



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 37/25

In the matter between:

SALUNGANO GROUP LIMITED

Applicant

and

MASHWAYI PROJECTS (PTY) LIMITED

First Respondent

PHAHLANI LINCOLN MKHOMBO N.O.

Second Respondent

ARNOT OPCO (PTY) LIMITED

Third Respondent

NDALAMO COAL (PTY) LIMITED

Fourth Respondent

WESCOAL MINING (PTY) LIMITED

Fifth Respondent

and

**INTERNATIONAL WOMEN'S INSOLVENCY
AND RESTRUCTURING CONFEDERATION
OF SOUTH AFRICA NETWORK NPC**

Amicus Curiae

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Neutral citation: *Salungano Group Ltd v Mashwayi Projects (Pty) Ltd and Others; Ndalamo Coal (Pty) Ltd v Mashwayi Projects (Pty) Ltd and Others* [2026] ZACC 38

Coram: Mhlantla ADCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Nuku AJ, Opperman AJ, Rogers J and Savage J

Judgment: Mathopo J (unanimous)

Heard on: 19 February 2026

Decided on: 7 October 2026

Summary: Companies Act 71 of 2008 — sections 152 and 153 — business rescue proceedings — voting rights — post-commencement creditors

Interpretation — entitlement to vote — no right for post-commencement creditors to vote on a business rescue plan

ORDER

On applications for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Johannesburg):

In Case CCT 37/25 *Salungano Group Ltd v Mashwayi Projects (Pty) Ltd and Others*:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - “(a) It is declared that Chapter 6 of the Companies Act 71 of 2008 does not permit post-commencement creditors to vote on the adoption of the business rescue plan.
 - (b) It is declared that the amended business rescue plan presented on 28 July 2023 was not supported by holders of more than 75% of creditors’ voting interests as required by section 152(2) of the Companies Act 71 of 2008. As a result, the matter is remitted to the business rescue practitioner for a fresh vote.”
4. The respondents must pay the applicant’s costs, including the costs of two counsel in the High Court, the Supreme Court of Appeal and in this Court.

In Case CCT 38/25 *Ndalamo Coal (Pty) Ltd v Mashwayi Projects (Pty) Ltd and Others*:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - “(a) It is declared that Chapter 6 of the Companies Act 71 of 2008 does not permit post-commencement creditors to vote on the adoption of the business rescue plan.
 - (b) It is declared that the amended business rescue plan presented on 28 July 2023 was not supported by holders of more than 75% of creditors’ voting interests as required by section 152(2) of the Companies Act 71 of 2008. As a result, the matter is remitted to the business rescue practitioner for a fresh vote.”

4. The respondents must pay the applicant's costs, including the costs of two counsel in the High Court, the Supreme Court of Appeal and in this Court.

JUDGMENT

MATHOPO J (Mhlantla ADCJ, Dambuza J, Kollapen J, Majiedt J, Nuku AJ, Opperman AJ, Rogers J and Savage J concurring):

Introduction

[1] This matter concerns two separate applications for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA). These applications have been consolidated because the parties are the same in both matters, and they are challenging the same SCA judgment on the same bases. There are two issues in this appeal – a legal one and a factual one. Legally, these applications concern a narrow issue of voting rights of creditors in business rescue proceedings. What is implicated is the right to vote in a meeting in terms of sections 152¹ and 153 of the Companies Act² (the Act), more particularly, whether post-commencement creditors are included in the definition of “creditor” in terms of section 152 of the Act, and thus entitled to vote on a

¹ Section 152(1)(e) and 152(2) read:

- (1) At a meeting convened in terms of section 151, the practitioner must—
 - ...
 - (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).
- (2) In a vote called in terms of subsection (1)(e), the proposed business rescue plan will be approved on a preliminary basis if—
 - (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.”

² 71 of 2008.

business rescue plan under Chapter 6 of the Act. Factually, the question is whether the business rescue plan presented to creditors on 28 July 2023 was properly adopted in accordance with section 152 of the Act.

The parties

[2] The applicants are Salungano Group Limited (Salungano) and Ndalamo Coal (Pty) Limited (Ndalamo). The overlapping respondents in both applications are Mashwayi Projects (Pty) Limited (Mashwayi), the business rescue practitioner Mr Phahlani Lincoln Mkhombo (practitioner), Arnot Opco (Pty) Limited (Arnot) and Wescoal Mining (Pty) Limited (Wescoal). Arnot was formed as a joint venture between Wescoal and Arnot Investco (Pty) Limited. Arnot Investco (Pty) Limited and Wescoal are presently undergoing business rescue proceedings and are not actively involved in this matter. The International Women’s Insolvency and Restructuring Confederation of South Africa Network NPC was admitted as an amicus curiae (friend of the court). With this in mind, references to “the applicants” are to Salungano and Ndalamo collectively. References to “the respondents” are to Mashwayi and the practitioner collectively.

Relevant statutory provisions

[3] Below are relevant provisions of the Act. Section 7(k) provides that:

“[t]he purposes of this Act are to—

...

- (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.

[4] Chapter 6, titled “Business Rescue and Compromise with Creditors”, contains the following relevant provisions. Section 128 includes the following definition:

“(1) In this Chapter—

- (a) ‘affected person’, in relation to a company, means—
 - (i) a shareholder or creditor of the company;
 - (ii) any registered trade union representing employees of the company; and
 - (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.”

[5] Section 135, entitled “Post-commencement finance”, stipulates:

“(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, post-commencement financing, and other claims arising out of the costs 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,

...

- (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

- (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.”

[6] Section 145, headed “Participation by creditors”, states:

- “(1) Each creditor is entitled to—
- (a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings;
 - (c) formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter; and
 - (d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.
- (2) 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 section 153.
- (3) The creditors of a company are entitled to form a creditors’ committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.
- (4) 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.

...

- (6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to—
 - (a) review the practitioner’s determination that the person is, or is not, an independent creditor; or
 - (b) review, re-appraise and re-value that person’s voting interest, as determined in terms of subsection (5)(b).”

[7] Section 150, under Part D,³ is titled “Proposal of business rescue plan”. It says:

- “(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) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;
 - (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;

³ Part D is titled “Development and approval of business rescue plan”.

- (iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
 - (iv) a complete list of the holders of the company's issued securities;
 - (v) a copy of the written agreement concerning the practitioner's remuneration; and
 - (vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.
- (b) Part B—Proposals, which must include at least—
- (i) the nature and duration of any moratorium for which the business rescue plan makes provision;
 - (ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
 - (iii) the ongoing role of the company, and the treatment of any existing agreements;
 - (iv) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
 - (v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;
 - (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; and
 - (vii) the effect that the business rescue plan will have on the holders of each class of the company's issued securities.”

[8] Sections 151 and 152 provide methods through which a creditors' meeting is convened and a proposed business rescue plan is voted upon. Of contention in this matter are the following provisions in section 152:

- “(2) In a vote called in terms of subsection (1)(e),⁴ the proposed business rescue plan will be approved on a preliminary basis if—
- (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.
- (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;
- ...
- (4) 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 a 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.”

(Footnote added.)

[9] Section 153, titled “Failure to adopt business rescue plan”, provides:

⁴ Section 152(1)(e) of the Act provides:

- (1) At a meeting convened in terms of section 151, the practitioner must—
- ...
- (e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).

Section 152(1)(d)(ii) of the Act states that:

- (1) At a meeting convened in terms of section 151, the practitioner must—
- ...
- (d) invite discussion, and entertain and conduct a vote on any motions to—
- ...
- (ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration

- “(1) (a) If a business rescue plan has been rejected as contemplated in section 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.
- (b) If the practitioner does not take any action contemplated in paragraph (a)—
- (i) any affected person present at the meeting may—
 - (aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or
 - (bb) apply to the 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.”

[10] Finally, section 154, titled “Discharge of debts and claims”, states:

- “(1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.
- (2) 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.”

Factual background

[11] The facts are common cause and similar in both applications. Arnot owns and operates the Arnot coal mine located in Middelburg, Mpumalanga. Wescoal holds an indirect 50% shareholding in Arnot. Wescoal is a wholly owned subsidiary of Salungano and was placed under supervision and business rescue on 23 August 2023. Wescoal and Salungano are Arnot's creditors. Arnot was placed under business rescue on 10 October 2022 at the instance of Wescoal. Mashwayi is a creditor of Arnot, being the cessionary of claims from several other former creditors of the company. Ndalamo is the party whose offer was accepted at a creditors' meeting on 28 July 2023, purportedly in accordance with section 151 of the Act. Although not a creditor of Arnot, Ndalamo intervened in the proceedings based on its direct and substantial interest in the matter.

[12] In terms of section 151 of the Act,⁵ the practitioner delivered a notice calling a creditors' meeting to be held virtually at 10h00 on 28 July 2023 via Microsoft Teams. The notice was sent to all affected persons, and the practitioner simultaneously published the proposed business rescue plan. In his notice, the practitioner informed those affected that a Microsoft Teams link for the meeting would be shared on 18 July 2023. He encouraged creditors to send in their completed and signed proxy forms so they could vote on the different bids.

⁵ Section 151 reads:

- “(1) Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan.
- (2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out—
 - (a) the date, time and place of the meeting;
 - (b) the agenda of the meeting; and
 - (c) a summary of the rights of affected persons to participate in and vote at the meeting.
- (3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153.”

[13] According to section 152(2)(a)⁶ of the Act, a business rescue plan can only be approved at a meeting specifically convened for the adoption of the business rescue plan and if it receives support from holders of at least 75% of the creditors' voting interests. In this matter, the proposed business rescue plan afforded voting rights to both pre- and post-commencement creditors. Four options were presented: Option A involved allocating capital for the refurbishment of facilities and the continued operation of Arnot's business; Option B entailed the sale of the business as a going concern with the proceeds distributed to creditors; Option C was the rejection of the business rescue plan; and Option D allowed for abstention from voting. Should Option B be approved, creditors would then consider four alternative acquisition proposals, including one submitted by Ndalamo.

[14] At the meeting of 28 July 2023, the options were voted upon, and Option B, as reported by the practitioner, was supported by 75.4% of the creditors' voting interests. The bids in respect of Option B were then voted upon. Wescoal and Salungano, which had voted in favour of Option B, supported Ndalamo's offer. Mashwayi voted against Option B. At the meeting, the practitioner stated that 88% of creditors supported Ndalamo's bid (July plan) and then met with Ndalamo to discuss its implementation.

[15] Four days after the July plan vote was shared with creditors, circumstances changed significantly. The practitioner alleged that there were material irregularities in the voting process. Additionally, the practitioner advised the parties that, with support from a forensic accountant, it was found that several creditors had sent emails retracting their votes, certain votes were recorded more than once and some creditors initially voted as a group before submitting individual votes. Furthermore, some proxies were received after the deadline and were therefore not considered. Consequently, the practitioner stated that the 75% threshold had not been met. According to the practitioner, the July plan was therefore not duly accepted. Wescoal and Salungano

⁶ Section 152(2)(a) has been quoted in [8] above.

objected, contending that the statutory threshold had been met and that the July plan had been validly adopted.

[16] In light of the aforesaid events, on 11 August 2023, the practitioner issued a letter stating that a circular would be provided in which he intended to schedule a creditors' meeting for 21 August 2023 to approve his revised business rescue plan and the updated voting interests schedule. On the same day, the practitioner sent an email confirming that a section 151 meeting was scheduled for 21 August 2023. The practitioner attached a revised plan and issued a formal notice to reconvene a meeting of creditors on 21 August 2023.

Litigation history

High Court

[17] Unhappy with the practitioner's conduct, Wescoal and Salungano instituted urgent proceedings on 13 August 2023. They ultimately amended their relief to seek declaratory orders that the July plan had been validly adopted and that Ndalamo's offer had been accepted, with an order directing the practitioner to implement the plan. Ndalamo was granted leave to intervene as an applicant and launched a counter-application seeking declaratory orders, namely, that the July plan had been adopted and that its offer had been accepted. Mashwayi was also allowed to intervene. Mashwayi, Arnot and the practitioner filed counter-applications for declaratory relief, arguing that the July plan had not been validly adopted.

[18] The main issue before the High Court was whether the business rescue plan had been validly adopted in terms of section 152 of the Act, which regulates the consideration of a business rescue plan. It was tasked with determining whether the word "creditor" used in Chapter 6 of the Act includes post-commencement creditors, that is, persons that become creditors after the commencement of the business rescue proceedings, or whether it is limited to pre-commencement creditors, that is, persons that were creditors of the company at the time the business rescue proceedings

commenced. The High Court noted that, in terms of section 145 of the Act, creditors have a right to participate in business rescue proceedings. It bemoaned the fact that the Legislature had not bothered to define creditor. It held, however, that, in the context of the relevant legislative provisions as a whole, creditors were confined to pre-commencement creditors.

[19] The High Court held that permitting creditors to acquire an interest shortly before a section 152 meeting would allow speculators to prey on business rescue proceedings, block the adoption of business rescue plans and force liquidations where they could be avoided. It noted that section 152(2) of the Act requires that a business rescue plan contain a complete list of the company's creditors when the business rescue proceedings begin.

[20] The High Court referred to section 135 of the Act, which deals with post-commencement finance. It pointed out that post-commencement creditors are not styled as "creditors", but as "lenders" that advance finance to a company in business rescue in return for a preferential claim against the company. It held that post-commencement financiers are rewarded with enhanced security and thus do not have a right to vote for the adoption of a business rescue plan.

[21] On the facts, the High Court concluded that the business rescue plan had reached the required threshold for approval, given that Mashwayi – which had voted against the plan – should not have been treated as a creditor for voting purposes as only creditors with claims predating the commencement of the business rescue were eligible to participate in the process. It confirmed that Option B was properly approved and Ndalamo's bid adopted in accordance with section 152(2) of the Act. It ordered the practitioner to implement the plan and give effect to Ndalamo's bid to purchase Arnot's business.

[22] Aggrieved by that decision, the respondents sought and were granted leave by the High Court to appeal to the SCA.

Supreme Court of Appeal

[23] Before the SCA, the present respondents argued that, because the Act does not specifically exclude them, post-commencement creditors are allowed to vote on a business rescue plan. They further contended that the High Court's reasoning was inconsistent with Chapter 6 of the Act. Moreover, they argued that excluding post-commencement creditors' rights would result in unbusinesslike outcomes and inevitably discourage post-commencement financing, which is significant to the rescue of companies in financial distress. They contended that excluding post-commencement creditors from a voting interest would implicate the equality provisions of the Constitution and erode their property rights.

[24] The present applicants argued in the SCA that post-commencement creditors are excluded and have no voting interest because there is no specific provision in Chapter 6 of the Act that affords them the right to vote. Specifically, sections 45(2),⁷ 135(2), 145(4)⁸ and 150(2)(a)(ii)⁹ of the Act do not address the voting rights of creditors that come after the commencement of business rescue. They further argued that the interpretation of the word creditor should be with reference to insolvency legislation. Additionally, reliance was placed on foreign jurisdictions to provide guidance on the question of whether post-commencement creditors are entitled to vote. In this regard, reference was made to the United States of America (United States), the United Kingdom and Australia as countries that do not permit post-commencement creditors to vote on arrangements akin to our business rescue regime.

⁷ Section 45(2) reads:

“Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).”

⁸ Section 145(4) has been quoted in [6] above.

⁹ Section 150(2)(a)(ii) has been quoted in [7] above.

[25] The other concern raised by the present applicants in the SCA was that pre-commencement creditors could be outvoted by post-commencement creditors in a manner that would violate the former's right to property.

[26] The SCA held that the Act does not distinguish between pre- and post-commencement creditors. Accordingly, the term creditor should be interpreted in line with its ordinary grammatical meaning, and there should be no distinction among various types of creditors, as this would contravene section 9 of the Constitution and section 7(k) of the Act. The SCA said that post-commencement creditors should be recognised as relevant stakeholders and creditors that are entitled to participate in voting for the adoption of the business rescue plan. The SCA further held that the creation of a list of creditors at the beginning of business rescue is for the purpose of establishing the *concursum creditorum* (coming together of creditors), should the company go into liquidation, and is therefore not relevant for the determination of voting interests concerning the business rescue plan.

[27] In relation to foreign law, the SCA held that the applicants' reliance on foreign law was misplaced, as the law in those jurisdictions is informed by particular policy considerations and socio-economic factors that do not necessarily apply in our country. Furthermore, the SCA found that the foreign legislative provisions relied on do not confirm "generally accepted practical needs and considerations" in our country and do not assist in the interpretative exercise.¹⁰ When drafting Chapter 6 of the Act, the Legislature considered the United States' Bankruptcy Reform Act (Bankruptcy Reform Act)¹¹ but elected to include only provisions suitable to a South African context, with its own socio-economic challenges and legislation.

[28] In terms of the factual dispute, the SCA held that, given the discrepancies in the voting process, the poll could not be regarded as conclusive and directed that creditors

¹⁰ *Mashwayi Projects (Pty) Ltd v Wescoal Mining (Pty) Ltd* [2025] ZASCA 5; (3) SA 441 (SCA) (SCA judgment) at para 16.

¹¹ Bankruptcy Reform Act of 6 November.

start afresh with the voting process. It further held that if Mashwayi's vote had been taken into account, the statutory threshold mentioned in section 152(2) of the Act would not have been met. The SCA thus set aside the High Court order.

Parties' submissions in this Court

Applicants

[29] The applicants contend that this Court's jurisdiction is engaged under section 167(3)(b)(ii) of the Constitution,¹² in that the matter raises an arguable point of law of general public importance concerning the interpretation of the meaning of the word creditor. They also contend that this matter raises a constitutional issue because it implicates violations of section 25 of the Bill of Rights. They argue that balancing stakeholders' rights supports their interpretation and it would be untenable for post-commencement creditors, whose claims are not compromised by a business rescue plan, to potentially outvote, and limit or even entirely preclude, the claims of pre-commencement creditors. This would amount to an arbitrary deprivation of property.

[30] In addition, the applicants submit that the term creditor has "been defined already through practice and through jurisprudence" in the insolvency setting. The applicants state that, by omitting to define the term, the Legislature intended the word to be construed as it was prior to the Act's enactment instead of its unlimited grammatical meaning. Relying on *Cool Ideas*,¹³ the applicants submit that the SCA's reliance on the grammatical meaning is misplaced because it offends rules of statutory interpretation, which dictate that words in a statute be interpreted according to text, context and purpose. The contention advanced is that pre- and post-commencement creditors

¹² Section 167(3)(b) of the Constitution provides that this Court—

“(i) may decide constitutional matters; and
 (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court.”

¹³ *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

occupy different positions during the business rescue and must not be placed on the same footing regarding the voting for the business rescue plan. The applicants say it is only pre-commencement creditors' claims that will be compromised by a business rescue plan involuntarily. They add that post-commencement finance creditors also enjoy a preference in liquidation.

[31] Finally, the applicants submit that Mashwayi is not a creditor of the company, but a post-commencement financier that enjoys the protection afforded to it by section 135 of the Act, which grants it a super-preference above all other creditors in liquidation. Thus, the applicants submit that leave to appeal to this Court should be granted; the appeal should be upheld; and the order of the SCA should be set aside and the High Court's order reinstated.

Respondents

[32] Conversely, the respondents oppose these applications on the basis that they do not raise any constitutional issue or an arguable point of law of general public importance. Furthermore, the respondents state that statutory interpretation is confined to the legislative context and does not implicate constitutional considerations. To this end, the respondents argue that not all statutory interpretation qualifies as a constitutional matter or warrants a hearing by this Court. Consequently, the respondents argue that it is not in the interests of justice to grant leave to appeal, as there are no reasonable prospects of success.

[33] On the merits, the respondents embrace the reasoning of the SCA and submit that by not defining the word creditor, the Legislature intended it to be understood according to its grammatical and literal meaning as "any person or entity owed a debt, irrespective of when the debt arose". This interpretation, they submit, is in line with the principles of interpretation set out in *Endumeni*,¹⁴ which states that consideration must be given to the language used in light of the ordinary rules of grammar and syntax, the

¹⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production.¹⁵ Moreover, the respondents contend that section 145(2) of the Act gives “each creditor” the right to vote to amend, approve or reject a proposed business rescue plan. The respondents say that on a plain reading of this section, the words “each creditor” do not limit rights under section 145(2) of the Act to pre-commencement creditors but also include post-commencement creditors.

[34] Furthermore, the respondents contend that on a proper textual reading of section 145(2) of the Act, which grants “each creditor” the authority to vote on the amendment, approval and rejection of the business rescue plan, read with section 145(4) of the Act, which establishes the method by which creditors’ voting interests are determined, it is impermissible to interpret the impugned provisions as conferring voting rights only to pre-commencement creditors. They argue that the distinction adopted by the High Court is inconsistent not only with the above provisions but also with section 7(k) of the Act.

[35] Dealing with the question of whether post-commencement creditors have voting rights, the respondents assert that an analysis of the impugned provisions, namely sections 128, 145 and 152 of the Act, includes post-commencement creditors as affected persons and creditors of the company that deserve to be included within the class of creditors entitled to vote on the business rescue plan. Additionally, they assert that post-commencement creditors are stakeholders that should be treated equally to all other creditors, consistent with the objectives of the Act, as set out in section 7(k).

[36] Addressing the applicants’ reliance on insolvency legislation, the respondents submit that “[b]usiness rescue is a new regime, introduced precisely to avoid liquidation”. In insolvency, it is the *concursum creditorum* principle that fixes the rights of creditors at the date of sequestration. However, they argue that business rescue “does

¹⁵ Id at para 18.

not trigger a *concurus*, does not fix creditors' rights at a single point in time and does not divest the company of its status as a going concern". The theoretical underpinning of the *concurus creditorum* principle, the respondents contend, is inapposite in business rescue. As a result, insolvency legislation cannot override the plain meaning of the text.

[37] Advancing their argument on context, the respondents contend that a consideration of other provisions of Chapter 6 of the Act suggests that the Legislature intended to give all creditors voting rights and that the statutory design centres creditors' rights, protections and decision-making power. As business rescue's primary objective is to restore a company to solvency or afford creditors better returns than liquidation, both pre- and post-commencement financiers are essential. The respondents submit that the Legislature opted for an inclusive process and that the relationship between pre- and post-commencement creditors is not one of opposition but mutual dependence. They argue that post-commencement creditors are invested in the success of the business rescue. To disenfranchise them would distort the intended inclusive legislative scheme and deter post-commencement financing. The preference in section 135 of the Act is not a substitute for voting rights because if the business rescue plan failed, the company would enter into liquidation, whereupon the post-commencement creditors' priority would be diminished by various other claims against the company.

[38] Concerning foreign law, the respondents state that, while United States law does preclude post-commencement lenders from voting, courts in that country ensure that business rescue plans treat all creditors fairly and afford them the same treatment as in liquidation. The respondents criticise the applicants' reliance on British and Australian statutes as irrelevant for the purposes of assessing our country's generally accepted business rescue regime standards.

[39] As a fall-back, the respondents contend that if their principal arguments are unsuccessful, the factual matter relating to the votes must be remitted to the business

rescue practitioner, owing to the alleged irregularities and discrepancies in the voting process which have been identified by the SCA.

Amicus curiae

[40] The amicus curiae supports the respondents' contentions, reiterating that since the Legislature did not define the word creditor in the Act, it should be accorded its widest meaning. In the context of this matter and particularly the role of post-commencement creditors in the adoption of the business rescue plan, there should be no distinction between various classes of creditors. It contends that it would be inequitable to exclude post-commencement creditors that have injected liquidity for the rescue of the company from participating in the vote.

Issues for determination

[41] The overarching issue is whether the Act bestows voting rights in a meeting convened in terms of section 152 of the Act exclusively on company creditors that existed at the initiation of the business rescue or whether creditors that acquire claims after the commencement of the business rescue may also participate in voting on the approval of the business rescue plan. At the heart of this matter is the proper interpretation of section 145(2) of the Act.

Jurisdiction

[42] For this Court's jurisdiction to be engaged, the matter must either be a constitutional matter or raise an arguable point of law of general public importance that ought to be considered by this Court. This matter engages our general jurisdiction, on the basis that it concerns the interpretation of the term "creditor" in relation to Chapter 6 of the Act. This is a pure question of law rather than a factual dispute. The issue is plainly arguable, as demonstrated by the fact that the High Court and the SCA reached opposite conclusions on the same statutory provisions.

[43] The next enquiry is whether the issue is one of general public importance. The answer is yes. The interpretation of Chapter 6 of the Act governs the operation of business rescue proceedings, a mechanism of substantial importance to the national economy and the business community. The question of who may vote on a business rescue plan affects a wide range of stakeholders, including distressed companies and pre- and post-commencement creditors and financiers, such as employees, suppliers and lenders, as well as business rescue practitioners. Clarification of this legal position will have consequences extending well beyond the immediate parties and will guide future business rescue proceedings.

[44] The final question on jurisdiction is whether the issue ought to be considered by this Court. It should. Conflicting interpretations by lower courts have created uncertainty in the application of the business rescue regime. Authoritative resolution by this Court would promote coherence and predictability in the law. I am of the view that this matter engages this Court's general jurisdiction.

Leave to appeal

[45] In assessing whether it is in the interests of justice to grant leave to appeal, both the prospects of success and the importance of the issue must be considered.

[46] As will become apparent, there are reasonable prospects of success. There is also a substantial public interest in the outcome of the matter. The decision will influence how business rescue proceedings are conducted throughout South Africa and could affect the willingness of creditors and investors to participate in restructuring processes. For these reasons, the interests of justice favour the granting of leave to appeal.

*Analysis**The scheme of the Act*

[47] The scheme of Chapter 6 of the Act evinces a statutory preference for the turnaround of financially distressed companies, balancing the interests of the company, its stakeholders and its creditors. The purpose of business rescue is to assist financially distressed companies to either recover and continue operating or at least achieve a better outcome for creditors, employees and stakeholders than immediate liquidation would provide. This is done through the placement of the financially distressed company under the supervision of a business rescue practitioner, who attempts to restructure the company's affairs, debts, operations and obligations.

[48] What happens at the commencement of business rescue proceedings is that additional funding is sought either from the existing creditors or new creditors that are willing to extend further credit under these challenging circumstances. Post-commencement creditors deploy this funding in anticipation that their financial assistance will help in facilitating the distressed company's recovery. This increases their chances of recovering a greater or the full value of their claim. Post-commencement financiers assume this risk because of the protection afforded to them by the Act.

[49] Section 135 of the Act sets out the framework for post-commencement finance. It recognises three kinds of post-commencement financiers: employees, in respect of amounts that become due during (that is, following commencement of) business rescue proceedings; financiers (lenders); and claims arising out of the costs of the business rescue proceedings (for example, amounts payable to landlords and suppliers for the continuation of the company's business). This section sets out the order of preference for post-commencement claims.

[50] It must be understood that throughout the course of business rescue proceedings, the fundamental objective is to ensure the safeguarding of the rights and priorities of

existing creditors to the extent that this is reasonably possible. Under section 7(k) of the Act, a necessary balance must be maintained in addressing the entitlements of creditors with pre- and post-commencement claims. Thus, awarding post-commencement financiers preferential treatment encourages them to assume the risk associated with extending credit to a financially distressed company.

[51] Chapter 6 of the Act creates a structured framework. Section 133 of the Act introduces a moratorium on legal proceedings against the company to stabilise the company's estate. Section 135 of the Act establishes a priority regime to encourage post-commencement financing. Sections 145 and 152 of the Act then regulate creditor participation and voting. These provisions form a coherent legislative design for the stabilisation of the company, incentivisation of new funding and inclusive participation in decision-making. Section 7(k) of the Act emphasises balancing the rights and interests of all stakeholders in achieving the rescue of distressed companies.

[52] The term creditor is not defined in the Act. The lack of a legislative definition of creditor warrants an examination of the Act's text, context and purpose to ascertain the scope and meaning of the term. In terms of section 128(1)(a) of the Act, the term "affected person", for purposes of business rescue proceedings under Chapter 6 of the Act, includes "a shareholder or creditor of the company". The definition of an "independent creditor" in section 128(1)(g) of the Act is of no assistance, because it simply refers to "creditor". Sections 5 and 7 of the Act provide instructive context and purpose when considering the relevant provisions of Chapter 6 of the Act. In terms of section 5(1) of the Act, the Act must be interpreted and applied in a manner that gives effect to the purposes of the Act as set out in section 7. The word "stakeholders", referred to in section 7 of the Act, is not confined to a particular category. In normal parlance, "stakeholders" means persons that have an interest in the company's affairs. This is not helpful in the interpretative exercise.

[53] What then is one to make of the Legislature's omission to define creditor? In *Cool Ideas*, this Court stated a 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.¹⁶ The mode of construction, however, should never be to interpret a particular word in a statute in isolation. The answer to this question requires a close analysis of the relevant provisions of the Act. The applicants say that the rationale for this omission demonstrates that the Legislature was aware of the negative implications of including post-commencement creditors in the term creditor for creditors that provided finance prior to the initiation of the business rescue. In essence, they assert that it was the intention of the Legislature to accord the term its meaning as in insolvency proceedings.

[54] It is important that the term creditor be interpreted in a way that is contextually appropriate, in line with Chapter 6 of the Act. We must acknowledge that the Legislature did not provide a specific definition for the term as it appears in the statute. In examining the term in the context of business rescue, it is important to ask whether it should be interpreted and distinguished from that which is applicable in liquidation proceedings of an insolvent company. The applicants invite us to follow this approach. They say that in liquidation, a *concursum creditorum* is established at the date of liquidation, with creditors strictly regulated by the Act and the relevant sections of the Insolvency Act. Business rescue does not involve a *concursum creditorum*.

[55] The respondents, in turn, contend that if one approaches the word creditor in its ordinary sense and unhampered by ingenious statutory arguments, the word should be interpreted, in its literal and grammatical meaning, as one to whom a debt is unpaid. The respondents say that there is no reason not to treat both types of creditors equally and on the same footing regarding their participation in the business rescue and in determining the company's fate during business rescue.

[56] It needs to be clearly understood that no statutory provision is made in a vacuum; there is always a setting in which it has to be placed. In *Capitec Bank*, the SCA affirmed

¹⁶ *Cool Ideas* above n 14 at para 28.

that statutory interpretation is not a mechanical exercise in textual formulation, but a deliberative process aimed at giving effect to the intention of the Legislature.¹⁷ The High Court answered the question of whether creditor includes post-commencement creditors in the negative; the SCA reversed that decision and agreed with the respondents that post-commencement creditors are entitled to vote on the adoption of the business rescue plan.

[57] Before I proceed with the interpretative exercise, it is important to say something. Some significance was attached to the distinction to be drawn between pre-and post-commencement creditors. Reference was made to certain sections in the Act as supporting either position. To decide what significance should be attached to this apparent distinction, it is necessary to consider the meaning of creditor in the Act and the degree of precision and consistency of terminology of the Act.

[58] The first consideration in the interpretative exercise is the definition of “affected person” in section 128 of the Act. This is a broad category of persons that includes creditors, registered trade unions, employees and shareholders. These are persons directly impacted by the commencement of business rescue. It is important to note that section 128 of the Act does not define the meaning of “creditors” but includes them as an “affected person”. The reference to “affected person” in section 128 of the Act demonstrates that the manifest purpose of the statute is to bring these affected persons into a collaborative effort aimed at rescuing the company. Although only creditors vote at a meeting under section 152 of the Act, the broader design of the Act appears to encourage all stakeholders affected by the commencement of the process to engage with one another in seeking the company’s rehabilitation. This is in conformity with the overall purpose of business rescue, which is to preserve the social value of the business as a going concern and avoid the destruction of that value. This broad category of persons is a further reason why creditor should not be given an extensive meaning wide enough to include post-commencement creditors because this will make drastic

¹⁷ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) at para 25.

inroads upon the normal procedure for the determination of claims and their recovery thereof.

[59] Second, an important textual point for consideration is the plain language of section 145 of the Act, which sets out how voting interests of creditors for the business rescue plan are to be determined. It mentions only three categories of creditors: a secured creditor, which has a voting interest equal to the value of the amount owed to that creditor by the company; an unsecured creditor, which likewise has a voting interest equal to the value of the amount owed to it by the company; and a concurrent creditor whose claim would be subordinated in a liquidation. The words in the section “owed to that creditor by the company” in liquidation clearly exclude post-commencement creditors. Construing this section differently seems forced, as a post-commencement creditor is not ordinarily a creditor with voting rights.

[60] In terms of section 145 of the Act, “creditors” have a right to participate in business rescue proceedings. This includes the right to vote to approve, amend or reject a proposed business rescue plan at a meeting called by the practitioner under section 152 of the Act. In terms of section 145(1)(c) of the Act, each creditor is entitled to formally participate in a company’s business rescue proceedings to the extent provided for in Chapter 6 of the Act. The Legislature carefully elected the words “to the extent provided”, thus allowing for the possibility that not all creditors are allowed to vote. One must not overlook section 128 of the Act, which defines “‘affected person’, in relation to a company”. The only practical effect of this provision is that it excludes post-commencement creditors as persons affected by the company. In the context of this section, the word is used to strictly refer to creditor at the time of the business rescue. An interpreter of a statute must proceed upon the assumption that the Legislature is well aware of the existing law and particularly of the content of legislative measures for which it has itself been responsible.

[61] It is inconceivable to me that when it left the word creditor undefined, the Legislature lost sight of what it enacted in the insolvency legislation. There is no reason

for supposing that the Legislature was not conversant with the currency that the term creditor had acquired in liquidation proceedings. It is therefore unsurprising that the Legislature did not define the term creditor, having used it against the backdrop of an established insolvency law framework in which its meaning was already well settled. Similarly, it cannot be validly suggested that the Legislature thought that post-commencement creditors are so obviously included in voting for the adoption of the business rescue plan that it was not necessary to mention them in the definition specifically.

[62] There is another line of interpretation that brings one to the same conclusion. Section 145(2)(a) of the Act makes this position clear. It says: “[i]n addition to the rights set out in subsection (1), each creditor has the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152”. Section 151 of the Act permits the practitioner to convene and preside over a meeting of creditors and holders of a voting interest to consider the business rescue plan. Significantly, the voting prescribed by this section is limited to holders of a voting interest, and such voting interests are determined by reference to the admitted or proved claims identified in the business rescue plan. In carrying out this function, the practitioner must send a notice to all affected persons mentioned in section 128 of the Act. The Legislature must have assumed that there would be a clear understanding of the meaning of the term creditor. As I pointed out earlier during my discussion of “affected person”, this must mean creditors of the company that existed at the initiation of the business rescue.

[63] It should be borne in mind that the fact that a person is reflected in the books or records of a company as a creditor does not automatically grant that person voting rights for the adoption of the business rescue plan. The aforesaid rights are limited to creditors with certain voting rights. This position was made clear in *Tuning Fork*, where the High Court held that a surety, whilst a contingent creditor, is not a creditor that has a

voting interest for the purposes of voting on a business rescue plan.¹⁸ By parity of reasoning, the fact that a post-commencement creditor is reflected in the books of the company does not mean that it automatically has voting rights for the purpose of voting on a business rescue plan. The simple answer is that voting interests are determined with reference to claims that are admitted for business rescue proceedings.

[64] Third, another textual interpretation to consider is section 150(2)(a)(ii) of the Act, which requires a business rescue plan to contain a complete list of the creditors of the company “when the business rescue began”, together with 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”. There is a reason why providing a list of creditors at the initiation of the business rescue is essential. The list promotes predictability, certainty and regulation, as pre-commencement creditors will know at that stage who other creditors are and what preference they may have in receiving the funds. Furthermore, the qualification “when the business rescue began” is a clear indication that the Legislature intended to include only pre-commencement creditors. Another factor pointing towards the exclusion of post-commencement creditors is that according to the section, a plan is not required to make any reference to post-commencement creditors.

[65] The specific reference to a list of creditors at commencement of the business rescue establishes that post-commencement creditors were not intended to have a voting interest in the business rescue plan. If they were meant to vote, the Act would be expected to require that they be identified and accounted for in the business rescue plan. Yet the statute contains no indication that any creditors other than those existing at the beginning of the business rescue must be included. The business rescue plan is not required to say anything to or about them. I agree with the High Court’s observation that the omission is deliberate. Post-commencement creditors are not contemplated as participants in the voting architecture because the business rescue plan is structured

¹⁸ *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff* [2014] ZAWCHC 78; 2014 (4) SA 521 (WCC) at para 43(ii).

around the creditor body as it existed at the commencement of the business rescue. Their protection lies instead in section 135 of the Act, which affords them preferential treatment, rather than voting rights.

[66] The High Court's interpretation better reflects the internal logic and architecture of Chapter 6 of the Act. Voting under section 152 of the Act presupposes a defined pool of voting interests capable of prior identification and valuation. Because the business rescue plan must furnish creditors with sufficient information to assess and exercise their voting rights, the absence of any mechanism to identify or value post-commencement creditors within that framework makes their integration into the statutory thresholds conceptually difficult. Section 150 of the Act is not merely descriptive. By requiring a "complete list" of creditors at commencement, it establishes the reference point for participation and voting. Read together with the broader structure of business rescue, business rescue is triggered at a defined date and anchored by mechanisms such as the moratorium and the liquidation comparison. Therefore, the voting constituency is coherently understood as fixed at commencement of the business rescue.

[67] It must be stressed that post-commencement creditors are not left without protection. Section 135 of the Act grants them super-preference over all other creditors. This preference incentivises them to lend to a distressed company. If such financiers were also entitled to vote on the business rescue plan, this would compromise the operation of sections 150 and 152 of the Act by prejudicing the interests of pre-commencement creditors. Because of their enhanced security and preferential status, they would distort the collective decision-making of pre-commencement creditors in a manner not contemplated by the Act. Nevertheless, it seems to me that section 135 of the Act was designed only to offer protection to post-commencement financiers by granting them super-preference above all other creditors but not to grant them rights to vote on a business rescue plan. There are cogent reasons why this appears to be so.

[68] Section 152(2)(a) of the Act makes it clear that, for a proposed business rescue plan to be approved on a preliminary basis, it must be supported by holders of more than 75% of the creditors' voting interests that have voted. The Act does not use creditors' voting interests in a general sense, but creditors' voting interests for specific purposes and goes on to say, in section 152(2)(b) of the Act, that the votes in support of the proposed business rescue plan must include at least 50% of the independent voting interests, if any, that were voted. It is significant to note that these are creditors that formed part of the list of creditors when the business rescue began. Additionally, this list indicates different rankings of creditors in terms of the law of insolvency. However, although one may borrow from the idea of the *concursum creditorum* to reason by analogy that assets should be distributed fairly among creditors according to a strict, prescribed order of preference, this concept does not extend to business rescue proceedings.¹⁹

[69] Section 135 of the Act is carried through to section 152(4) of the Act, which provides that, once adopted, a business rescue plan binds all creditors, whether or not they attended the meeting, voted or proved their claims. Such a business rescue plan will almost always compromise certain debts. Section 150(2)(b)(i) and (ii) of the Act contemplates the inclusion of a moratorium and even the release of the company from payment of some debts. It would be incoherent to grant a post-commencement financier a preferent claim under section 135 of the Act if that claim could then be suspended or extinguished by the business rescue plan. If one reads section 152(4) of the Act literally and without qualification, then any creditor whose claim falls within the business rescue plan may have that claim compromised, even if it enjoys statutory priority like post-commencement creditors. Their participation in the process would therefore expose their claim to the plan's restructuring mechanism.

[70] Although section 135 of the Act would continue to regulate the ranking of their claim, the amount payable or the timing of payment could nonetheless be varied by the

¹⁹ *SCA judgment* above n 10 at paras 22-3.

adopted plan. No rational financier would advance funds on that basis. Rather, the statutory scheme contemplates that post-commencement financiers enjoy a preferent claim regardless of the plan, which serves to facilitate repayment, not to authorise its compromise. These considerations strongly militate against the SCA's approach which it claims to be consonant with commercial reality. On the contrary, as I see it, the fact that post-commencement financiers are granted a statutory preference, preserved even in liquidation, is a powerful inducement to lend to a distressed company.²⁰ It makes structural sense that the Legislature chose security rather than governance power as the trade-off.

[71] It is true that, in the case of business rescue, there is not a *concursum creditorum* in the strict insolvency sense of that term.²¹ Nevertheless, the provisions of the Act indicate that, in the context of a business rescue plan, Chapter 6 of the Act has in mind creditors determined in substantially the same way as in insolvency proceedings, namely those whose claims existed immediately prior to the commencement of the business rescue proceedings.

[72] This should come as no surprise. Although a company in business rescue is not thereby placed in liquidation, the context of a business rescue application is the company's financial distress. Liquidation is foreseen as a real danger, and an important part of the purpose of business rescue is to achieve a better outcome than would follow from liquidation. A business rescue plan must contrast the plan's outcome with the outcome for creditors in liquidation, and those creditors would be the creditors making up the *concursum creditorum*. Chapter 6 of the Act envisages a transition from business rescue to liquidation where the former has failed.

[73] If creditors were not limited to those existing at the time business rescue proceedings commenced, creditors' voting interests would constantly be fluctuating as

²⁰ Section 135(2)(b), (3)(b) and (4) of the Act.

²¹ Sections 150(2)(a)(ii)-(iii), 150(2)(b)(ii) and (iv)-(vi), 152(4) and 154(1)-(2) of the Act; *SCA judgment* above n 10 at paras 22-3.

post-commencement claims were incurred or reduced. How then is the practitioner to fix the voting interests in advance of any particular meeting? In terms of section 151(2) of the Act, a meeting to determine the future of a company and vote on a business rescue plan must be preceded by a notice given at least five business days before the meeting, and such notice must state, among other things, “a summary of the rights of affected persons to participate in and vote at the meeting”.²² Yet the claims of post-commencement creditors could fluctuate after the giving of notice but before the meeting. A constantly shifting body of creditors would greatly complicate business rescue proceedings.

[74] The argument that insolvency law must be ignored falters on several grounds. First, a list of creditors of the company is determined according to the laws of insolvency. It is a body of those creditors that must meet for the adoption of the business rescue plan. Second, voting procedures and interests are also determined according to the law of insolvency. Third, if the plan has been rejected under section 153, the business rescue practitioner is obliged to seek a vote of approval from the holders of voting interests to prepare and publish a revised business rescue plan. Fourth, Chapter 6 of the Act makes provision for proof of claims by creditors.²³ The proof of claims, which is typical of insolvency proceedings, is something that typically happens promptly after the commencement of the business rescue proceedings.²⁴

[75] Only debts incurred before the relevant date are capable of proof against the company. In relation to a winding-up, the relevant date is the date on which the winding-up is deemed to commence, which in the normal course of events is the date taken as the commencement of the winding-up process, namely the first meeting of creditors. A person is not entitled to vote as a creditor at a meeting of creditors unless its debt has been admitted wholly or in part by the relevant business rescue practitioner.

²² Section 151(2)(c) of the Act.

²³ In terms of section 147(1) of the Act, the practitioner must, within 10 days of appointment, convene a first meeting of creditors at which, among other things, the practitioner may receive “proof of claims by creditors”.

²⁴ Section 147(1)(a)(ii) of the Act.

Votes are allocated according to the value of a particular creditor's claim. That claim must be proved and accepted by the business rescue practitioner before commencement of the meeting. Post-commencement creditors come after all these processes have been undertaken.

[76] Denying post-commencement creditors from voting on a business rescue plan does not mean that they have no role to play or remedy in the business rescue of the company. The Act protects their interests and the liquidity they have provided by granting them preferential rights over other creditors in terms of section 135 of the Act. This section is headed "post-commencement finance". It does not refer to the post-commencement financiers as "creditors" but instead refers to their claims and the preference they enjoy. This includes post-commencement employment claims. Evidently, in the context of this section, an unpaid post-commencement employment claim is regarded as a form of post-commencement finance. Employees' rights are limited too – they do not get to vote unless they are creditors under section 144 of the Act, that is, in respect of their pre-commencement employment claims.

[77] Fourth, section 144 of the Act treats employees as preferred unsecured creditors of a company in business rescue, but only to the extent of any remuneration, expenses and reimbursement for expenses or other amounts of money relating to employment which become due and payable to them before the beginning of the business rescue.²⁵ In respect of employees' post-commencement claims, they are treated not as creditors with a right to vote on the business rescue plan; instead, and like other post-commencement creditors, they are given a special statutory preference under section 135 of the Act. The post-commencement creditors help to keep the company going during business rescue as part of a process to see whether, among other things, the business rescue will be more beneficial to the pre-commencement creditors (including pre-commencement employment creditors) than liquidation. For this contribution, they receive a special statutory preference.

²⁵ Section 144(2) of the Act.

[78] On the respondents' construction, post-commencement creditors qualify as creditors even though they were not affected persons at the time of the commencement of the business rescue proceedings. This interpretation would lead to some absurdity. The argument of the applicants is reinforced by the text, context and purpose of the Act. It establishes certainty, efficiency and predictability, and all of these factors must be given effect to. Construing the provisions to the effect that post-commencement creditors are excluded reinforces the legislative intent. A literal or grammatical meaning of the word creditor involves a radical departure from the proper interpretation of the relevant impugned statutory provisions.

[79] The finding by the SCA – that if the Legislature had intended to exclude post-commencement financiers, it should have made this position clear – is not borne out by the text, context and purpose of the Act. The Legislature said employees do not have a right to vote as creditors except in respect of their pre-commencement claims. Electing not to mention post-commencement financiers at all is an indication that the Legislature must have known that it had created this new category of financiers under section 135 of the Act with a particular super-preference. In relation to the employees, they would have been in service of the company before the commencement of business rescue, and their service for the company would most likely continue thereafter. In this regard, there is no change in the employer-employee relationship. For this reason, because employees would typically feature as both pre- and post-commencement creditors, the Act has made it clear that they are only creditors with a right to vote to the extent of their pre-commencement claims.

Factual considerations

[80] At a factual level, there were several irregularities relating to the tallying of the votes. The irregularities in the voting process are pertinent to whether the plan was validly adopted. These included the double-counting of certain votes, the failure to take account of emails revoking votes, certain creditors voting as a group and subsequently voting separately and the late receipt of certain proxies. Once these errors were

considered, the 75% threshold was not met. The forensic accountant, Mr Makhuvele, initially calculated that 72,2% of creditors' voting interests had been voted in favour of Option B, which was subsequently amended to 70,5%.²⁶ In light of these irregularities and the resulting ambiguity regarding the ultimate voting outcome, we cannot conclude that the plan was validly adopted. The SCA held that, because of the irregularities, the High Court ought to have remitted the matter to the creditors to vote afresh.

[81] The finding of the SCA on the remittal point is unassailable. The question regarding the manner in which the vote for the business rescue plan takes place lies at the heart of the legitimacy of the business rescue plan. Further, the voting process is an important procedural aspect for the adoption of the business rescue plan. More so when the practitioner is the one who alleges irregularities in the voting process. This is a factual issue that necessitates a finding that the aspect of the vote be remitted back to the creditors to vote for the business rescue plan afresh. It further necessitates a finding that the practitioner ensures that only those that are eligible to vote in fact vote.

[82] In deciding the remittal point, the SCA, however, acknowledged that the Act is silent on the remittal of a business rescue plan back to a creditors' meeting for a new vote. As a basis for its finding, it relied on section 153(1)(a)(i) of the Act, which stipulates that if a business rescue plan has been rejected, the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised business rescue plan. The SCA was correct to find that remittal is not provided for in the Act. This notwithstanding, I am of the view that section 153(1)(a)(i) of the Act read with section 140(3)(a), (b) and (c)(ii) of the Act can be read as the basis through which remittal can find expression. Section 153(1)(a)(i) of the Act deals with instances where the business rescue plan had been rejected. In terms of section 140 of the Act, the provision imposes broad obligations on the practitioner during business rescue, and there is no reason why the said obligations should not apply during the adoption of the business rescue plan. The question to be asked is whether the identified irregularities

²⁶ SCA judgment above n 10 at para 5.

affect the credibility and legitimacy of the adoption of the business rescue plan. In my view, they do. In the present matter, the procedural irregularities raised by the practitioner and the respondents necessitate that the vote be recast. It is therefore only just and equitable that the matter be remitted to the business rescue practitioner for a fresh vote.

Foreign law considerations

[83] What remains is to determine whether the SCA correctly rejected guidance from foreign jurisdictions. The SCA held that the legislative provisions relied on by the applicants were not reflective of the “generally accepted practical needs and considerations” relevant to our country and do not assist in the interpretative exercise. It did not enumerate what those needs are and failed to state why our needs are different from those in the rest of the world. This reasoning is unsustainable. Our restructuring regime has its origin in the United States’ regime, so that country’s position and experience should serve as a significant comparative consideration in our interpretative exercise. The flaw in the SCA judgment lies in its failure to engage with foreign jurisdictions and explain why those practices are untenable in our country.

[84] In some foreign jurisdictions that have restructuring regimes similar to our business rescue regime, post-commencement creditors do not have a right to vote, even though this state of affairs is not universal. In the United States, section 101 of the Bankruptcy Reform Act excludes post-commencement creditors from the definition of a creditor.²⁷ The definition encompasses only an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor”. Japan’s Corporate Reorganization Act²⁸ concerns, as the name suggests, “corporate reorganisation”, being the Japanese equivalent of business rescue. It generally militates against post-commencement creditors having a vote on the reorganisation plan. There is one exception, located in article 136, and that is for claims “with an uncertain due

²⁷ Bankruptcy Reform Act above n 11.

²⁸ Corporate Reorganization Act 154 of 13 December 2002.

date that is to become due after the commencement of reorganisation proceedings and bears no interest”.

[85] Under section 108 of Singapore’s Insolvency, Restructuring and Dissolution Act,²⁹ the entitlement of a creditor to vote on a judicial restructuring plan is subject to the judicial manager’s acceptance of that creditor’s claim. It would appear that post-commencement debt only affords a right to vote to the extent that the debt stems from an obligation incurred pre-commencement of the judicial restructuring plan. India’s Insolvency and Bankruptcy Code³⁰ provides that post-commencement financiers receive priority protection but do not participate in voting on the resolution for adopting the business rescue plan. This appears from section 109(1), read with sections 102, 104 and 109(4) of India’s Insolvency and Bankruptcy Code. I must also add that the United Kingdom’s Companies Act³¹ does not allow post-commencement creditors to vote in business rescue proceedings.

[86] There is no reason to believe that the position in South Africa should, as a matter of policy, be any different. Providers of post-commencement finance typically protect their interests by structuring their funding arrangements, for example, by making such finance conditional upon the approval of a business rescue plan drafted to their satisfaction. It would be inherently unfair for a post-commencement creditor, whose rights are not limited or curtailed by the business rescue plan, to have the right to vote on a business rescue plan that could potentially deprive pre-commencement creditors (especially unsecured ones) of a substantial portion of their claims.

Conclusion

[87] In sum, the definition of “affected person” in section 128 of the Act includes creditors alongside registered trade unions, employees and shareholders, as classes of

²⁹ Insolvency, Restructuring and Dissolution Act 40 of 2018.

³⁰ The Insolvency and Bankruptcy Code 31 of 28 May 2016.

³¹ The Companies Act of 8 November 2006.

stakeholders affected by the business rescue proceedings at the time of commencement. The overall purpose of business rescue is to preserve the social value of a business as a going concern and to avoid the destruction of that value that would come about if the company were to be liquidated.³² Considering the text, context and purpose of the Act, it would be inconsistent with the underlying purpose of business rescue and the Act if post-commencement creditors could vote at the section 152 meeting. Allowing such creditors to vote would open the door to speculators preying on business rescue proceedings and, in some instances, blocking the adoption of an appropriate business rescue plan with their financial muscle, thereby forcing companies into liquidation where this could be avoided. Furthermore, section 150(2)(a)(ii) of the Act requires that a business rescue plan contains a complete list of creditors of the company when the business rescue proceedings began. Post-commencement creditors do not fall within this category.

[88] Accordingly, I find that a proper and purposive interpretation of Chapter 6 of the Act excludes post-commencement creditors from participating in the vote on a business rescue plan. To hold otherwise would distort the statutory scheme and undermine the carefully calibrated balance between pre- and post-commencement interests.

Order

[89] The following orders are made:

In Case CCT 37/25 *Salungano Group Ltd v Mashwayi Projects (Pty) Ltd and Others*:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

³² Rajaram et al “Business Rescue: Adapt or Die” *South African Journal of Economic and Management* (2018), available at <https://sajems.org/index.php/sajems/article/view/2164/1666> .

- “(a) It is declared that Chapter 6 of the Companies Act 71 of 2008 does not permit post-commencement creditors to vote on the adoption of the business rescue plan.
 - (b) It is declared that the amended business rescue plan presented on 28 July 2023 was not supported by holders of more than 75% of creditors’ voting interests as required by section 152(2) of the Companies Act 71 of 2008. As a result, the matter is remitted to the business rescue practitioner for a fresh vote.”
4. The respondents must pay the applicant’s costs, including the costs of two counsel in the High Court, the Supreme Court of Appeal and in this Court.

In Case CCT 38/25 Ndalamo Coal (Pty) Ltd v Mashwayi Projects (Pty) Ltd and Others:

- 1. Leave to appeal is granted.
- 2. The appeal is upheld.
- 3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
 - “(a) It is declared that Chapter 6 of the Companies Act 71 of 2008 does not permit post-commencement creditors to vote on the adoption of the business rescue plan.
 - (b) It is declared that the amended business rescue plan presented on 28 July 2023 was not supported by holders of more than 75% of creditors’ voting interests as required by section 152(2) of the Companies Act 71 of 2008. As a result, the matter is remitted to the business rescue practitioner for a fresh vote.”
- 4. The respondents must pay the applicant’s costs, including the costs of two counsel in the High Court, the Supreme Court of Appeal and in this Court.

Case CCT 37/25

For the Applicant:	A Botha SC and S Mohapi instructed by Mkhabela Huntley Attorneys Incorporated
For the First Respondent:	N Maritz SC and J Viljoen instructed by MC Steyn Incorporated
For the Second and Third Respondents:	S Symon SC and A Vorster instructed by Cox Yeats Attorneys
For the Fourth Respondent:	I Miltz SC and D Block instructed by Webber Wentzel

Case CCT 38/25

For the Applicant:	I Miltz SC and D Block instructed by Webber Wentzel
For the First Respondent:	N Maritz SC and J Viljoen instructed by MC Steyn Incorporated
For the Second and Third Respondents:	S Symon SC and A Vorster instructed by Cox Yeats Attorneys
For the Fifth Respondent:	A Botha SC and S Mohapi instructed by Mkhabela Huntley Attorneys Incorporated
For the Amicus:	P Stais SC and L Acker instructed by Cliffe Dekker Hofmeyr Incorporated