

# INCORPORATING THE INCORPOREAL: THE POTENTIAL CLASSIFICATION OF BITCOIN AS A 'THING' UNDER SOUTH AFRICAN COMMON LAW

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## Abstract

*This article aims to determine whether Bitcoin could be classified as a 'thing' in the South African common law of things. The key motivation behind this article is to determine whether the Pandectist focus on the corporeality requirement in the classification of things is outdated in the modern, technologically driven era. Bitcoin, which is classified as a decentralised convertible virtual currency has been received positively in South Africa over the course of the last few years, as Bitcoin adoption has grown exponentially. South Africa has also seen the implementation of important regulatory reforms surrounding virtual currencies; primarily the recognition of virtual currency as a financial product and its traders as financial service providers. Given the positive reception of virtual currencies, particularly Bitcoin, in South Africa, this article explores the recognition of Bitcoin as a 'thing' in South Africa law, as well as the significance of this classification. From this evaluation, it will become clear that the incorporeal nature of Bitcoin poses a challenge to its common law recognition, albeit not an insurmountable one. In this regard, two arguments – the doctrinal argument and the exception argument – are proposed whereby Bitcoin could be recognised as a thing despite its incorporeality.*

\* This paper is a shortened version of my LLB dissertation, under the supervision of Dr Clireesh Joshua, see B Geyer 'The legal status of Bitcoin in South African and Namibia: A property law perspective' unpublished LLB dissertation, University of Pretoria, 2022. ORCID ID: 0000-0002-0651-4745.

# 1 Introduction

Bitcoin is indeed becoming local and brings with it novel challenges and places pressure on established legal and regulatory frameworks that were not developed to respond to it. Certain challenges may potentially be managed within the existing South African legal and regulatory framework, while other unique legal and regulatory concerns may be incapable of such reconciliation.<sup>1</sup>

The above assessment by Nieman serves as the foundation for evaluating the proprietary law position of virtual currencies in South Africa, with a specific focus on Bitcoin. This focus on Bitcoin stems from the fact that, aside from being the first virtual currency that gained widespread adoption,<sup>2</sup> it remains one of the two most widely used cryptocurrencies globally,<sup>3</sup> dominating over half of South Africa's virtual currency market by 2021.<sup>4</sup> Over its 14-year lifespan, Bitcoin has had an undeniable impact on the world's financial markets.<sup>5</sup> While the passionate praises of Bitcoin's decentralised algorithm continue to grow – especially in South Africa<sup>6</sup> – concerns regarding its volatile nature and lack of regulation have also been a cause for concern.<sup>7</sup> This increased interest, together with the fear that Bitcoin can be used to facilitate illegal activity,<sup>8</sup> raises questions regarding the legal status, responsibilities and remedies afforded to Bitcoin users.

The central thesis of this article is to address the dilemma surrounding the common-law status of Bitcoin in South Africa. The relevance of this inquiry stems from the fact that Bitcoin is novel technology, especially in South Africa, and scholars have only recently begun grappling with its proprietary law implications.<sup>9</sup> The Roman-Dutch common law, which serves as an important source of law in

1 A Nieman 'A few South African cents' worth on bitcoin' (2015) 18 *Potchefstroom Electronic Law Journal* at 1999.

2 Congressional Research Service 'Introduction to Cryptocurrency' 2023 at 1.

3 As above.

4 IT News Africa 'Report: South Africa ranks 21st in crypto ownership' (2022) at <https://www.itnewsafrika.com/2022/01/report-south-africa-ranks-21st-in-crypto-ownership/> (accessed on 2 August 2023).

5 See Chainalysis '2021 Geography of Cryptocurrency Report' 2021 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://go.chainalysis.com/rs/503-FAP-074/images/Geography-of-Cryptocurrency-2021.pdf (accessed on 2 August 2023).

6 As above.

7 W Erlank 'Introduction to virtual property: *Lex virtualis ipsa loquitur*' (2015) 18 *Potchefstroom Electronic Law Journal* at 2542.

8 M Lehmann 'Who owns Bitcoin? Private law facing the blockchain' (2020) 21 *Minnesota Journal of Law, Science & Technology* at 96.

9 See R Cloete 'Ontstoflike sake in die nuwe Suid-Afrikaanse sakereg' unpublished LLD thesis, University of Pretoria, 2001 at 1-392; F Giglio 'Pandectism and the Gaian classification of things' (2012) 62 *University of Toronto Law Journal* at 1-28 & M Njotini 'Examining the 'objects of property rights – lessons from the Roman, Germanic and Dutch legal history' (2017) 50(1) *De Jure* at 136-155.

South Africa,<sup>10</sup> is a principle-based (and therefore adaptable) source of law designed to adapt in congruence with the evolving needs of society.<sup>11</sup> Therefore, the current socio-economic relevance of, and regulatory frameworks surrounding Bitcoin in South Africa should be investigated in relation to the contemporary tenets and attitudes regarding the law of things to assess the common-law status of Bitcoin.

## 2 The definition and classification of Bitcoin

### 2.1 The definition of Bitcoin

In 2008, Satoshi Nakamoto proposed a new payment system named Bitcoin.<sup>12</sup> Nakamoto's paper, published in the wake of the 2008 Global Financial Crisis,<sup>13</sup> presented an entirely new currency with the chief objective of eliminating central governing and mediating authorities within financial transactions.<sup>14</sup> In simple terms, Nakamoto presented Bitcoin as a decentralised electronic payment system, which means that two parties can transact directly with one another, via the internet, without the interference of a third-party intermediary,<sup>15</sup> such as a financial institution.<sup>16</sup> This system also functions without requiring a regulating body since Bitcoin transactions are verified and recorded by 'nodes', an extensive network of independent computers.<sup>17</sup> As this network of computers verifies these transactions, a transparent ledger is created, which keeps track of every Bitcoin transaction, which are authenticated by the sender's unique signature.<sup>18</sup> The nodes creating and storing this ledger forms part of what is referred to as the 'blockchain'.<sup>19</sup> By keeping an inalterable and verifiable record of all previous transactions, the blockchain effectively combats the looming threat of the double-spending problem,<sup>20</sup> whereby individuals may attempt to duplicate their digital money fraudulently.<sup>21</sup> Bitcoin is also pseudo-

10 See s 7 the Constitution of the Republic of South Africa, 1996 (the Constitution); see also T Humby et al 'Introduction to law and legal skills in South Africa' (2016) 6 *Oxford University Press South Africa* at 144.

11 JA Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies* at 175.

12 S Nakamoto 'Bitcoin: A peer-to-peer electronic cash system' 2008 available at [www.bitcoin.org](http://www.bitcoin.org) (accessed 31 March 2022).

13 TG Massad 'It's time to strengthen the regulation of crypto-assets' (2019) *Economic Studies at Brookings* at 9.

14 DLK Chuen 'Introduction to Bitcoin' in DLK Chuen (ed) *Handbook of digital currency* (2015: Academia Press) at 9.

15 Nakamoto (n 12) 1.

16 As above.

17 Nakamoto (n 12) 3.

18 Nakamoto (n 12) 2.

19 As above.

20 See Chuen (n 14) p 15-17 for more information on the double-spending problem.

anonymous since all verified transactions are trackable, but neither the identity of the sender nor that of the receiver is revealed to the public.<sup>22</sup>

Bitcoin is stored in and transferred between wallets'. Bitcoin wallets can be explained as follows:

[Bitcoin] wallets utilize elliptic curve digital signatures to handle the transfer of ownership rights and ensure that unauthorized spending of the cryptocurrency is infeasible. Each wallet randomly generates a private key (Pr) that is used to derive its corresponding public key (Pub) that is shared among all users. The Pub is used to generate the address of the wallet needed to make payments to it while Pr is used to generate a digital signature corresponding to Pub in order to claim payments made to the wallet and use them in later transactions.<sup>23</sup>

Bitcoin, furthermore, intends to act as an alternative to fiat money. Fiat money can be defined as a government-issued and regulated legal tender backed by the government itself, such as the South African Rand.<sup>24</sup> Fiat money is founded upon the premise that the government controls and regulates the supply of banknotes to avoid hyperinflation.<sup>25</sup> Therefore, the value of fiat money is regulated by governments and financial institutions, while the value of Bitcoin is essentially determined purely by supply and demand.<sup>26</sup>

## 2.2 The classification of Bitcoin

To understand the significant differences between Bitcoin and fiat currencies within the South African context, it is imperative to understand how Bitcoin is classified within the country's financial system. Nieman indicates that Bitcoin is classified as a decentralised convertible virtual currency (DCVC).<sup>27</sup> To fully comprehend this multi-faceted classification, it is important first to understand what a virtual currency (VC) is. Like all other payment methods, VCs stand as a substitute for value.<sup>28</sup> Referencing the South African Reserve Bank's (SARB) Position Paper on Virtual Currencies, Nieman defines VCs as:

21 Nakamoto (n 12) 1.

22 As above.

23 E Zaghoul et al 'Bitcoin and blockchain: Security and privacy' (2020) 7(10) *IEEE Internet of Things Journal* at 10291.

24 For more information on fiat currencies, see K Bankov 'From gold to futurity: A semiotic overview on trust, legal tender and fiat money' (2019) 29 *Social Semiotics* at 344.

25 Chuen (n 14) 33.

26 See J Bouoiyour 'What determines Bitcoin's value?' (2015) 16 *Centre d'Analyse Théorique et de Traitement des Données Économiques* at 1-14 for more information on the fluctuating value of Bitcoin.

27 Nieman (n 1) 1980.

28 Nieman (n 1) 1981.

[d]igital representations of value that can be digitally traded and functions as a medium of exchange, a unit of account or a store of value, but does not have a legal tender status.<sup>29</sup>

Legal tender is defined as any method of payment that is 'lawfully in circulation in the Republic [of South Africa]'.<sup>30</sup> VCs can be subdivided into convertible and non-convertible currencies, which refers to the possibility of such currencies being exchanged for tangible money and goods, as well as services.<sup>31</sup> Bitcoin is not recognised as a legal tender in South Africa but as a convertible VC that can be exchanged for fiat money.<sup>32</sup> Finally, VCs that are convertible are categorised as either centralised or decentralised.<sup>33</sup> As previously mentioned, decentralisation means that a currency is not subject to any mediating or governing authorities but rather math-based peer-to-peer systems run by a vast network of independent computers.<sup>34</sup>

On the other hand, centralised currencies are controlled by a third-party administering authority, such as a financial institution that issues, authorises and oversees the operation and functioning of the currency and its payment ledger.<sup>35</sup> Thus, while fiat money is centralised and tangible legal tender, Bitcoin is classified as a decentralised, convertible virtual currency (DCVC).<sup>36</sup> Because of its virtual nature, Bitcoin would be classified as incorporeal under South African proprietary law. Objects that exist in virtual worlds are, by this definition, incorporeal as they do not exist in terms of people's understanding of real-world physics.<sup>37</sup> Corporeal objects are, in modern terms, defined as those object that occupy space and are capable of sensory perception by any of the five senses.<sup>38</sup> According to Erlank, VCs are 'something that one cannot touch, cannot taste, and cannot pick up and take home ... however, it is still property, and it still exists'.<sup>39</sup> The implications of Bitcoin's incorporeality will be expanded on in paragraph 4.3.2.

29 South African Reserve Bank National Payment System Department's 'Position Paper on Virtual Currencies' 2014 at 2.

30 Section 17(2) of the South African Reserve Bank Act 90 of 1989.

31 Nieman (n 1) 1982.

32 As above.

33 As above.

34 Nakamoto (n 12) 3.

35 As above.

36 Nieman (n 1) 1980.

37 W Erlank 'Things' in G Muller et al (eds) *General principles of South African property law* (2019) 13-35 at 25.

38 G Muller et al *Silberberg and Schoeman's: The law of property* (6th Edition: 2019) at 19.

39 Erlank (n 7) 2526.

### 3 The relevance and recognition of Bitcoin in South Africa

#### 3.1 The relevance of Bitcoin in South Africa

To contextualise the debate around the recognition and regulation of Bitcoin, it is necessary to acknowledge the relevance and value of DCVCs in the South African socio-economic sphere. There are significant economic consequences of owning virtual property in the modern world.<sup>40</sup> Erlank uses the example of Bitcoin withdrawals from ordinary ATMs, which creates various new possibilities and complications within the financial sector.<sup>41</sup> He also notes that, left unregulated, VCs could open the door for schemes of money laundering and tax evasion.<sup>42</sup> Thus, governments will have to start formulating regulations for the sale and use of VCs. This call for regulation will be discussed below.

Spruyt illustrates that the global rise in VC usage ushers in a new era which challenges perceptions of money, payment, and property.<sup>43</sup> As people and organisations come to terms with the rapidly evolving nature of money, technology and work brought about by the fourth industrial revolution, their actions and habits are also changing. According to Brookings, Africa has seen an exponential growth of interest in cryptocurrencies over the last few years.<sup>44</sup> Between 2020 and 2021, Africa saw a 1 200 per cent increase in crypto payments valued at US\$105,6 billion.<sup>45</sup> Aside from this, Chainalysis ranked South Africa as one of 2021's top 20 countries in cryptocurrency adoption.<sup>46</sup> This illustrates how rapidly Bitcoin is gaining popularity and pertinence in Sub-Saharan African countries, where hyperinflation and failing economies have resulted in citizens distrusting their respective governments.<sup>47</sup> This can partially be ascribed to the fact that Bitcoin's decentralised algorithm provides the citizens of these countries with the option to store and trade their financial assets on a platform that is inaccessible to their nation's financial and governmental institutions and which is unaffected by the state of their national economy.<sup>48</sup>

40 Erlank (n 7) 2542.

41 Erlank (n 7) 2542.

42 Lehmann (n 8) 96.

43 W Spruyt 'An assessment of the emergent functions of virtual currencies' (2018) 4 *Journal of South African Law* at 707.

44 Brookings Africa Growth Initiative 'Foresight Africa 2022' 2022 at 96.

45 As above.

46 Chainalysis (n 5).

47 See K Omoteso 'Corruption, governance and economic growth in Sub-Saharan Africa: a need or the prioritisation of reform policies' (2014) 10 *Social Responsibility Journal* at 316-330.

48 Bankov (n 24) 2.

Another reason for DCVCs increasing relevance in South Africa is that they provide much-needed relief to individuals in impoverished environments, especially those excluded from the existing financial system.<sup>49</sup> According to the World Bank Group, the number of unbanked adults in Sub-Saharan Africa is 350 million – approximately 17 per cent of the global total.<sup>50</sup> This means that they cannot access conventional modes of financial independence,<sup>51</sup> since ‘no one in the household [has] a checking or savings account at a bank or credit union’.<sup>52</sup> According to 27 per cent of the individuals surveyed, the main reason for not belonging to a recognised financial institution is a lack of access, primarily due to their remoteness.<sup>53</sup> Many others also cite a mistrust in recognised banks, as they have historically been untrustworthy.<sup>54</sup> The steep incline in Bitcoin usage within this region is promising since independent virtual currencies can provide much-needed financial inclusion and independence to those who do not have access to traditional financial facilities without having to vest their trust solely in banks or the government. However, crypto scams may also lead to the exploitation of Bitcoin users.<sup>55</sup> This issue necessitates the debate surrounding the regulatory oversight of Bitcoin.

### 3.2 Bitcoin regulation in South Africa

Several stumbling blocks present themselves when it comes to applying the rules of private property law to blockchain transactions. Lehmann identifies how these issues could be addressed through regulatory oversight.<sup>56</sup>

First, the blockchain is an entirely decentralised, autonomous algorithm.<sup>57</sup> This means that when, for instance, a thief obtains the key to a victim’s wallet and successfully transfers the stolen Bitcoin into their wallet without the holder’s consent, the algorithm will

49 Chuen (n 14) 13.

50 The World Bank Group *The Global Findex Database* 2014 at 1.

51 As above.

52 FDIC ‘2021 FDIC National Survey of Unbanked and Underbanked Households’ 24 July 2023 <https://www.fdic.gov/analysis/household-survey/> (accessed on 24 August 2023).

53 It is admitted that VCs may not be a viable replacement for all unbanked individuals, since they may also struggle with access to the necessary digital infrastructure required to access VCs, such as computers and internet access. This being said, for those who do have access to such facilities and remain unbanked for other reasons, VCs could provide significant financial freedom. See V Lawack-Davids ‘The legal and regulatory framework of mobile banking and mobile payments in South Africa’ (2012) 7 *Journal of International Commercial Law and Technology* at 323.

54 World Bank Group (n 50) 3.

55 See M Bartoletti et al ‘Cryptocurrency scams: Analysis and perspectives’ (2021) 9 *IEEE Access* at 148353-148373.

56 Lehmann (n 8) 108.

57 See para 2.1.

recognise this transaction as valid and irreversible, despite the lack of a legal basis for such a manoeuvre.<sup>58</sup> Alternatively, a person who lawfully inherits Bitcoin but does not receive the private key to access the wallet would have no way to access the currency to which they are entitled.<sup>59</sup> In other words, that which the law recognises as lawful and fair may not always be readily enforceable on Bitcoin.

Secondly, Bitcoin transactions are irreversible.<sup>60</sup> This means that even if the law recognises a particular transaction's unlawfulness, there is no way to remedy the situation by deleting that transaction from the blockchain.<sup>61</sup>

Thirdly, Bitcoin is anational and not subject to one particular legal system, which means that it is not regulated under a particular government or legal system.<sup>62</sup>

To reconcile Bitcoin with South African private law, these problems will have to be addressed. Lehmann's proposal in this regard is that the nature of Bitcoin should not be tampered with, as its decentralised nature is quintessential to the benefit it provides, but that the law must still play a regulatory and corrective role with regard to blockchain transactions.<sup>63</sup> Rather than attempting to recode the blockchain algorithm to avoid mistakes, fraud and ownership issues, the law should find unique external solutions for these issues that apply to users within a specific jurisdiction. Therefore, Bitcoin regulation is not about removing transactions from the Bitcoin ledger or altering the autonomous nature of the blockchain but rather about how the legal system could potentially address the individual needs of users concerning their cryptocurrency.<sup>64</sup> If Lehmann's solution is applied to stolen Bitcoin, this would mean that while the illegal transfer cannot be physically removed from the blockchain, the thief could be legally obligated to make a new transaction wherein they pay the stolen currency back to the rightful holder.<sup>65</sup> Lehmann thus suggests that Bitcoin regulation is the best way to oversee the rights and responsibilities of those involved in trading DCVCs.<sup>66</sup> While this solution has challenges, it is a good place to start in addressing these obstacles.

There are differing schools of thought surrounding the regulation of Bitcoin.<sup>67</sup> On the one hand, proponents of deregulation claim that

58 Lehmann (n 8) 98.

59 Lehmann (n 8) 108.

60 Lehmann (n 8) 110.

61 As above.

62 Lehmann (n 8) 113.

63 Lehmann (n 8) 117.

64 Lehmann (n 8) 120.

65 As above.

66 Lehmann (n 8) 93.

67 See R Khan 'Cryptocurrency: usability perspective versus volatility threat' (2022) 2 *Journal of Money and Business* at 16-28.

the genius of Bitcoin is that it allows ordinary people to manage their finances without any form of external interference.<sup>68</sup> Bitcoin has no senior authoritative body that can freeze your account, increase the available amount of Bitcoin or interfere with your freedom to transact.<sup>69</sup> In other words, buying Bitcoin is a risk you take without the opportunity of legal recourse in the event of financial loss. Those that are in favour of minor regulation, on the other hand, contend that a complete lack of government control renders individuals, especially those uneducated and uninformed about the risks intrinsic to this technology, vulnerable to exploitation.<sup>70</sup> Cryptocurrencies are also known to increase the risk of fraud and money laundering.<sup>71</sup>

In light of this debate, evaluating Bitcoin regulation in South Africa is necessary. Until recently, the SARB did not regulate or oversee any VCs. It thus did not provide recourse for victims of fraud or financial loss within the VC landscape.<sup>72</sup> In its 2022 Budget Review, however, the South African Treasury set out its approach to VC regulation in line with the recommendations of the Intergovernmental Fintech Working Group (IFWG).<sup>73</sup> First, the amendments to Schedules 1, 2 and 3 of the Financial Intelligence Centre Act 38 of 2001 (FICA) were finalised in 2022 to include all crypto asset providers as accountable institutions.<sup>74</sup> This aligns FICA better with the international standards regarding VCs as set out by the Financial Action Task Force (FATF), an intergovernmental organisation with the aim of combatting fraud, money laundering and the financing of terrorism at both a local and international level.<sup>75</sup> In this regard, on 20 October 2022, the Financial Sector Conduct Authority (FSCA) also declared that the recently promulgated Financial Advisory and Intermediary Services Act<sup>76</sup> (FAISA) includes crypto assets under the definition of a financial product.<sup>77</sup> Accordingly, all crypto financial service providers (FSPs) exchanges, platforms, advisors, brokers and any other entity providing intermediary services relating to VCs will have to be licensed as financial service providers and act in accordance with the requirements for such service providers.<sup>78</sup> This amendment intends to limit the risk that crypto assets and activities

68 Khan (n 67) 19.

69 Chuen (n 14) 8.

70 Khan (n 67) 24.

71 As above.

72 Nieman (n 7) 1989.

73 IFWG 'Position Paper on Crypto Assets' 2021 at 21.

74 SAICA 'Schedule 1, 2 and 3 of the FIC Act amended' 2022 <https://www.saica.org.za/resources/153240> (accessed on 2 August 2023).

75 Financial Action Task Force *Virtual Currencies: Key Definitions and Potential AML/CFT Risks* (2014).

76 37 of 2002.

77 Financial Sector Conduct Authority 'Declaration of crypto assets as a financial product' 2022 at 1.

78 Financial Sector Conduct Authority 'Policy document supporting the declaration of a crypto asset as a financial product under the Financial Advisory and Intermediary Services Act' 2022 at 3.

pose to financial customers.<sup>79</sup> These commitments were confirmed by the Deputy Governor of the SARB, Kuben Naidoo.<sup>80</sup> In a nutshell, Naidoo expressed the SARB's commitment towards the regulation of cryptocurrencies in order to make the cryptosystem in South Africa safer.<sup>81</sup> The Treasury also described these new regulations as measures aimed at 'promoting financial innovation to improve competition and inclusion'.<sup>82</sup> In light of this commitment to VC regulation, a 2018 report by the international law firm, Baker McKenzie,<sup>83</sup> classified South Africa as a 'green' country in the context of Bitcoin acceptance, indicating that South Africa has adopted a friendly and progressive approach towards Bitcoin.<sup>84</sup>

In light of the above, it is submitted that the South African government and public have been particularly welcoming towards Bitcoin technology. What remains to be determined is whether the South African proprietary law system is equally accommodating towards incorporeal, virtual assets, such as Bitcoin.

## 4 The common-law classification of Bitcoin

### 4.1 The distinction between property and things

Different types of property are afforded different levels of recognition, as well as different protective measures.<sup>85</sup> The question at the heart of this inquiry is whether Bitcoin can be classified as a 'thing'. In order to understand the nature and role of 'things' within the broader scope of property law, one should begin by distinguishing between 'property' and 'things'. Erlank states:

Recognition of property in private law (things) differs from recognition in constitutional law since the purpose of recognition in private law is to enforce protection against other private actors, while the corresponding

79 FSCA (n 78) 8.

80 See 'Future of money, banking and crypto' 2022 [https://video.search.yahoo.com/search/video;\\_ylt=AwrFG.8fEDtjJgwESVvXNyoA;\\_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZANMTONVSTA1NENfMQRzZWMDcGl2cw--?p=psg+webinar+%2B+the+future+of+money+banking+and+crypto&fr2=piv-web&type=E210US714G0&fr=mcafee#id=1&vid=49847fb28f47d755a8d57aa16220ecc1&action=view](https://video.search.yahoo.com/search/video;_ylt=AwrFG.8fEDtjJgwESVvXNyoA;_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZANMTONVSTA1NENfMQRzZWMDcGl2cw--?p=psg+webinar+%2B+the+future+of+money+banking+and+crypto&fr2=piv-web&type=E210US714G0&fr=mcafee#id=1&vid=49847fb28f47d755a8d57aa16220ecc1&action=view) (accessed on 3 October 2022).

81 Cliffe Dekker Hofmeyr 'Finance and Banking Alert' 4 August 2022 at *Future of money, banking and crypto* 2022 [https://video.search.yahoo.com/search/video;\\_ylt=AwrFG.8fEDtjJgwESVvXNyoA;\\_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZANMTONVSTA1NENfMQRzZWMDcGl2cw--?p=psg+webinar+%2B+the+future+of+money+banking+and+crypto&fr2=piv-web&type=E210US714G0&fr=mcafee#id=1&vid=49847fb28f47d755a8d57aa16220ecc1&action=view](https://video.search.yahoo.com/search/video;_ylt=AwrFG.8fEDtjJgwESVvXNyoA;_ylu=Y29sbwNiZjEEcG9zAzEEdnRpZANMTONVSTA1NENfMQRzZWMDcGl2cw--?p=psg+webinar+%2B+the+future+of+money+banking+and+crypto&fr2=piv-web&type=E210US714G0&fr=mcafee#id=1&vid=49847fb28f47d755a8d57aa16220ecc1&action=view) (accessed on 3 October 2022).

82 As above.

83 Baker McKenzie 'Blockchain and cryptocurrency in Africa: a comparative summary of the reception and regulation of blockchain and cryptocurrency in Africa' 2018 at 2.

84 Baker McKenzie (n 83) 5.

85 Erlank (n 85) 15.

purpose in constitutional law is to enforce protection against state intervention.<sup>86</sup>

Furthermore, 'property' refers to 'a wide variety of assets that make up a person's estate or belongings and which serve as objects of the rights that such a person exercises in respect thereof'.<sup>87</sup> At the same time, things simply amount to 'the object of a right, in the restricted meaning of referring only to corporeal or material objects'.<sup>88</sup> Du Bois also confirms this distinction between constitutional and private law property protection.<sup>89</sup> In private law, the focus is on the competing rights of private parties, while the Constitution of the Republic of South Africa, 1996 (Constitution) insulates property against a certain measure of state interference, as well as the constitutional rights of other parties.<sup>90</sup>

Furthermore, private property law, generally focuses on the objects of rights, known as things. In contrast, constitutional property law emphasises rights held by individuals, known as constitutional property.<sup>91</sup> In light of this, 'things' can be defined as the objects of real rights, and fall within the realm of private law rather than public law.<sup>92</sup> In summary, while property describes the constitutional right to both corporeal and incorporeal legal objects, things are traditionally defined more narrowly as the physical objects of real rights.<sup>93</sup>

Ownership is the most comprehensive real right that a person can have over a thing.<sup>94</sup> According to Lehmann, determining the meaning of Bitcoin ownership in a private law context poses various challenges.<sup>95</sup> First, there is the fact that defining ownership of Bitcoin is significantly harder than determining the ownership of physical assets. While Bitcoin is often colloquially referred to as property and to the holders of private keys as 'Bitcoin owners', it is still uncertain whether crypto-assets can realistically be recognised as such within the ambit of the South African common law.<sup>96</sup> Aside from the fact that Bitcoin is, by its nature, 'completely delocalised and a-national',<sup>97</sup> it also introduces an entirely new concept of property which challenges the traditional conceptions of ownership. This is the question this inquiry aims to answer – whether Bitcoin can be

86 As above.

87 Muller et al (n 37) 1.

88 As above.

89 M Du Bois 'Intellectual property as constitutional property right: the South African approach' (2012) 24(2) *South African Mercantile Law Journal* at 177-193.

90 See s 25 of the Constitution.

91 Erlank (n 85) 16.

92 The Constitution of the Republic of South Africa, 1996.

93 Erlank (n 85) 16.

94 Muller et al (n 37) 103.

95 Lehmann (n 8) 101.

96 As above.

97 Lehmann (n 8) 98.

recognised as property regulated by South African common-law provisions. The answer to this question would then facilitate future inquiries into the various private law concerns affecting Bitcoin, including the ownership of stolen coins, the right of a Bitcoin user to reverse an erroneous transfer and the impact that bankruptcy or succession may have on Bitcoin holders.<sup>98</sup>

The first central question is thus whether Bitcoin can be classified as a ‘thing’. If so, the door may be open for further inquiry into how such rights and responsibilities may be practically enforced. For an owner of an object to enjoy the rights and remedies prescribed in the law of things, however, the object must first meet a set of specific requirements.<sup>99</sup>

## 4.2 The characteristics of things

Traditionally, a ‘thing’ is defined according to a specific set of criteria, namely that it is an object which is external, independent, appropriable, of use and value and, most importantly, corporeal.<sup>100</sup> Furthermore, things can be subcategorised by their classification in relation to persons and their nature.<sup>101</sup>

First, the fact that things ought to be external to persons and of an impersonal nature indicates that the object cannot be a physical extension of the human body, such as organs or limbs, which are considered to be part of a person’s individuality and to fall outside the scope of legal commerce (*res nullius*).<sup>102</sup>

Secondly, independence refers to the fact that the object in question has a distinct and definite nature, which enables it to exist entirely on its own, taking up its own space.<sup>103</sup> While this excludes, for instance, natural resources which are incapable of being isolated, controlled or individually sold, such as air or rivers, it does include things such as demarcated land.<sup>104</sup>

Thirdly, the appropriability of things means they ought to be susceptible to human control or submission.<sup>105</sup> This definition includes things such as cell phones or vehicles. However, it excludes those phenomena beyond the scope of human power and which are not divided into manageable parts, such as the natural elements, such as space.<sup>106</sup>

98 Lehmann (n 8) 93.

99 Muller et al (n 37) 19.

100 Erlank (n 85) 23-29.

101 Erlank (n 85) 29-35.

102 Erlank (n 85) 26.

103 Erlank (n 85) 27.

104 As above.

105 Erlank (n 85) 28.

106 As above.

Fourthly, things have to be of use and value and meet the needs of legal subjects for a legal relationship to arise between them. This includes both economic and sentimental value.<sup>107</sup> To determine whether this element is present, an objective test is applied to determine whether the item in question carries the potential to be of use or to contribute value to a hypothetical person.<sup>108</sup> In other words, while one person may subjectively regard something as useless, another person may find great use and value for it. The example presented is a leaf, which one person may regard as lacking any use and value, while another may utilise it for their composting business.<sup>109</sup>

Finally, the corporeality requirement first refers to the possibility of being observed with the five human senses: sight, hearing, taste, touch and smell. However, it is sufficient if at least some of those senses could perceive the thing.<sup>110</sup> The second condition for corporeality is that the thing ought to occupy a physical volume of space. This implies that, while at least some senses can observe natural phenomena such as loud noises or warm gusts of wind, they cannot be defined as 'corporeal' since they do not occupy any space in the physical world.<sup>111</sup> There are, however, select, legally recognised exceptions to the requirement of corporeality, which will be elaborated upon shortly.<sup>112</sup>

What is important to understand about the corporeality requirement, however, is that its application is not rooted in pure physics but rather in a theoretical context which is informed by the views of society and scholars of proprietary law.<sup>113</sup> The contentious debate around the present-day relevance of this requirement, which pertains to the central question regarding the classification of Bitcoin, will be discussed in detail below.<sup>114</sup>

#### **4.3 Bitcoin and the law of things**

##### **4.3.1 *The individual characteristics of things as applied to Bitcoin***

To understand the scope of the common-law definition of a thing, each fundamental requirement will first be evaluated individually concerning Bitcoin. Since not much research has been done on

107 Erlank (n 85) 28.

108 As above.

109 As above.

110 Erlank (n 85) 23.

111 As above.

112 See para 4.3.2 below.

113 Erlank (n 85) 23.

114 See para 4.3.2 below.

applying these concepts to virtual currencies, scholarly views pertaining to the internet and other virtual assets will be relied on to extrapolate general principles regarding virtual property. What follows is an evaluation of each element of a 'thing'.

First, things must be external and impersonal.<sup>115</sup> It is submitted that virtual property meets this requirement, as it is completely removed from the physical bodies of users. Another way of understanding this requirement is to regard it as distinguishing between objects considered *in commercio* and those that are not. In the virtual realm, external things can be found in the form of avatars, which can be bought, sold, edited and discarded by a real-world user.<sup>116</sup> This reasoning applies to Bitcoin also, which is linked to a real-world monetary value and can be bought and sold using a virtual account.<sup>117</sup>

Secondly, things should exist independently.<sup>118</sup> Incorporeals may also be regarded as independent if they are recognised as such in legal practice. In other words, the independence of incorporeals may be determined on an *ad hoc* basis.<sup>119</sup> Erlank argues that virtual property gains independence when data is converted into identifiable virtual items.<sup>120</sup> While the abovementioned analysis refers specifically to lifelike objects used by avatars in video games, such as crops or minerals, it is submitted that this could equally apply to the Bitcoin system, whereby individual virtual currency is stored in separate, identifiable wallets, transactions are coded onto a visible ledger through machine learning systems etcetera.

Thirdly, things should be susceptible to human control.<sup>121</sup> This means that a user can protect and enforce their entitlement to a specific asset.<sup>122</sup> It is argued that, within the broad interpretation of things, both corporeals and incorporeals may be satisfactorily susceptible to human control.<sup>123</sup> Bitcoin arguably complies with this requirement in that each Bitcoin user has a wallet exclusively accessible through their unique key.<sup>124</sup> This, coupled with the fact that Bitcoin users can use their virtual currency to conclude transactions and purchase real-world items according to their own

115 See 4.2 above.

116 Erlank (n 85) 26.

117 See para 2.1 above.

118 See 4.2 above.

119 Muller et al (n 37) 25.

120 Erlank (n 85) 27.

121 See para 4.2 above.

122 See Schindlers Attorneys 'Are crypto assets property in South African law? 2021 <https://www.schindlers.co.za/news/are-crypto-assets-property-in-south-african-law/> (accessed on 5 October 2022).

123 Muller et al (n 37) 26.

124 See Schindlers (n 122).

will, indicates that such DCVCs meet the appropriability requirement.<sup>125</sup>

Fourthly, things should be of use and value to persons.<sup>126</sup> It is important to note that incorporeals can hold just as much economic value as corporeals.<sup>127</sup> According to Erlank, this is paramount for courts regarding the classification of virtual property.<sup>128</sup> Bitcoin is a representation of tangible money, as well as proof of the transfer of ownership of tangible assets. Therefore, despite its intangibility, Bitcoin is of genuine commercial use and value to its users.<sup>129</sup> Furthermore, as will be discussed shortly, scholars have suggested that, due to the evolving nature of society's understanding of property, the primary focus regarding the classification of things should shift towards the use and value of property rather than its corporeality.<sup>130</sup>

Finally, and of significant importance in the Pandectist common-law interpretation, things can only be corporeal.<sup>131</sup> Bitcoin does not meet this corporeality requirement since it exists virtually. However, the validity of this requirement is a matter of debate. What follows is a discussion of the various arguments regarding the corporeality requirement of things under South African common law.

#### **4.3.2 Contentions surrounding the corporeality requirement**

As discussed above, the dominant, traditional Pandectist understanding of the law of things is that it only protects objects that meet all five requirements, focusing on corporeality. There is a convincing argument to be made that the restrictions on incorporeal things are founded upon systematic and dogmatic considerations rather than concrete logic or the rules of physics.<sup>132</sup> If this is true, then the basis of the traditional view should be re-evaluated to determine if such a view is still relevant and applicable in the current legal system.

Cloete provides an in-depth analysis of the two contesting approaches to defining a thing in the South African common law.<sup>133</sup> On the one hand, there is the narrow, traditional view which holds that the essence of a thing lies in its corporeality and that the law of things strictly excludes any incorporeal assets, save for some select

125 See para 2.1 above.

126 See 4.2 above.

127 Muller et al (n 37) 27.

128 Erlank (n 85) 29.

129 Schindlers (n 122).

130 Cloete (n 9) 343.

131 See 4.3.2 below.

132 Erlank (n 85) 23.

133 Cloete (n 9).

exceptions.<sup>134</sup> However, the rapid rate of technological innovation and recent constitutional property law developments have led contemporary scholars to reject the dogmatic view in favour of a broader, more modern understanding of things as is reflected in traditional Roman law.<sup>135</sup>

According to Cloete, South African law's narrow, traditional definition of things is blatantly incorrect and derives from a relatively recent legal interpretation.<sup>136</sup> To understand this critique of the narrow conception of things, one should first understand the historical context of this legal development. Naturally, the scholars discussed below were not referring to virtual property, such as virtual currencies, but rather to other intangible rights, such as usufructs. The object of this discussion is nonetheless to show that the corporeality requirement of things is not deeply ingrained in the Roman-Dutch legal tradition but rather a modern interpretation.

In traditional Roman law, jurists recognised three distinct categories of private law: persons, actions and things.<sup>137</sup> In other words, all aspects of private law, whether corporeal or incorporeal, which could not be classified as actions or persons, were classified as 'things' or '*res*'.<sup>138</sup> Incorporeal things (*res incorporales*) were thus explicitly recognised in Roman times and later during the Middle Ages.<sup>139</sup> Roman-Dutch common-law writers continued with this approach.<sup>140</sup> Voet, for instance, defined 'things' as 'everything of which the courts take cognisance'.<sup>141</sup> Voet argued that incorporeals could be recognised as things since they are equally capable of having 'an inherent value to the person who had an interest in them'.<sup>142</sup> In other words, the most essential characteristic of a thing in old Roman-Dutch law was economic use and value.<sup>143</sup>

In contrast with the Roman-Dutch approach, German Pandectists, who were also scholars of Roman law, adopted an interpretation of the concept of things which significantly differed from that of the Roman jurists by arguing that corporeality is a requirement of things.<sup>144</sup> Pandectism started in the nineteenth century in Germany and focused on 'a systematic and dogmatic classification of Roman law',<sup>145</sup> – an approach sometime criticised as 'exaggerated

134 Erlank (n 85) 17.

135 See Cloete (n 9), Giglio (n 9) & Njotini (n 9).

136 Cloete (n 9) 4.

137 Muller et al (n 37) 18.

138 As above.

139 Cloete (n 9) 4.

140 Muller et al (n 37) 18.

141 Voet Elem Jur 2 1 1.

142 Voet (n 141) 1.8.11.

143 Njotini (n 9) 154.

144 Cloete (n 9) 316.

145 Giglio (n 9) 1.

dogmatism'.<sup>146</sup> Pandectists were keenly interested in the work of Gaius, a Roman jurist who introduced the distinction between corporeal and incorporeal things.<sup>147</sup> That being said, it is contended that the Pandectist reading of Gaius' distinction between corporeals and incorporeals is not a true reflection of the intention behind the distinction itself.<sup>148</sup> The Pandectist interpretation of Gaius' scheme led to the belief that incorporeals are distinguished from corporeals in the sense that they do not form part of the definition of a thing but rather exist purely as an exception to the corporeality requirement.<sup>149</sup> Giglio, however, argues that the Pandectist interpretation is incorrect and should therefore be discarded in its entirety.<sup>150</sup> Giglio argues that Gaius's distinction between corporeals and incorporeals did not intend to impact the recognition or ownership of such objects<sup>151</sup> and that the true nature of Gaius's scheme was philosophical rather than legal-analytical.<sup>152</sup> Therefore, the Pandectists' legal interpretation of Gaius's didactic scheme resulted in consequences within the law of things which Gaius would not have intended.<sup>153</sup>

While South African law was primarily influenced by the view of the Roman-Dutch scholars during its early development, the post-1950 Pandectist view increasingly influenced the South African interpretation.<sup>154</sup> Before the 1950s, South African jurists underscored Voet's broad interpretation of things as 'everything which can be the object of a right [and which has] monetary value',<sup>155</sup> thereby acknowledging the existence of incorporeal things. In the years since, South African scholars, such as Van der Merwe and Joubert,<sup>156</sup> began to adopt narrower Pandectist views and subsequently inspired the opinion that corporeality stands at the centre of private property law and that incorporeals may merely be included as exceptions in specific circumstances.<sup>157</sup> In other words, a shift can be observed from a broad, pragmatic approach to a narrower, doctrinal approach to classifying things in the South African common law.<sup>158</sup>

In contrast with this narrow approach, South African scholars such as Kleyn and Boraine have subsequently reverted to the original

146 As above.

147 Giglio (n 9) 3.

148 As above.

149 Muller et al (n 37) 18.

150 Giglio (n 9) 3.

151 Giglio (n 9) 5.

152 Giglio (n 9) 8.

153 Giglio (n 9) 9.

154 Cloete (n 9) 316.

155 Muller et al (n 37) 18.

156 See CG Van der Merwe Sakereg (2nd ed 1989) and CG Van der Merwe 'Ownership' in WA Joubert & JA Faris (eds) *The law of South Africa* volume 27 (1st reissue 2002) at 217-355.

157 As above.

158 Cloete (n 9) 316.

Roman law stance by arguing that the concept of a thing transcends the distinction between corporeal and incorporeal and is dependent on the commercial use and value of the particular asset.<sup>159</sup> Kleyn argues that including incorporeal things within the law of things does not threaten the doctrine of subjective rights.<sup>160</sup> In addition to this, modern French authors also depart from the unnecessary distinction between corporeals and incorporeals.<sup>161</sup> This movement was initiated by Ginossar, who presented the notion that ‘a patrimony comprises corporeal and incorporeal things, and ownership is the link between the person and all the elements present in his patrimony’.<sup>162</sup> In other words, ownership establishes a relationship between a person and their thing, whether that thing is a car (corporeal) or an usufruct (incorporeal).<sup>163</sup> The implication being that not all incorporeals will qualify as things, only those which could be the object of ownership, provided that it is of use and value to its owner.

In addition, it is submitted that there is no legitimate reason for corporeals to enjoy preference over incorporeals in the legal sense.<sup>164</sup> Giglio argues:

Law ... is a social science, a creation of the human intellect to the organization of a social community. Tangibles exist for the law only insofar as they form the objects of legal interests and legal relations. Factual, corporeal things are only that, facts of nature, until the law takes notice of them and incorporates them into its system of ideas by attaching legal interests to them. Through this passage, physical things lose their corporeality and become legal things. Legal things are not physical things They are concepts.<sup>165</sup>

In light of these arguments, it is submitted that the corporeality requirement should not be accepted as an undisputed, inherent legal principle in South African law but rather as a very recent, narrow and dogmatic interpretation of proprietary law which does not necessarily serve the developing needs of South African legal subjects in the era of VCs.<sup>166</sup> This approach is preferable, as it is more pragmatic and aligns with the traditional Roman concept of a thing.<sup>167</sup>

159 DG Kleyn & A Boraine *Silberberg and Schoeman's the law of property* (3rd Edition: 1992) at 19.

160 See DG Kleyn ‘Dogmatiese probleme rakende die rol van ontstoflike sake in die sakereg’ 1993 (26) *De Jure* at 11.

161 Giglio (n 9) 14.

162 As above.

163 As above.

164 Giglio (n 9) 7.

165 As above.

166 As above.

167 Cloete (n 9) 92.

## 5 Arguments for the common law recognition of Bitcoin despite its incorporeality

It is clear that the corporeality requirement poses a significant obstacle for virtual assets, such as Bitcoin, to be recognised as property under the South African common law. In light of this, Cloete's evaluation of the historical development of the corporeality requirement<sup>168</sup> demonstrates the need to transform the law of things within the modern age of rapid technological development. Rethinking the corporeality requirement and aligning the law with technological advancement is thus required.

The corporeality requirement presents dogmatic problems, which can be resolved in various ways: One solution is to disregard the requirement altogether, while another is to recognise incorporeals as 'patrimonial rights serving as the object of limited real rights', thus classifying them as an exception to the requirement of corporeality.<sup>169</sup>

It is submitted that the first proposal, namely the altogether elimination of the corporeality requirement, can be achieved by emphasising 'use and value' rather than 'corporeality', which would allow for incorporeal assets, such as VCs to gain recognition as 'things'. This argument will be described as the 'doctrinal argument'. Secondly, it will be argued that a compromise could be struck by recognising incorporeal assets as an exception to the corporeality requirement.<sup>170</sup> This is referred to as the 'exception argument'.

### 5.1 Doctrinal argument

It has been argued that the corporeality requirement may be eschewed, and the 'use and value' requirement preferred. It is argued that:

There seems to be no reason why an immaterial property right cannot also be the object of a real right, considering the economic value implicit in such immaterial property rights.<sup>171</sup>

As previously stated, Bitcoin is a commodity subject to private ownership, which meets all four of the other requirements of a thing aside from corporeality, including socio-economic use and value.<sup>172</sup> In terms of use and value, Bitcoin is entirely subject to the personal control of its owner, using a wallet and key without any external

168 See para 4.2.

169 Muller et al (n 37) 41.

170 As above.

171 Muller et al (n 37) 20.

172 See para 4.3.1 above.

interference. Moreover, the primary objective of owning Bitcoin is to put the user in a superior financial position by allowing them to invest and spend their finances free from (excessive) governmental control. Finally, the last couple of years have seen the use of crypto transactions increase exponentially due to a rising interest in DCVCs and a growing awareness of the access to commercial and economic freedom that it provides. Therefore, it is not only clear that Bitcoin's use and value are prominent, but the argument can be made that the large-scale adoption of Bitcoin should weigh more than its intangibility. The fourth industrial revolution has brought about unprecedented developments and requires that we re-assess the way in which the law functions. As Njotini puts it:

Property or the objects that are or should be accorded the status of property for legal purposes seem to depend on the social circumstances of a specific society during a particular point in time ... because property seems to amount to those things that a particular society during a particular period regards as of interest to it.<sup>173</sup>

Njotini argues that modern society is information and technology-driven and that this *status quo* should affect society's perception and classification of things.<sup>174</sup> Kley and Boraine underscore this view by stating that 'no worthy purpose can be served by denying present-day realities and needs through unquestioned acceptance of a dogmatic structure'.<sup>175</sup>

The doctrinal argument is thus based on three sub-arguments: First, it is argued that the corporeality requirement in the law of things is a recent and incorrect interpretation of Roman law.<sup>176</sup> Secondly, it is purported that proprietary law should adapt to the interests and needs of a specific society at a specific point in time.<sup>177</sup> Thirdly, it has been argued that society is continuously influenced by technology and an increased interest in VCs.<sup>178</sup> In light of this, it would be justifiable to return to the classic understanding of 'things' by focusing on the use and value that both corporeals and incorporeals hold for individuals. In light of this, it is that Bitcoin has a distinct economic value that should be recognised and protected.<sup>179</sup>

## 5.2 Exception argument

One argument against the doctrinal argument is that by completely discarding the corporeality requirement, the definition of a thing may

173 Njotini (n 9) 136.

174 Njotini (n 9) 137.

175 Kley & Boraine (n 159) 14.

176 See para above.

177 Njotini (n 9) 137.

178 See para above.

179 See para 4.2 above.

‘become too vague to have a scientific meaning’.<sup>180</sup> In light of this, a second argument, known as the exception argument, entertains the possibility of circumventing the issue of Bitcoin’s incorporeality altogether by recognising VCs as an official exception to the corporeality requirement.<sup>181</sup> The benefit of this requirement is that it does not upset the *status quo* in any significant way, while the corresponding negative aspect is that it merely makes another exception to the narrow, traditional perspective on things rather than actively adapting the common law to address the needs of modern society. Therefore, while this proposal is arguably not ideal, it serves as a safety net should the doctrinal argument fail.

As the common law developed in South Africa, the judiciary has made exceptions to incorporate certain incorporeals under the law of things.<sup>182</sup> These exceptions usually pertain to patrimonial rights, which are subject to real rights in the same way a tangible object would be.<sup>183</sup> It can thus be argued that incorporeal assets, such as Bitcoin, may be regarded as an exception to the corporeality rule if they are recognised as patrimonial rights, which can be defined as a property right corresponding with a legal object.<sup>184</sup>

Importantly, Cloete rejects the ‘exception argument’ and states that such an attempt to broaden the scope of the common law of things whilst still operating within the ambit of the incorrect Pandectist view that corporeality is paramount is unsound.<sup>185</sup> It is submitted that such an argument is not historically justifiable and is not be the optimal solution to the issue.<sup>186</sup> South African common law has developed a relatively new conception of the law of things which does not serve the needs of the modern, technologically driven society. In light of this, while the exception argument may seem more convenient, the dogmatic argument ought to be preferred.

## 6 Conclusion: The potential legal classification of Bitcoin in South Africa

This article determines that Bitcoin is classified as a DCVC, which implies that Bitcoin usage is not overseen or regulated by a central government or financial institution but rather by a complex network of Bitcoin user<sup>187</sup>s. The central question of this article is subsequently to determine whether Bitcoin, as a DCVC, could enjoy common-law

180 Muller et al (n 37) 23.

181 Erlank (n 85) 24.

182 As above.

183 As above.

184 Muller et al (n 37) 23.

185 Cloete (n 9) 131.

186 As above.

187 See para 2.

recognition as a 'thing'. It has been argued that Bitcoin meets four of the five requirements, with the requirement of corporeality being the only subject of contention. According to the Pandectist view, VCs cannot be classified as things because they are incorporeal and no specific exception is made for their inclusion. In this article, however, two arguments have been set out whereby VCs could be regarded as things despite their incorporeal nature.

What is clear is that some form of legal development, whether disruptive or not, is essential to reframe our modern understanding of the common law by rejecting the Pandectist school of thought and returning to the Roman conception of things in order to avoid the dogmatic and unnecessary exclusion of incorporeal things – especially in the modern context. This stance also opens the door for more robust discourse surrounding the proprietary law implications of such a classification in the context of succession, insolvency, theft, etcetera, to determine the common law rights, responsibilities and remedies of Bitcoin users in Southern Africa.