THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) handed down judgment in which it upheld the appeal against an order of the Gauteng Division of the High Court, Johannesburg (the high court).

This appeal concerned the interpretation of various provisions of Chapter 6 of the Companies Act 71 of 2008 (the Act) and the legal question whether post-commencement creditors of an entity in business rescue can vote on the adoption of a business rescue plan. The factual question was whether a business rescue plan was validly adopted at a meeting of creditors of the third appellant, Arnot Opco (Pty) Ltd on 28 July 2024.

A meeting of creditors of the third appellant was held on 28 July 2024 at which creditors voted for the adopted of a business rescue plan. After counting the votes, a representative of the practitioner, the second appellant, declared that the statutory threshold had been met and the plan was validly adopted. The creditors voted on four options and approved the offer of the third respondent.

After the meeting, the second appellant had advised creditors that there were errors in the tallying of the votes at the meeting and that the 75% threshold envisaged by s 152(2) of the Act had not been met. The second appellant sought the creditors' consent for the publication of a new business rescue plan which was to be presented at a further meeting of creditors. The first and second respondents, creditors of the third appellant, who had voted in support of the business rescue plan, objected. They approached the high court for urgent declaratory relief that the business rescue plan had been validly adopted and the third respondent's offer had been validly accepted. The second and third appellants and the first appellant, a post-commencement creditor, opposed the application and launched counter applications for a declaratory order that the business rescue plan had not been validly adopted. The third respondent, whose offer had been accepted at the meeting, launched a counter application for an order declaring that the plan had been validly adopted and its offer accepted at the meeting.

The high court interpreted the relevant provisions of Chapter 6 and concluded that post-commencement creditors to not have the right to vote on the adoption of a business rescue plan. It granted declaratory orders that the plan was validly adopted at the meeting of creditors and that the third respondent's offer was accepted at the meeting.

Aggrieved by the result, the appellants sought and obtained leave to appeal to the SCA from the high court. The first and second amici curiae were not involved in the proceedings before the high court. They obtained leave to make submissions under rule 16(2) of the Supreme Court Rules.

The appellants and the amici contended that on a proper interpretation of the relevant provisions of Chapter 6 of the Act, there was no limitation placed on the rights of post commencement creditors to vote on a business rescue plan. The respondents submitted the opposite and contended that the relevant provisions must be interpreted with reference to foreign law and insolvency legislation.

The SCA held that the respondents' reliance on foreign law was misplaced and their contentions involved policy considerations rather than interpretation. The function of a court is to interpret legislation not to comment on policy considerations, which falls within the remit of the Legislature.

The SCA held that on a unitary interpretation of the relevant provisions of Chapter 6 of the Act, including ss 128, 135, 144, 150, 151, 152, 153, 154 and 155 and the concept of 'creditor', the Act did not limit the voting rights of creditors to pre-commencement creditors. To import such limitation would strain the meaning of the text and require an unjustified reading in. Pre-commencement creditors and post-commencement creditors are stakeholders who deserve equal protection under s7k of the Act. The SCA held that post-commencement creditors do have a voting interest on the adoption of a business rescue plan.

On the factual question, the SCA held that the statutory threshold under s 152(2) of the Act was not met and that the plan was not supported by the holders of more than 75% of the creditors' voting interests that were voted. The plan was not validly adopted and was rejected at the meeting as it was not approved as contemplated by s 152(3)(a) of the Act.

The SCA held that section 153(1)(a)(i) entitles the practitioner to seek a vote of approval from the holders of voting interests to prepare and publish a revised plan. No further directives were required as the provisions of s 153 are clear.

The SCA upheld the appeal with costs and set aside the order of the high court. The SCA substituted it with an order dismissing the application with appropriate costs orders and an order declaring that the business rescue plan presented to the meeting of creditors on 28 July 2023 was not supported by the holders of more than 75% of creditors' voting interests at the meeting as required by s 152(2) of the Act and was accordingly rejected in terms of s 152(3)(a) of the Act.

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