REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case No: HC-MD-CIV-MOT-GEN-2024/00196

In the matter between:

UITKOMS FARMING (PTY) LTD **APPLICANT**

and

BREMEN FARMING (PTY) LTD **1ST RESPONDENT**
PETRUS JACOBUS BOLTMAN **2ND RESPONDENT**
WILLEM JOHANNES CARSTENS **3RD RESPONDENT**

Neutral Citation: *Uitkoms Farming (Pty) Ltd v Bremen Farming (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2024/00196) [2024] NAHCMD 324 (14 June 2024)

Coram: MASUKU J
Heard: **24 May 2024**
Delivered: **14 June 2024**

Flynote: Civil Procedure – Rules of Court – Urgent applications – Rule 73 – Requirements to be met by applicant for urgency – Urgent applications in interlocutory matters arising where some main proceedings are pending before a judge already

docket-allocated the matter – Interim interdict – Requirements to be met by applicant therefor.

Summary: The parties in this matter had a contractual agreement in respect of which the second respondent was engaged to run the applicant's farm in which the rearing of sheep, amongst other activities took place. The agreement was terminated by the applicant resulting in some disputes between the parties. The applicant instituted a claim for damages against the second respondent alleging that it had suffered damages as a result of the second respondent's running of the farm. In like manner, the second respondent sued the applicant for delivery of some sheep. Both actions remain pending before two different managing judges who were docket-allocated these cases.

The applicant thereafter brought this application on an urgent basis, claiming that because of a drought that presently obtains in the south of the country, the court should allow it to auction some sheep which are subject to a dispute between the parties. This, it was claimed, was to avoid the sheep perishing as a result of the drought. The applicant also put up security for the second respondent's claim by placing funds in the excess of N$2 million in its legal practitioners' trust account. The application was opposed by the respondents.

Held: That in terms of rule 73(6), where a matter has already been docket allocated to a managing judge, any urgent application arising in that matter must be dealt with by the said managing judge. If the managing judge is absent or is, for a reason satisfactory to the Judge-President, unavailable, the duty judge or any other judge designated by the Judge-President may hear the urgent application.

Held that: The said subrule was designed to ensure the smooth and orderly dispatch of matters before the same judge. This avoids the duplication of efforts and the likelihood that different outcomes might arise in respect of the same matter. Because of the non-compliance with this subrule, the matter was struck from the roll as it was not brought as

an urgent application before a judge docket allocated to deal with the pending actions between the parties.

Held further that: An applicant for urgency must satisfy the court by explicitly showing that there are circumstances which render the matter urgent and that he or she cannot be afforded substantial redress at a hearing in due course.

Held: That in the instant case, the applicant failed to show that the matter was urgent as the dates when it knew of the drought are not disclosed. Furthermore, there appears to be a dispute of fact on the papers as to whether there is in fact a drought as the respondents put up countervailing evidence.

Held that: The applicant failed to meet the requirements of the granting of an interim interdict in that the sale or slaughter of the sheep to avoid the drought was relief that is final in form and effect.

The application was struck from the roll with costs.

ORDER

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1. The application is struck from the roll for non-compliance with rule 73(6).
2. To the extent necessary, the application for hearing the matter as one of urgency is refused.
3. To the extent necessary, the application for the granting of an interim interdict is refused.
4. The applicant is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner.

RULING

MASUKU J:

Introduction

[1] Presently serving before this court is an application by the applicant Uitkoms Farming (Pty) Ltd in which it seeks the following relief:

'1.Condoning the applicant's non-compliance with the forms and service as provided for in the rules of court and authorizing the applicant to bring this application on an urgent basis as contemplated in rule 73(3) read with rule 72 of the rules of court.

2. Authorizing and granting the applicant leave to sell by auction, alternatively to sell to the Upington abattoir and/or any other abattoir in the vicinity of the farm Uitkoms the following livestock currently on the farm Uitkoms
   2.1 450 production ewes
   2.2 68 old ewes
   2.3 30 rams
   2.4 110 weaned lambs;
   2.5 149 whethers;
   2.6 all other lambs if and when they attain their living weight of 35 kg pending the final determination of action(s) so instituted by the applicant against the respondents and vice versa as referred to in paragraph 9 infra;

3. Directing and ordering that the amount of N$2 000 000 so deposited by the applicant and currently being kept in the trust account of Messrs. Theunissen, Louw & Partners, shall serve as collateral security for the benefit of the respondents in lieu of any findings made in favor of the second respondent in the pending action brought under the case number HC-MD-CIV- ACT-COM-2023/03286 concerning his claim for the return of 774 head of sheep and their value currently to be found on the farm Uitkoms and insofar as the remaining ewes on the farm

Uitkoms falls short of the number in question, pending the final determination of the action(s) by the applicant against the respondents and vice versa as referred to in paragraph 9 *infra*.

4. Directing and ordering that all monies derived from the sale of the sheep as per paragraph 2 supra shall be paid into the business account of the applicant whereas the applicant shall retain the amount of N$2 000 000, currently being kept in the trust account of Theunissen, Louw & Partners on the basis and for the duration as contemplated in paragraphs 2 and 3 *supra*;

5. Further directing the second respondent to sign and execute all documents necessary, including but not limited to transport permits, health declarations etc. if any, with regard to those head of sheep bearing the second respondents ear tag and whereby effect be given to the relief contemplated in paragraph 2 *supra* within 7 days from date when such documents are presented to the mentioned respondents, alternatively authorizing and directing the Deputy Sheriff for the district of Mariental to sign and execute such documents in the event of the respondents failing to do so;

6. Further directing the first and/or second and/or third respondents to give unrestricted passage over the Farm Bremen No 183 to the applicant and its employees and/or agents acting on its behalf to remove the animals earmarked for sale as contemplated in paragraph 2 *supra*;

7. Interdicting and restraining the first and/or second and/or third respondents from in any way refusing and/or preventing and/or interfering with the applicant’s execution of the sale of the sheep contemplated in paragraph 2, 5 and 6 supra pending the final determination of the action(s) referred to in paragraph 9 *infra*;

8. Directing the first and second respondents (and/or any other respondent opposing) to pay the costs of this application on a scale as between party and party, jointly and severally, the one paying the other to be absolved consequent upon the appointment of one instructing and one instructed counsel.

9. The relief set out in paragraphs to 2 - 7 supra shall serve as an interim order with immediate effect pending the determination of the applicant’s pending High Court action against the respondents and a case number HC- MD-CIV- ACT-CON-2023/03606

and/or pending the final determination of any consolidation of such action brought by the second respondent and a case number HC- MD-CIV- ACT-CON-2023/03286.

10. Further and/or alternative relief.'

The parties

[2] The applicant in this matter is Uitkoms Farming (Pty) Limited, a company with limited liability and duly registered in terms of the company laws applicable in Namibia. It has its place of business situated at farm Uitkoms portion 1 of farm Grau water 186 and portion one of farm Tranedal no. 184 Gochas, Mariental District, Republic of Namibia. The first respondent is Bremen Farming (Pty) Limited, a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of Namibia. Its principal place of business is situated at some Bremen number 182, Gochas, Mariental district Republic of Namibia. The second respondent is Mr Petrus Jacobus Boltman an adult major male person and shareholder of the first respondent, currently residing on farm Bremen no. 182, Gochas described above. The third respondent is Mr Willem Johannes Carstens, an adult male and shareholder of the first respondent currently residing on farm Kameelrust no. 183 Gochas, Mariental district, Republic of Namibia.

Background

[3] From a reading of the papers filed by the applicant, it becomes plain that in the main, the applicant seeks an order authorising it to sell by auction, alternatively, to sell to the Upington abattoir or any other abattoir in the vicinity of Farm Uitkom the livestock mentioned in the notice of motion quoted above. It also seeks an order that it, together with its employees and/or agents, be granted unrestricted passage over Farm Bremen No 183 in the process of moving animals earmarked for sale.

[4] It is the applicant's case that the reason it seeks the order, which it terms interim, pending the finalisation of action proceedings instituted among the parties, is to sell the stock mentioned in the notice of motion by auction. This it is claimed, is to avoid the devastating effects of a drought that is afflicting the South of Namibia.

[5] There is a relationship that previously existed among the parties. It would seem that the second respondent was the owner of Farms Bremen and Uitkoms, which are adjacent to each other from around 1978. Both are situated in the Mariental District, in the south of this Republic. They were engaged in small livestock farming and game farming.

[6] Some transactions appear to have taken place between that parties. These resulted in the applicant becoming the owner of the two adjacent farms. The second respondent was later engaged by the applicant as its farm manager in respect of the small livestock farming. This was around the year 2000. It would appear that a partly oral and partly written agreement, was signed between the parties.

[7] As often happens, the relationship *inter partes* reached a nadir. As a result, the agreement between the parties was terminated. This resulted in some disputes erupting between the parties. The dispute apparently led to the second respondent no longer being allowed access into Uitkoms, thus leading to a dispute regarding the ownership of some of the sheep at Uitkoms. The parties do not see eye to eye regarding the number and ownership of the sheep at Uitkoms. These disputes, among other things, concern the number of sheep and the question of ownership of some of the sheep in question.

[8] As a result of the disputes *inter partes*, the applicant lodged a claim against the second respondent for damages in the amount of N$4 263 001, 32 relating to alleged breaches of the agreement that existed *inter partes*.[1] Responding in kind, the second respondent also instituted a claim against the applicant for the return of 774 sheep, with

[1] HC-MD-CIV-ACT-CON-2023/03606.

the second respondent claiming that that herd of sheep belongs to him.[2] Both cases are under judicial case management at this stage and may have to be the subject of consolidation at some stage.

[9] The second type of relief sought by the applicant relates to it being granted access through the second respondent's farm Bremen. The applicant contends that there is a road traversing the second respondent's farm, which has been previously used without let or impediment. It is contended by the applicant that this is thoroughfare through which it can gain access to its farm. It is claimed that after the dispute between the parties, the second respondent sent notice raising issues regarding the use of the road through the latter's farm. It is applicant's case that the new stance by the second respondent is obviously influenced by the deteriorated relations *inter partes*.

[10] In the wake of the dispute, the second respondent, by letter dated 3 May 2024, served notice on the applicant that the key to Uitkoms will be kept at farm Kameelrus and can be collected from there by the applicant. The second respondent indicated that he took the steps to lock the gate for the reason that he maintains the road without any assistance from the applicant and that third parties use the road without any contribution. Furthermore, the second respondent claimed that the gates were left open and that there was some reckless driving occurring, which resulted in an accident. Last, the second respondent pointed out that the locks are necessary for the protection of his livestock.

[11] The respondent denies that the matter is urgent as alleged. It is his case that if any urgency attaches to the matter, it is of the applicant's own making. Secondly, the second respondent contends that Mr Willem Johannes Carsten was misjoined to the proceedings and in the same breath, Ms Belinda Sabine Carsten has not been joined to the proceedings, yet she is an interested party.

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[2] HC-MD-CIV-ACT-CON-2023/03286.

[12] Furthermore, the second respondent takes the view that for the court to grant the relief sought, especially that appertaining to the sheep, it must show that it is the owner of the said sheep and in that connection, there is a dispute of fact that cannot be resolved in these proceedings. It was in that connection, so argued the second respondent, that there are two actions presently pending before court. To resolve that issue and to decide whether the relief should be granted, further contends the second respondent, oral evidence would need to be adduced. This, it was finally contended, pointed inexorably, in the direction that the relief sought by the applicant in these proceedings, is inappropriate and that the application must be dismissed with costs.

[13] On the merits, the second respondent joins issue with the applicant and does so toe to toe, as it were. He denies almost all the allegations made by the applicant in support of the relief sought. Of particular note, is that the second respondent denies the allegation that there is a drought as alleged by the applicant. To this end, the second respondent attached pictures depicting what he calls the current situation in Bremen, near the border with Uitkoms. He contends that these pictures were taken between 3 and 5 May 2024 by him and they depict a fair amount of grazing in the vicinity.

[14] Furthermore, the second respondent denies that the relief sought by the applicant is temporary in nature and effect. This is so, he claims, because if the sheep were to be sold on auction and slaughtered, which is the ultimate end to the sale sought to be sanctioned, the sheep will not be ‘unkilled’ or ‘unslaughtered’ once the dispute arising from the actions instituted, is resolved in the respondents’ favour. The second respondent argued that the applicant does not show that it has a *prima facie* right, let alone a clear right to the relief sought.

[15] For the above reasons, the second respondent, for the above reasons, moved the court to dismiss the application with costs. The question is whose arguments should carry the day? The applicant’s or the respondents’?

[16] The court is now called upon to decide whether the application should be granted or not. In doing so, it will be necessary to deal first with the issue of urgency and the other contentions raised by the respondents. I proceed to deal with the issues below.

Rule 73(6)

[17] The first issue that must be considered, in my opinion, is the one regarding the provisions of rule 73 that Mr Ravenscroft-Jones, for the respondents, brought to the court's attention. It relates in particular, to rule 73(6). That provision reads as follows:

'(6) The managing judge is responsible for hearing any interlocutory application lodged with the registrar as an urgent application in a matter which has previously been docket-allocated to that managing judge, except that if the managing judge due to absence or a reason to the satisfaction of the Judge-President is not available on the date and time specified in the application, the duty judge or any other judge designated by the Judge-President may hear the urgent interlocutory application.'

[18] Mr Strydom, for the applicants confessed that he had no answer to this particular issue. He had not considered it at all before it was raised in argument on the respondents' behalf. What are the implications of this provision?

[19] I am of the considered view that this provision is designed for the smooth running and orderly dispatch of the cases allocated to managing judges. What it does, is to ensure that matters allocated to judges, are dealt with by those judges from start to finish, barring exceptional circumstances eventuating. This ensures familiarity with intricate details of those cases and to the necessary extent, a guided and consistent approach and management of cases. Furthermore, it is aimed at consistency in judgments that are issued ultimately. It must be mentioned in this regard that urgent applications brought in the course of a managing a matter that has been docket-allocated, may have a serious implications on the main case.

[20] It is thus grossly unfair and inimical to the interests of justice to have an urgent application serving before a non-managing judge when the main case has been docket-allocated to the managing judge. As intimated above, the intention of the rule-maker, is

that one judge, allocated to deal with the matter, deals with that matter in its entirety. This includes interlocutory and urgent applications relating to that matter.

[21] It is also plain that it is in the most exceptional circumstances that an urgent application in respect of a docket-allocated matter, can be dealt with by another judge. It is only where that judge is absent or for a reason that satisfies the Judge-President unable to deal with the said urgent application. In that case, the duty judge or a judge designated by Judge-President must deal with that urgent application.

[22] In the instant case, it is apparent that there are two other cases involving the parties and which it is clear, have been docket-allocated to other judges. One is brought by the applicant and the other, by the respondents. They appear to be related matters. The current application, it is clear from the applicant's papers, implicate those other cases. For that reason, the relief sought by the applicant in this case, is interlocutory to those other matters and should, for that reason, have been allocated to one of the managing judges in line with the above-cited rule.

[23] Properly considered, this court should have refused to entertain this application because of the non-compliance with rule 73(6). There is no explanation as to why the said provisions were not followed by the applicant in this matter. There is also no indication that the matter was referred to me by the Judge-President in compliance with the above subrule. For that reason, it would be appropriate to strike this matter from the roll for non-compliance with the said subrule. Compliance with this subrule, as indicated earlier, conduces to the proper and orderly management and adjudication of cases. It also serves to avoid haphazard allocation, management and inconsistent decision of matters.

[24] In view of the conclusion I have reached in relation to rule 73(6), it is strictly unnecessary to deal with the other issues that arise. I, however, for the sake of completeness, deal with some of these issues below, commencing with the question of urgency.

Urgency

[25] I now proceed to deal with urgency. In the founding affidavit, the deponent Mr Abraham Johannes van der Hoven, the applicant's director, deposes, as intimated earlier, that the issue of the grazing conditions in both farms Bremen and Uitkoms are of such a nature that neither farm can accommodate and sustain the current number of livestock on the farms. He alleged that a substantial number of sheep might perish unless the sheep are marketed. It was also his case that the winter season is upon us and that it will render an already bad situation worse.

[26] The deponent further stated that the applicant had put up an amount of N$2 million and deposited it into the trust account of the applicant's legal practitioners. This amount, it was deposed, would serve as security in the event the second respondent's claim referred to earlier, was resolved in his favour against the applicant. He further reasoned that the ewes retained on the farm would and could serve as further protection and security in respect of any judgment issued against the applicant.

[25] As narrated above, the respondents take the position that the urgency is a figment of the applicant's imagination. They totally deny that there is any urgency in relation to the issue of the drought. Alternatively, the respondents contend that if there is any urgency, it is of the applicant's own making and for that reason, the court should not come to the applicant's assistance by invoking the urgency procedures in rule 73.

[26] The relevant provisions of rule 73 that will be applicable in this matter, are rule 73(4), which read as follows:

'In an affidavit filed in support of an application under subrule (1), the applicant must set out explicitly –

(a) the circumstances which he or she avers render the matter urgent; and

(b) the reasons why he or she claims he or she could not be afforded substantial redress in due course.'

[27] There are numerous judgments and rulings of this court which expatiate on what a litigant, in the shoes of the applicant, is required to do to enable the court to invoke the urgency provisions. In dealing with the requirements of rule 73(4)(*a*), the applicant must show that there are present in the matter, circumstances that render the matter urgent. These, it must be added, should be explicitly set out in the founding affidavit.

[28] In the instant case, the difficulty that one faces, is that the applicant does not state explicitly when it became aware that the drought it alleges would ravage the flock, became apparent. In para 60 of the founding affidavit, the applicant refers to pictures dated 22 March 2024 for the allegation of drought. No indications are given as to when this dire situation became apparent to the applicants for the first time. The situation is described as current, with no indications whatsoever, as to when it became apparent and a source of bother it now is to the applicant. This must be contrasted with the fact that the application was brought in May 2024. No explanation is given for the delay in approaching the court from the time, whenever it is, that it became apparent to the applicant that the drought was a vexing phenomenon to the applicant.

[29] In the absence of any indication by the applicant in this regard, it becomes difficult for the court to find for the applicant in this connection. Dates when issues relating to urgency arise are often critical in the determination of the application of rule 73(4). This is because for urgency procedures to be invoked, time must be shown to be of the essence. If the applicant takes an inordinately long period to act and then approaches the court on urgency, the court may well be within its rights to refuse to succumb to the wails of the applicant for urgent relief to be issued. The inference likely to be drawn by the court in that event, is that the urgency, is of the applicant's own creation, in which case, the court may well be within its rights to refuse to invoke the urgency procedures.

[30] In the instant case, I am of the considered view that the applicant has failed to show as to when the urgency touted started and why it finds it appropriate to approach the court at this juncture. It may well be that indication of the drought alleged may have been visible months ago and if that is the case, then the decision that there is no urgency may well be appropriate. For a party in the applicant's shoes to jump the queue ahead of parties whose case have been awaiting determination of their cases for some time, must not be done simply out of maudlin sympathy. A proper case must be made out by the applicant therefor in the founding affidavit.

[31] There are other considerations that must be taken into account in this matter. The allegation of a drought is made by the applicant, who in that connection, filed pictures of what the farm looks like. On the other hand, the respondent has alleged that there have been some rains in the area that have improved the outlook and dimmed the potential effects of the drought. Pictures of what the place looks like, from the respondent's perspective have also been placed before court. The respondent claims, and it is common cause that the farms are neighbours, that the prospects, after the rains, are good.

[32] This situation, in my considered view, raises a dispute of fact. There is, on the one hand, the version of the applicant, supported by pictures. There is, on the other hand, a version by the respondents, to the contrary. This, in my considered opinion becomes an issue just on the drought and therefor, the alleged urgency, that may require the adduction of oral evidence. This plainly renders the case one that is not capable of being resolved on the papers, even on the question of urgency. In any event, the application of the *Plascon Evans* rule[3], may be in favour of the respondents on this issue. I, however, make no firm finding on this issue in this case as it is unnecessary to do so.

[3] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints Ltd* 1984 (3) SA 620 (AD).

[33] I would, for the foregoing reasons, find that the hurdle of urgency, has not been overcome by the applicant and that the court is entitled to withhold the invocation of the urgency procedures from the applicant.

Interim interdict

[34] I now turn to deal with the interim interdict in this matter. It is clear, from the applicant's papers that it seeks among other relief – actually in the main, an interim interdict. The requirements that an applicant therefor needs to satisfy, are trite. They are to be found in the work of the learned author C B Prest.[4]

[35] These requirements are that the applicant must show that (a) the right which is the subject matter of the main action and which he seeks to protect by interim interdict is clear, if not clear, is *prima facie* established, though open to some doubt; (b) if the right is only *prima facie* established, there is a well-grounded apprehension of harm if the interim relief is not granted and he or she ultimately succeeds in establishing his right or her right; (c) that the balance of convenience favours the granting of the interim relief; and (d) that the applicant has no other satisfactory remedy. These requirements have been subsumed in numerous judgments of our courts and have become part of the law of Namibia.

[36] Mr Ravenscroft-Jones argued quite forcefully and correctly so, in my considered view, that the application brought by the applicant has no ring of being interim in nature. This is because the relief sought by the applicant, is, if granted, not temporary in nature. If carried out, it permanently disposes of the sheep, which are the bone of contention between the parties. Once the applicant is granted the 'interim relief', namely the sale and inevitable slaughter of the sheep, that marks the end of the matter as the sheep cannot answer to any call or compulsive order, even by this court to resurrect and return to the kraal where they are presently kept.

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[4] C B Prest, *Interlocutory Interdicts,* Juta & Co, 1993, p 55.

[37] It must not be forgotten that the ownership of the sheep forming the subject of this application, is disputed by the litigants. As intimated earlier, there are two cases pending before court bearing at least in part, on the very ownership of these sheep. The court may ultimately have to hear evidence adduced by the parties regarding the ownership of the sheep in question and thereafter decide who is entitled to what.

[38] The relief sought by the applicant, properly considered, is not at all interlocutory as the sheep face the prospect of a doomsday in the slaughterhouse and this would be before the resolution of the dispute about them by the parties, is resolved. Granting the order sought by the applicant, which as I have said has no ring transience about it, would not accord with the court having to ultimately fulfil its function as the order sought, would conclusively and in final fashion, have disposed of the sheep before the determination of the dispute as to who owns what.

[39] In my considered view, it can only be after the issue of ownership is determined that the court could be properly placed to issue an order of the kind sought by the applicant in this matter. The posting of security in the form of the amount held in trust does not alter the precarious effect of the order sought by the applicants.

Conclusion

[40] In view of what has been stated above, it appears to me that the application cannot succeed. Not only has the issue of urgency not been satisfied, there is also the issue of bringing what is clearly an interlocutory application before a judge who has not been docket-allocated any of the matters to which this application relates. More fundamentally, the relief sought by the applicant has no ring of transience about it. It is final in nature and effect, thus resulting in the applicant not meeting the requirements of the interim interdict it seeks. I dare say that the applicant has not met the requirements of a final interdict, either, which are more exacting and require more clarity and certainty.

[41] I do not find it necessary to deal with the other issues raised by the respondents relating to the misjoinder, non-joinder of certain parties and the issue of the unrestricted passage over the respondents' farm by the applicant. The result reached is not impoverished by not dealing with those issues, which appear surplus to issues necessary for determination.

Costs

[42] The general rule applicable to costs, generate little contention. Save in special circumstances, the costs should follow the event. In the instant case, the respondent's contentions have prevailed. There is nothing submitted by the applicant not apparent from the record, that would suggest it improper or unjust to order costs to follow the event. The respondents, are entitled to their costs.

Order

1. The application is struck from the roll for non-compliance with rule 73(6).
2. To the extent necessary, the application for hearing the matter as one of urgency is refused.
3. To the extent necessary, the application for the granting of an interim interdict is refused.
4. The applicant is ordered to pay the costs of this application consequent upon the employment of one instructing and one instructed legal practitioner.

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T S MASUKU

Judge

APPEARANCES

APPLICANT: J Strydom
Instructed by: Theunissen, Louw & Partners, Windhoek

RESPONDENTS: JP Ravenscroft-Jones
Instructed by: Köpplinger Boltman Van Greunen, Windhoek