THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1157/2023

In the matter between:

MASHWAYI PROJECTS (PTY) LTD	**FIRST APPELLANT**
PHAHLANI LINCOLN MKHOMBO NO	**SECOND APPELLANT**
ARNOT OPCO (PTY) LTD (in Business Rescue)	**THIRD APPELLANT**

and

WESCOAL MINING (PTY) LTD	**FIRST RESPONDENT**
SALUNGANO GROUP LTD	**SECOND RESPONDENT**
NDALAMO COAL (PTY) LTD	**THIRD RESPONDENT**
IWIRC SOUTHERN AFRICA NETWORK NPC	**FIRST *AMICUS CURIAE***
INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA	**SECOND *AMICUS CURIAE***

Neutral citation: *Mashwayi Projects (Pty) Ltd and Others v Wescoal (Pty) Ltd and Others* (1157/2023) [2025] ZASCA 5 (29 January 2025)

Coram: MAKGOKA, SMITH and KEIGHTLEY JJA and HENDRICKS and DIPPENAAR AJJA

Heard: 30 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 29 January2025 at 11h00.

Summary: Company law – Companies Act 71 of 2008 (the Act) – Chapter 6 thereof – business rescue – whether post commencement creditors excluded from voting on a business rescue plan – whether business rescue plan validly adopted at meeting under s 151 of the Act.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wilson J, sitting as court of first instance): judgment reported *sub nom Wescoal Mining (Pty) Ltd and Another v Mkhombo NO and Others* 2024 (2) SA 563 (GJ).

1 The appellants' appeals are upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and replaced with the following order:

'1 The first and second applicants' application is dismissed with costs, including the costs of two counsel.

2 The third respondent's counter application is dismissed with costs, including the costs of two counsel.

3 It is declared that the amended business rescue plan presented by the first respondent to the meeting of creditors of the second respondent, held on 28 July 2023, was not supported by the holders of more than 75% of creditors' voting interests at the meeting as required by section 152(2) of the Companies Act 71 of 2008 (the Act) and was accordingly rejected in terms of section 152(3)*(a)* of the Act.

4 The first and second applicants and the third respondent are directed to pay the costs of the first and second respondents' counter application, jointly and severally, the one paying, the other to be absolved, including the costs of two counsel.

6 The first and second applicants and the third respondent are directed to pay the costs of the fourth respondent's counter application, jointly and severally, the one paying, the other to be absolved, including the costs of two counsel.'

JUDGMENT

Dippenaar AJA (Makgoka, Smith and Keightley JJA and Hendriks AJA concurring):

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg (the high court). The appeal is with the leave of the high court. There are two issues in the appeal – a legal one and a factual one. The legal issue is whether, on a proper interpretation of the relevant provisions of Chapter 6 of the Companies Act 71 of 2008 (the Act), post-commencement creditors may vote on a business rescue plan. The high court held that only pre-commencement creditors are entitled to such voting rights and made consequential orders. Factually, the question is whether the business rescue plan presented to creditors on 28 July 2023, was properly adopted in accordance with s 152 of the Act. The high court concluded that it was properly adopted.

[2] The second appellant, Arnot Opco (Pty) Ltd (Arnot), was established as a joint venture between the first respondent, Wescoal Mining (Pty) Ltd (Wescoal) and Arnot Investco (Pty) Ltd. It owns and operates the Arnot coal mine in Middelburg, Mpumalanga. Wescoal is a wholly owned subsidiary of Salungano (Pty) Ltd (Salungano), the second respondent. Wescoal was placed under supervision and business rescue on 23 August 2023. Wescoal and Salungano, (collectively the Wescoal parties) are creditors of Arnot. Arnot was placed under business rescue on 10 October 2022 at the instance of Wescoal. The third appellant, Mr Phahlani Lincoln Mkhombo (the practitioner), was appointed as Arnot's business rescue practitioner. The first appellant, Mashwayi Projects (Pty) Ltd (Mashwayi), is a creditor of Arnot and a cessionary of the claims of various of Arnot's creditors. The third respondent, Ndalamo Coal (Pty) Ltd (Ndalamo), is the party whose offer was accepted at the creditors meeting, in terms of s 151 of the Act, on 28 July 2023. It is not a creditor of Arnot but intervened in the proceedings on the basis that it had a direct and substantial interest.

[3] The first *amicus curiae*, IWIRC Southern Africa Network NPC (IWIRC), is a South African non-profit company which acts as the Southern Africa Network of the International Women's Insolvency and Restructuring Confederation, a global organisation. The second *amicus curiae*, the Industrial Development Corporation of South Africa SOC Ltd, is a development finance institution, established under s 2 of the Industrial Development

Corporation Act.[1] The *amici curiae* were not involved in the proceedings before the high court. They obtained leave under rule 16(2) of the Rules of this Court to make submissions in this appeal.

[4] The genesis of the appeal lies in a meeting of creditors of Arnot, held virtually on 28 July 2023 under s 151 of the Act, convened by the practitioner to adopt a business rescue plan (the plan). Creditors voted electronically via email or WhatsApp. In terms of s 152(2)*(a)* of the Act, to be approved at a meeting called for that purpose, a business rescue plan must be supported by the holders of at least '75% of the creditors' voting interests that were voted'. The proposed plan afforded voting rights to both pre-commencement and post-commencement creditors. It proposed four options: Option A was to expend capital on refurbishing facilities and running Arnot's business; Option B was for the sale of its business as a going concern and the application of the free residue to creditors' claims; Option C was to reject the business rescue plan; and Option D was to abstain from voting. If Option B was approved, creditors had to vote on four alternative purchase offers, one of which was proposed by Ndalamo.

[5] The Wescoal parties voted in favour of Option B and supported Ndalamo's offer. Mashwayi voted against the adoption of the plan. After the counting of the votes cast at the meeting, the practitioner's representative declared that 75.4% of the voting interest present, 50% + 1% of whom were independent creditors, had voted in favour of Option B. After tabling the four offers, 88% of the parties present voted in favour of Ndalamo's offer. A forensic accountant, appointed by the practitioner after the meeting to verify the tallying of the votes, subsequently produced a report particularising some errors which had occurred during the tallying of the votes.[2]

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[1] Industrial Development Corporation Act 22 of 1940.

[2] These errors included the double counting of certain votes, the failure to consider emails revoking votes, certain creditors voted as a group and later cast a separate vote and certain proxies were received late and not taken into consideration. After the errors were taken into account, it transpired that the necessary 75% threshold had not been met. The forensic accountant, Mr Makhuvele, produced a report, reflecting that only 72.2% of creditors voting interests voted in favour of Option B. That figure was later amended to 70.5%.

[6] This resulted in the practitioner notifying the creditors, on 4 August 2023, of the said errors, the effect of which, according to him, was that the threshold of 75% had not been achieved. Thus, said the practitioner, Ndalamo's offer had not been properly accepted. He accordingly invited the creditors to inform him whether they objected to the proposed publication of a revised plan on the basis that the plan had not been validly adopted under s 152(2) of the Act. The Wescoal parties objected, contending that the statutory threshold had been met and that the plan had been validly adopted.

[7] The Wescoal parties approached the high court on an urgent basis, citing Arnot, the practitioner and Ndalamo as respondents. They ultimately amended their relief to seek declaratory orders that the plan was validly adopted and Ndalamo's offer was accepted, and an order directing the practitioner to implement the plan. Ndalamo sought leave to intervene as applicant,[3] and launched a counter-application seeking declaratory orders that the plan was adopted and its offer accepted. As Mashwayi was not cited as a party, it sought and was granted leave to intervene. Mashwayi, Arnot and the practitioner brought counter-applications seeking declaratory relief that the plan was not validly adopted. Thus, on the one hand, the Wescoal parties and Ndalamo contended that the plan had been validly adopted. Arnot, the practitioner and Mashwayi, on the other hand, contended the opposite.

[8] The high court had to decide whether Mashwayi's vote as post-commencement creditor should have been taken into account. It was common cause that had Mashwayi's vote been excluded, the relevant 75% threshold would have been met and the plan validly adopted. The high court interpreted the relevant provisions of Chapter 6 of the Act. As stated, it concluded that 'the business rescue provisions of the Companies Act assign voting interests under section 152 of the Act only to those who were creditors of the entity under business rescue at the time the business rescue process commenced'. After considering the factual evidence, the high court declared that Option B was duly approved and finally adopted in accordance with s 152(2) of the Act. It further declared that

[3] It does not appear from the judgment that such order was granted expressly, although the high court granted the declaratory relief sought.

Ndalamo's offer was accepted and directed the practitioner to implement the plan to give effect to Ndalamo's bid. Arnot and Mashwayi were directed to pay the costs.

[9] The first issue on appeal remains whether on a proper interpretation of the relevant provisions of Chapter 6 of the Act, post-commencement creditors are entitled to vote on a business rescue plan. The debate crystallised into these various subsets:

(a) the interpretation which best balances the interests of stakeholders;

(b) the correct interpretation of the term 'creditor'; and

(c) whether the absence of an express reference to post-commencement creditors in various sections of the Act, limits such provisions to pre-commencement creditors.

Its resolution informs the determination of the factual issue whether the high court correctly declared the plan to be properly adopted or whether it should be remitted to a meeting of creditors.

[10] Mashwayi, the practitioner and Arnot (collectively 'the appellants') submitted that post-commencement creditors are entitled to vote on a business rescue plan. They submitted that the high court's reasoning was at odds with the relevant provisions of Chapter 6 and did not align with its text, which contained no provisions excluding or limiting post-commencement creditors' rights to a voting interest. They contended that the opposite interpretation by the high court disregarded commercial realities and would have an unbusinesslike result which would inevitably discourage post-commencement financing critical to the rescue of companies in financial distress. It was contended that to treat post-commencement creditors differently, would implicate the equality provisions of the Constitution and erode their property rights.

[11] Both *amici curiae* supported the stance adopted by the appellants. They submitted that without the lifeblood of post commencement financial assistance and access to finance, the objectives of business rescue would be difficult, if not impossible to achieve.[4]

[4] For this submission the amici relied on R D Friesendorp and M A Gramatikov 'Impact of Financial Crisis' (2010) 42 *Vakgroep CentER* 1 at 8.

[12] Wescoal, Salungano and Ndalamo (collectively 'the respondents') submitted the converse. Their case was predicated on the notion that the word 'creditor' should be interpreted with reference to insolvency legislation. The absence of an express reference to post-commencement creditors and their voting interest in the relevant provisions of the Act,[5] meant that they were excluded and had no voting interest. They contended that a balancing of stakeholders' rights supports their interpretation as it would be untenable for post-commencement creditors, whose claims were not compromised by a business rescue plan, to potentially outvote and limit the claims of pre-commencement creditors. It was submitted that this would amount to an arbitrary deprivation of property under s 25 of the Constitution.

[13] The submissions surrounding the balancing of stakeholders rights focused primarily on policy considerations rather than on interpretation. The respondents' contentions were premised on the hypothesis that under the 'cram down' provisions of s 152(4),[6] pre-commencement creditors may be prejudiced if they were outvoted by post-commencement creditors in circumstances where there was no protection or court oversight.[7] Under s 152(4), creditors holding the requisite 75% majority voting interest may foist their election on the remaining creditors, which then binds them. The views of legal and academic writers are divided on the issue.[8] Some support the notion that post-

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[5] Sections 135(2), 45(2), 145(4) and 150(2)*(a)*(ii).

[6] As read with s 152(1)*(e)* and 152(2). Section 152(4) provides: 'A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the Company's securities, whether or not such person – (a) was present at the meeting; (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the company.'

[7] Under the compromise provisions of s 155 of the Act requiring court sanction, which does not apply to companies in business rescue.

[8] B da Costa and S Braybrooke 'Post–commencement financier: to vote or not to vote' (2018) 18(9) *Without Prejudice* 10 at 10; R Bradstreet 'The Leak in Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willingness and the Growth of the Economy' (2010) 22 *South African Mercantile Law Journal* 195; M Pretorius and W du Preez 'Constraints on decision making regarding post commencement finance in business rescue' (2013) 6(1) *The Southern African Journal of Entrepreneurship and Small Business Management* 168; 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) 49(2) *De Jure* 265; R D Friesendorp and M A Gramatikov 'Impact of Financial Crisis' (2010) 42 *Vakgroep CentER* 1 at 8; Werksmans Legal Updates and Opinions 'Should Post-Commencement financiers have a vote on Business Rescue Plans?'(October 2023) Available at: https://www.werksmans.com/legal-updates-and-opinions/should-post-commencement-financiers-have-a-vote-on-business-rescue-

commencement creditors should have a voting interest, while others strongly support the opposite view.

[14] It is not however the function of a court to decide on policy considerations. That falls within the remit of the Legislature. The function of a court is to interpret the statutory instrument involved and not to postulate what the law should be or what policy considerations should inform it.

[15] The respondents also relied on s 5(2) of the Act, which permits the consideration of foreign company law in appropriate cases in its interpretation or application. They contended that the Act must be interpreted in a manner which is consistent with how business rescue legislation is structured in countries like the United States of America (USA), the United Kingdom (UK) and Australia, where post-commencement creditors are not afforded voting rights on a business rescue plan.[9] It was submitted that the principles underpinning Title 11 Bankruptcy of the USA Bankruptcy Reform Act of 1978 should be adopted, which in s 101 limits a creditor to a pre-commencement creditor.[10] Reliance was placed on recommendations made by the World Bank regarding principles it advocates for successful post-commencement financing in business rescue as constituting international consensus on best practice.[11] Those recommendations refer only to the establishment of a priority to be accorded to post-commencement finance creditors and the granting of a security interest for the repayment of post-commencement financing. They do not include any recommendation affording post-commencement financing creditors a right to vote on a business rescue plan.[12]

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plans/#:~:text=Only%20those%20persons%20who%20were,on%20a%20business%20rescue%20plan (accessed on 24 January 2025).

[9] United Kingdom's Enterprise Act of 2002, which introduced Schedule B1 of the Insolvency Act 1986 to consolidate with UK laws with Title 11 and Part 5.3A of Australia's Corporations Act 2001.

[10] M F Cassim 'South African Airways makes an emergency landing into business rescue: some burning issues' (2020) 137(2) *SALJ* 201; Prof Anneli Loubser. Available at: https://www.businesslive.co.za/bd/opinion/letters/2023-10-5-letter-what-about-the-original-creditors (accessed on 24 January 2025).

[11] World Bank Revised Principles for Effective Creditor Rights and Insolvency Regimes, United Nations Commission on International trade Law (UNCITRAL): Legislative Guide on Insolvency Law (Revised draft – 20 January 2011)'Creditor Rights and Insolvency Standard' at 31, paras 63-67.

[12] Ibid, para 64.

[16] The respondents relied on *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others*[13] in submitting that the suggestion that post-commencement creditors must be entitled to vote is not in accordance with international practice and generally recognised needs and considerations. It does not avail them. The foreign legislative provisions relied on do not confirm 'generally accepted practical needs and considerations' in our country and do not assist in the interpretation exercise. The respondent's reliance on foreign law is misplaced. The statutes in those jurisdictions are informed by particular policy considerations and socio-economic factors which do not necessarily apply in our country. In the drafting process of Chapter 6,[14] the Legislature considered, among others, the USA Bankruptcy Reform Act of 1978 (Title 11); but elected which provisions would be suited to a South African context, with its own socio-economic challenges and legislation.[15]

[17] It is trite that a grammatical, contextual and purposive unitary approach to interpretation is required.[16] As pointed out by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another:*[17]

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provisions must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. The proviso to the general principle is closely related to the purposive approach referred to in (a).'[18]

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[13] *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* [2013] ZAWCHC 156; 2014 (1) SA 381 (WCC); [2014] 1 All SA 592 (WCC) para 37.

[14] South African Company Law for the 21st Century: Guidelines for Corporate Law Reform, GN 1183, GG 26493: 23 June 2004 at 45.

[15] Such as the statutory mandate provided to the IDC under s 3 of the Industrial Development Corporation Act 22 of 1940.

[16] *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC) para 29.

[17] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

[18] Ibid para 28.

[18] The context and purpose of the relevant provisions of Chapter 6 are found in s 5 and s 7 of the Act. In terms of s 5(1), the Act must be interpreted and applied in a manner that gives effect to the purposes of the Act as set out in s 7. Of relevance is s 7(*a*), which is to 'promote compliance with the Bill of Rights as provided for in the Constitution'. Under s 7(*k*), it is to 'provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders'. The word 'stakeholders' is not confined to a particular category. In normal parlance 'stakeholders' means persons who have an interest in the company. [19]

[19] The inevitable point of departure is the language used in the relevant provisions of the Act.[20] It is apposite to start the analysis with the concept of 'creditor' and to consider the provisions of s 128, s 135, s 144, s 150, s 151, s 152, s 153, s 154 and s 155 to determine whether they impose any a limitation on the entitlement of certain creditors to vote on a business rescue plan.

[20] As stated, the respondents contended that the word 'creditor' should be interpreted in accordance with insolvency law. The word 'creditor' is not defined in the Act, either generally in s 1, or specifically in s 128. Under s 128(1)*(a)*, 'affected persons' for purposes of business rescue proceedings under Chapter 6 includes 'a shareholder or creditor of the company'. The definition of an 'independent creditor' in s 128(1)*(g)*[21] does not take matters further as it too, simply refers to 'creditor'.

[21] The absence of a specific definition of 'creditor' is an indication that the Legislature did not contemplate a specific meaning other than the ordinary grammatical meaning of

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[19] In the King IV Report on Corporate Governance for South Africa 2016, 'stakeholders' are defined as:
'Those groups or individuals that can reasonably be expected to be significantly affected by an organization's business activities, outputs or outcomes, or whose actions can reasonably be expected to significantly affect the ability of the organization to create value over time'.

[20] *Ragavan and Others v Optimum Coal Terminal (Pty) Ltd and Others* [2023] ZASCA 34; 2023 (4) SA 78 (SCA) para 13; *Commissioner for South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 8.

[21] It is defined as: '. . . a person who -
(i) is a creditor of the company, including an employee of the company who is a creditor in terms of s 144(2); and
(ii) is not related to the company, a director, or the practitioner, subject to subsection (2).'

the word; that is a person or entity to whom an unpaid debt is due.[22] Unless the Act has classified creditors and given them different or unequal rights, there is no basis to import, via interpretation, any such different or unequal rights. Any interpretation which draws distinctions between different categories of creditors, without express legislative sanction, would fall foul of the equality provisions of the Constitution and the obligation to interpret statutes through the prism of the Bill of Rights and the Constitution as required by s 7(*a*) of the Act. No absurdity would result if the word were afforded its ordinary meaning.

[22] The view that 'creditor' should be defined with reference to insolvency legislation, is predicated on the fact that only creditors forming part of the *concursus creditorum* are entitled to vote. Creditors whose claims arise after liquidation do not have voting rights. Their claims are dealt with as part of the costs of administration. That view is misconceived. The purposes, mechanisms and procedures pertaining to insolvency and business rescue are distinct and the Legislature has seen fit to regulate them separately.[23] It is not permissible to use the meanings attributed to words in other statutes as determinative in the interpretation of a different statute without caution.[24]

[23] It is uncontentious that the purpose of business rescue is to save flailing entities and to avoid liquidation.[25] The purpose of liquidation proceedings is different. It is to determine an appropriate distribution of an insolvent entity's assets. The hand of the law is laid upon an estate and creditors' rights become fixed and immutable in terms of the relevant provisions of Chapter XIV of the Companies Act 61 of 1973.[26] The context of a *concursus creditorum* does not apply to business rescue proceedings. The differences between pre-commencement and post-commencement creditors are less pronounced and there is no need to differentiate between them.

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[22] *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26; 2016 (1) SA 103 (CC); (2015) 36 ILJ 2751 (CC); 2015 (10) BCLR 1172 (CC) para 20.
[23] Business rescue is regulated by Chapter 6 of the Act, whereas liquidation proceedings of insolvent companies are regulated by Chapter XIV of the Companies Act 61 of 1973.
[24] *Greater Johannesburg Transitional Metropolitan Council v Eskom* [1999] ZASCA 95; 2000 (1) SA 866 (SCA) para 20.
[25] *Oakdene Square Properties (Pty) Ltd v Farm Bothafontein (Kyalami) (Pty) Ltd and Others* [2013] ZASCA 68; 2013 (4) SA 539 (SCA); [2013] 3 All SA 303 (SCA) paras 22 and 23. *Diener NO v Minister of Justice and Others* [2017] ZASCA 180; [2018] 1 All SA 317 (SCA); 2018 (2) SA 399 (SCA) paras 40-41.
[26] *Emontic Investments (Pty) Ltd v Bothomley NO and Others* [2024] ZASCA 1 para 17.

[24] Even in the liquidation context, the word 'creditor' is to be given its normal grammatical meaning. In *Ex Parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd*,[27] it was held 'the word in the section is probably limited to persons having pecuniary claims, whatever the nature of their source may be'.[28] In *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and Others*,[29] it was concluded that 'a creditor includes a contingent or prospective creditor'.[30] It is not the word 'creditor', but the other relevant provisions of the insolvency legislation which provide the context and limits who has voting interests in an insolvency scenario.

[25] Post-commencement finance is regulated by s 135 which does not expressly refer to a creditor.[31] Instead, ss 2(*a*), in relevant part, provides that 'financing may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered'. A 'lender' is but a sub-category of 'creditor'. I agree with the view expressed in *Pruta Securities (Jersey) Limited v Roper NO and Others*[32] that:

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[27] *Ex Parte Kaplan and Others NNO: In re Robin Consolidated Industries Ltd* 1987 (3) SA 413 (W) at 428B.
[28] In the context of s 311 of the Companies Act 1973
[29] *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and Others* 1999 (3) SA 480 (W) at 489D-G.
[30] In the context of s 424 and s 346 of the Companies Act 1973.
[31] Section 135 in relevant part provides: '(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee –
(a) the money is regarded to be post-commencement financing; and
(b) will be paid in the order of preference set out in subsection 3(a).
(2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing –
(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
(b) will be paid in the order of preference set out in subsection 3(b).
(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the cost of the business rescue proceedings, all claims contemplated –
(a) in subsection (1) will be treated equally, but will have preference over –
(i) all claims contemplated in subsection (2) irrespective of whether or not they are secured; and
(ii) all unsecured claims against the company; or
(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company'.
[32] *Pruta Securities (Jersey) Limited v Roper NO and Others* (EL 1522/2023) [2023] ZAECELLC 31 (24 October 2023) para 38.

'. . . the choice of the word "lender" could never have been employed by the Legislature with the purpose of excluding lenders as "creditors" post – commencement of business rescue. If that was the intention such exclusion would have been expressed in clear terms.'

[26] Although post-commencement finance creditors enjoy a preference in ranking under s 135(2), as read with s 135(3), there is no indication in the text that post-commencement creditors' rights are limited to such preference or that the preference adequately safeguards their position, as contended by the respondents. That view further disregards commercial realities. There may not be sufficient unencumbered assets available to secure their exposure or insufficient funds to do so once the practitioner's fees and amounts due to employees are paid.

[27] The absence of a specific reference to post-commencement creditors in s 145 and s 150 does not evidence any intention on the part of the Legislature to exclude them or to limit their rights. Section 145 regulates the rights and voting interests of creditors. A 'voting interest' is defined in s 128*(j)* as 'an interest as recognised, appraised and valued in terms of s 145(4) to (6)'. It expressly grants 'each creditor' various rights. There is no limitation placed on which creditors are afforded those rights. Instead, each creditor is expressly afforded such rights, including the right to vote in respect of a business rescue plan by s 145(2).[33] The value of a voting interest is regulated by s 145(4), which only draws a distinction between secured and unsecured creditors, but not between pre-commencement creditors and post-commencement creditors.[34]

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[33] It provides: 'In addition to the rights set out in subsection (1), each creditor has-
(a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and
(*b*) if the proposed business rescue plan is rejected, a further right to –
(i) propose the development of an alternative plan, in the manner contemplated in section 153, or
(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in s 153.'

[34] It provides: 'In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests –
(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and
(b) a concurrent creditor, who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company'.

[28] Section 135 is also important in another context, in that the Act expressly regulates the rights of employees and their entitlement to vote on a business rescue plan. In relation to their pre-commencement claims, s 144(2) designates employees as preferred unsecured creditors who may vote to the extent that they are creditors.[35] Under s 144(3)*(f)*, employees are expressly not designated as creditors and are not given a voting interest for their post-commencement claims. The rights of post-commencement creditors are not regulated or limited in a similar way by the Act. Had the Legislature intended to differentiate between pre-commencement creditors and post-commencement creditors in a similar way, it would have done so in clear terms.

[29] The high court found support for its interpretation in the provisions of s 150(2)*(a)*(ii), which the respondents support. It was contended that the fact that there was no express provision made for post-commencement creditors in s 150 and the express reference to a list of creditors when the business rescue began in s 150(2)(*a*)(ii), supports an interpretation that post commencement creditors are to be excluded from having voting interests.

[30] Section 150 provides in relevant part:

'150 Proposal of business rescue plan. –

(1) The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.

(2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:

(a) PART A – Background, which must include at least –

(i) . . .

[35] Section 44(2) provides: To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment become due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the Company for the purposes of this Chapter.

(ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation…'

[31] Read in context, no limitation is placed on the concept 'creditors' in s 150. Its purpose is to identify the basic information necessary to enable affected persons to evaluate whether the proposed business rescue plan would yield a better result for them than liquidation. That would inform their decision whether to accept or reject the proposed business rescue plan. The reference in s 150(2)*(a)*(ii) of the Act to the list of existing creditors, links to the requirement in s 150(2)*(b)*(vi)[36] to set a comparative benchmark between the benefits of the business rescue plan and the dividend to be received by creditors in liquidation. As a *concursus creditorum* is created at the commencement of liquidation, the analysis would require a list of creditors with claims at commencement of the business rescue in order to perform such calculation. The calculation must be performed at the time of commencement of the business rescue.[37] The section thus provides no support for an interpretation which excludes post-commencement creditors from having a voting interest.

[32] Under s 151(1), the practitioner is obliged to convene and preside over a meeting of 'creditors and any other holders of a voting interests' called for the purpose of considering the plan'. Again, there is no limitation on the word 'creditor' and the Legislature has not seen fit to exclude post-commencement creditors. Similarly, s 152 also contains no express limitation on the word 'creditor'. In terms of s 152(2), in a vote called in terms of ss (1)*(e)*, the proposed business rescue plan:

'. . . will be approved on a preliminary basis if –

[36] It provides: '(vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation'.
[37] *Commissioner of South African Revenue Services v Beginsel NO and Others* [2012] ZAWCHC 194; *2*013 (1) SA 307 (WCC); 75 SATC 87 paras 47 and 48.

(a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and
(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.'

[33] Section 152 does not limit the holders of creditors' voting interests to pre-commencement creditors and the Legislature has not seen fit to exclude post-commencement creditors. In terms of s 152(2) an approved business rescue plan binds the company, its creditors and holders of its securities if a business rescue plan is adopted. In terms of s 154(2),[38] a creditor cannot enforce any pre-commencement debt, except to the extent provided for in the business rescue plan. However, s 153(1)*(a)* affords a remedy for bad faith actors and entitles a court to set aside an inappropriate vote in the rejection of a plan.

[34] The Legislature elected not to draw any distinction between pre-commencement and post-commencement creditors or to deprive the latter from the right to vote. It expressly crafted the mechanisms in Chapter 6 to place the approval of a business rescue plan under the control of the practitioner and creditors without court sanction. By contrast, the Legislature decided to place compromises between a company and its creditors in terms of s 155 of the Act, under court supervision and expressly to exclude business rescue proceedings from its ambit.[39] Those choices by the Legislature were informed by policy considerations, not open to debate in this forum.

[35] The respondents' submissions regarding the interpretation of Chapter 6, lack merit. A unitary interpretation of the various sections of Chapter 6 of the Act does not favour the importation of a limitation of the word 'creditor' to mean only pre-commencement creditor. One cannot adopt such an interpretation without straining the meaning of the text. The

[38] Section 154(2) in relevant part provides:
'If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan'.
[39] In terms of s 155(1).
.

flaw in the respondents' interpretation is that it ignores what the Act in the relevant provisions expressly provides in respect of creditors and their rights. Seen in context, the omission of a specific reference to post-commencement creditors, means that the Legislature purposefully elected not to draw the distinction contended for by the respondents. Moreover, such limitations would require a reading-in, which is not justified.

[36] Absent the Act drawing any distinction between pre-commencement creditors and post-commencement creditors, they are, as stakeholders, deserving of equal protection under s 7(*k*) of the Act. As such they are equally entitled to vote on the adoption of a business rescue plan.

[37] Turning to the factual issue of whether the plan was properly adopted, the question is whether the statutory threshold under s 152(2) was met. Mashwayi's version that numerous other post-commencement creditors' votes were taken into account, was not challenged. It was further undisputed that there were various tallying errors in the voting, although there were irresoluble factual disputes on the papers regarding what voting percentages were achieved. It was not appropriate for the high court to make the declaratory orders it did as it effectively substituted its powers for the votes of the creditors. Given the exclusion of the vote of only one post-commencement creditor, Mashwayi, it was by no means clear what the ultimate voting percentages would have been if all post-commencement creditors' votes were treated equally and the irregularities had not occurred. The matter should have been remitted to the creditors to vote afresh upon the changed landscape. It was common cause that if Mashwayi's votes were taken into account, the necessary statutory threshold under s 152(2) was not achieved.

[38] On the evidence presented, it must be concluded that the plan was rejected at the creditors meeting of 28 July 2023 as it was not approved as contemplated in s 152(3)*(a)*.[40] It follows that the respective appeals must succeed and the declaratory order sought by

[40] It provides: '(3) If a proposed business rescue plan – (a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153. . .'

the appellants granted. The high court's substantive orders must be set aside and the applications of the Wescoal parties and Ndalamo dismissed.

[39] It must be considered whether any further relief would be appropriate. The Act does not permit the remission of a plan back to a meeting for a new vote. It is open to the practitioner to proceed under s 153(1)*(a)*(i)[41] of the Act to seek a vote of approval from the holders of voting interests to prepare and publish a revised plan. At the hearing, the practitioner and Arnot sought orders by way of a proposed draft order [42] setting time lines to do so. The provisions of s 153 are clear and no further directives are required. The relevant time periods commence from the date of this order.

[40] Costs follow the result. Although Wescoal is in business rescue and its practitioners did not participate in the proceedings, counsel on its behalf conceded in argument that any adverse costs order granted against the Wescoal parties, should include Wescoal. Considering the complexities of the matter, the employment of two counsel was justified. The *amici curiae* have not sought costs orders, and none will be made in their favour.

[41] In the result, the following order is granted:

1 The appeals of the first, second and third appellants are upheld with costs, including the costs of two counsel;

2 The order of the court a quo is set aside and replaced with the following order:

'1 The application is dismissed with costs, including the costs of two counsel;

2 The third respondent's counter-application is dismissed with costs;

3 It is declared that the amended business rescue plan presented by the first respondent to the meeting of creditors of the second respondent, held on 28 July 2023, was not supported by the holders of more than 75% of creditors' voting

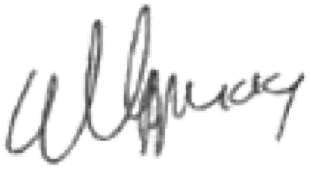
[41] Section 153(1)*(a)* in relevant part provides: 'If a business rescue plan has been rejected as contemplated in s 152(3)*(a)* or *(c)* (ii) (bb) the practitioner may(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or (ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate'.

[42] Provided after the hearing.

interests at the meeting as required by section 152(2) of the Companies Act 71 of 2008 (the Act) and was accordingly rejected in terms of section 152(3)*(a)* of the Act;

4 The first and second applicants and the third respondent are directed to pay the costs of the first and second respondents' counter application, jointly and severally, the one paying, the other to be absolved, including the costs of two counsel.

5 The first and second applicants and the third respondent are directed to pay the costs of the fourth respondent's counter-application, jointly and severally, the one paying, the other to be absolved, including the costs of two counsel.'



E F DIPPENAAR

ACTING JUDGE OF APPEAL

Appearances

For the first appellant:	N G D Maritz SC (with him J C Viljoen)
Instructed by:	Liebenberg, Malan, Mofolo Inc., Pretoria Lovius Block Attorneys, Bloemfontein
For the second and third appellants:	S Symon SC (with him A Vorster)
Instructed by:	Cox Yeats Attorneys, Johannesburg Symington De Kok Inc, Bloemfontein
For the first and second respondents:	A C Botha SC (with him S L Mohapi)
Instructed by:	Mkhabela, Huntley Attorneys Inc., Johannesburg McIntyre Van der Post, Bloemfontein
For the third respondent:	I Miltz SC (with him D Block)
Instructed by:	Webber Wentzel, Johannesburg Noordmans Attorneys, Bloemfontein
For the first *amicus curiae*:	L Acker
Instructed by:	Brown, Braude and Vlok Inc, Port Elizabeth Symington De Kok Inc, Bloemfontein
For the second *amicus curiae*:	K Tsatsawane SC (with him B Mkhize and I Chaba)
Instructed by:	K Hlatshwayo Radebe Attorneys, Johannesburg Honey Attorneys, Bloemfontein.