

Post-Commencement Creditors Rights to Vote on Business Rescue Plans:

Mashwayi Projects (Pty) Ltd and Others v Wescoal (Pty) Ltd and Others (1157/2023) [2025] ZASCA 5 (9 January 2025)

INTRODUCTION

In the recent judgment of the Supreme Court of Appeal (“SCA”), of *Mashwayi Projects (Pty) Ltd and Others v Wescoal (Pty) Ltd and Others (1157/2023) [2025] ZASCA 5 (9 January 2025)*, the SCA affirmed the position of post-commencement creditor’s right to vote in plans set for business rescue.

BACKGROUND

The matter concerned a meeting of creditors of a company, namely Arnot Opco (Pty) Ltd, who sought to adopt a business rescue plan (the “**Proposed Plan**”), that was held in terms of section 151 of the Companies Act 71 of 2008 (the “**Act**”). The Proposed Plan afforded for both pre-commencement and post-commencement creditors to have voting rights. Upon completion of the voting, it was determined that 75.4% of the votes were in favour of the Proposed Plan which, in accordance with section 152(2)(a) of the Act, meets the prescribed threshold of support (by holders of more than 75% of the creditors’ voting interests that were voted) for the Proposed Plan to be approved.

However, the creditors had been voting towards the Proposed Plan electronically, via WhatsApp and email respectively. Upon further investigation, it was determined that a number of errors had occurred during the voting process. These errors included failure to consider the revocation of votes, certain votes being counted twice and additional issues that raised concerns as to the reliability of the tallying of votes. As a result, these errors brought into question whether the votes had indeed met the threshold of 75% required to adopt the Proposed Plan. Furthermore, the votes of a post-commencement creditor (which contributed to votes against the Proposed Plan) were excluded from the overall tally. Had these votes been included, it was common cause that it would have resulted in the votes being below the threshold required to adopt the

By **Aleksandra Marek** (Candidate Attorney),
checked and released by **Robert January**
(Senior Associate)

24 February 2025

Proposed Plan. Subsequent to this discovery, a dispute arose amongst the creditors and the matter was brought before the High Court (“HC”).

THE ISSUES

When the dispute was raised in the HC, it presented itself as a two-tiered problem. Firstly, it presented the legal issue as to whether the provisions of the Act allowed for post-commencement creditors to vote for plans relating to business rescue proceedings. Secondly, it presented the factual issue as to whether the Proposed Plan was properly adopted in terms of section 152 of the Act which determines the voting and approval processes.

JUDGMENT

In determining the dispute, the HC interpreted and ruled that in terms of the provisions of the Act, only pre-commencement creditors (creditors present before the business rescue proceedings were instituted) would be entitled to voting rights regarding to plans for business rescue. Furthermore, the HC ruled that the Proposed Plan had indeed been adopted properly in accordance with section 152 of the Act.

When the matter was brought before the SCA, on appeal from the HC, similar issues were unpacked in deciding whether the appeal may succeed. The point of departure for the SCA was to determine whether any provision of the Act limited certain creditors to vote on business rescue plans. In doing so, reference was made to Section 7(k) of the Act, which states that the purpose of the Act is to provide for the effective rescue and recovery of companies that are financially distressed in a way that keeps **all** of the stakeholders’ rights in the forefront of consideration. Additionally, the SCA delved into the meaning of a “creditor” and considered that there the term is not specifically defined in the Act. As a result, the SCA accepted the ratio in *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd*¹ that the normal, grammatical, contextual and purposive meaning of the word should be used in the absence of a definition provided by the Legislature. The SCA went further to state that had the Legislature intended for creditors to be given different rights, it

would have classified them differently. However, in the absence of such differentiation, one cannot merely interpret this to be the case.

The SCA further ruled that there is no distinction between pre-commencement and post-commencement creditors when it comes to business rescue proceedings, nor is there any need to deprive post-commencement creditors from exercising their voting rights. As a basis for its judgment, the SCA stated that section 152 of the Act does not expressly limit voting interests to pre-commencement creditors exclusively, therefore allowing for the inclusion of post-commencement creditors.

CONCLUSION

In adopting a purposive interpretation of the provisions in the Act, the SCA determined that pre-commencement and post-commencement creditors are to be treated on equal footing when it comes to their voting rights, insofar as the Act does not provide that there should be a distinction made between these creditors. With further reference to section 7(k) of the Act, the SCA held that the Act requires and clarifies that all relevant stakeholders should have their rights and interests balanced in the process of business rescue proceedings. With the above in mind, the SCA ruled that post-commencement creditors have voting rights for business rescue plan proceedings and that the Proposed Plan was not properly adopted in terms of the 75% creditor support threshold requirement contained in section 152(2) of the Act. The SCA expressed the view that, in terms of section 153(1)(a)(i), it is open to the business rescue practitioner to seek a vote of approval from the holders of voting interests, for the preparation and publication of a revised business rescue plan.

Please note: This article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis, and you should consult with an attorney before taking any action based on the information provided herein.

¹*Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC) para 29*



Robert January
(Senior Associate)



Aleksandra Marek
(Candidate Attorney)