

## **Blockchain & Cryptocurrency in South Africa: A legal Overview**

The use of Blockchain based solutions as an alternative to traditional payment options in e-commerce has arisen in the digital age. The term blockchain has gained popularity within businesses and governments and it has become imperative to examine the legal status and consequences of the use of block chain technology in e-commerce in South Africa. According to the World Bank definition, “a blockchain is one type of distributed ledger”.

Distributed ledgers use independent computers (referred to as nodes) to record, share and synchronize transactions in their respective electronic ledgers (instead of keeping data centralized as in a traditional ledger). A Blockchain allows for a private or public, electronic general ledger that records all payments and transfers of data, from the time of creation.

Once data has been recorded inside a Blockchain it becomes almost impossible to modify , corrupt or change. The World Bank definition further outlines that blockchain’s are the building blocks of the “internet of value”. They enable recording of interactions and transfer ‘value’ peer-to-peer, without a need for a central coordinating entity. ‘Value’ refers to any record of ownership of asset — for example, money, securities, land titles — and also ownership of specific information like identity, health information and other personal data.” There are no specific laws or regulations governing the use or trading of blockchain technology, The legal status of Bitcoin and other Cryptocurrencies remains undefined. However without clear regulation authorised or supervised by South African Reserve Bank (SARB) lamented that “no legal protection or recourse is afforded to users, traders or intermediaries of virtual currencies, and such activities are performed at the end-users sole and independent risk.”

As a result of the growing interest and rapid innovation in the financial technology (“ fintech”) and crypto assets domain, the Intergovernmental Fintech Working Group (hereafter IFWG) was established in 2016. In January 2019, the IFWG and the CARWG released a joint consultation paper entitled the “ Consultation Paper on Policy Proposals for CryptoAssets” (the “Consultation Paper”) for public comment. The Consultation Paper focuses only on the purchase and sale of crypto assets and payment using crypto assets.

The regulatory authorities in South Africa are of the view that crypto assets do not constitute “money” as per the traditional definition of the word, but acknowledge that crypto assets may perform certain functions similar to those of currencies, securities and commodities. There is currently no fintech specific regulation for crypto assets, but crypto assets are also not prohibited. The use of DCVs’s such as Bitcoin and other Cryptocurrencies is not unlawful nor it is submitted can it be stopped or discouraged. However, to comply with money laundering legislation a crypto asset service providers (including crypto asset exchanges and entities that provide custodial services) will be obliged to register as accountable institutions in terms of The Financial Intelligence Centre Act 38 of 2001 (FICA), and as such will be obliged to comply with anti-money laundering and counter financing of terrorism requirements in the Financial Intelligence Centre (FIC).

The issue of awareness of cryptocurrency on its own is an important one for South Africans in that some of the top internet searches for words such as ‘Bitcoin’ come from within its jurisdiction.<sup>1</sup> This in itself might not be a stark indication that the South African economy will follow suit. The reality, outside of the services offered by banking institutions, is that prevalent thought around the use of virtual currencies in South Africa is synonymous with scams and various crimes that occur in cyberspace. The reality remains that in countries prone to scams conducted in cyberspace, there exists skepticism towards any financial activity occurring outside the traditional forms of financial or commercial transactions activity.<sup>2</sup>

Cryptocurrency crime is therefore a real phenomenon which entails cyber money laundering, cyber extortion, phishing, hacking, cyber fraud, and other financial crimes such as Ponzi and fictitious investment schemes.<sup>3</sup> This is an indicator of the importance of the ECT Act<sup>4</sup> as well as that of the Cybercrimes Bill<sup>5</sup> in the South African legal framework. The regulation of activities in cyberspace, particularly associated with the use of virtual currencies as a medium of exchange in the not so distant future has never been more important. The Courts have had sufficient opportunity to grapple with the provisions of the ECT Act, however, equally as important is the need for the Cybercrimes and Cybersecurity Bill to become entrenched as law in that it seeks to afford wider and specific protection to the victims of cybercrimes.

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<sup>1</sup> *Ibid.*

<sup>2</sup> Mazambani, L & Mutambara, E ‘Predicting FinTech Innovation Adoption in South Africa: The Case of Cryptocurrency’ *SAJEMS* 2019.

<sup>3</sup> Reddy, E & Minnaar, A ‘Cryptocurrency: A Tool and Target for Cybercrime’ *Acta Criminologica: African Journal of Criminology & Victimology*, 31, 3, p71 – 92.

<sup>4</sup> Electronic Communications and Transactions Act, 25 of 2002.

<sup>5</sup> Cybercrimes Bill 2017.

There exists a view that regulators tend to adopt one of three approaches when tackling nuances in technology and innovation.<sup>6</sup> The first approach (Head in the Sand Approach) is that regulators choose to ignore disruption to the prevalent norms and new technological advancements with a view that they may be fleeting. The second approach (Combative Approach) is that strict measures of control and limitation are put into place. It is rather recommended that regulators take cognizance of what the technology aims to achieve than simply put up legal hurdles to the continued disruption. The third approach (Collaborative Approach), which is the preferred approach entails engagement with stakeholders, collaboration between various regulators, innovators and thought leaders amongst various pioneers to best understand the regulatory framework.

While virtual currencies do not constitute legal tender according to the South African Reserve Bank, it will in future become important for it to reconsider the *status quo* to stay ahead. The position adopted by National Treasury that merchants who refuse virtual currencies as a payment instrument without being in breach of the law makes the legal position at this stage clear.<sup>7</sup> This essentially amounts to a limitation of freedom of trade and commerce as a Constitutional norm, however, considering the dynamic nature with which financial technology solutions such as virtual currencies take, as well as the rapidity with which their environment changes, such a limitation is a sensible one in the present day.

The approach taken by the regulators, being collaborative, is preferable to the approaches adopted by other jurisdictions in Africa and beyond, which elect to either ignore the disruption or tend to overregulate by means of legal frameworks they employ. The IFWG rightly points out that crypto assets and activities can no longer remain out of the bounds of regulation, and in developing its recommendations it follows a structured approach distilled into three essential pillars and illustrated as follows:<sup>8</sup>.

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<sup>6</sup> Bowan, N (2017) 'How Regulation Keep Up With Technology and Innovation' *Law. Innovation. Technology. Tomorrow* 23/6/19 available at <http://nerushkabowan.com/2017/06/23/how-does-regulation-keep-up-with-technology-and-innovation-part-3-2/> on 11/5/20.

<sup>7</sup> Greef, C 'An Investigation Into the Output Tax Consequences of Bitcoin Transactions for South African value-added Tax Vendor' *SAJEMS* 22, 1 p1-9.

<sup>8</sup> IFWG Crypto Assets Regulatory Working Group: Consultation Paper on Policy Proposals for Crypto Assets (2020).

- Pillar 1: The descriptive characterisation of crypto assets and related activities. This was achieved through the issuance of a consultation paper to the industry at the start of 2019. It has been noted that, due to the evolving nature of crypto assets, continuous analysis is required to identify and investigate other developing crypto asset activities.
- Pillar 2: The identification of the critical areas of risk, and the development of mitigating measures to address these areas of risk through regulatory intervention. The position paper highlights these critical risk factors and the recommendations towards a regulatory framework.
- Pillar 3: The continuous monitoring of crypto assets and related activities, and the identification of the evolution of channels for the possible transmission of risks to the financial sector and the economy. A monitoring program should be implemented by the regulatory authorities for crypto assets.

## **7 Conclusion**

Defining cryptocurrency, blockchain and various subsets thereof precisely and clearly is important for the creation of legal certainty in the absence of policy specifically designed to regulate this nuance in technology and finance. There may be no litigation or much academic discourse relating to these concepts, however, this will change and when disputes arise it will be important for them to be clearly identifiable and defined.

Presently, no sufficient legal ground has been covered to give legal practitioners and the public sufficient illustration of the consequences of using crypto currencies in South Africa, however, the legal framework within which issues around crypto assets and crypto assets find discussion identifies some critical areas of concern and creates an environment with a semblance of certainty in how virtual assets will be dealt with in the not so distant future.

The cohesion between various pieces of legislation within the financial sector as well as well as areas affected by cybersecurity is not out of reach for South Africa. While the principles surrounding the use of crypto assets is untested in various legal *fora* such as the Courts, the discourse is fertile enough to indicate the attitude taken by the State and guide industry and individuals on the salient features of cryptocurrency trade and appropriate use.



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