crypto asset mining and risks presented. Crypto assets have the ability to create financial fortunes for people however, the risk of fraud, money laundering and the lack of accountability emphasise the need for regulation. Crypto assets have unique characteristics that make regulation extremely difficult, these characteristics include the fact crypto assets are decentralised<sup>105</sup>, the users thereof are anonymous<sup>106</sup> and the crypto assets are extremely volatile<sup>107</sup> and irreversible.<sup>108</sup> This chapter also compares the global regulatory stances taken by countries like Japan that have implemented strict regulations requiring registration. In contrast countries like Switzerland and the Cayman Islands have crypto havens where regulation is far more lenient. South Africa has taken steps to regulate crypto assets as financial products and the next chapter will discuss the regulatory efforts introduced in South Africa as well as the effect thereof on the Insolvency regime.

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<sup>102</sup> *Id* 71 -72.

<sup>103</sup> See <https://getgoldenvisa.com/crypto-tax-free-countries> (accessed 16 July 2023).

<sup>104</sup> The Declaration.

<sup>105</sup> Farrell (2015) *Wharton Research Scholars* 2.

<sup>106</sup> McDermott (2021) *Northwestern University Law Review* 1932.

<sup>107</sup> Babie & Brown *et al* (2020) *University of Adelaide Law Research Paper* 3.

<sup>108</sup> de Mink (2018) *De Rebus*. 34.

## CHAPTER 3: CRYPTO ASSET REGULATIONS AND THE IMPACT ON INSOLVENT ESTATES

### 3.1 Introduction

This chapter will discuss the recent regulations that the FSCA has published regarding crypto assets. Focus will be placed on the Policy Document that has been published in support of the decision to declare crypto assets as financial products. This will be considered in conjunction with the COFI Bill and the FAIS Act. Finally, the chapter will conclude with a discussion on whether the recent regulations could be of assistance to an insolvency practitioner when he or she is faced with a company or insolvent debtor that holds crypto assets.

On 19 October 2022, the FSCA published a notice in the Government Gazette in terms of the FAIS Act.<sup>109</sup> The title of the notice is “Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act” (the Declaration).<sup>110</sup> The effect of the Declaration is that it has amended the definition of financial product in terms of the FAIS Act, to include crypto assets.

On 19 October 2022, the FSCA also published the Policy Document Supporting the Declaration of a Crypto Asset as a Financial Product under the Financial Advisory and Intermediary Services Act.<sup>111</sup> Regarding the Policy Document, the FSCA has specifically recorded that the Declaration aims to ensure that customers within the crypto asset environment are protected pending the finalisation of the broader development of crypto asset regulation, like the COFI Bill.<sup>112</sup>

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<sup>109</sup> The Declaration.

<sup>110</sup> The Declaration.

<sup>111</sup> FSCA Policy Document 2.

<sup>112</sup> *Id.*

The FSCA required that every Crypto Asset FSP should have applied for a license in terms of section 8 of the FAIS Act between 1 June 2023 and 30 November 2023.<sup>113</sup>

On 11 May 2023, the FSCA published Notice 25 of 2023 entitled ‘Exemption of Persons Rendering a Financial Service in Relation to Crypto Assets from Certain Requirements, 2023’<sup>114</sup> (the Exemption). This dissertation will only discuss the relevant exemptions to this subject matter. In terms of the Exemption, Crypto Asset FSPs are exempted from section 13 of the General Code of Conduct and Board Notice 123 of 2009. This Exemption provides that Crypto Asset FSPs’ and their key representatives are exempt from maintaining suitable guarantees or professional indemnity insurance cover.<sup>115</sup>

The Exemption also provides for the exclusion of Crypto Asset Supervised Representatives.<sup>116</sup> The Exemption defines a Crypto Asset Supervised Representative as “a representative of a Crypto Asset FSP who (a) renders financial services in relation to crypto assets (b) does not meet one or more of the competency requirements; and (c) renders financial services under supervision”.<sup>117</sup> The Exemption provides that if a supervised representative was not appointed as a representative of an FSP before publication of the Exemption, such person will be exempt from the regulatory examination requirements.<sup>118</sup> However, this exemption depends on the completion of a relevant examination within two years from the date of appointment of the supervised representative as a representative for providing financial services in relation to crypto assets.<sup>119</sup>

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<sup>113</sup> FSCA Policy Document 7.

<sup>114</sup> FSCA FAIS Notice 25 of 2023 – *Exemption of Persons Rendering a Financial Service in Relation to Crypto Assets from Certain Requirements* (11 May 2023). available at <https://www.fsca.co.za/Regulatory%20Frameworks/Pages/Notices.aspx> (accessed 20 August 2024).

<sup>115</sup> The Exemption 3.

<sup>116</sup> *Id* 3 – 4.

<sup>117</sup> *Id* 2.

<sup>118</sup> *Id* 3-4.

<sup>119</sup> *Id*.

Failure to adhere to the exemption requirements and conditions will automatically result in the Exemption no longer being applicable to such Crypto Asset FSP.<sup>120</sup>

Section 4(1) of the COFI Bill indicates that:

*“A financial institution that provides a financial product or a financial service is subject to this Act”.*<sup>121</sup>

The effect that the Declaration has on the COFI Bill is that crypto assets are now defined as a financial product and as such, this will include crypto assets. This brings crypto assets under the regulation of the COFI Bill. The COFI Bill, at the time of this dissertation, was not enacted, however, a discussion regarding the COFI Bill is included below.

### **3.2 The Policy Document**

The FSCA has regard to the threats and dangers posed by crypto assets to financial customers and it has adhered to the local and international calls for regulation.<sup>122</sup> In terms of the Policy Document, the FSCA has recorded that any person who as a regular feature of a business, renders financial services (including crypto assets) must be authorised as an FSP in terms of section 8 of the FAIS Act or be appointed as a representative of an authorised FSP in terms of section 13 of the FAIS Act.<sup>123</sup> Such persons must also comply with the FAIS Act's requirements and its subordinate legislation.<sup>124</sup>

The FSCA has further incorporated a term referred to as “Crypto Asset FSPs” into the Declaration.<sup>125</sup> As the name suggests, this person or entity is a registered financial services provider and primarily provides such financial services by using crypto assets.

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<sup>120</sup> The Exemption 4-5.

<sup>121</sup> S4(1) COFI Bill.

<sup>122</sup> The Policy Document 7.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id* 11.

The FSCA has performed an evaluation to determine whether the current set of regulations is fit for the registration and compliance of Crypto Asset FSPs.<sup>126</sup>

The FSCA documentation and policies that govern the registration are the FAIS Act, the General Code of Conduct for Authorised Financial Services Providers and Representatives, 2003 (the General Code), and the Determination of Fit and Proper Requirements for Financial Services Providers, 2017 (Fit and Proper Requirements).<sup>127</sup> The FSCA has looked at each of these documents to establish readiness to regulate Crypto Asset FSPs.

### 3.2.1 The FAIS Act

Chapters 1, 3 and 5 are the only provisions of the FAIS Act that apply to FSPs.<sup>128</sup> Chapter 1 of the FAIS Act deals with the authorisation and licensing framework for FSPs, Chapter 3 deals with representatives and Chapter 5 sets out the duties of authorised FSPs.<sup>129</sup> The FSCA is of the view that it will not be necessary to amend any of these provisions of the FAIS Act in order to incorporate specific reference to Crypto Asset FSPs and did not deem it necessary to have any specific exemptions of Crypto Asset FSPs from FAIS Act.

Section 8(1) of the FAIS Act requires that FSPs must apply for authorization with the FSCA.<sup>130</sup> The FSCA has published a license application form that is used to assess whether an applicant meets the requirements for registration. In the context of Crypto Asset FSPs, the FSCA has indicated that the information in the license application forms is generic and does not distinguish between the financial products (i.e., ordinary financial products vs crypto assets).<sup>131</sup>

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<sup>126</sup> The Policy Document 11.

<sup>127</sup> *Id* 10.

<sup>128</sup> *Id* 11.

<sup>129</sup> *Id*.

<sup>130</sup> *Id*. S8(1) FAIS Act.

<sup>131</sup> The Policy Document 11.

The FSCA also confirms that the information requested in the application forms (forms FSP 1 – FSP 13 containing information regarding the business activities, company ownership, financial soundness and external auditors) are relevant and could be applied to Crypto Asset FSPs as is. There are, however, specific forms (forms FSP 2, FSP 4C, FSP 4D and FSP 5) that must be amended to make provisions for a crypto asset product category.<sup>132</sup>

### 3.2.2 General Code

The General Code is of particular importance to this dissertation insofar as it relates to Crypto Asset FSPs. The General Code does not apply to any specific product but to the conduct of companies and businesses that provide these products to their customers.<sup>133</sup> The General Code requires that when providing general financial services, it be honest, fair, and in the interests of clients, with the integrity of the financial services industry.<sup>134</sup>

Crypto Asset FSPs must also ensure that they comply with the advertising requirements in the General Code. This will assist with mitigating false advertising regarding crypto assets, such as unrealistic returns on investment.<sup>135</sup> The General Code also provides for a proper risk management system in that FSPs need to implement proper risk management procedures and internal controls, which is critical for a Crypto Asset FSP.<sup>136</sup>

Section 10 of the General Code outlines the requirements for FSPs who receive and hold financial products or funds on behalf of their clients.<sup>137</sup> In particular, section 10(1) provides that FSPs should account to their clients adequately and promptly, section 10(1)(c) provides that FSPs should take reasonable steps to ensure that the financial products or

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<sup>132</sup> *Id.*

<sup>133</sup> *Id* 12.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id* 12 – 13.

<sup>137</sup> The Policy Document 13.

funds are adequately safeguarded and section 10(1)(e) provides that FSPs should ensure that "at all times such financial products are dealt with strictly by the mandate given to the provider".<sup>138</sup> Finally, FSPs need to ensure that the client's financial products and funds are readily discernible from the private assets or funds of the provider.<sup>139</sup> This would ensure that a customer's funds are kept separate from those of other customers and the FSP itself.

The FSCA has indicated in the Policy Document that Crypto Asset FSPs are placed in a position where they hold property and funds on behalf of their customers as "trust property".<sup>140</sup> This would require a Crypto Asset FSP to hold or keep a crypto asset in safe custody and ensure that the trust property is invested in a manner as directed by the customer.<sup>141</sup>

The Financial Institutions (Protection of Funds) Act 28 of 2001 (hereafter FI Act) would also find application. Section 4(1) of the FI Act provides that a financial institution that administers trust property under an agreement may not cause such trust property to be invested otherwise than in the manner agreed.<sup>142</sup> Section 4(4) of the FI Act provides that a financial institution must keep trust property separate from other property belonging to the financial institution and must clearly record this in its books and records.<sup>143</sup> Section 4(5) of the FI Act provides that the property or funds invested by a client in no way form part of the assets or funds of the financial institution, thereby implying that the funds invested by customers will always belong to that customer.<sup>144</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* 14.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* S4(1) FI Act.

<sup>143</sup> *Id.* S4(4) FI Act.

<sup>144</sup> The Policy Document 14. S4(5) FI Act.

Finally, section 19(3) of the FAIS Act provides that all funds invested by clients need to be accounted for by an auditor who performs an audit that confirms the amount of money and financial products held by the FSP on behalf of clients and well as such funds and financial products that were kept separate from those of the business of the FSP.<sup>145</sup> Section 19(3) of the FAIS Act will automatically require Crypto Asset FSPs to ensure that funds held on behalf of their customers are earmarked to purchase crypto assets on behalf of their client to ensure that customers are providing and controlling a custodial wallet.<sup>146</sup>

### 3.2.3 Fit and Proper Requirements

The FSCA has acknowledged that the guidance laid down in the Fit and Proper requirements may not be applicable to Crypto Asset FSPs in its entirety.<sup>147</sup> There are certain exemptions that will not apply to Crypto Asset FSPs, however, the applicable general principles are honesty, integrity and good standing.<sup>148</sup>

The evaluation conducted by the FSCA in the Policy Document is welcomed and is a step in the right direction. However, the question that remains is whether this is enough to regulate crypto assets in South Africa. The COFI Bill is the draft legislation that seeks to regulate and streamline all existing regulations within the financial sector.<sup>149</sup> Although the COFI Bill is not in operation yet, it does offer a degree of future regulation.

### 3.3 The COFI Bill

The objective of the COFI Bill is to establish legislation in a consolidated and comprehensive manner that regulates the conduct of financial institutions.<sup>150</sup> The

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id* 15.

<sup>148</sup> *Id.*

<sup>149</sup> S3(1) COFI Bill.

<sup>150</sup> *Id.*

essence of the COFI Bill focuses on “treating customers fairly” and uniformly regulating the conduct of financial institutions.<sup>151</sup>

Section 9(1) of the COFI Bill provides that a person or entity may not provide a financial product (like a collective investment scheme) unless such person or entity has been provided with a license to do so.<sup>152</sup> The licenses provided to financial institutions regarding the COFI Bill are issued in terms of specific licensing categories stipulated in Schedule 1 of the COFI Bill.<sup>153</sup> A financial institution can, therefore, only conduct specific activities in terms of the license issued by the regulator.<sup>154</sup>

The effect of the licensing requirements is that a financial institution carrying on one or more activities listed in Schedule 1 will have to apply for a single license that authorizes various sub-activities thereunder. This means that a financial institution can only carry out or provide a financial service that is linked to a specific financial product for a specific set of customers.<sup>155</sup>

The obligations placed on financial institutions that have successfully obtained a license in terms of the COFI Bill include the appointment of a qualified and competent representative that meets the prescribed standards of a fit and proper person<sup>156</sup> such as honesty, integrity and good standing.<sup>157</sup> In addition, section 26(1) of the COFI provides that when financial institutions provide financial products and services, the representative must ensure that the products and services are appropriate for the targeted customers,

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<sup>151</sup> Preamble of COFI Bill.

<sup>152</sup> S9(1) COFI Bill.

<sup>153</sup> S9(2) COFI Bill.

<sup>154</sup> *Id.*

<sup>155</sup> Van Rensburg & Lebelo “Conduct of Financial Institutions Bill” published by Werksmans Attorneys (December 2019) Legal Brief available at [https://www.werksmans.com/wp-content/uploads/2019/12/18715\\_Werksmans\\_Legal\\_Brief\\_03\\_FA-1.pdf](https://www.werksmans.com/wp-content/uploads/2019/12/18715_Werksmans_Legal_Brief_03_FA-1.pdf) (accessed 22 August 2024).

<sup>156</sup> S13(1)(b) COFI Bill.

<sup>157</sup> S1 *id.*

are provided as objectively as possible and are provided in a manner that supports the delivery of appropriate financial products.<sup>158</sup>

Section 26(2) of the COFI Bill provides that a financial institution must ensure that it provides financial products and services to its customers that perform as that institution had led its customers to expect through the information and advertising it provides to its customers.<sup>159</sup> Section 26(3) of the COFI Bill provides that if a financial institution has identified circumstances that result in a material risk of a financial product or service as being unsuitable for its targeted customers or if the financial product or service is not performing as the customers were led to expect, the financial institution must take remediation action to reasonably mitigate the risk.<sup>160</sup>

The COFI Bill also regulates the principles that financial institutions should follow in terms of advertising and disclosure. Section 29(1) of the COFI Bill provides that a financial institution must ensure that financial products and services are marketed in a "clear, fair, unambiguous and not misleading or fraudulent" way.<sup>161</sup> Subsection 2 provides that a customer must be provided and accurate information and be kept appropriately informed for that customer to make informed decisions regarding the financial product or service.<sup>162</sup>

Section 31 of the COFI Bill relates to Disclosure. Section 31(1) of the COFI Bill provides that before, during and after the conclusion of a contract for the provision of a financial product or service, a financial institution must make a customer aware of all relevant facts that could be expected to influence the customer's decisions regarding the financial product or service.<sup>163</sup> The information that the financial institution should provide should

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<sup>158</sup> S26(1) *id.*

<sup>159</sup> S26(2) *id.*

<sup>160</sup> S26(3) *id.*

<sup>161</sup> S29(1) *id.*

<sup>162</sup> S29(2) *id.*

<sup>163</sup> S31(1) *id.*

relate to the benefits and risks of the product,<sup>164</sup> the costs to the customer,<sup>165</sup> the contractual obligations of the customer and the financial institution,<sup>166</sup> the consequences for each party in the event of a breach of contract<sup>167</sup> and the recourse options of the customer in the event of a dispute.<sup>168</sup>

Finally, section 31(2) of the COFI Bill provides that a financial institution must make disclosures to its customers by using plain and unambiguous language that is appropriate for the target market,<sup>169</sup> provide adequate, appropriate and timely information,<sup>170</sup> information that is factually correct and not misleading,<sup>171</sup> promote understanding of the financial service being provided,<sup>172</sup> promote a comparison of financial products and services<sup>173</sup> and information that considers the nature and complexity of the financial product and the reasonable assumed level of knowledge of the targeted financial customer.<sup>174</sup>

The current draft of the COFI does not refer to or envisage crypto assets, however, the FSCA has published a Crypto Assets Market Study after it, declaring crypto assets a financial product.<sup>175</sup> The FSCA has indicated that any individual or business that provides financial advice or intermediary services by means of crypto assets, for example, a

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<sup>164</sup> S31(1)(a) *id.*

<sup>165</sup> S31(1)(b) *id.*

<sup>166</sup> S31(1)(c) *id.*

<sup>167</sup> S31(1)(d) *id.*

<sup>168</sup> S31(1)(e) *id.*

<sup>169</sup> S31(2)(a) *id.*

<sup>170</sup> S31(2)(b) *id.*

<sup>171</sup> S31(2)(c) *id.*

<sup>172</sup> S31(2)(d) *id.*

<sup>173</sup> S31(2)(e) *id.*

<sup>174</sup> S31 (2)(f) *id.*

<sup>175</sup> FSCA “South Africa’s Crypto Assets Market Study”

<https://www.fsc.co.za/Documents/Crypto%20Market%20Study.pdf> (accessed 26 August 2024).

“broker” or “advisor”, will have to register as a financial service provider.<sup>176</sup> This is what the FSCA views as regulating financial services regarding crypto assets.<sup>177</sup> The FSCA has acknowledged that the Declaration is not enough to properly regulate and deal with the risks posed by crypto assets.<sup>178</sup> There remains a need to develop bespoke and specific regulations that are fit for dealing with the risks of crypto assets in South Africa.<sup>179</sup>

The FSCA, in its market study, has indicated that further regulation regarding crypto assets will be given effect through the COFI Bill and financial services related to crypto assets will likely be included in the licensing activities required in terms of the COFI Bill.<sup>180</sup>

It is not certain when the COFI Bill would come into operation as it should still be amended to include crypto assets, however, at the time of preparing this dissertation, there has not been any movement and/or amendments to the COFI Bill to include crypto assets and/or to define it as a financial activity in terms of the COFI Bill.

Of particular interest, on 30 November 2023, the FSCA published a press release that indicated that as of 30 November 2023, 128 crypto asset FSPs had applied to be licensed because of the publication of the Declaration.<sup>181</sup>

### **3.4 The Impact on the Insolvency Regime**

An in-depth discussion and analysis will be outlined in Chapters 4 and 5 of this dissertation regarding the legal classification of crypto assets and the effect thereof on

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<sup>176</sup> FSCA “South Africa’s Crypto Assets Market Study” 4.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* 9.

<sup>181</sup> FSCA Press Release – “Findings of Crypto Asset Market Study” (30 November 2023) available at [https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20publishes%20Crypto%20Assets%20Market%20Study\\_30%20November%202023.pdf?ref=mariblock.com](https://www.fsca.co.za/News%20Documents/FSCA%20Press%20Release%20-%20FSCA%20publishes%20Crypto%20Assets%20Market%20Study_30%20November%202023.pdf?ref=mariblock.com) (accessed 26 August 2024).

the duties of insolvency practitioners. This chapter will only discuss the general effect that the Declaration, Policy Document, FAIS Act and COFI Bill have on the insolvency regime.

The FSCA has declared crypto assets to be a financial product under the ambit of the FAIS Act.<sup>182</sup> The effect of this is that companies who provide financial services such as advice or intermediary services by using crypto assets will have to be registered as financial services providers under the FAIS Act.<sup>183</sup> The Declaration has the effect that crypto asset FSPs are required to deal with their customers in an honest, fair and open manner and with the utmost integrity. This would mean crypto asset FSPs are no longer unregulated and must deal with their customers in an open and fair manner. Crypto asset FSPs cannot conceal anything from their customers. The Declaration protects customers against fraud in that crypto asset FSPs are now required to conduct proper risk management and internal controls and this will also minimise the risk of hacking and theft.

Crypto asset FSPs are also required to have proper accounting and auditing records in place, and they are required to keep customers' assets and investments separate from their own. Intermediaries would therefore be required to keep their customers' crypto assets separate from their own assets at all times.

In order to understand the implication of the Declaration and its effect on the Insolvency Act, one must consider the definition of a financial product in the FAIS Act to determine whether this falls within the scope Insolvency Act. The FAIS Act defines financial products as securities and instruments including (a) shares in a company other than a "share block company", (b) debentures and securitised debt, (c) any money market instrument, any warrant, certificate and other instrument acknowledging conferring or creating rights to

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<sup>182</sup> Tibane and Kern "South Africa: Decalaration of Crypto Assets as a Financial Product" (20 October 2022). [https://bowmanslaw.com/insights/south-africa-declaration-of-crypto-assets-as-a-financial-product/#:~:text=The%20effect%20of%20the%20Crypto,financial%20services%20provider%20\(FSP\)%20under](https://bowmanslaw.com/insights/south-africa-declaration-of-crypto-assets-as-a-financial-product/#:~:text=The%20effect%20of%20the%20Crypto,financial%20services%20provider%20(FSP)%20under) (accessed 1 October 2024)

<sup>183</sup> Tibane and Kern (20 October 2022) (accessed 1 October 2024).

subscribe to, acquire or dispose of, or convert securities and instruments and (d) any securities defined in the Securities Services Act.<sup>184</sup>

The definition of a financial product also includes a participatory interest in one or more collective schemes and includes long or short-term insurance contracts or policies.<sup>185</sup> Notably, financial products also include foreign currency-denominated investment instruments, such as foreign currency deposits.<sup>186</sup> The definition of a financial is very wide and items like shares, debentures and investments also fall within the definition of property in the Insolvency Act.

Section 2 of the Insolvency Act defines property as movable or immovable property situated within the Republic of South Africa and includes the contingent interests in property other than the contingent interests of a *fidei commissary* heir or legatee.<sup>187</sup> Property, according to the Insolvency Act, includes intangible movable property such as investments, shares and securities.<sup>188</sup> Such intangible property forms part of the insolvent estate.<sup>189</sup> In the circumstances, the classification of crypto assets as financial products in terms of the FAIS Act brings these products directly under the ambit of the Insolvency Act. Since shares, debentures and investments are financial products that fall within the definition of property in the Insolvency Act, crypto assets held by crypto asset FSPs would similarly constitute property if a liquidator has been appointed to wind up a crypto asset exchange company.<sup>190</sup>

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<sup>184</sup> S1(1) FAIS Act.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> S2 Insolvency Act.

<sup>188</sup> Smith, Van der Linde, Calitz (2022) 86. Kunst, Boraïne and Brudette “Meskin’s Insolvency Law” (2024) Chapter 5.1.

<sup>189</sup> *Id.*

<sup>190</sup> Kunst, Boraïne and Brudette (1997) Chapter 5.1 discusses the *Bester N.o v Mirror Trading (in liquidation) MTI* and discusses the decision by the Western Cape High Court where the court held that crypto assets are movable property and crypto assets the characteristics of a thing,

In support of the above submission, the definition of crypto assets as outlined in chapter 1<sup>191</sup> states that a crypto asset is a digital representation of value not issued by a central bank, but is capable of being transferred and stored electronically for purposes of payment, investment and other forms of utility. The FSCA, in defining the term crypto asset suggested that such assets could be used for purposes of making payments or investments, thus bringing them within the purview of the Insolvency Act.

The effect that the Declaration has on insolvency law is that crypto assets will be treated in the same manner as any other ordinary financial product such as an investment, share or security. Section 20(1) of the Insolvency Act provides that an insolvent is divested of his assets upon the date of sequestration.<sup>192</sup> The insolvent's property vests with the Master until a trustee is appointed, thereafter, the insolvent estate vests in the trustee or liquidator.<sup>193</sup>

The registration of crypto asset FSPs makes it easier for insolvency practitioners to locate and preserve crypto assets by contacting either the regulator or the intermediary through which the crypto asset is held. This process of investigation would be the same for any other "ordinary" share or investment an insolvent holds at a financial institution. The accounting and auditing records could also assist insolvency practitioners who have either been appointed as the liquidator of an intermediary company (a crypto asset FSP) in ascertaining the whereabouts of crypto assets and the regulations could assist an insolvency practitioner who has been appointed as a trustee or liquidator of a person or company holding crypto assets via a crypto asset FSP.

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incorporeal, intangible, fungible, divisible and movable. A detailed discussion regarding the *MTI* case is included in Chapter 4 of this dissertation.

<sup>191</sup> Ch 1, par 1.1.

<sup>192</sup> S20(1) Insolvency Act. Evans and Steyn "Property in Insolvent Estates – *Edkins v Registrar of Deeds, Fourie v Edkins and Motala v Moller*" (2014) *PER* 2746.

<sup>193</sup> S20(1) Insolvency Act. Evans and Steyn (2014) *PER* 2746.

The difficulty, however, is that crypto assets are not legal tender, and the legal classification thereof remains unclear.<sup>194</sup> Further, crypto assets that are held privately by companies and individuals who have traded on a peer-to-peer basis fall outside of the ambit of the Declaration and still present several challenges for insolvency practitioners. A classic example of this would be when an insolvent debtor or liquidated company holds a cryptographic private key and they are being uncooperative in providing the key to the insolvency practitioner thereby depriving the insolvency practitioner of to access the asset. Alternatively, when the crypto asset has been disposed of and the insolvency practitioner has no means of reversing the asset. These issues are dealt with in detail in chapter 5 of this dissertation.<sup>195</sup>

### 3.5 Summation

This chapter has explored the recent regulatory developments published by the FSCA regarding crypto assets, particular reference is made to the fact that the FSCA has declared crypto assets as financial products under the FAIS Act.<sup>196</sup> The Policy Document has also provided important guidance on how the Declaration would align with the broader financial regulatory framework.<sup>197</sup> This chapter also provided a high-level overview of the proposed CoFI Bill and its effects on the financial regulations concerning crypto assets.<sup>198</sup> In addition, this chapter detailed the interplay between the definition of crypto assets in conjunction with the definition of a financial product and a submission has been made that this definition aligns with the property definition in terms of the Insolvency Act.<sup>199</sup>

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<sup>194</sup> Williams and Anley “Crypto Assets as Regulated Financial Products” (12 April 2023) available at <https://www.golegal.co.za/crypto-asset-regulated/> (accessed 1 October 2024).

<sup>195</sup> Ch 5, par 5.4

<sup>196</sup> The Declaration.

<sup>197</sup> Ch 3, par 3.2.

<sup>198</sup> Ch 3, par 3.3.

<sup>199</sup> Ch 3, par 3.4.

It has been highlighted how crypto assets, now classified as financial products could assist insolvency practitioners.<sup>200</sup> The regulations do provide for a framework of regulation by ensuring better protection for customers and enhancing the traceability and preservation of crypto assets that are held by or through crypto asset FSPs.<sup>201</sup> However, challenges remain, particularly with peer-to-peer trading as this has not been addressed by the current regulations. In addition, the regulations have not explicitly classified crypto assets as property or currency and insolvency practitioners have looked to the Courts for guidance on how to classify crypto assets in an insolvent estate. The next chapter of this dissertation will examine whether crypto assets should be regarded as property or currency in an insolvent estate and will also discuss the most recent judgment by the Western Cape High Court where the court grappled with the interplay of crypto assets and insolvency law.

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

## CHAPTER 4: THE LEGAL NATURE OF CRYPTO ASSETS

### 4.1 Introduction

It has been established that crypto assets are classified as financial products in South Africa. This is of much assistance to insolvency practitioners who are tasked with dealing with crypto assets held by a crypto asset FSP on behalf of an insolvent debtor or an insolvent company. The Declaration would also assist an insolvency practitioner when tasked with winding up a crypto exchange company because these entities are required to be registered as financial service providers. Crypto assets have, however, not been classified as property or money. The classification of a crypto asset is essential as an insolvency practitioner must ensure that the crypto assets are eventually disposed of for the benefit of the general body of creditors in an insolvent estate.<sup>202</sup>

This chapter will consider whether crypto assets could be classified as currency with a focus on the developments in Europe and the United States. This chapter will also consider whether crypto assets should be classified as property for purposes of the Insolvency Act. Finally, a detailed discussion will be outlined regarding the decision of the Western Cape High Court that dealt with the interplay of crypto assets and the insolvent estate.

### 4.2 Crypto Assets as Currency

The INSOL International Special Report has defined currency as “a medium of exchange and fiat money is currency that has been declared by a government as legal tender”.<sup>203</sup>

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<sup>202</sup> INSOL International Special Report “Cryptocurrency and its impact on insolvency and restructuring” May 2019 (“INSOL International Special Report”) [https://www.studocu.com/en-za/document/university-of-johannesburg/law-of-insolvency/special-report-cryptocurrency-29-may-2019-final/32429448?utm\\_campaign=shared-document&utm\\_source=studocu-document&utm\\_medium=social\\_sharing&utm\\_content=special-report-cryptocurrency-29-may-2019-final](https://www.studocu.com/en-za/document/university-of-johannesburg/law-of-insolvency/special-report-cryptocurrency-29-may-2019-final/32429448?utm_campaign=shared-document&utm_source=studocu-document&utm_medium=social_sharing&utm_content=special-report-cryptocurrency-29-may-2019-final) (accessed on 27 September 2024) 8.

<sup>203</sup> INSOL International Special Report 8.

In South Africa, fiat currency is known as the Rand. The Rand is accepted as legal tender and is like the Dollar being considered as legal tender in the United States of America. Legal tender is a means used in a legal system to meet a financial obligation, and for crypto assets to be considered legal tender, they must be capable of being used to meet a financial obligation.<sup>204</sup>

There are certain jurisdictions that have been very wary of letting go of their traditional fiat currency. When the Euro was introduced, articles 10 and 11 of the Council Regulation No 974/98 declared that the only lawful currency within the Eurozone is the Euro.<sup>205</sup> Thereby eliminating the possibility of crypto assets ever being classified as currency within the Eurozone.<sup>206</sup> In a similar breath, the South African regulator has carefully chosen to label crypto assets as a financial product.

On the other hand, the United States has not outrightly declared crypto assets as currency, however, within the criminal and civil sectors, the courts have treated Bitcoin as something similar to money.<sup>207</sup> In the case of *Securities Exchange Commission v Shavers*<sup>208</sup>, the defendant had enticed lenders to invest in Bitcoin-related activities.<sup>209</sup> The defendant made the argument that Bitcoin is not money and it is not part of anything regulated by the United States and that all investments that were made to the defendant were with Bitcoin and not US Dollars.<sup>210</sup> The plaintiff in this matter argued that the Bitcoin investments should be investment contracts and notes and as such it should be declared as securities.<sup>211</sup>

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<sup>204</sup> *Id* 9.

<sup>205</sup> *Id* 9.

<sup>206</sup> *Id*.

<sup>207</sup> *Id*.

<sup>208</sup> *Securities and Exchange Commission v. Trendon T Shavers and Bitcoin Savings and Trust Case* No. 4:2013cv00416 United States District Court – Eastern District of Texas Sherman Division (6 August 2013) (hereafter *Shavers case*).

<sup>209</sup> *Shavers case* 1.

<sup>210</sup> *Id* 2.

<sup>211</sup> *Id* 3.

In the *Shavers* case, the court held that the term ‘security’ is defined as “any note, stock, treasury stock, security future, security-based swap, bond...[or] investment contract.”<sup>212</sup> The court held that an investment involves an investment of money, common enterprise, with the exception that the funds and profits are derived through the efforts of a third party.<sup>213</sup> The court held that it is clear that a Bitcoin can be used to purchase goods or services and as such, it can be used as money.<sup>214</sup> The only limit of Bitcoin is its geographical location, which allows it to be accepted as currency, however, Bitcoin can be exchanged for fiat currency such as the US Dollar, Euro, Yen, and Yuan.<sup>215</sup> In the case of *United States of America v Ross William Ulbricht* the court also held that Bitcoin is considered money and is a medium of exchange.<sup>216</sup>

It is clear from the aforesaid that the courts in the United States have taken a more liberal approach to classifying crypto assets in that crypto assets were classified as money and/or currency. This approach is different from the position in South Africa; as will be seen in the case of *Bester N.O and Five Others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI*<sup>217</sup> as discussed below.

### 4.3 Crypto Assets as Property

Section 2 of the Insolvency Act defines property as either movable or immovable property situated within South Africa, this property includes contingent interests in property other than the contingent interests of the *fidei commissary* heir.<sup>218</sup> Property includes immovable

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *United States of America v Ross William Ulbricht* 31 F. Supp. 3d 540 (S.D.N.Y. 2014).

<sup>217</sup> *Bester N.O and Five Others v Mirror Trading International (Pty) Ltd (in liquidation) t/a MTI* 2024 (1) SA 112 (WCC) (26 April 2023) (hereafter *MTI*).

<sup>218</sup> S1 Insolvency Act. Smith, Van der Linde, Calitz (2022) 86.

and movable property, whether tangible or intangible.<sup>219</sup> Therefore, the South African insolvency regime recognises property as being intangible, such as book debts or an investment policy. This could include a crypto asset as a financial product.

Property within private law has two meanings, the first the right in a legal object and the second the object to which that right relates.<sup>220</sup> A right is seen as a claim that a person has against another person in relation to a legal object, this is known as property in the sense of rights.<sup>221</sup> Property, as it relates to objects, was initially limited to corporeal things, however, property now includes incorporeals and private law patrimonial objects (like incorporeals).<sup>222</sup> Corporeal things are tangible while intangible things, such as rights are incorporeal.<sup>223</sup> Examples of incorporeals are real rights, personal rights and immaterial property rights.<sup>224</sup> In the circumstances, an insolvent would have a real or personal right in stocks and shares that he or she has acquired.

Property and ownership go hand-in-hand and to exert ownership over property, an individual was, historically, required to be in possession of such property under the common law.<sup>225</sup> The law has, however, evolved to recognise that a person in possession is no longer the only means of proving ownership. Intangible property, such as a right to institute legal proceedings is a personal right that one person has against another and is seen as an incorporeal property although not physical in nature.<sup>226</sup> Crypto assets are intangible in nature as they do not have a physical form and cannot be possessed.<sup>227</sup>

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<sup>219</sup> *Id.*

<sup>220</sup> Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's: The Law of Property* (2019) par 2.1.

<sup>221</sup> Muller, Brits, Pienaar and Boggenpoel (2019) par 2.2.

<sup>222</sup> *Id* par 2.3.

<sup>223</sup> *Id* par 3.3.2.1.

<sup>224</sup> *Id* par 3.3.2.1.

<sup>225</sup> Eiselen "What to Do with Bitcoin and Blockchain" (2019) *THRHR* 632. Watts & Low (2023) 1.

<sup>226</sup> Muller, Brits, Pienaar and Boggenpoel (2019) par 2.4.1.1.

<sup>227</sup> Udofia (2022) 2.

Therefore, exerting or proving ownership over crypto assets presents its own challenges.<sup>228</sup>

The only way the holder of crypto assets can exert his or her ownership is by having possession of the private cryptographic key. This would allow the holder of the private key to have undisturbed use of the crypto asset. The UK Jurisdiction Taskforce published a report on 18 November 2019 titled “Legal Statement of Crypto Assets and Smart Contracts”.<sup>229</sup> The UK Jurisdiction Taskforce came to the conclusion that crypto assets have all the legal characteristics of property and is property according to the English legal principles.<sup>230</sup> The reasons for this conclusion was that there are special features of some crypto assets, such as ‘intangibility, cryptographic authentication, use of a distributed ledger transaction, decentralisation, and rule by consensus’ this does not eliminate crypto assets from being considered intangible property.<sup>231</sup> The United Kingdom is therefore one of the jurisdictions that consider crypto assets as intangible property.<sup>232</sup>

In the United Kingdom, personal property is classified into a ‘Chose in possession’ and ‘Chose in action’.<sup>233</sup> A ‘Chose in possession’ includes instances where a person can take actual physical control over property (i.e. a vehicle) and a ‘Chose in action’ refers to instances where a person obtains property by having a right of legal action (i.e. incorporeal rights).<sup>234</sup> In the case of *AA v Persons Unknown* the English court held that crypto assets are special kinds of incorporeal assets and do not fall squarely within the

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<sup>228</sup> Naidoo (2020) 15.

<sup>229</sup> Sir Geoffrey Vos, Chancellor of the High Court “The Launch of the Legal Statement on the Status of Cryptoassets and Smart Contracts” (18 November 2018) available at [https://www.judiciary.uk/wp-content/uploads/2019/11/LegalStatementLaunch.GV\\_.2-1.pdf](https://www.judiciary.uk/wp-content/uploads/2019/11/LegalStatementLaunch.GV_.2-1.pdf) (accessed 13 November 2024)

<sup>230</sup> Sir Geoffery Vos (18 November 2018) 3.

<sup>231</sup> *Id*; Cone, Bjorklund and Dyekman “Digital Assets and Property Rights in Insolvency” (2021) *Trusts & Trustees* 407.

<sup>232</sup> Cone, Bjorklund and Dyekamn (2021) *Trusts Trustees* 407.

<sup>233</sup> Watts & Low (2023) 5.

<sup>234</sup> *Id*.

‘Chose in action’ category.<sup>235</sup> The court concluded that Bitcoin constitutes property and the owner thereof was entitled to reclaim the crypto assets due to a cyber-attack.<sup>236</sup>

In the case of *Robertson v Persons Unknown* the owner of Bitcoin was hacked, the court held that Bitcoin is a “hybrid virtual ‘Chose in possession’”.<sup>237</sup> The court was of the view that incorporeal property has the characteristics of ‘Chose in possession’ and essentially concluded that Bitcoin constituted property.<sup>238</sup>

#### 4.4 The *MTI* Case

MTI was placed under final liquidation on 30 June 2021 by the Western Cape High Court.<sup>239</sup> The joint final liquidators of MTI sought an order to the effect that the business model of MTI was an unlawful Ponzi scheme and that all the agreements concluded between the investors and MTI be declared null and void.<sup>240</sup> Of particular interest, the liquidators sought an order exercising their clawback powers by declaring that all the dispositions of payments by way of fiat currency or Bitcoin made to investors be declared as a disposition without value in terms, as defined in section 2, read with section 26(1) of the Insolvency Act.<sup>241</sup> The joint liquidators of MTI also sought an order that the payments made to investors in fiat currency or Bitcoin be dispositions that had the effect of preferring one or more of MTI’s creditors above others as defined in terms of section 2, read with section 29(1) of the Insolvency Act.<sup>242</sup>

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<sup>235</sup> Naidoo (2020) 19.

<sup>236</sup> *Id.*

<sup>237</sup> Watts & Low (2023) 19.

<sup>238</sup> *Id.*

<sup>239</sup> *Bester N.O v Mirror Trading International (Pty) Ltd (in liquidation)* par 17.

<sup>240</sup> *Id* par 1.

<sup>241</sup> *Id* par 1.

<sup>242</sup> *Id.*

MTI's business was an unlawful Ponzi scheme<sup>243</sup> that was founded by the sole director, Mr Steynberg, in April 2019.<sup>244</sup> The business of MTI was described as an internet-based cryptocurrency club and the members of the club benefit from Bitcoin that grows through forex trading through a registered and regulated broker.<sup>245</sup> The FSCA eventually conducted an in-depth report on the legality of MTI's business and found that MTI operated a massive unlawful investment scheme in breach of the financial sector laws.<sup>246</sup> The FSCA found that the business operated in contravention of the FAIS Act and the investments made by the investors of MTI were misappropriated by the sole director.<sup>247</sup>

Amidst the investigations conducted by the FSCA, the sole director, Mr Steynberg went missing on or about 14 December 2020 while he was processing withdrawal requests from the MTI investors.<sup>248</sup> Mr Steynberg was eventually arrested during January 2020 in Brazil and his personal estate was finally sequestered in April 2021.<sup>249</sup>

The main opposition to the declaratory relief by respondents in the application was that all payments that were made to MTI by its investors were by way of transferring cryptocurrency in the form of Bitcoin. One of the submissions made by the respondents was that Bitcoin is not regulated by South African law and it does not amount to 'property' in terms of the Insolvency Act.<sup>250</sup>

Thus, one of the legal questions that the court had to consider was whether Bitcoin fell within the definition of 'property' as defined in section 2 of the Insolvency Act and whether the court has jurisdiction in respect of cryptocurrency.<sup>251</sup> Firstly, the court considered the

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<sup>243</sup> *Id* par 137.

<sup>244</sup> *Id* par 28.

<sup>245</sup> *Id*.

<sup>246</sup> *Id* par 31.

<sup>247</sup> *Id* par 31.

<sup>248</sup> *Id* par 39.

<sup>249</sup> *Id*.

<sup>250</sup> *Id* par 40.

<sup>251</sup> *Id* par 41.

definition of property in terms of section 2 of the Insolvency Act, which includes movable and immovable property wherever situated within the Republic of South Africa, and includes contingent interests in property other than those of a *fideicommissary* heir or legatee.<sup>252</sup> The Court held that the meaning of 'property' in terms of the Insolvency Act is far broader than the common law and money falls within the definition of movable property that is included in an insolvent debtor's estate.<sup>253</sup>

The court held that cryptocurrency has the following characteristics "...a thing, incorporeal, intangible, fungible, divisible and movable."<sup>254</sup> The court referred to an international case where the High Court of New Zealand, in the case of *David Ian Rusco and Melcolm Russel Moore v Cryptopia Limited (in liquidation)*, held that cryptocurrencies are a class of intangible property and referred to cryptocurrency as digital assets.<sup>255</sup> The court held that cryptocurrency is subject to taxation and is considered an intangible asset by the South African Revenue Service.<sup>256</sup> The court also referred the English law cases described above, namely *Robertson v Person Unknown* and *AA v Persons Unknown* where cryptocurrency was ordered to be property.<sup>257</sup>

The court ultimately concluded that even on the strictest interpretation of the meaning of property, cryptocurrencies are movable property for purposes of section 2 of the Insolvency Act.<sup>258</sup> The court held that when a company's primary business activities are conducted by using Bitcoin, the respondents' contention that Bitcoin is not property would "...lead to the absurd result that an insolvent with cryptocurrency will be untouched under the Insolvency Act...".<sup>259</sup> The court emphasised the 'always speaking' doctrine of

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<sup>252</sup> *Id.*

<sup>253</sup> *Id* par 42 and 43.

<sup>254</sup> *Id* par 43.

<sup>255</sup> *Id* par 45.

<sup>256</sup> *Id* par 46.

<sup>257</sup> *Id* par 47.

<sup>258</sup> *Id* par 48.

<sup>259</sup> *Id* par 49.

interpretation that has the effect that when a court is approached with a new situation that was not contemplated by the legislature at the time of drafting, the courts should consider the broad purpose of the legislation, the current social conditions and technological development in order to determine whether the language can properly encompass the new situation.<sup>260</sup>

In the *MTI* case, the court held that the law must keep up with new technological innovations that use the internet and transcend beyond physical boundaries, resulting in new concepts and areas of the law being developed.<sup>261</sup> The court held that Bitcoin is movable property for purposes of the Insolvency Act and the transfer thereof constitutes a disposition that can be set aside in terms of the Insolvency Act.<sup>262</sup> The final conclusion reached by the court was that MTI is domiciled in South Africa and as such its movable property within the country is present at its domicile.

#### 4.5 Summation

This chapter has examined the legal nature of crypto assets with a focus on their classification as either currency or property within South Africa and comparative international framework and case law. This chapter has reviewed international perspectives in the United States and Europe on whether crypto assets could be classified as currency.<sup>263</sup> Some courts in the United States have treated cryptocurrencies like Bitcoin as money due to their use in transactions and exchange for fiat currency,<sup>264</sup> while South African regulators have been more wary and have chosen to classify crypto assets as financial products.<sup>265</sup> This chapter has also addressed the complexities regarding the classification of crypto assets as property in terms of the Insolvency Act

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<sup>260</sup> *Id.*

<sup>261</sup> *Id* par 50.

<sup>262</sup> *Id.*

<sup>263</sup> Ch 4, par 4.2.

<sup>264</sup> Ch 4, par 4.2.

<sup>265</sup> Ch 3, par 3.1.

with a focus on the unique challenges posed by their intangible and decentralised nature.<sup>266</sup>

Of particular importance, this chapter details the findings of the Western Cape High Court and its decision is indeed a step in the right direction.<sup>267</sup> Crypto assets are a novel feature across the world and the way the courts deal with such crypto assets in an insolvency law context is of crucial importance. Crypto assets need to be considered in conjunction with the purpose of insolvency law and the duties of insolvency practitioners. As a result of the *MTI* case, the joint liquidators could deal with the Bitcoin that was recovered as they would any other movable assets. The Bitcoins could be converted into fiat currency for the benefit of the general body of creditors of MTI.

The legal classification of crypto assets plays a vital role in relation to the statutory duties of insolvency practitioners. It has also been established that crypto assets remain unregulated on a peer-to-peer basis, which still hinders an insolvency practitioner in fulfilling his statutory duties and obligations. The following chapter in this dissertation discusses insolvency practitioners' duties and the challenges crypto assets present.

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<sup>266</sup> Ch 4, par 4.3.

<sup>267</sup> Ch 4, par 4.4.

## CHAPTER 5: THE DUTIES OF INSOLVENCY PRACTITIONERS AND THE CHALLENGES PRESENTED BY CRYPTO ASSETS

### 5.1 Introduction

This chapter will focus on the general duties of insolvency practitioners, specifically those duties of liquidators outlined in the Companies Act 61 of 1973.<sup>268</sup> This chapter will also provide an overview of the insolvency practitioners' clawback powers in terms of sections 26, 29, 30 and 31 of the Insolvency Act. An analysis will be provided regarding the complexities of crypto assets and how these “assets” affect insolvency practitioners in administering an insolvent estate. This chapter will address the difficulties faced by insolvency practitioners in identifying, preserving, valuating and realising crypto assets.

### 5.2 The Duties of Insolvency Practitioners

The duties of liquidators are contained in sections 391 to 410 of the 1973 Companies Act.<sup>269</sup> Only the specific duties that are relevant to this subject matter, being the assets and financial records of the company, will be discussed in this chapter.

Section 391 of the 1973 Companies Act contains the general duties of a liquidator. A liquidator in any winding up, whether voluntary or compulsory, is tasked with recovering and reducing all the assets and property of a company, whether movable or immovable.<sup>270</sup> The liquidator is required to use the proceeds thereof to pay for the costs

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<sup>268</sup> Hereinafter the “1973 Companies Act”.

<sup>269</sup> Joubert and Calitz “To be or not to be? The Role of Private Enquiries in the South African Insolvency Law” (2014) *PELJ* 895.

<sup>270</sup> S391 of the 1973 Companies Act. Joubert and Calitz (2014) *PELJ* 895. Delpont *Henochsberg on the Companies Act 71 of 2008* (2024) APPI-208. Meskin *Henochsberg on the Companies Act 61 of 1973* (2011) 841. Naidoo (2020) 23. Marumoagae “Impeachable Transactions and Available

of winding up, the creditors who have lodged claims in the insolvent estate and should distribute the balance thereof to the members and shareholders of the company.<sup>271</sup> This duty is owed to creditors and the members of the company and in the event of a compulsory liquidation, such duty is also owed to the court.<sup>272</sup> This is often referred to as a three-fold fiduciary relationship.<sup>273</sup>

Section 392 of the 1973 Companies Act mandates a liquidator to provide financial information to the Master of the High Court<sup>274</sup> and section 393 of the 1973 Companies Act provides that a liquidator should keep records of all monies collected.<sup>275</sup>

A liquidator is required to acquaint him- or herself with the affairs of the company and to examine transactions of the company before it's winding up to ascertain whether the directors or officers may have contravened any laws, including the Companies Act 61 of 2008 and other legislation.<sup>276</sup> In the case of *Standard Bank v the Master of the High Court*,<sup>277</sup> the Supreme Court of Appeal echoes the duty of a liquidator to acquaint himself thoroughly with the affairs of the company and a liquidator should not conceal anything.<sup>278</sup>

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Defences to those who Transacted with Companies Before Liquidation" (2022) *Spec Juris* 295-296.

<sup>271</sup> S391 of the 1973 Companies Act. Joubert and Calitz (2014) *PELJ* 895. Delpoort *Henochsberg on the Companies Act 71 of 2008* (2024) APPI-208. Meskin *Henochsberg on the Companies Act 61 of 1973* (2011) 841. Naidoo (2020) 23. Marumoagae (2022) *Spec Juris* 295-296.

<sup>272</sup> Meskin (2011) 842. Delpoort (2024) APPI 208.

<sup>273</sup> Naidoo (2020) 24.

<sup>274</sup> S392 of the 1973 Companies Act. Meskin (2011) 844(1). Delpoort (2024) APPI 212.

<sup>275</sup> S393 (1) of the 1973 Companies Act. Meskin (2011) 844(2). Delpoort (2024) APPI 213.

<sup>276</sup> S400 of the 1973 Companies Act. Meskin (2011) 842. Joubert and Calitz (2014) *PELJ* 895. *Kebbel v Gainsford N.O and Five Others* 2010 (1) SA 561 (GSJ) par 57.

<sup>277</sup> *Standard Bank v The Master of the High Court* 2010 4 SA 405 (SCA). Marumoagae (2022) *Spec Juris* 296.

<sup>278</sup> *Standard Bank v The Master of the High Court* par 96.

Of further importance, a liquidator is required to act with the necessary care, skill and diligence.<sup>279</sup> A liquidator is, therefore, not allowed to act negligently and should always act in the best interests of the creditors of the company and place the creditors in the "most advantageous position".<sup>280</sup> Section 402 of the 1973 Companies Act also provides that a liquidator has a duty to prepare and distribute a report to the creditors no later than three months after his date appointment at a general meeting of creditors that details, among other things, the assets and liabilities of the company.<sup>281</sup> In circumstances where a liquidator has discovered certain impeccable transactions or dispositions of property, he must obtain the approval of the general body of creditors and he must set aside such transactions.<sup>282</sup>

Finally, section 403 of the 1973 Companies Act provides that a liquidator is required to lodge a liquidation and distribution account with the Master of the High Court.<sup>283</sup> The liquidation and distribution account confirms all receipts and payments made in relation to the insolvent estate and provides a plan for the distribution of funds amongst the creditors and/or members, alternatively, whether there is a liability amongst the creditors and/or members for contributions to made towards the winding up costs.<sup>284</sup>

The Insolvency Act contains similar duties that apply to a trustee of an insolvent estate of a natural person. Section 80(1) of the Insolvency Act provides that a trustee is required to investigate the affairs and transactions of an insolvent before sequestration and must submit a full written report regarding those affairs and transactions to the creditors who have lodged claims in the insolvent estate.<sup>285</sup> The report that is submitted to the creditors

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<sup>279</sup> *Standard Bank v the Master of the High Court* par 97. Meskin (2011) 842.

<sup>280</sup> Meskin (2011) 842. Singh & Calitz (2021) *SA Merc LJ* 310.

<sup>281</sup> S402 of the 1973 Companies Act. Joubert and Calitz (2014) *PEJ* 985. Naidoo (2020) 24.

<sup>282</sup> Singh & Calitz (2021) *SA Merc LJ* 310.

<sup>283</sup> S403(1)(a) 1973 Companies Act.

<sup>284</sup> S403(1)(a) 1973 Companies Act. Meskin (2011) 855. Delport (2024) *APPI* 208.

<sup>285</sup> S80(1) Insolvency Act. Marumoagae (2022) *Spec Juris* 294.

should include the assets and liabilities of the estate<sup>286</sup>, the books relating to the insolvent's affairs and whether a proper record has been kept of the insolvent's transactions<sup>287</sup>.

The duties above are the express duties contained in the 1973 Companies Act and the Insolvency Act, however, in the circumstances where an insolvency practitioner has identified any impeachable dispositions, he is entitled to apply to the High Court to set aside those dispositions in terms of his clawback powers as provided for in terms of the Insolvency Act.

### 5.3 Clawback Provisions in Terms of the Insolvency Act

The following provisions apply to trustees of an insolvent estate and *mutatis mutandis* to liquidators of companies.<sup>288</sup> The provisions relating to the clawback powers of an insolvency practitioner are contained in sections 26, 29, 30 and 31 of the Insolvency Act. These powers generally relate to transactions or dispositions that took place before liquidation or sequestration and are referred to as voidable or impeachable dispositions.<sup>289</sup>

Section 2 of the Insolvency Act defines a disposition as a transfer or abandonment of rights to property and includes, *inter alia*, a sale, lease, payment or any contract in support of such disposition.<sup>290</sup> Dispositions are, therefore, seen as a transfer or disposal of property that belongs to an insolvent company or person, including payment of monies and transfer of any assets. An insolvency practitioner is required to impeach certain

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<sup>286</sup> S81(1)(a) Insolvency Act.

<sup>287</sup> S81(1)(c) Insolvency Act.

<sup>288</sup> See s340(1) of 1973 Companies Act, and the discussion by Marumoagae (2022) *Spec Juris* 295.

<sup>289</sup> Smith, Van der Linde, Calitz (2022) 168. Marumoagae (2022) *Spec Juris* 297. Naidoo (2020) 25. Singh & Calitz (2021) *SA Merc LJ* 311.

<sup>290</sup> S2 Insolvency Act 24.

dispositions made by a company to increase the amount of funds available in the insolvent estate for distribution amongst the creditors.<sup>291</sup>

The date on which a disposition takes place is of crucial importance for an insolvency practitioner when exercising his clawback powers to reclaim such assets when the insolvent disposes of it under the circumstances provided for in the sections above of the Insolvency Act.<sup>292</sup> An insolvency practitioner, therefore, must have knowledge of the date of a specific disposition in order to ascertain the exact category of such disposition.

### 5.3.1 Dispositions without value

Section 26 of the Insolvency Act provides that a disposition not made for value can be set aside by the Court if an insolvency practitioner can prove that the disposition was made more than two years before the liquidation/sequestration and the effect thereof was that the liabilities of the insolvent exceeded its assets.<sup>293</sup> Where a disposition was made within two years from the date of liquidation, the person who benefitted from the disposition has to prove that the company was solvent at the time when the disposition was made.<sup>294</sup> These dispositions typically occur when property is disposed of without a *quid pro quo* and the insolvent company loses money or assets and gains nothing in return.<sup>295</sup>

### 5.3.2 Voidable preferences

Section 29 of the Insolvency Act provides that transactions that take place within six months from the date of the insolvency proceedings that prefer one creditor above

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<sup>291</sup> Boraine “A Perspective on the Doctrine of Voidable Dispositions in South African Insolvency Law” (2000) *Int. Insolv. Rev.* 68.

<sup>292</sup> Marumoagae (2022) *Spec Juris* 298.

<sup>293</sup> S26(1)(a) Insolvency Act.

<sup>294</sup> S26(1)(b) Insolvency Act.

<sup>295</sup> *Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and Others* 2022 (5) SA 438 (SCA).

another can be set aside by the insolvency practitioner upon application to the Court.<sup>296</sup> This is referred to as a voidable preference.<sup>297</sup> The effect of such disposition should be that the value of the insolvent's liabilities must exceed its assets immediately after such disposition is made.<sup>298</sup> This typically occurs where third parties receive preferential treatment to the prejudice of the other creditors<sup>299</sup> or where one creditor is paid in full for a pre-existing debt while another creditor is not.<sup>300</sup>

### 5.3.3 Undue preferences

Section 30 of the Insolvency Act provides that an insolvency practitioner can apply to Court to set aside a disposition made at any time when an insolvent's liabilities exceed the assets. This is applicable where the intention of the insolvent when making such a disposition was to prefer one creditor above another.<sup>301</sup>

### 5.3.4 Collusive dealings

Section 31 of the Insolvency Act allows an insolvency practitioner to apply to Court to set aside a disposition where the insolvent has colluded with a third party to dispose of property to the prejudice of the creditors and to prefer one creditor above another.<sup>302</sup> In this regard, the timing of when such disposition took place is not material.<sup>303</sup> The only requirement is that the insolvent should have colluded with another person to the prejudice of the general body of creditors by preferring one creditor above another.

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<sup>296</sup> S29(1) Insolvency Act.

<sup>297</sup> Smith, Van der Linde, Calitz (2022) 171.

<sup>298</sup> S29(1) Insolvency Act.

<sup>299</sup> Marumoagae (2022) *Spec Juris* 299.

<sup>300</sup> Borraine (2000) *Int. Insolv. Rev.* 77.

<sup>301</sup> S30(1) Insolvency Act.

<sup>302</sup> S31(1) Insolvency Act; Borraine (2000) *Int. Insolv. Rev.* 81.

<sup>303</sup> Borraine (2000) *Int. Insolv. Rev.* 81.

The provisions above are known as the clawback powers of an insolvency practitioner and are regularly used in insolvency proceedings to recover funds for the general body of creditors. Crypto assets in an insolvent estate present many challenges for an insolvency practitioner. The following part of this thesis will discuss how insolvency practitioners are hindered in fulfilling their duties when crypto assets are present in insolvent estates.

## 5.4 The Anomalies of Crypto Assets in an Insolvent Estate

### 5.4.1 Identification and access

An insolvency practitioner is tasked with the duty of locating and recovering all assets that belong to a company/insolvent debtor and to realise those for distribution amongst the creditors. Assuming that crypto assets are classified as property, as was the case in *MTI*, an insolvency practitioner is also obliged to investigate the insolvent company's affairs to ascertain the nature and extent of all assets that form part of the insolvent estate. In instances where a company directly holds crypto assets, there are two main issues presented to an insolvency practitioner, namely transparency regarding the presence of crypto assets and realising value by converting the crypto asset into fiat currency for distribution amongst the creditors.<sup>304</sup>

In these circumstances, an insolvency practitioner is required to vigorously investigate and interrogate a company's directors (or the insolvent debtor) to determine whether the company holds any crypto assets. A duty also rests on directors and insolvent debtors to disclose whether they hold crypto assets as it has been established that these assets are valuable and can be realised for the benefit of the *concursum creditorum*.<sup>305</sup>

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<sup>304</sup> Sara & Gullifer (2019) *International Insolvency Review* 235.

<sup>305</sup> *Id* 254.

The directors of a company or an insolvent debtor could always raise the argument that crypto assets are not legally recognised as property in South Africa, however, an insolvency practitioner is afforded a right to approach the Court to obtain declaratory relief, as in the *MTI* case. If the directors or insolvent debtors have gone completely rogue, it would be difficult for the insolvency practitioner to identify the presence of crypto assets and obtain access to them. It is also straightforward for the directors to simply refuse to disclose the private key.<sup>306</sup>

When a company trades by using a centralised exchange, it would be easier for the insolvency practitioner to reach out to the exchange company (like Luno) to gain access to the crypto assets.<sup>307</sup> However, where the insolvent company has privately traded with crypto assets it would be very difficult for an insolvency practitioner to identify the presence of crypto assets.<sup>308</sup>

The anonymous nature of crypto assets makes this responsibility of identification even more demanding.<sup>309</sup> The stumbling block for insolvency practitioners is that the identities of traders who trade on a peer-to-peer basis are recorded on the blockchain in the form of the trader's public key and this cannot assist in identifying the personal identity of the trader.<sup>310</sup> Nonetheless, suppose an insolvency practitioner suspects the holding of crypto assets. In that case, he is required to obtain evidence of a digital wallet belonging to the company by interrogating the bank records and computer systems.<sup>311</sup> This simply means that insolvency practitioners should rigorously investigate the affairs and records of a company or insolvent debtor and ensure that no stone is left unturned.

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<sup>306</sup> Sara & Gullifer (2019) *International Insolvency Review* 254.

<sup>307</sup> Du Plessis *Cryptocurrencies in an Insolvent Estate* (2021) LLM Thesis, *University of Johannesburg* 25.

<sup>308</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 19; Du Plessis (2021) 25.

<sup>309</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 19; Sara & Gullifer (2019) *International Insolvency Review* 255.

<sup>310</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 19

<sup>311</sup> *Id.*

An example to illustrate the difficulty of identification is the QuadrigaCX (Quadriga) matter. Quadriga operated a cryptocurrency exchange in Canada.<sup>312</sup> The accounts of Quadriga were operated by an individual CEO and the business had no other employees or offices.<sup>313</sup> The CEO of Quadriga unexpectedly died in December 2019. The primary issue was that the CEO only knew the passwords to access the crypto assets, which were not written down anywhere or disclosed to anyone else.<sup>314</sup> This resulted in the company experiencing difficulties in its cash flow and the debtors of Quadriga commenced proceedings in terms of the Companies' Creditors Arrangement and a monitor was appointed.<sup>315</sup>

The Quadriga saga is a clear demonstration of the difficulties that insolvency practitioners face in that they were not able to identify or locate the crypto asset holders, further, the company did not maintain bank accounts or keep proper records.<sup>316</sup> In Quadriga, the hidden or undisclosed crypto assets could not be retrieved and this was a simple situation where the insolvency practitioner could not realise value of the crypto assets for the benefit of the creditors of the insolvent estate.

#### **5.4.2 Realisation and the date of valuation**

The second issue that insolvency practitioners face when dealing with crypto assets is deciding when to sell the crypto assets for the benefit of the general body of creditors. Crypto assets are extremely volatile and determining their fiat value is onerous and burdensome.<sup>317</sup> Although the FSCA has declared crypto assets as a financial product and the Western Cape High Court ruled that crypto assets are property for purposes of the

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<sup>312</sup> Bayliss "Recent Developments Virtual Assets, Real Insolvency Issues" (2020) *Banking and Finance Law Review* 113.

<sup>313</sup> Baylis (2020) *Banking and Finance Law Review* 113.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id* 113-114; Shawver (2022) *Boston College Law Review* 2024.

<sup>317</sup> Shawver (2022) *Boston College Law Review* 2016.

Insolvency Act, this does not assist insolvency practitioners in the process of realising the value of the insolvent estate. The valuation of assets, in general, plays a crucial role in insolvency proceedings because an insolvency practitioner should obtain the best possible value for the assets to ensure that the creditors obtain the best possible financial return.<sup>318</sup>

More guidance is needed to help insolvency practitioners value crypto assets.<sup>319</sup> The value of crypto assets rests entirely on demand and is not controlled by any other determining factor.<sup>320</sup> The actions of buyers and sellers determine the price of crypto assets on a specific exchange.<sup>321</sup>

It is supply and demand that sets the price at which crypto assets are sold and not the intrinsic quality of the crypto asset.<sup>322</sup> In the circumstances, there is no “correct” or “opportune” time when an insolvency practitioner should exchange crypto assets for cash.<sup>323</sup> Insolvency practitioners find obtaining the market value of crypto assets challenging and are open to criticism.<sup>324</sup> Pascoe and Scott make the following example:

*“An insolvency practitioner may be accused of choosing the wrong day to sell or the incorrect method of sale. Alternatively, how the assets are realised may cause the value in the currency to drop, thereby rendering the realisation of the assets potentially injurious to creditors' interests.”*<sup>325</sup>

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<sup>318</sup> Shawver (2022) *Boston College Law Review* 2027.

<sup>319</sup> *Id* 2031.

<sup>320</sup> *Id.*

<sup>321</sup> *Id* 2032.

<sup>322</sup> *Id.*

<sup>323</sup> *Id* 2033.

<sup>324</sup> Pascoe & Scott 2018 *Australian Restructuring Insolvency & Turnaround Association Journal* 22.

<sup>325</sup> *Id.*

The implication of the correct timing of realisation should, therefore, be carefully documented and considered by obtaining expert advice from a seasoned crypto assets trader or dealer.<sup>326</sup>

The valuation and realisation of crypto assets arose in the case of *Mt. Gox* which was a popular Bitcoin exchange company.<sup>327</sup> In the *Mt. Gox* case, it was reported that 850 000 Bitcoins belonging to customers were stolen.<sup>328</sup> It is said that this Bitcoin accounted for seven percent of worldwide Bitcoins, which were worth approximately \$473 000 000.00 in 2014.<sup>329</sup> This led to MT Gox filing for bankruptcy relief in Japan and the United States.<sup>330</sup> The insolvency practitioner sold approximately \$400 million worth of Bitcoin to be distributed to the creditors of MT Gox, the enormous sale of Bitcoin led to a drastic price fluctuation in 2017 and this led to MT Cox moving from bankruptcy to civil rehabilitation.<sup>331</sup>

Bankruptcy is akin to sequestration or (insolvent) liquidation in South Africa, while civil rehabilitation is focused more on debt restructuring and is more debtor-friendly.<sup>332</sup> This is a unique situation however it clearly demonstrates the extreme volatility of crypto assets.

In relation to the clawback powers of an insolvency practitioner, the date of valuation plays another crucial role. The main questions are whether an insolvency practitioner should value the crypto assets at the date when the disposition took place, when the Court

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<sup>326</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 22.

<sup>327</sup> Shawver (2022) *Boston College Law Review* 2033.

<sup>328</sup> *MtGox Co., Ltd (Re)* 2014 ONSC 5811 par 4.

<sup>329</sup> Shawver (2022) *Boston College Law Review* 2034.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> Fukuoka “An Introduction To Court Procedures For Insolvency In Japan” available at <https://www.nishimura.com/en/knowledge/publications/20110408-39201> (accessed 5 October 2024).

granted an order to set aside the disposition, or when the insolvency practitioner decides to sell the crypto assets.<sup>333</sup>

In the ordinary course, an insolvency practitioner would recover the funds in fiat currency that were subject to a voidable disposition or undue preference or the value thereof as of the date of such disposition. This should be the same for crypto assets, however, an insolvency practitioner can only receive an amount that is equivalent to the current value of Bitcoin as at the date of realisation. Case law, however, suggests that an insolvency practitioner should recover the value of the asset at the time of the disposition with the goal of treating all creditors equally.<sup>334</sup> This is, however, impossible and the value of crypto assets can only indeed be obtained or made known at the date on which it is sold in the market.

Insolvency practitioners could also be found to be negligent or open to personal liability if they realise crypto assets when the market is not doing well, as he or she will not be able to obtain the same value for the amount that the crypto assets were initially bought for. In a case where an insolvency practitioner is exercising his clawback powers, the insolvency practitioner might not be able to obtain the same value that the crypto assets were initially disposed of.

The issue of the date of realisation was unfortunately not addressed in the *MTI* case and the courts were not provided with an opportunity to deal with the date on which to value voidable and undue preferences. If insolvency practitioners are faced with a decision to dispose of crypto assets, the insolvency practitioner will have to approach the Court first, to obtain an order declaring the crypto assets to be classified as property, second to obtain an order setting aside voidable dispositions and undue preferences and finally an order as to the date of valuation of these assets.

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<sup>333</sup> Shawver (2022) *Boston College Law Review* 2044.

<sup>334</sup> *Id* 2045.

### 5.4.3 Preservation

As soon as an insolvency practitioner has identified assets belonging to an insolvent company, the insolvency practitioner must take control of these assets.<sup>335</sup> Control over crypto assets requires an insolvency practitioner to obtain access to the private keys to gain access to the wallet where the crypto assets are stored.<sup>336</sup> The insolvency practitioner is then required to open his own crypto asset wallet on behalf of the insolvent company in order to transfer the crypto assets and safely preserve the crypto assets.<sup>337</sup>

Suppose the crypto assets are not transferred to a wallet under the insolvency practitioner's control. In that case, anyone with a copy of the private key can access the wallet and transfer the crypto assets to a third party.<sup>338</sup> This transfer would have the effect that the crypto assets would be stolen from the insolvent and the insolvency practitioner would not know who stole the crypto assets and would be unable to reverse the transaction as crypto assets are irreversible and completely anonymous.<sup>339</sup> Insolvency practitioners, therefore, have to act with necessary haste when conducting their investigations in order to avoid the dissipation of crypto assets that could possibly never be traced and recovered once transferred.

A further issue created by crypto assets is that they are decentralised and can "can be held anywhere".<sup>340</sup> This would invoke Cross-Border insolvency principles.<sup>341</sup> In instances where the crypto assets are held through an exchange, the insolvency practitioner will be required to ascertain where the exchange company is registered and will be required to institute recognition proceedings in that country.<sup>342</sup> This creates an additional stumbling

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<sup>335</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 20.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*; Baylis (2020) *Banking and Finance Law Review* 116.

<sup>342</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 20.

block for an insolvency practitioner as there are a number of jurisdictions, including South Africa, that have not adopted the UNICTRAL Model law on Cross-Border Insolvency making the process uncertain, complex and costly.<sup>343</sup> Baylis, nonetheless, suggests that insolvency practitioners should use the physical location of the wallet as a starting point, an example would be where the local machine (computer) is located that contains the online wallet and use that to determine the jurisdiction in which the crypto asset is located.<sup>344</sup>

## 5.5 Summation

This chapter discussed the duties of insolvency practitioners in detail, particularly those of liquidators under the 1973 Companies and trustees under the Insolvency Act.<sup>345</sup> These duties focused on the responsibilities to recover assets, report to creditors and the clawback powers.<sup>346</sup> This chapter then details the challenge insolvency practitioners face when dealing with crypto assets, specifically, the difficulties in identifying, preserving, valuating and realising crypto assets.<sup>347</sup> This chapter highlighted how the anonymous and volatile nature of crypto assets aids in the complex process nature of classifying these “assets” as well as the timing of valuations and the need to act swiftly to prevent dissipation and theft of these assets.<sup>348</sup>

In order to aid insolvency practitioners, it is pivotal to consider international instruments that deal with crypto assets in an insolvent estate. The next chapter is the final chapter of this dissertation and it will consider the provisions of the Unidroit Principles on Digital Assets and Private Law. It will provide a concluding discussion on whether the current

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<sup>343</sup> Pascoe & Scott (2018) *Australian Restructuring Insolvency & Turnaround Association Journal* 20.

<sup>344</sup> Baylis (2020) *Banking and Finance Law Review* 117.

<sup>345</sup> Ch 5, par 5.2.

<sup>346</sup> Ch 5, pars 5.2 - 5.3.

<sup>347</sup> Ch 5, par 5.4.

<sup>348</sup> *Id.*

regulations in South Africa could assist insolvency practitioners and will focus on a few suggestions and conclusions.

## CHAPTER 6: UNIDROIT PRINCIPLES ON DIGITAL ASSETS AND PRIVATE LAW, CONCLUSIONS AND RECOMMENDATIONS

### 6.1 Introduction

This chapter will be divided into two parts, the first part will discuss the UNIDROIT Principles on Digital Assets and Private Law<sup>349</sup> and its applicability within a South African insolvency context. The second part of this chapter will consist of concluding remarks and recommendations on how insolvency practitioners should deal with crypto assets. The conclusion will also address whether the Declaration could assist within the context of the crypto assets and the insolvency conundrum.

### 6.2 The UNIDROIT Principles

It should be noted that South Africa is a Member State of the International Institute for the Unification of Private (UNIDROIT)<sup>350</sup> and as such the UNIDROIT Principles can easily be implemented and applied in South Africa. The UNIDROIT Principles are aimed at guiding legal practitioners, judges, arbitrators, legislators and market participants who are tasked with dealing with digital assets.<sup>351</sup> It has been recommended that Member States should adopt legislation that is consistent with the UNIDROIT Principles.<sup>352</sup> The UNIDROIT Principles will increase the predictability of transactions involving crypto assets and it is aimed at developing greater consistency among Member States, resulting in greater predictability in cross-border transactions.<sup>353</sup>

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<sup>349</sup> Unidroit Principles on Digital Assets and Private Law 2023 *International Institute for the Unification of Private Law (UNIDROIT)* (hereinafter UNIDROIT Principles).

<sup>350</sup> See <https://www.unidroit.org/about-unidroit/members-states-2/> (accessed 17 October 2024).

<sup>351</sup> Principle 3 UNIDROIT Principles.

<sup>352</sup> Principle 4 *Id.*

<sup>353</sup> *Id.*

The UNIDROIT Principles are seen to be technology and business model neutral and apply to all digital assets, even those that have yet to be recorded on a blockchain.<sup>354</sup> Principle 6 provides that the UNIDROIT Principles are also jurisdiction neutral and have not been drafted using specific terminology that applies to a specific Member State.<sup>355</sup>

The UNIDROIT Principles are guidelines for Member States to ensure that their local legislation is consistent with best practice and international standards about the holding, transfer and use as collateral of digital assets.<sup>356</sup> The Principles seek to address gaps in law where traditional approaches have yet to be modified to deal with crypto assets.<sup>357</sup>

Cryptocurrencies, such as Bitcoin, form part of the scope of application of the UNIDROIT Principles in that a person who has control over a private key has control over a digital asset.<sup>358</sup> A digital asset is defined as "...an electronic record that is capable of being subject to control..."<sup>359</sup> and a digital asset can be the subject of proprietary rights, meaning that digital assets would constitute an asset in the hands of an individual.<sup>360</sup> The use of the term digital assets is akin to that of crypto assets that is used in the dissertation.

Principle 19 of UNIDROIT Principles deals with the "...effect of insolvency on proprietary rights in digital assets...".<sup>361</sup> Principle 19(1) provides a proprietary right in a digital asset that has become effective against third parties in terms of the UNIDROIT Principles or in terms of a Member State's regional law will also be effective against an insolvency practitioner, creditors or any other third party in insolvency-related proceedings.<sup>362</sup>

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<sup>354</sup> Principle 5 UNIDROIT Principles.

<sup>355</sup> Principle 6 *id.*

<sup>356</sup> Principle 9 *id.*

<sup>357</sup> *Id.*

<sup>358</sup> Principle 15 UNIDROIT Principles.

<sup>359</sup> Principle 6 *id.*

<sup>360</sup> Principle 3 *id.*

<sup>361</sup> Principle 19 *id.*

<sup>362</sup> *Id.*

The effect of the UNIDROIT Principles is that if an insolvent debtor holds crypto assets, these crypto assets will be seen as the insolvent's property. When applying the UNIDROIT Principles within a South African context, all the assets of an insolvent vests in the Master until the appointment of a trustee. Therefore, the crypto assets would fall under the insolvent estate. Similarly, the liquidator of a company that holds crypto assets can classify the crypto assets as intangible movable property by applying the UNIDROIT Principles.

The application of Principle 19 of the UNIDROIT Principles operates in terms of three typical situations, namely (a) where the insolvent debtor owns digital assets, (b) where the insolvent has granted a security right to a creditor by using digital assets and (c) where a custodian holds crypto assets on behalf of a client (an exchange company).<sup>363</sup>

In terms of the first typical situation, the UNIDROIT Principles confirm that when a debtor becomes insolvent, the crypto asset forms part of the insolvent estate since the debtor's proprietary right remains effective in insolvency.<sup>364</sup> Once preserved, these assets can be sold for the benefit of the general creditors.<sup>365</sup> Regarding the second typical situation, the UNIDROIT Principles drafters believe that the insolvency of a debtor does not affect the rights of a secured creditor who holds a digital asset as security.<sup>366</sup> The secured creditor or the insolvency practitioner can sell the digital asset and pay the secured creditor's claim from the sale proceeds.<sup>367</sup> Finally, when a custodian holds the crypto asset, the insolvent's proprietary right remains unaffected.<sup>368</sup> The insolvency practitioner is required to retrieve the crypto asset and sell it for the benefit of the creditors.<sup>369</sup>

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<sup>363</sup> Principles 118 UNIDROIT Principles.

<sup>364</sup> Principles 118-119 *id.*

<sup>365</sup> Principles 119 *id.*

<sup>366</sup> Principle 120 *id.*

<sup>367</sup> Principle 120 *id.*

<sup>368</sup> Principle 119 *id.*

<sup>369</sup> Principle 119 *id.*

The UNIDROIT Principles have the effect that crypto assets are seen and classified as property in an insolvent estate and can be realised for the benefit of the general body of creditors. This is a simple and universal approach to dealing with crypto assets in an insolvent estate. This is also the same approach the Western Cape High Court applied in the *MTI* matter.<sup>370</sup> The drafters of the UNIDROIT Principles are, however, alive to the fact that an insolvent might refuse to disclose the wallet or private key, and this will result in an insolvency practitioner approaching the court to obtain access to the crypto assets.<sup>371</sup>

### 6.3 Conclusion

Crypto assets are an invention of a unique nature that relies on advanced technology to operate. It has been established that crypto assets are completely decentralised and do not rely on a central issuing authority.<sup>372</sup> Crypto asset transactions operate on a peer-to-peer basis and are supported by blockchain technology.<sup>373</sup> Once crypto assets have been transferred, the transaction cannot be reversed<sup>374</sup> and the users of crypto assets operating on these platforms are entirely anonymous.<sup>375</sup> Crypto assets are also highly volatile the value thereof fluctuates daily and this aids in the difficulties presented to the insolvency regime.<sup>376</sup>

In light of the aforesaid, the overarching research objective of this dissertation was to discuss whether the Declaration and the supporting regulations have been of assistance to the insolvency practitioners and the insolvency regime at large. This dissertation aimed to address the following objectives: (a) whether the definition of property in the Insolvency Act aligns with the definition of crypto assets, (b) whether the Declaration and the COFI Bill address the complexities faced by the insolvency regime regarding crypto assets, (c)

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<sup>370</sup> *Bester N.O v Mirror Trading International (Pty) Ltd (in liquidation)* par 45.

<sup>371</sup> Principle 119 UNIDROIT Principles.

<sup>372</sup> Ch 1, par 1.1.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

how are the duties of insolvency practitioners affected by crypto assets and what are the practical implications thereof and (d) what the practical and regulatory solutions are that may assist insolvency practitioners as well as the insolvency sphere as a whole.<sup>377</sup>

In addressing the research objectives of this dissertation, chapter 1 introduces the rise of cryptocurrencies and its impact on the South African insolvency regime.<sup>378</sup> In South Africa, the rise of cryptocurrency ownership is estimated at 5.8 million people in 2022 and this prompted the FSCA's regulatory framework that was published in 2022.<sup>379</sup> The regulations have recognised crypto assets as financial products and this regulation aims to create accountability but leaves open the question concerning their treatment in insolvency proceedings.<sup>380</sup>

Chapter 2 of this dissertation provides an in-depth discussion of crypto assets and the underlying blockchain technology.<sup>381</sup> Chapter 2 explores the key technical elements of crypto assets, such as blockchain technology which is a tamper-resistant digital ledger used to record cryptocurrency transactions.<sup>382</sup> Each block on the chain is verified through proof of work referred to as mining and this involves solving complex mathematical problems.<sup>383</sup> The chapter then explains the difference between public and private keys by comparing a public key to bank account number while a private is a unique alphabetical and numerical code that is used to access crypto assets.<sup>384</sup> The importance of safeguarding a private key is stressed because when a private key is lost there is no means of accessing crypto assets.<sup>385</sup> Finally, chapter 2 touches on the risks associated

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<sup>377</sup> Ch 1, par 1.4.

<sup>378</sup> Ch, par 1.1.

<sup>379</sup> Ch par 1.2.

<sup>380</sup> *Id.*

<sup>381</sup> Ch 2 par 2.2.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> Ch 2 par 2.3.

<sup>385</sup> *Id.*

with crypto assets, particularly their anonymity, volatility and susceptibility to criminal activities such as money laundering and fraud.<sup>386</sup>

Crypto assets are mainly unregulated, however, the FSCA recently classified crypto assets as financial products in terms of the FAIS Act.<sup>387</sup> The Declaration has the effect that crypto asset FSPs are required to be registered in terms of the FAIS Act.<sup>388</sup> As part of such registration, crypto asset FSPs must deal with their customers honestly, fairly and openly.<sup>389</sup> Crypto asset FSPs are also required to keep proper account and auditing records.<sup>390</sup> The COFI Bill also echoes these principles.<sup>391</sup>

The Declaration, the Policy Document, the FAIS Act and the COFI Bill do not strictly classify crypto assets as either property, commodity or money, however, the Declaration has the effect that crypto assets are regarded as any other ordinary financial products (like investments and shares).<sup>392</sup> This would have the effect that crypto assets held by crypto asset FSPs can fall part of an insolvent estate and could vest with the Master until the appointment of a trustee.<sup>393</sup>

The Declaration would also assist insolvency practitioner in their investigative powers.<sup>394</sup> It would be easy for an insolvency practitioner to obtain access to a crypto asset by contacting the crypto asset FSPs that hold the assets on behalf of an insolvent debtor or company.<sup>395</sup> This is coupled with the fact that the crypto asset FSP is required to maintain proper accounting and auditing records. This information will be easily available to

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<sup>386</sup> Ch 2, par 2.4.

<sup>387</sup> Ch 3, par 3.1.

<sup>388</sup> *Id.*

<sup>389</sup> Ch 3, par 3.2.

<sup>390</sup> Ch 3, par 3.3.

<sup>391</sup> *Id.*

<sup>392</sup> Ch 3, para 3.4.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

insolvency practitioners who are seeking to ascertain the presence of crypto assets in an insolvent estate.<sup>396</sup>

The Declaration, however, does not apply to transactions that take place without the involvement of a crypto asset FSP. The Declaration does not prevent individuals or companies from trading and dealing with crypto assets on a peer-to-peer basis. Chapter 5 of this dissertation deals with an insolvency practitioner's general duty to recover, collect and reduce all the assets of an insolvent debtor or company and cause same to be realised for the benefit of the general body of creditors.<sup>397</sup> The fact that the Declaration does not deal with crypto assets on a peer-to-peer basis still presents difficulties to insolvency practitioners in that insolvency practitioners would still face challenges in terms of collecting, preserving and realising crypto assets.<sup>398</sup>

In the case of MTI, the Western High Court held that the meaning of property in terms of the Insolvency Act is broad enough to include the crypto assets held by MTI.<sup>399</sup> This judgment is a step in the right direction and is welcomed within the crypto asset and insolvency conundrum context. However, it remains questionable whether an insolvency practitioner would be required to seek a declarator from the court each time he is presented with crypto assets in an insolvent estate.

Further, because of the principle of *stare decisis*, lower courts are bound by the decisions of higher courts.<sup>400</sup> The effect hereof is that the decision of the Western Cape High Court would only apply within the Western Cape as one High Court is not bound by another and the decisions made by a High Court only bind its own territorial areas.<sup>401</sup> Therefore, unless

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<sup>396</sup> *Id.*

<sup>397</sup> Ch 5, par 5.2.

<sup>398</sup> Ch 5, par 5.4

<sup>399</sup> Ch 4, par 4.4.

<sup>400</sup> Harms *Civil Procedure in the Superior Courts* (2024) Part A3.3A.

<sup>401</sup> Brickbill "Precedent and the Constitutional Court" (2010) *Constitutional Court Review* 92.

the Supreme Court of Appeal confirms the MTI judgment, it is only of persuasive value to other jurisdictions of the High Court.

## 6.4 Recommendations

The powers and duties of insolvency practitioners are also extremely hampered by crypto assets in an insolvent estate.<sup>402</sup> An insolvency practitioner will be required to thoroughly investigate the insolvent's affairs and bank records to ascertain whether the insolvent may have purchased crypto assets.<sup>403</sup> This investigation may also entail that an insolvency practitioner would have to search the internet history of an insolvent to obtain hints of possible crypto asset trading.<sup>404</sup> This duty is even more complex when an insolvent does not cooperate with the insolvency practitioner or is being dishonest. It is, of course, easier for an insolvency practitioner to locate crypto assets that have been bought via a crypto asset FSPs.

In instances where an insolvency practitioner has established the existence of crypto assets, the insolvency practitioner should interrogate the insolvent debtor or the directors of the companies to ensure that full disclosure is provided to the insolvency practitioner. Additional methods of investigation could include an insolvency enquiry in terms of section 417 of the 1973 Companies Act.<sup>405</sup> This process allows any person to be subpoenaed to testify at the enquiry, including third parties<sup>406</sup> that may have helped the company in acquiring crypto assets.

Insofar as the realisation and valuation of crypto assets are concerned, Pascoe submits that an insolvency practitioner will have to carefully consider the interests of creditors when realising crypto assets to ensure that the sale thereof takes place at an opportune

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<sup>402</sup> Ch 5 par 5.4.

<sup>403</sup> *Id.*

<sup>404</sup> Udofia (2022) 3.

<sup>405</sup> S417 1973 Companies Act.

<sup>406</sup> Smith, Van der Linde, Calitz (2022) 307.

time when the crypto asset market is doing well.<sup>407</sup> An insolvency practitioner should strategically refrain from selling crypto assets when the markets are low and should only sell when prices soar.<sup>408</sup> It is, therefore, the duty of an insolvency practitioner to ensure that he is well-versed with the crypto asset market trends. Alternatively, he or she should appoint a market expert to ensure that crypto assets are realised at the best possible time.

In instances where an insolvent has transferred crypto assets to the detriment of the general body of creditors, an insolvency practitioner might not be able to exercise his clawback powers due to the anonymous and irreversible nature of crypto assets.<sup>409</sup> An insolvency practitioner can only use these powers if the insolvent has disclosed the identity of the person to whom he has sold the crypto assets. Singh and Calitz are, however, of the view that an insolvency practitioner is still able to appoint an expert tracing company to track the dispositions, but the cost thereof would far outweigh the benefit that would be received from the sale of the crypto asset.<sup>410</sup>

As regards the preservation of crypto assets, Udofia submits that if an insolvency practitioner eventually obtains a private key, the insolvency practitioner should consider holding the crypto assets in a cold storage pending the eventual sale thereof.<sup>411</sup> A cold storage is "...an offline wallet for storing..." crypto assets.<sup>412</sup> The cold storage protects crypto assets from hackers and unauthorised access.<sup>413</sup> It has also been suggested that an insolvency practitioner should move crypto assets to an entity that provides custodian services (like a crypto asset FSP).<sup>414</sup> The benefit of this is that crypto asset custodians

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<sup>407</sup> Pascoe (2018) *Insolvency and Restructuring International* 9.

<sup>408</sup> Udofia (2022) 4.

<sup>409</sup> Singh & Calitz (2021) *SA Merc LJ* 311.

<sup>410</sup> Singh & Calitz (2021) *SA Merc LJ* 311

<sup>411</sup> Udofia (2022) 4.

<sup>412</sup> Udofia (2022) 4.

<sup>413</sup> Udofia (2022) 4.

<sup>414</sup> Remolina, Gurrea-Martinez & Liu "The Treatment of Digital Assets in Insolvency" (2024) *Singapore Management University Yong Pung How School of Law Working Paper* 12.

provide insurance if crypto assets are lost or stolen.<sup>415</sup> The insurance is, however, only commonly available to crypto assets like Bitcoin or Ethereum and no other types of crypto assets that are created.<sup>416</sup>

It is the author's submission that the Declaration, the Policy Document and the FAIS Act have created a level of regulation in relation to crypto assets. These regulations are of much help within the insolvency regime. Insolvency practitioners can now track and investigate crypto assets held by crypto asset FSPs on behalf of insolvent debtors and insolvent companies. In addition, the COFI Bill, once enacted, would be of greater assistance in that crypto asset FSPs will have to be registered<sup>417</sup> and would be required to ensure complete transparency regarding the risks of these products.<sup>418</sup> Crypto assets, however, remain unregulated on a peer-to-peer basis and this would still be laborious and challenging for insolvency practitioners. The cost of winding up an insolvent estate that holds crypto assets will also affect the eventual distributions that are paid to creditors. Nonetheless, an insolvency practitioner must conduct strenuous investigations and preserve and realise crypto assets.

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415 *Id.*

416 *Id.*

417 S9 COFI Bill.

418 S31 COFI Bill.

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