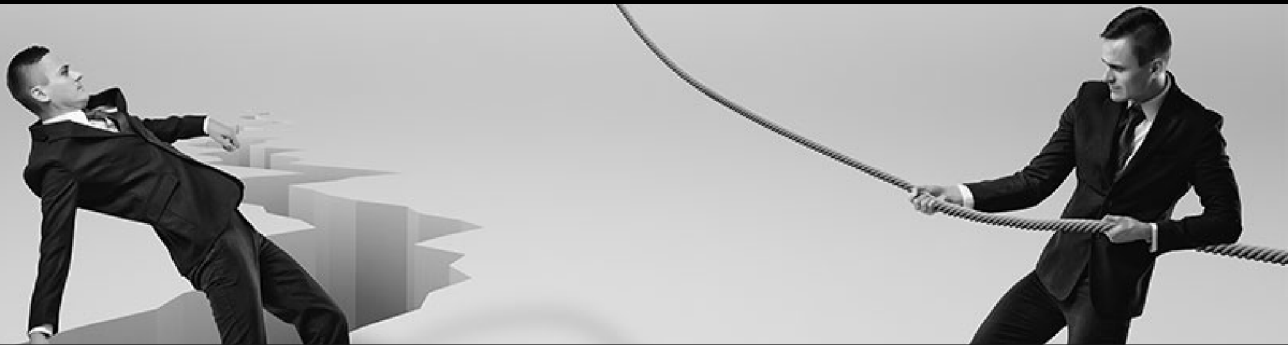




## INSOLVENCY & BUSINESS RESCUE

# No Claim? No Problem. Rethinking Creditor Rights in Insolvency Law

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A recent judgment handed down in the Johannesburg High Court in *Single Destination Engineering (Pty) Ltd and Another v Van Den Heever N.O. and Others* (14 April 2025) has brought both clarity and controversy to the question of who qualifies as a "creditor" entitled to inspect the books of a company in liquidation under section 360(1) of the Companies Act 61 of 1973 (as preserved by item 9 of Schedule 5 to the Companies Act 71 of 2008) ("the Act"). The court's answer may reshape creditor participation and redefine transparency obligations in the insolvency landscape.

The applicants, Single Destination Engineering (Pty) Ltd ("SDE") and Guardian Integrated Systems CC ("GIS"), applied for access to the records of Skincon Kalibrate (Pty) Ltd ("Skincon"), in liquidation. Skincon was the principal contractor responsible for project management in a consortium formed to upgrade and renovate a data centre for FNB. Skincon allegedly misappropriated funds owed to subcontractors. GIS had secured a judgment against Skincon for R6 million and was subsequently placed into business rescue. SDE, claiming approximately R3.2 million, had submitted a claim to the liquidators but had not proven the claim formally at a meeting of creditors. The liquidators opposed the application for access to Skincon's books and records in terms of section 360(1) of the Act, contending that such relief is reserved solely for proven creditors.

Section 360(1) of the Act permits "any member or creditor" of a company being wound up to apply to court to inspect the company's records. The term "creditor" is not defined in the Act. The dispute was whether this term includes unproven creditors.

The respondents contended that access should be limited to proven creditors to safeguard the privacy of the company in liquidation and prevent abuse. They argued that proven creditors have formally subjected themselves to the risks and responsibilities of liquidation, whereas mere claimants may be untested and speculative.

The court held that:

1. The term 'creditor' as used in section 360 of the Act must be given its 'ordinary grammatical meaning' — a person to whom an unpaid debt is due.
2. A creditor need not prove its claim at a creditors' meeting to rely on section 360 of the Act.
3. The requirement that the applicant must bring an application to court in terms of section 360(1) acts as a sufficient safeguard, because if the claim is disputed, the liquidator has an opportunity to oppose it.

The court cited *Mashwayi Projects v Wescoal Holdings*, where the SCA was confronted with a similar interpretative question as to who qualifies as a creditor for purposes of participation in business rescue proceedings. The SCA took the approach of widening the notion of who was a creditor to include both pre-commencement creditors and post-commencement creditors. The court in *Single Destination*

*Engineering* adopted this reasoning, observing that unless the Act classifies creditors and assigns unequal rights, it would be constitutionally impermissible to impose such distinctions judicially.

The court also addressed concerns that inspection rights under section 360 of the Act should not be used to pursue directors personally. Citing Australian precedent, the court held that the fact that the principal motive of a creditor is to further their own interests such as suing a director, does not disqualify the application under section 360(1) of the Act.

The court authorised the applicants to inspect Skincon's records at the liquidators' offices, subject to confidentiality undertakings. In doing so, the decision broadens the scope of participation in insolvency proceedings:

- 1. Unproven creditors may seek inspection orders, provided they are persons to whom money is owed in the ordinary sense.
- 2. The requirement that an application be made to court functions as a safeguard, allowing the liquidator to dispute the claim.
- 3. It is only through a court application that inspection may be authorised, thereby allowing the court to scrutinise the applicant's status and the basis for the request.

It is important to note that the implications of this interpretation may spill into business rescue, where defining "creditor" similarly affects participation rights, voting thresholds, and plan negotiations. If "creditor" is broadly construed here, it reinforces a more inclusive business rescue regime.

The court's interpretation upholds access to justice as proving a claim should not be a barrier to accountability, particularly when wrongdoing is suspected. However, the broader interpretation of "creditor" risks inviting abuse. There is a risk that any party merely alleging a debt could gain access to private company documents. This may encourage fishing expeditions, increase liquidators' administrative burdens, and lead to delays in the winding-up process.

*Single Destination Engineering v Van Den Heever* is a decisive moment in South African insolvency law. It affirms the principle that creditors, even those yet to prove claims, have a stake in transparency. Whether this decision fosters justice or procedural strain will depend on how thoughtfully and consistently our courts apply their discretion in future applications.



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