Rethinking creditor participation in business rescue: The role of post-commencement creditors after *Mashwayi Projects v Wescoal Mining and Others* 1157/2023 [2025] ZASCA

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SUMMARY

Creditor participation lies at the heart of South Africa's business rescue framework under Chapter 6 of the Companies Act 71 of 2008. Yet, until recently, uncertainty surrounded the status and voting rights of post-commencement creditors – those who extend credit, supply goods, or provide services after the commencement of business rescue proceedings. In *Mashwayi Projects (Pty) Ltd and Others v Wescoal Mining (Pty) Ltd and Others* [2025] ZASCA 5, the Supreme Court of Appeal addressed this ambiguity, holding that all creditors – whether pre- or post-commencement – are entitled to vote on a business rescue plan. This judgment marks a turning point in South African corporate rescue law by embedding commercial realism, constitutional values, and procedural fairness into the interpretation of creditor rights. This article critically examines the implications of the *Mashwayi* decision, highlighting the Court's rejection of foreign insolvency models and its endorsement of a stakeholder-driven, constitutionally grounded approach. It argues that the decision enhances the legitimacy of business rescue by affirming the participatory rights of post-commencement creditors in key decision-making areas, including the adoption of rescue plans, practitioner oversight, and the continuation or termination of rescue proceedings. In doing so, the Court paves the way for a more inclusive, resilient, and commercially effective rescue regime tailored to South Africa's unique legal and socio-economic context.

Key words: business rescue, creditor participation, post-commencement financiers, procedural fairness, commercial realism.

1 Introduction

Creditor participation is a cornerstone of South Africa's business rescue process. Introduced under Chapter 6 of the Companies Act 71 of 2008, the business rescue framework was established as a mechanism to afford financially distressed companies an opportunity to reorganise their affairs, rehabilitate their operations, and ultimately avoid liquidation (see *Koen and Another v Wedgewood Village Golf* 2012 2 SA 378 (WCC) para

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14; *African Bank Corporation of Botswana LTD v Kariba Furniture Manufacturers (Pty) Ltd* 2013 6 SA 471 (GN) para 40, K Mpofu and MH Moolman 'A case for specialised insolvency and Business Rescue Courts in South Africa' (2023) *Spec Juris* 312. Crucially, this statutory intervention was never intended to operate as a closed or practitioner-driven process. Instead, it is premised on principles of transparency, accountability, and inclusive decision-making, which necessitate the active engagement and oversight of all affected stakeholders. Among these stakeholders, creditors occupy a particularly prominent position, given that their rights, interests, and financial entitlements stand to be directly influenced by the adoption and implementation of any proposed business rescue plan. Accordingly, the legislative framework seeks to strike a delicate balance between facilitating corporate recovery and safeguarding the legitimate interests of all participants in the rescue proceedings, thereby reinforcing the participatory nature of South Africa's business rescue process. (See section 7k of the Companies Act 2008; *Ziegler South Africa (Pty) Ltd v South African Express SOC Ltd and Others* 2020 (4) SA 626 (GJ) para 46).

Basically, the ability of creditors to actively participate in the rescue process is essential for the legitimacy, transparency and success, it guarantees that decisions about the restructuring of debt and operations are not imposed unilaterally but emerge through negotiations and engagement between the company and those to whom it owes obligations. (See KM Kekana, M Pretorius and NVA De Abreu 'Enhancing creditor decision-making in South African business rescue proceedings: a comprehensive analysis of information requirements in business rescue plans' (2024) *International Journal of Law and Management* 555-577; S Madaus 'On decision-making in rescue cases: why creditors and shareholders should decide about a rescue plan' in B Santen and DH Van Offeren (eds) *Perspectives on international insolvency law* (2014) 215-228). Despite this clear policy emphasis on creditor involvement, South African business rescue law has, until recently, grappled with an important unanswered question: Are creditors who supply goods, services, or funding to a company after the commencement of business rescue proceedings entitled to vote on the adoption of a business rescue plan? The Companies Act is silent on this point, and this gap in the legislation has generated uncertainty and often discouraged post-commencement finance financiers from supporting companies in financial distress (K Van der Linde 'Company and insolvency law update' (2014) *Annual Banking law Update* 15; A Loubser 'Post-commencement financing and the ranking of claims – A South African perspective' in R Parry (ed) *European insolvency law: Current issues and prospects for reform* (2014) 31).

This legal uncertainty was decisively resolved by the Supreme Court of Appeals (SCA) in *Mashwayi Projects (Pty) Ltd and others v Wescoal Mining (Pty) Ltd and others* (1157/2023) [2025] ZASCA 5. The court held that all creditors, whether their claims arose before or after the commencement of business rescue, are entitled to vote on a proposed business rescue plan. In doing so, the SCA firmly placed creditor participation at the centre of business rescue while aligning the interpretation of the Companies Act with constitutional values of fairness, equality and inclusivity in corporate restructuring processes. The note critically examines the SCA's decision, situating it within the broader evolution of South African corporate rescue law and considering its significant implications for creditor rights, the practice of business rescue and the sustainability of post commencement finance.

2 A synopsis of *Mashwayi Projections (Pty) Ltd and others v Wescoal Mining Ltd and others* (157/2023) [2025] ZASCA 5

This case concerned the business rescue proceedings of Arnot Opco (Pty) Ltd ('Arnot'), a company engaged in coal mining operations at the Arnot coal mine in Middelburg, Mpumalanga. Arnot operated as a joint venture between Wescoal Mining (Pty) Ltd ('Wescoal') and Arnot Investco (Pty) Ltd. Owing to financial distress, Wescoal initiated business rescue proceedings against Arnot, resulting in its placement under business rescue (para 2). At the time, both Wescoal and its holding company, Salungano Group Ltd ('Salungano'), were creditors of Arnot (para 2). Section 131(1) of the Companies Act 71 of 2008 grants creditors the statutory right to apply to court for the commencement of business rescue proceedings. This reflects a deliberate legislative intention to protect creditor interests and ensure their active participation from the outset, recognising creditors as key stakeholders in the rescue process rather than passive claimholders.

Mr Phahlani Lincoln Mkhombo was subsequently appointed as the business rescue practitioner. A core function of the business rescue practitioner (BRP) is the preparation and formulation of a business rescue plan, which serves as the foundation for restructuring the financially distressed company. In terms of section 150 of the Companies Act 71 of 2008, the BRP is legally required to draft this plan in consultation with all relevant stakeholders, including creditors, shareholders, employees, and other affected persons. This consultative process is essential to ensure that the proposed rescue plan is both commercially viable and acceptable to those whose rights and interests are directly impacted by the rescue proceedings. According to Bradstreet, the practitioner is expected to act not merely as an independent officer of the court but also as a negotiator and facilitator who balances divergent stakeholder interests in pursuit of the company's rehabilitation (R Bradstreet 'The new business rescue: Will creditors sink or swim?' (2011) *SALJ* 359). In this case, the rescue practitioner convened a meeting of Arnot's creditors to vote on a proposed business rescue plan (para 4). Significantly, the proposed plan allowed for the participation and voting rights of both pre-commencement and post-commencement creditors (para 4). The majority of creditors, including Wescoal and Salungano, voted in favour of the plan (referred to as Option B), which supported a bid by Ndalamo Coal (Pty) Ltd ('Ndalamo') to acquire Arnot's business as a going concern (para 5). In terms of section 153(1) of the Companies Act, where the requisite majority of creditors vote in favour of a business rescue plan, dissenting creditors are generally bound by the terms of the adopted plan and may only seek to challenge it on limited grounds, including procedural irregularities, bad faith, or substantial unfairness (see, for example, *Reiscor Two (Pty) Ltd t/a Bootleggers v Anheuser-Busch Inbev Africa (Pty) Ltd and Others* [2024] ZAGPJHC 363, *African Bank Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* 2013 (6) SA 471 (GNP) para 42). However, this case highlights an important qualification to that principle: the legitimacy of the adopted plan depends fundamentally on the proper calculation and verification of voting outcomes. As the court would later find, errors in vote tallying – including double-counting and failure to account for revoked votes – ultimately undermined the validity of the voting process, thereby preventing the plan from attaining the statutory voting threshold required for adoption (para 5).

Mashwayi Projects (Pty) Ltd ('Mashwayi'), a post-commencement creditor who had also acquired claims from several other creditors through cession, opposed the adoption of the plan (para 2). Following the vote, concerns arose regarding the accuracy of the voting results. A forensic accountant's investigation revealed material errors in the counting process, including instances of double-counting and the failure to exclude revoked votes (para 5). Once these discrepancies were corrected, it became apparent that the statutory voting threshold of 75%, as required by section 152(2) of the Companies Act, had not been satisfied (para 5). Consequently, the business rescue practitioner advised the creditors that the plan had not been validly adopted (para 6). Dissatisfied with this outcome, Wescoal and Salungano approached the Gauteng Division of the High Court, Johannesburg, seeking declaratory relief to the effect that the business rescue plan had been lawfully adopted and should, therefore, be implemented (para 7).

The legal dispute centred on two main issues: Firstly, whether, on a proper interpretation of Chapter 6 of the Companies Act, post commencement creditors such as Mashwayi were entitled to vote on a business rescue plan (para 1). Secondly, whether the business rescue plan had been validly adopted in accordance with section 152 of the Act, given the tallying irregularities and the votes cast by post-commencement creditors (para 1).

The High Court, per Wilson J, concluded that only pre-commencement creditors – those whose claims existed prior to the commencement of business rescue proceedings – were entitled to exercise voting rights on a proposed business rescue plan (para 8). The High Court's decision was grounded in its interpretation of the relevant provisions of Chapter 6 of the Companies Act. The court found support for its conclusion in section 150(2)(a)(ii) of the Act, which requires a business rescue plan to include a complete list of the creditors of the company 'when the business rescue proceedings began' (para 29). In the court's view, this provision implied that only pre-commencement creditors were recognised for purposes of voting under section 152 of the Act. The Supreme Court of Appeals (SCA) approached the question using a unitary interpretive framework grounded in a grammatical, contextual, and purposive methodology, as endorsed by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) (para 17). It emphasised that where the Act does not draw explicit distinctions between classes of creditors, the ordinary meaning of 'creditor' must prevail – meaning any person to whom a debt is owed (paras 20–21). It is argued that the requirement in section 150(2)(a)(ii) of the Companies Act —that the business rescue plan must include a complete list of creditors as at the commencement of the business rescue proceedings – cannot be interpreted as limiting the class of creditors who are entitled to vote on the plan. This provision serves a disclosure and comparative purpose, enabling affected persons to assess the projected outcomes of the plan against a liquidation scenario. It does not purport to define or restrict the voting constituency under section 152. The function of section 150 is thus procedural and informational, regulating the content and structure of the plan to ensure transparency rather than prescribing the substantive participatory rights of creditors. In other words, section 150 regulates the *content* of the plan, not the *voting* constituency**.** Therefore, conflating the disclosure requirements of section 150 with the voting provisions in section 152 results in a narrow and overly formal interpretation. This approach is misaligned with the purpose of the Companies Act and runs counter to the modern, business-oriented principles that underpin South Africa's corporate rescue framework.

The High Court reasoned that allowing post-commencement creditors to vote on a business rescue plan could lead to commercially unreasonable outcomes. It expressed concern that creditors whose claims were not compromised by the plan could potentially outvote pre-commencement creditors whose claims were materially affected. According to the court, this would upset the balance intended by the legislature between different classes of creditors and could result in the unfair treatment of pre-existing claims (para 13). In contrast, the Supreme Court of Appeal (SCA) adopted a more commercially sensible interpretation. It recognised that excluding post-commencement creditors – those who supply goods, services, or finance after the initiation of business rescue – undermines the practical functioning of corporate rehabilitation. These creditors play a vital role in keeping distressed companies afloat, and the Court acknowledged that their continued participation is often essential to the success of the rescue process (para 11).

The SCA held that excluding such creditors from voting discourages the very trade and financial support that business rescue seeks to attract, thereby defeating the core objectives of Chapter 6 of the Companies Act – particularly the goal of avoiding liquidation and preserving enterprise value. The Court further noted that post-commencement creditors face considerable risk, yet the Act does not provide adequate protection for their interests. Although section 135 grants them a degree of payment priority, this safeguard is often insufficient, especially when practitioner fees and employee claims are settled first and assets are fully encumbered (para 26). Ultimately, the SCA found that denying post-commencement creditors voting rights is not only commercially irrational but also unjust. It would deter much-needed engagement from creditors who take on substantial risk without the assurance of influence over the outcome of the business rescue process – particularly smaller suppliers whose support is often critical to a company's survival.

A major weakness in the High Court's approach lies in its blanket exclusion of all post-commencement creditors from the voting process without making a critical distinction between new post-commencement creditors and continuing post-commencement creditors. New post-commencement creditors are those who first engage with the company after the start of business rescue, whereas continuing Post commencement creditors had an existing commercial relationship with the company before the commencement and continued to supply goods or services during the rescue period. This distinction is significant because continuing Post commencement creditors often extend credit based on long-standing trust, ongoing contractual obligations, or historical business relationships – placing them at considerable financial risk.

To exclude such creditors solely because their claims arose after the formal start of business rescue is both inequitable and commercially unrealistic. As Calitz and Freebody observe, this approach disregards the dynamic and evolving nature of creditor-debtor relationships in rescue contexts. It imposes an artificial legal divide that fails to reflect practical commercial realities. Denying voting rights on such a rigid basis undermines the cooperative foundation of business rescue and threatens to sideline those whose contributions are essential to a company's rehabilitation (see J Calitz and G Freebody 'Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?' (2016) *De Jure* 270). Similarly, Loubser cautions against legal classifications that do not accommodate the complex dynamics of creditor engagement during financial distress (A Loubser *Some comparative aspects of corporate rescue in South African company law* (2010) LLD UNISA 53). Generally, the SCA's position promotes commercial sensibility, fairness, and inclusiveness within the business rescue process. In contrast, the High Court's rigid interpretation risks discouraging essential post-commencement support, which would ultimately hinder rather than help financially distressed companies on the path to recovery.

The Supreme Court of Appeal (SCA) drew a clear and important distinction between liquidation and business rescue. In liquidation, the creation of a *concursus creditorum* freezes the rights of creditors at the point of commencement, thereby excluding claims that arise thereafter. This approach is appropriate in the context of winding up an insolvent estate, where the objective is to distribute remaining assets fairly among existing creditors. In contrast, business rescue serves a fundamentally different purpose: it is forward-looking and aims to restore the company to solvency through continued operations. Achieving this goal often depends on the availability of new credit, the ongoing supply of goods and services, and post-commencement financial support.

In this context, the SCA correctly held that there is no sound legal basis to import the insolvency law principle of pre-commencement creditor exclusivity into business rescue proceedings (paras 22-23). Doing so would contradict the very essence of rescue legislation, which requires flexibility, commercial pragmatism, and stakeholder engagement to succeed. This distinction is more than theoretical – it reflects the reality that business rescue, unlike liquidation, is a dynamic process that must adapt to the company's operational and financial needs. As such, the SCA's reasoning is both doctrinally sound and commercially astute. It reinforces the view that business rescue should be treated as a distinct legal regime, with its own principles tailored to promote recovery rather than closure.

The High Court placed significant reliance on principles derived from international insolvency regimes, particularly those of the United States, the United Kingdom, and Australia, where post-commencement creditors are generally excluded from voting on rescue or reorganisation plans (para 15). It found these jurisdictions to offer persuasive authority in support of the proposition that voting rights should be limited to creditors who formed part of the original *concursus creditorum* at the commencement of business rescue proceedings (para 16). The Supreme Court of Appeal (SCA) firmly rejected this line of reasoning. It emphasised that South African business rescue law must be interpreted within its own constitutional and socio-economic framework, not by mechanically adopting foreign models (paras 15-16). The Court noted that the Companies Act 71 of 2008 deliberately deviates from traditional, court-driven insolvency procedures by establishing a creditor-led process – placing commercial decision-making in the hands of stakeholders rather than judicial officers. This stakeholder-driven model reflects a deliberate legislative choice aligned with the values of participatory democracy and access to justice.

Furthermore, the SCA highlighted that the exclusion of post-commencement creditors from voting in foreign systems is typically counterbalanced by more developed protective mechanisms, including court-supervised debtor-in-possession (DIP) financing, statutory security for new creditors, and enhanced oversight of reorganisation plans. For example, in Australia, under Part 5.1 of the *Corporations Act 2001 (Cth)*, creditors are classified into voting groups based on the nature and extent of their legal rights, and only those creditors whose rights are affected by a scheme of arrangement are entitled to vote. Similarly, in the United

States, Chapter 11 of the *Bankruptcy Code* allows post-commencement creditors to obtain priority status under section 364 and benefit from court-authorised security interests.

By contrast, South Africa's business rescue framework does not include comparable judicial oversight or statutory protections for post-commencement creditors. Instead, it places much of the responsibility on the business rescue practitioner to negotiate and secure post-commencement finance, often without meaningful external supervision. In such a context, excluding post-commencement creditors from the voting process – despite their financial exposure – would be both inequitable and commercially unsound. The Court's rejection of foreign jurisprudence in this instance is therefore not a rejection of comparative reasoning *per se*, but a reaffirmation that comparative models must be adapted to local conditions. The SCA's approach, in this regard, not only reinforces the integrity of South Africa's business rescue system but also ensures that it remains aligned with international best practice, without compromising on its commitment to constitutional fairness, commercial rationality, and stakeholder participation. It is a necessary corrective to formalistic reasoning that overlooks the nuanced and evolving needs of corporate rescue in the Global South.

The judgment is particularly commendable for integrating constitutional considerations into its reasoning. The Court warned that treating post-commencement creditors unequally could infringe on section 9 (equality) and section 25 (property rights) of the Constitution (paras 10, 21). The absence of express exclusion in the Act, coupled with the text's inclusive language (e.g., 'each creditor' in section 145(2)), indicated a deliberate legislative choice to afford voting rights to all creditors. This approach reflects a broader constitutional commitment to fairness, inclusion, and substantive equality in commercial regulation. By grounding its interpretation in constitutional values, the Court rightly affirmed that statutory ambiguity should not be resolved in ways that unjustifiably limit participation or undermine legitimate commercial expectations.

3 Commentary: The expanding role of post-commencement creditors in light of *Mashwayi Projects*

The Supreme Court of Appeal's decision in *Mashwayi Projects* marks a watershed moment in the development of South African business rescue jurisprudence. By affirming the full participatory rights of post-commencement creditors, the court fundamentally repositions these actors from the margins of the process to its very centre. Previously, the involvement of post-commencement creditors was largely viewed through the narrow lens of their involvement as financiers of the business rescue process. However, *Mashwayi* demands a broader, more nuanced appreciation of their multifaceted contributions to business rescue, both functionally and legally.

At the heart of this shift is the recognition that post-commencement creditors are not merely creditors with contingent claims, but critical enablers of the rescue effort. One of their most important functions lies in their role as financial lifelines. Section 135(2) of the Companies Act allows companies in business rescue to access post-commencement finance, granting post-commencement creditors a preferential position in the waterfall of claims. These creditors provide working capital or continue to supply essential goods and services at a time when the company is at its most vulnerable, often in the absence of traditional financing routes. Their support enables the continuation of operations, helps preserve jobs, and stabilises stakeholder confidence. As Calitz and Freebody rightly observe, the decision to provide such finance is often based on a delicate balance of commercial trust and the expectation of legal recognition and influence over the rescue outcome (J Calitz and G Freebody's 'Post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?' (2016) *De Jure* 265-287; Davis *et al, Companies and other business structures in South Africa* (2011) 165-167). By interpreting section 145(2) to include all creditors whose rights are affected, the SCA not only validated the economic significance of post-commencement creditors but also reinforced a powerful incentive for continued post-commencement engagement.

Crucially, *Mashwayi* also reaffirms the principle that business rescue is a creditor-driven process – a process that must reflect commercial realities rather than formalistic exclusions. While section 152(1) empowers creditors to vote on the adoption of a rescue plan, the Court clarified that participatory rights extend beyond this procedural moment. Specifically, the interpretation of 'creditor' in sections 145(1) and 145(2) as encompassing post-commencement creditors enables them to engage in governance-related decision-making, most notably the right to remove a business rescue practitioner (BRP) under section 139(1). This is not a mere procedural courtesy. Post-commencement creditors, particularly those supplying goods or extending credit throughout the rescue period, are often best positioned to evaluate the BRP's performance. Their operational proximity equips them with real-time insights into the company's trajectory, and their financial exposure gives them legitimate standing to hold the BRP accountable. A Pretorius and du Preez (2013:174) point out, this oversight role enhances practitioner accountability and safeguards the integrity of the rescue process. (See W du Preez *The status of post-commencement finance for business rescue in South Africa* (2012) unpublished MBA dissertation, University of Pretoria 67; UNCITRAL *Legislative guide on insolvency law* (2005) 118).

Equally important is the Court's recognition of the post-commencement creditors' role in determining whether business rescue should continue or be terminated. Sections 141(2)(a)(ii) and 132(2)(c) of the Companies Act empower either the BRP or the court to terminate rescue proceedings if continuation is no longer viable. These decisions directly affect Post commencement creditors, whose claims are predicated on the company's rehabilitation. By affirming that post-commencement creditors qualify as 'affected persons' under section 145(1), the SCA ensures that they cannot be excluded from existential determinations about the rescue's future. Excluding these stakeholders, who often keep the company afloat, would compromise both the legitimacy and credibility of the decision-making process.

The *Mashwayi* judgment is also commendable for embedding constitutional values into the interpretation of participatory rights. Rooted in section 9 of the Constitution, the principle of equality is given substance through the Court's insistence on non-discrimination between pre- and post-commencement creditors. Excluding post-commencement creditors from voting on termination or other fundamental matters would effectively deny them an equal seat at the table, despite their real-time financial exposure and active role in corporate recovery. The Court's purposive interpretation of section 145(2) reinforces the notion that all creditors whose rights are materially affected, regardless of when their claims arise, must be afforded procedural and substantive equality. Basically, by recognising these roles and reinforcing the full spectrum of PCC participation, the SCA has laid the foundation for a more inclusive, commercially realistic, and constitutionally aligned business rescue regime in South Africa.

4 Conclusion

The *Mashwayi Projects* judgment reaffirms that creditor participation, particularly that of post-commencement creditors, is essential to the legitimacy and effectiveness of South Africa's business rescue regime. By confirming that all creditors whose rights are affected may vote on a rescue plan, the Supreme Court of Appeal resolved a key ambiguity and aligned the law with commercial realities and constitutional values. The Court recognised that post-commencement creditors do more than cast votes – they provide critical post-commencement finance and operational support, often under risk-laden conditions. Their continued involvement makes them indispensable stakeholders with a vested interest in the rescue's outcome. Their entitlement to influence practitioner accountability and decisions on whether to continue or terminate rescue proceedings reflects their central role in shaping recovery. Denying Post commencement creditors participation would undermine fairness, stakeholder democracy, and commercial pragmatism. *Mashwayi* thus lays a doctrinal foundation for interpreting the Companies Act in a purposive, inclusive manner – one that accommodates the evolving nature of creditor-company relationships. In this light, business rescue is no longer a closed, practitioner-driven exercise but a collaborative, creditor-led process. The judgment sets the stage for further reforms aimed at deepening creditor engagement and ensuring that participation remains the bedrock of a fair and functional rescue system.