



INSOLVENCY & BUSINESS RESCUE

Voting rights not afforded to post-commencement creditors

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On 7 October 2026, the Constitutional Court (“the Court”) delivered a unanimous judgment addressing a question on which the High Court and the Supreme Court of Appeal had reached opposite conclusions: whether post-commencement creditors are entitled to vote on the adoption of a business rescue plan. The Court held that they are not.

In *Salungano Group Ltd v Mashwayi Projects (Pty) Ltd and Others; Ndalamo Coal (Pty) Ltd v Mashwayi Projects (Pty) Ltd and Others* [2026] ZACC 38, the Constitutional Court of South Africa upheld the appeals against the decision of the Supreme Court of Appeal and declared that Chapter 6 of the Companies Act 71 of 2008 (“the Act”) does not permit post-commencement creditors to vote on the adoption of a business rescue plan.

The Court emphasised that statutory interpretation cannot be approached by reference to dictionary meanings alone. Instead, the term “creditor” had to be interpreted in light of the text, context and purpose of Chapter 6 of the Act.

While acknowledging that business rescue proceedings do not create a *concurso creditorum* as in liquidation proceedings, the Court held that the business rescue framework is nonetheless built around a defined body of creditors whose claims existed when business rescue proceedings commenced.

The Court's decision turned principally on the text and structure of Chapter 6 of the Act.

As a starting point, the Court held that section 145 of the Act only defines three categories of creditors: secured, unsecured and concurrent. This, together with the fact that the term “creditor” was left undefined in Chapter 6, led the Court to conclude that post-commencement creditors are not entitled to vote to adopt a business rescue plan.

The Court also rejected the argument that the reference to “each creditor” in section 145(2) of the Act, which confers the right to vote on a business rescue plan, extends that right to post-commencement creditors. It noted that section 145(1)(c) entitles creditors to participate formally in business rescue proceedings only “*to the extent provided for*” in Chapter 6, which allows for the possibility that not all creditors may vote. Voting interests are determined by reference to claims admitted or proved in the business rescue proceedings. The mere fact that a person appears in the company's books as a creditor therefore does not, on its own, confer a right to vote on the plan.

In particular, section 150(2)(a)(ii) of the Act requires a business rescue plan to identify the company's creditors when the business rescue began, together with details of their ranking in accordance with insolvency law. The Court considered this significant because it establishes a defined creditor body against which voting interests can be determined.

Importantly, the Act does not require post-commencement creditors to be identified in the business rescue plan, nor does it prescribe any mechanism for incorporating their claims into the statutory voting architecture. The Court considered this omission a deliberate choice by the Legislature, and one that leads to the ineluctable conclusion that post-commencement creditors do not get to vote on a business rescue plan.

Who gets a say?

A key aspect of the Court's reasoning was the distinction between the rights afforded to pre-commencement creditors and the protections afforded to post-commencement financiers.

The Court found that granting post-commencement creditors both preferential repayment rights and voting rights would upset the carefully calibrated balance created by Chapter 6. Pre-commencement creditors are the parties whose claims stand to be compromised by a business rescue plan. By contrast, post-commencement financiers receive statutory protection in respect of the ranking of their claims and are not intended to participate in deciding whether such compromises should occur.

The judgment notes that, because of their enhanced security and preferential status, post-commencement financiers who were also entitled to vote would distort the collective decision-making of pre-commencement creditors in a manner not contemplated by the Act. The Court added that it would be inherently unfair for a creditor whose rights are not curtailed by the plan to vote on a plan that could deprive pre-commencement creditors, particularly unsecured creditors, of a substantial portion of their claims.

The Court emphasised that, even on its reading of the Act, post-commencement financiers remain incentivised to fund business rescue proceedings. Section 135 of the Act grants post-commencement financiers a statutory “super-preference” in respect of repayment. This enhanced protection exists precisely to encourage lenders, suppliers and other stakeholders to continue supporting a financially distressed company during business rescue. The Court viewed this preferential treatment as the legislative bargain struck by Chapter 6: protection through repayment priority rather than governance through voting rights.

Certainty, predictability and the financing trade-off

The Court was also persuaded by practical considerations. It held that allowing post-commencement creditors to vote would create uncertainty because the voting constituency could change as additional debts are incurred during the rescue process. This would make it difficult for business rescue practitioners to determine voting interests and assess whether the statutory voting thresholds had been met.

By limiting voting rights to creditors existing at the commencement of business rescue, the Act promotes certainty, predictability and the efficient administration of rescue proceedings. The Court considered these objectives central to the successful operation of the business rescue regime.

The implications for business rescue stakeholders

This judgment is the final word in the debate relating to the voting rights of post-commencement financiers.

It provides clarity for business rescue practitioners, existing creditors and potential post-commencement financiers, particularly when determining voting interests and during business rescue. There is no doubt that the judgment will shape restructuring and business rescue practice for years to come.

In particular, the judgment confirms that –

- the voting constituency on a business rescue plan is determined by reference to creditors existing when business rescue commenced;
- post-commencement creditors are not entitled to vote on the adoption of a business rescue plan, even though they are creditors of the company;
- while post-commencement creditors are not entitled to vote to adopt a business rescue plan, they are protected by other mechanisms, such as the statutory preference afforded by section 135 of the Act; and
- allowing post-commencement creditors to vote would undermine certainty and predictability in the business rescue process.



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