Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION, KIMBERLEY)

Case No.:	***233/2025 & 1475/2023,***
Date heard:	13-08-2025
Date delivered:	26-09-2025

In the matter between:

ELIZABETH NEELS **Applicant**

and

LU-ALLYS GUEST HOUSE (PTY) LTD
(Reg No: 2013/178702/07) **1st Respondent**

COMPANIES AND INTELLECTUAL PROPERTIES COMMISSION **2nd Respondent**

FREE STATE WHEELS (PTY) LTD
(Reg No: 2022/647862/07) **1st Intervening Party**

THE EMPLOYEES OF LU-ALLYS GUESTHOUSE (PTY) LTD **2nd Intervening Party**

In re:

In the matter between:

FREE STATE WHEELS (PTY) LTD
(Reg No: 2022/647862/07) **Applicant**

and

LU-ALLYS GUEST HOUSE (PTY) LTD
(Reg No: 2013/178702/07) **1st Respondent**

ELIZABETH NEELS **2nd Respondent/Intervening Party**

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:

Background

1. Free State Wheels (Pty) Ltd (Free State Wheels) obtained default judgment against Lu-Allys Guesthouse (Pty) Ltd (the company) in the Free State High Court on 7 March 2021, in the total amount of about R5 million.

2. A warrant of execution against the movable property of the company resulted in a *nulla bona* return by the Sheriff.

3. Attachment of the bank accounts of Ms Elizabeth Neels, who was surety for the indebtedness of the company, resulted in certain payments received by Free State Wheels, reducing the amount of the company's indebtedness to R4. 96 million.

4. When no further payments were received, Free State Wheels served a notice in terms of s 345 (1)(a) of the Companies Act, 61 of 1973 upon the company on 31 March 2023.

5. When no response to the s 345(1)(a) notice was received, Free State Wheels issued an application for the winding-up of the company on 10 August 2023.

6. The provisional winding-up order was granted on 20 October 2023 with the return day being 1 December 2023. The return day was extended to 23 February 2024 after notice of intention to defend was filed.

7. Ms Neels, the sole director and shareholder of the company then filed an application to intervene in the winding-up and on 23 February 2024, she was granted leave to intervene as the second respondent and the return date for the winding-up application was further extended to 31 January 2025.

8. Ms Neels' affidavit in support of her application to intervene is regarded as the answering affidavit in the liquidation application. She in short disputed the claim of Free State Wheels and contended that she had instructed her attorney of record to immediately apply for rescission of the judgment granted by default and file a counterclaim, alternatively sue for damages, which she and the company would claim against Free State Wheels an amount of approximately R19 million.

9. On 30 January 2025, one day before the return date in the liquidation application, Ms Neels launched an application to place the company in business rescue in terms of S131(4) of the Companies Act 71 of 2008.

10. Since the launch of the business rescue application had the effect of suspending the liquidation process, the parties by agreement postponed the business rescue application and the liquidation application to 6 June 2025 for hearing of the business rescue application, which should it fail, then the hearing of the liquidation application

11. On 6 June 2025 certain employees and participants brought an application to intervene in the business rescue application. I allowed the employees to intervene and ordered that the matters again be postponed to 13 August 2025 and that the parties file the necessary affidavits in the meantime.

12. On 13 August 2025 I heard arguments on both the business rescue application and the liquidation and extended the rule for judgment to be handed down, on the basis that should the business rescue application succeed, the liquidation will be suspended and should the business rescue application fail, I would then consider the liquidation application.

The business rescue application.

13. The business rescue application is brought in terms of s 131(4)(a) of the Companies Act and on the basis that the company is in financial distress, that the company has failed to pay amounts owing in terms of obligations with respect to employment related matters, that it would be just and

equitable to place the company in business rescue and that there are reasonable prospects for rescuing the company.

14. Ms Neels in her founding affidavit states that the company's core business is in the hospitality industry (guest house), logistics, hauling and other mining related activities. Since it had started its operations 10 to 15 years ago, the company had acquired a fleet of trucks and trailers in order to offer a more comprehensive service to its mining clients in the area.

15. During April 2019 Kulumela Mine had offered the company a contract to transport iron ore from Aucampsrus to Kulumela Mine worth R36 million. She alleges that the company lost this contract due to the illegal actions of Free State Wheels. Due to the default judgment obtained, the company's assets and bank accounts were attached which led to a mass exodus of workers leaving the company to seek alternative employment.

16. The company however, denied liability and continued trading. After the provisional liquidation order was issued the provisional liquidators attached all the company's equipment and machinery resulting in the company being unable to generate an income sufficient to finance its operations, pay trade creditors when payments fell due, cover overheads and the staff salaries of the employees who are still working at the guesthouse. The municipal rates pertaining to the guesthouse currently stands at R120,000.00 and it is unclear how that amount would be paid.

17. Ms Neels states that despite the present difficulties experience by the company, the future looks promising. The company is in the process of finalising a contracts with TP Andover Rock (Pty) Ltd for contract mining, operations management and maintenance of mining assets at its three mines, with a value of R10 million to R15 million annually for 5 years, with an option to extend for another year.

18. The company has also received a purchase order from Advent One Project (Pty) Ltd for accommodation for its contractors working at Kulomela Mine at R130,000.00 per month over 18 months.

19. Ms Neels herself has purchased two vehicles for the company to commence a motor vehicle rental business from which the monthly income is estimated at R30,000.00 per vehicle.

20. Taking into account the above mentioned financial opportunities it is contended on behalf of the company that there is a reasonable prospect for its rescue as envisaged in the Companies Act.

21. Ms Neels further states that the company has book debts of R720,000.00 resulting from the rental of a trailer and that attempts were being made to recover the debt and retrieve the trailer.

22. The only creditors of the company, according to Ms Neels, are Free State Wheels and the Tsantsabane Municipality. She however disputes the claim of Free State Wheels against the company on the basis that it is based on fraud and a contravention of the Consumer Protection Act. The liquidation of the company has been opposed by her on this basis.

23. As mentioned, six employees of the company have intervened in support of the business rescue application. Initially they also sought an order that the company and or the joint provisional liquidators release and make available to them certain documents and information in terms of Rule 35 (14), which would be in possession of the provisional liquidators. This relief was subsequently abandoned after the employees were advised that the provisional liquidators were not obliged to release such information to them and were in any event not parties to these proceedings.

24. The employees are allegedly employed at the guesthouse run by the company. Their interest lies in the continuation of the guesthouse business of the company and by deduction their employment. They also attached two documents shown to them by "management", presumably Ms Neels and which they refer to as requests for services from the

company as proof of financial opportunities available to the company, which if realised, would return the company to profitability under the control of a business rescue practioner.

25. These documents appear to be an agreement entered into between the company and Nguni Logistics (Pty) Ltd for the transportation of manganese from Hotazel to Gqeberha. This agreement is signed by both parties, A J Roos on behalf of Nguni (Pty) Ltd and Ms Neels on behalf of the company and dated 3 July 2025.

26. The other document is a tax invoice from the company dated 1 July 2025 to one Eugene Phemelo relating to the use of mining vehicles and diesel costs in the amount of about R7 million and signed by Ms Neels.

27. Should these documents be genuine, the upshot of this is that Ms Neels has been entering into agreements on behalf of the company while the company is in provisional liquidation. Whether the provisional liquidators are aware of the position is a mystery. It also presupposes the use of vehicles and equipment which the company does not possess, at least as far as the liquidators are aware of. In its opposing affidavit to the business rescue application, the attorney for Free State Wheels attached an email from Ubique, the auctioneers appointed by the provisional liquidators and dated 3 September 2024 wherein it is stated that the auctioneers removed all the trucks and trailers belonging to the company which they could find and that it consisted of 3 trucks and 2 tipper trailers. These vehicles were held by the auctioneers in Postmasburg.

28. A similar situation arises with regard to the guesthouse. Ms Neels in her affidavit stated that the guesthouse business remained operational after the provisional sequestration and generates about R1 million per year. The intervening employees have also indicated that they are employed in the guesthouse. One on the provisional liquidators, Mr Cornelius Van Heerden, has however filed an affidavit attached to Free State Wheel's answering affidavit wherein he states that Ms Neels had informed him on 16 September 2024 that the guesthouse was no longer operating and

that it ceased its business activities after the provisional liquidation order was granted.

29. When confronted with the allegation in the opposing affidavit of Free State Wheels, that the "active" contract which Ms Neels referred to in her founding affidavit with Advent One Projects (Pty) Ltd for accommodation for their contractors in the guesthouse is without the permission or knowledge of the provisional liquidators and that such action is illegal, Ms Neels in her replying affidavit, merely responded by stating that she had mentioned in her founding affidavit that the contracts referred to would be implemented once consent is obtained from either the provisional liquidators or the business rescue practioner, should one be appointed.

30. This reply by Ms Neels is untenable and contradicts not only what she stated in her founding affidavit regarding the guesthouse but also what the employees state in their affidavit that they had been informed (by Ms Neels apparently) that the company has a current 18 month contract with Advent One Projects for accommodation which is subject to renewal or extension.

31. The guesthouse property itself is not owned by the company, only the business of the guesthouse. Ms Neels says in her application that the guesthouse has 20 bedrooms, which means that it is a substantial property. However no lease agreement has been signed with the owner of the property and no mention is made of any rental payable on the property. She mentions only that the company is responsible for the municipal costs. She does concede in her replying affidavit that the Municipality is not a creditor of the company, since the company is not liable to the Municipality for the services but the owner of the property itself, a complete turnabout of what was stated in the founding affidavit.

32. The business rescue application leaves one with more questions than answers. Clearly Ms Neels is not playing open cards with the court or the provisional liquidators, which negatively impacts on her *bona fides* and that of the application for business rescue.

33. As it is, on her version now, Free State Wheels is the only creditor of the company. Ms Neels however denies that the claim of Free State Wheels is legitimate and expresses an intention to apply for the rescission of the judgment obtained by Free State Wheels and possibly file a counterclaim. Long and costly litigation with its only creditor would defeat the objectives of business rescue which amongst others envisage the implementation of a business rescue plan which must be approved by the majority of the creditors of a company, with the aim of achieving the rescue of the business or a better return for the creditors than what they would receive should the company be immediately liquidated.

34. In *Southern Palace Investments 265 Ltd v Midnight Storm Investments 386 Ltd* 2012 (2) SA 423 (WCC) Eloff AJ stated as follows at paragraph 3"

> *[3] The scheme created by the business rescue provisions in Chapter 6 of the new Act envisages that the company in financial distress will be afforded an essential breathing space while a business rescue plan is implemented by a business rescue practitioner. <u>It is, however, necessary to caution against the possible abuse of the business rescue procedure, for instance, by rendering the company temporarily immune to actions by creditors so as to enable the directors or other stakeholders to pursue their own ends</u>. The courts in Australia have been careful not to allow their equivalent procedure to be used where there appears to be an ulterior purpose behind the appointment of an administrator by the directors, <u>it is necessary that an application for business rescue be carefully scrutinized so as to ensure that it entails a genuine attempt to achieve the aims of the statutory remedy</u>."* (own highlighting)

35. Ms Neels in her application for business rescue has not mentioned a single word about how the rescue of the company would be in the interest of its sole creditor, Free State Wheels. I must mention at this stage that the intervening employees have not alleged non-payment of salaries, in fact they state that they have always been paid their salaries, contrary to Ms Neels' contention in the founding affidavit of the company's inability to pay the salaries of the employees still working at the guesthouse. All these factors and those previously mentioned, support an inference that Ms Neels is running the guesthouse independent of the company or the fact of it being in provisional

liquidation, for her own account. There is no indication that the current employees would find themselves unemployed should an order placing the company in business rescue not be made and a final order of liquidation is granted.

36. The interests of all affected persons must be weighed up in considering whether a business rescue application should succeed.

37. In terms of s 131(4) of the Companies Act, the court may, after considering an application for business rescue;

> *"(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—*
>
> *(i) the company is financially distressed;*
>
> *(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or*
>
> *(iii) it is otherwise just and equitable to do so for financial reasons."*
>
> *and there is a reasonable prospect for rescuing the company"*

38. Mr Zietsman SC for Free State Wheels, has argued that Ms Neels has not even made out a case that the company is in financial distress which is a prerequisite for a business rescue order. He bases this argument on the fact that Ms Neels mentioned that the company is financially distressed because of its only creditor obtaining judgment against it, but then goes on to deny that the company is indebted to Free State Wheels, alleging that the claim has its origins in fraud and that the company reserves the right to challenge the debt – thereby approbating and reprobating, which is not allowed. I do not agree with Mr Zietsman in this regard. The stands taken by Ms Neels are not necessarily mutually destructive. The claim upon which the judgment is based is disputed, not the fact of the judgment itself – which then led to what she alleges is the cause of the financial distress. I will accept that in terms of the definition of *"financially distressed"* under s 128 of the Companies Act, it appears

to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months.

39. There is no indication that the company has not been able to pay its employees, indeed the contrary is averred by the employees, but the real issue to my mind is whether it has been shown that there is a reasonable prospect of rescuing the company by placing it in business rescue.

40. The only known or admitted assets of the company are those three trucks and tipper trailers which have been in storage with the auctioneers since 2023 and some cash which was in the attached bank account of the company. The value of these assets have not been disclosed by Ms Neels, not even an estimation was ventured.

41. With these assets, the condition of the vehicles and machinery is also unknown, Ms Neels seems to envisage the company being able to perform services, if the contracts attached to her affidavit are anything to go by, such as mining operations and transportation of minerals, worth millions of Rands. No mention is made of how and from where the company would be able to source financial backing for these ventures. In *Nedbank Ltd v Bestvest 153 (Pty) Ltd, Essa and Another v Bestvest 153 (Pty) Ltd and others* 2012(5) SA 497 (WCC), Gamble J stated, at paragraph 41 – 42, that although it should be left to the business rescue practioner to formulate a rescue plan after properly assessing the company and its prospects going forward, "*That is not to say, however, that a party can approach the Court for the appointment of a business rescue practitioner with flimsy grounds in the hope that the practitioner will provide the panacea to its problems. The application must set out sufficient facts, if necessary augmented by documentary evidence, from which a Court would be able to assess the prospects of success before exercising its discretion.*"

42. Gamble J refers in, paragraph 43 of the judgment, that it would be ideal *inter alia* for the applicant to show the prospects and likelihood of obtaining financial assistance for the company to attain commercial viability.

43. Financial institutions and event private individuals are known to be reluctant to invest in companies which are in business rescue and if they do, they do it at exorbitant interest rates. The position in the case of the company is worsened by the fact that it has been in provisional liquidation for the last two years. In these circumstances I would expect to have been provided at least, with a provisional financial plan which would enable the company to fulfil its requirements relating the attached mining industry contracts. Mr Snyders who appeared for Ms Neels, has referred me to the judgment of *Lever J* in this division *Schwartz v Tornado Boerdery and Algemene Handelaars CC and Others* (854/2022) [2024] ZANCHC 62 where he summarized the requirements needed to establish a reasonable prospect of success for business rescue. One of these grounds mentioned is apposite to this case and it is found in paragraph 19.3 of that judgment where Lever J states:

"There must at least be a coherent factual foundation laid for establishing the above reasonable grounds that takes it out of the realm of speculation and/or wishful thinking;"

44. Without financial backing, the probability of the company achieving success in business rescue, is to my mind, mere wishful thinking.

45. This is however not the only problem that I have with this application. As already mentioned the *bona fides* of Ms Neels in bringing this application is questionable, not only for the issues already mentioned but also for the fact that this application has been brought so late. The company had been in provisional liquidation for more than 1½ years before the business rescue application was launched and just days before the return date of the provisional liquidation order. The argument on behalf

of Free State Wheels that this was just an unmeritorious attempt to delay the liquidation, is more than just a reasonable inference, taking into account also the fact of the denial of the claim of Free State Wheels.

46. This is not an instance where I can reasonably find that Ms Neels or the intervening employees have shown that there is a reasonable prospect for rescuing the company.

47. Another issue which must be addressed is that of Free State Wheels referring in its opposing affidavits to evidence led during the ss417 and 418 enquiry without having brought a proper application to court for such confidential evidence to be allowed. Ms Neels has objected to this evidence and has sought its striking out. It is only fair, in my view, that without the proper opportunity to respond to such evidence, or its inclusion, that it would be prejudicial to Ms Neels and should therefore be struck out. All references in the papers to the evidence led at the ss417 and 418 enquiry are thus struck out.

48. The application for business rescue must thus fail and the only issue remaining is that of costs. There is no reason why costs should not follow the result. However, it would only be fair that the intervening employees pay the wasted costs occasioned by their late intervention on 6 June 2025, having known of the application since January 2025.

The application for liquidation

49. There is no dispute that the formal requirements for a final winding-up order had been met. The company has been placed under provisional liquidation on the basis that it was deemed to be unable to pay debts, having neglected (i) in terms of s 345 (1) (a) of the Companies Act, to pay the demanded sum due within three weeks or to secure or compound for it to the satisfaction of the creditor; and (ii) in terms of s 345 (1) (b) a warrant of execution for movable property served by the Sheriff resulted in a *nulla bona* return.

50. The intervening party, Ms Neels, opposed the granting of a final order of liquidation on the basis that the company is not factually or commercially insolvent. That the claims of Free State Wheels on which default judgment was obtained were mired in fraud and that Ms Neels, as surety in her personal capacity for the indebtedness of the company, had instructed her attorneys to bring an application for rescission of the judgment and to file a counterclaim, alternatively she intended commencing legal proceedings against Free State Wheels for damages suffered by the company. The averment is that it would not be just and equitable, where the company has a *bona fide* defense to the claim and there is a *bona fide* dispute of the claim on reasonable grounds, for the company to be finally liquidated.

51. The main thrust of Ms Neels' defense to the claim upon which Free State Wheels obtained judgment, is that the company had purchased five trucks from Free State Wheels to enable it to perform a contract with Kolomela Mine worth about R36 million. It is alleged that Free State Wheels had supplied the company with vehicles which were not fit for purpose and on pretense of removing it for purposes of repairing the trucks, sold it to unknown persons, resulting in the company losing the contract with Kulumela.

52. Free State Wheels did not oppose the intervention of Ms Neels in the liquidation application, only the opposition put forward in her affidavit. Free State Wheels denies the allegation of the purchase of the trucks and states that it entered into rental agreements with the company after it (Free State Wheels) had purchased the vehicles for supply to the company. The trucks were collected from the company after non-payment of rentals and the rental agreements had already expired.

53. I do not need to delve any deeper into the merits of the disputed claim raised by Ms Neels, except to say that there is clearly a dispute of facts. The question is whether such a dispute is *bona fides*.

54. Ms Neels has not made out any case in her intervention application, despite mere reference thereto, that the company is indeed commercially solvent. The only basis on which the opposition to the granting of a final liquidation order was argued, was that there exists a *bona fide* dispute of the debt on reasonable grounds, thus relying on what is called the *Badenhorst* rule, in reference to *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T), where the court held that the process of liquidation was not meant to enforce questionable debts.

55. The Court retains a discretion (although narrow), notwithstanding the *ex debito justitiae maxim* – i.e. that where a company is unable to pay a creditor's claim the creditor is entitled to a winding up order – to refuse the granting of a liquidation order if the claim of the creditor is *bona fides* and genuinely disputed.

56. In *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC), Rogers J, as he then was deals extensively with the *Badenhorst* rule and its applicability as demonstrated with regard to the authorities. The learned judge, at paragraph 67 and 68 the judgment, states as follows:

> *"[67] I must emphasise, though, that the Badenhorst rule is conventionally formulated as requiring the company to satisfy the court of two things: its bona fides and the reasonableness of its grounds for disputing the claim. …Bona fides is a question of fact. At the stage of a final order, it must be assessed in accordance with the Plascon-Evans rule. Even though the onus on a particular issue in motion proceedings might rest on the respondent, this does not reverse the operation of the Plascon-Evans rule (see Ngqumba en 'n Ander v Staatspresident en Andere 1988 (4) SA 224 (A) at 259E-263D; Rawlins & Another v Caravantruck (Pty) Ltd [1992] ZASCA 204; 1993 (1) SA 537 (A) at 541I-542B). And bona fides, in the context of the Badenhorst rule, does not in my view require that the*

company should hold a belief that at trial its defence to the claim would definitely succeed or even be more likely than not to succeed. It would be sufficient, I think, that the company genuinely wishes to contest the claim and believes it has reasonable prospects of success.

[68] I mention bona fides at this point, because it bears on the two remaining issues to be addressed below, namely inability to pay debts and discretion. A finding that the company is not bona fide in disputing the applicant's claim would usually go hand in hand with a finding that the claim is being disputed solely for purposes of delay; and such a purpose would often support an inference that the company is unable to pay its debts and militate against the exercise of a discretion in its favour."

57. What stand out from the authories referred to is that a *"claim being bona fide disputed on reasonable grounds"*, is not one such as in this case, where judgment has already been obtained in relation to the claim. It is trite that a judgment stands and is enforceable until it is set aside. Neither the company (before provisional liquidation) nor Ms Neels, have done anything since the judgment was granted, to initiate a rescission application. The issue of a rescission of the judgment and the possibility of a counterclaim or a claim for damages was brought up only in opposition to the final order of liquidation, almost one and a half years after the judgment was obtained. In circumstances where it has not been shown that the company is commercially solvent, the only reasonable inference to be drawn is that the claim is only disputed for purposes of delay and does not support a contention that the court should exercise its discretion in favor of the company and refuse a final order.

58. I must also mention that the possibility of a counterclaim has been held not in itself to be a reason to refuse the liquidation of a company, but it may be a factor taken into account in exercising the court's discretion as to whether or not to grant and order (see *Afgri Operations Limited v*

Hamba Fleet (Pty) Ltd (542/2016) [2017] SASCA 24; 2022 (1) SA 91 (SCA) at paragraph 7 thereof).

59. Taking into account all the circumstances, Free State Wheels has satisfied the requirements for the granting of a final order of liquidation. There is no reason why costs should not follow the result.

A In case number 233/2025 (Business rescue application)

a) The application is dismissed with costs on scale C, inclusive of the costs of the intervention of the employees.

b) The wasted costs of Free State Wheels (Pty) Ltd occasioned by the postponement on 6 June 2025 are to be borne by the intervening employees.

B In case number 1475/2023 (The liquidation application)

a) A final order of liquidation is granted.

b) Costs of this application are costs in the liquidation, to be determined upon taxation on scale C.

[redacted]

CC WILLIAMS
JUDGE

For Applicant in liquidation: Intervening Party in business rescue:	Adv P Zietsman SC Symington De Kok Attorneys c/o Mervyn Joel Attorneys
For Intervening party in liquidation: Applicant in business rescue application:	Adv T Snyders Elton De bruin Attorneys c/o Towell & Groenewald
For Intervening party in business rescue: (employees)	Adv Maluleke Kenneth Juries & Associates