



INSOLVENCY & BUSINESS RESCUE

Breaking News – Supreme Court of Appeal Rules on Voting Rights of Post-Commencement Creditors in Business Rescue in Landmark Judgment

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The Supreme Court of Appeal (SCA) in *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd* has delivered a significant ruling confirming that post-commencement finance (PCF) providers have a voting interest in business rescue proceedings. The case concerned the interpretation of Chapter 6 of the Companies Act 71 of 2008 (the Act) and whether post-commencement creditors are entitled to vote on a business rescue plan.

Legal Issues Considered

The appeal addressed the following principals:

- Balancing stakeholder interests
 - The appellants argued that excluding post-commencement creditors from voting would deter business rescue financing, undermining the purpose of Chapter 6. They emphasised that Section 7(k) of the Act requires a balancing of all stakeholder interests.

- The SCA held that all creditors, including post-commencement creditors, must receive equal protection under Section 7(k) of the Act (para [36]).
- Interpretation of the term 'Creditor'
 - The respondents argued that the term "creditor" should be interpreted in line with insolvency legislation, where only pre-commencement creditors have voting rights.
 - They contended that because Sections 145, 150, and 152 of the Act did not expressly include post-commencement creditors, they should be excluded from voting (para [12]).
 - The SCA rejected this argument, ruling that the ordinary meaning of "creditor" applies—any person to whom a debt is owed (para [21]).
- Absence of express reference to Post-Commencement Creditors
 - The respondents maintained that legislative silence indicates exclusion and that allowing post-commencement creditors to vote could undermine pre-commencement creditors' interests (para [12]).
 - They further argued that this could constitute an arbitrary deprivation of property under Section 25 of the Constitution.
 - The SCA disagreed, stating that legislative silence does not imply exclusion, and that if it had intended to restrict voting rights, the legislature would have done so explicitly (para [27]-[28]).
- Consideration of Foreign Law
 - The respondents relied on Section 5(2) of the Act, arguing that South African business rescue law should be interpreted in line with international practices, where post-commencement creditors are not afforded voting rights. They cited similar restructuring frameworks in the United States, the United Kingdom, and Australia.
 - The SCA rejected this approach, holding that South Africa's legislative framework differs from these jurisdictions. It emphasised that the statutes in those jurisdictions are based on specific policy considerations and socio-economic factors that do not necessarily apply in South Africa (para [15]-[16]).

Was the Business Rescue Plan Lawfully Adopted?

A key factual issue was whether the business rescue plan had been validly approved and adopted. The High Court had ruled that only pre-commencement creditors could vote, meaning the 75% approval threshold had been met. However, the SCA overturned this finding, concluding that because post-commencement creditors were entitled to vote, the required threshold had not actually been met (para [37]). As a consequence, the SCA held that the business rescue plan was accordingly rejected in terms of section 152(3)(a) of the Act.

Legal Implications

The judgment is critically important in the context of business rescue proceedings in South Africa and confirms that:

- Post-commencement creditors (PCF providers) have voting rights in business rescue plans.
- Their votes impact on the approval of a business rescue plan and must be taken into account when determining the voting on a business rescue plan.
- Business rescue practitioners must include all PCF votes in tallying voting results.

This decision finally provides clarity on the status of PCF creditors voting on business rescue plans, and provides certainty for those PCF providers who wish to provide PCF funding to companies undergoing a restructuring in terms of Chapter 6 of the Act.

The SCA judgement strengthens the legal standing of PCF providers and ensures that their financial contributions are recognised in decision-making when it comes to the approval of business rescue plans going forward.

A copy of the full judgement is [annexed](#).



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