

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 3678/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
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.....	
DATE 30 March 2026	SIGNATURE.....

In the matter between:

CITIMBA (PTY) LTD

PLAINTIFF

and

HENLEY CITRUS (PTY) LTD

DEFENDANT

Delivered : 30 March 2026

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **30 March 2026 at 10:00 AM.**

Date heard : 19th to 21st and 30th of January 2026
Coram : Chidi AJ

JUDGMENT – ABSOLUTION FROM THE INSTANCE

Chidi AJ

INTRODUCTION:

- [1] The plaintiff, a macadamia grower and producer, instituted action proceedings against the defendant claiming two contractual heads of damages amounting to R 5 485 472,20. The cause of action is pleaded as breach of two sets of agreements. The alleged damages

arise from loss of time in and delayed production of macadamia nuts. The defendant is a nursery, grower, grafter and dealer in Macadamia trees. Both parties are registered as companies according to the law of the Republic of South Africa.

- [2] Trial commenced. After the plaintiff's case was closed, the defendant applied for absolution from the instance¹ against the plaintiff's two claims, which application the plaintiff opposes. Following written and oral submissions, I reserved judgment.
- [3] In addition to the parties, there is another enterprise, which is a partnership, namely Citimba Estates. The partnership is relevant only to claim 1. For the moment, it suffices to state that the plaintiff's main witness, Mr Bruce Milton (Mr Milton), was or is one of the partners in the partnership and is also the plaintiff's director. Further, Mr Milton is a liquidating partner, appointed to liquidate what remains of the partnership. More about the partnership and the liquidating partner, and how the two interfaced or interface with the parties or one of them below. At this stage, it suffices to state that the partners, in their capacities as individuals, are part of the plaintiff. Ordinarily, I would have turned to the evidence immediately below. However, I start with issues for determination.

ISSUES FOR DETERMINATION

- [4] Issues for determination are-

Claim 1

4.1. in respect of claim 1-

- a. whether the plaintiff or the liquidating partner of the partnership was the one with the title to litigate;
- b. if title vests in the liquidating partner, whether the plaintiff had ceded to it the right to litigate, and

4.2. further, whether the defendant was required to specifically plead the plaintiff's standing to litigate as a defence;

Claim 2

4.3. whether the plaintiff should prove that the trees delivered to it by the defendant were too small;

Both claims

4.4. whether the filed expert's document was a summary or report and whether, regardless of what it is, whether it contained factual foundation and whether such absence, if any, may render the plaintiff's claims speculative and incapable of sustaining a judgment, and

4.5. whether, absent expert evidence, the Court may assess damages.

¹ In terms R39 (6) of the Uniform Court Rules.

THE PLEADINGS

Pleadings, claim 1

[5] The parties' common cause version in respect of claim 1 is as follows:

- 5.1. a sale agreement was concluded during the year 2016, in terms of which Citimba Estates, a partnership (herein after called the partnership) purchased 2000 macadamia trees called 814 (814 trees)² from the defendant;
- 5.2. the partnership paid the defendant the purchase amount (**R79 000.00**);
- 5.3. the trees were delivered by the defendant to the plaintiff on the 06th of October 2017, and
- 5.4. the partnership, and subsequently the plaintiff, relied on the defendant skills, attributes and expertise in the macadamia ecosystem in transacting with the defendant.

[6] The plaintiff's material allegations, which are neither denied nor admitted, but for which the defendant puts the plaintiff to the proof thereof are:

- 6.1. that on the 31st of August 2018, the partners of Citimba Estates resolved to sell the assets, liabilities, creditors, movable assets and claims of the partnership to the Plaintiff with effect from **1 September 2018**;
- 6.2. as a result, the partnership was dissolved on **31 August 2018**, and
- 6.3. from 1 September 2018, the plaintiff became the successor in title of the partnership as a result of the said sale agreement and continued with the farming enterprise previously conducted by the partnership.

[7] In her plea, the defendant pleads that the dissolution of the partnership and the subsequent sale of assets to the plaintiff is outside of the defendant's knowledge and the plaintiff is placed to proof thereof. That creditors cannot be sold is obvious. Nothing turns on this.

Pleadings, claim 2

[8] As for the 2nd claim, a summary of the plaintiff's undisputed pleaded case is that-

- 8.1. on the 19th of October 2018, the plaintiff ordered *inter alia* 1000 x 814 trees from the defendant;
- 8.2. on the 18th of January 2019, the defendant delivered the 1000 x 814 trees to the plaintiff, and
- 8.3. at all relevant times, the plaintiff relied on the skills, attributes and expertise of the defendant.

[9] The essence of the pleading is that the cause of action arose when the plaintiff realized that the delivered trees were, as it pleaded, too small, which would result in loss of income. The loss would arise from, if established, the loss of time in production between the time

² This is a type of relevant only to quantification.

the small plants were supposed to have been planted and the time they were planted after collection from and return to the plaintiff by the defendant, which has an impact on harvesting, or alternatively, that such damages claimed flow naturally from the alleged breach. This, the defendant denies.

[10] The loss of income suffered by the plaintiff is computed as follows and/or quantifiable from, which is denied by the defendant-

- 10.1. the plaintiff's accurate and meticulous keeping of records of the planting, progress, production and harvesting of its 814 trees planted on the farm Teaklands in Block 13 (the neighbouring farm);
- 10.2. the neighbouring farm and the farm Matanda (Matanda farm) being in the same geographical area and having the same soil type;
- 10.3. the plaintiff's application of the same management practices to the trees planted in January 2019 as those applied to the trees planted in the neighbouring farm, and
- 10.4. the plaintiff's planting of the same trees relevant to claim 2 on the neighbouring farm from the year 2002 to 2004.

[11] The Matanda farm is where the trees were planted. As further pleaded, a table reflected the plaintiff's alleged total loss of income of R1 879 882.15 in respect of claim 2. The first part of this reflected a summary of production of the 814 trees on the neighbouring farm. The other part, distilled from the first part, reflects the alleged loss of income in respect of the 400 x 814 trees that were too small to plant. The defendant denied the allegations regarding the table.

THE LAW

[12] Under this rubric, I do only set out some aspects of law I deem appropriate. Under each claim, I specify the applicable law and proceed to apply it. I start with expert evidence. Courts rely on expert evidence regularly. How an expert opinion is arrived at is important. A summary of **R.M**³ is apposite. It is that-

- 12.1. an expert's work starts with the facts or data, which may either be common cause, or established by his/her own evidence or that of some other competent witness. Second, it is the process of reasoning, which is premised on and proceeds from facts or data. Third, the reasoning should lead to the conclusion, which should be in the form of an opinion. An opinion, therefore, represents the expert's reasoned conclusion;
- 12.2. the above is so in that the cogency of an expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached. The facts and reasoning assist the Court in the sense of being the source for the evaluation of

³**R.M v Road Accident Fund** (11868/17) [2024] ZAGPPHC 137 (22 February 2024), paras 43 to 45. See also **Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH** 1976 (3) SA 352 (A) at 371, from paragraph F to bottom of the page.

expert evidence. For cogency and reliability of such evidence, an expert's report should be reasoned, which reasons should be the basis upon which the opinion rests. The reasoning must have a logical basis when measured against the established facts, and

12.3. in essence, the expert's process of reasoning is affected by the facts on which it is premised, and

[13] This Division has added its voice. **R.M** was quoted with approval by **P.M.M**⁴, in which the Court, per the Honourable **Marais AJ**, held that expert witnesses are called upon to provide opinions on the facts pertaining to their expertise,⁵ that an expert witness should state the facts or assumptions on which his opinion is based,⁶ and that a factually unsupported opinion holds no merit for the Court.⁷

Pleading defence

[14] A party in litigation should plead a defence it seeks to rely on⁸ because the purpose of the pleadings is to define the issues⁹ in order to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Consistent with this, pleadings must therefore be lucid and logical and in an intelligible form; and the cause of action or defence must appear clearly from the factual allegations made. One of the considerations for this position is that a party cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another point.¹⁰ When this is considered, and in the circumstances of this case, the following are relevant-

14.1. **Giant Concerts CC v Rinaldo Investments (Pty) Ltd** 2013 (3) BCLR 251 (CC), para 33 (**Giant Concerts**), where the Constitutional Court held that the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated. In para 34, the Constitutional Court held that, in line with the position of the Supreme Court of Appeal (SCA), standing determines solely whether this particular litigant is entitled to mount the challenge. The Court went on and dealt with impugned public decisions, a point not relevant in this matter;

14.2. relying on the above judgment, the SCA's judgment in **Kangra Coal**¹¹ should be understood to mean that issues must be pleaded expressly for the other party to respond properly and not be ambushed, and

⁴ **P.M.M v Road Accident Fund** (873/2019) [2024] ZALMPPHC 152 (24 October 2024).

⁵ Para 49.

⁶ Para 53

⁷ Para 54. See also para 60. "The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact."

⁸ Rule 18 (4).

⁹ **Robinson v Randfontein Estates Gold Mines Co Ltd** (1925 (AD) 173 at 198.

¹⁰ **Nyandeni v Natal Motor Industries Ltd** 1974 (2) SA 274 (D), p279 (B-C).

¹¹ **Kangra Coal (Pty) Ltd v The Trustees of the Time Being of the Corneels Greyling Trust and Others** (1052/2023) [2025] ZASCA 9 (6 February 2025). para 22.

14.3. if a point not pleaded was fully canvassed in evidence by both sides in the sense that the Court was expected to pronounce upon it, then and in that case, the Court should make a pronouncement. See ***South British Insurance Co. Limited v Unicorn Shipping Lines (Pty) Ltd*** 1976 (1) SA 708 (A) at 714 F-G.

Test for absolution

[15] Turning to the test for absolution from the instance, what is required is whether there is evidence which, considered by this Court, could or might find for the plaintiff.¹² The test is 'not should nor ought to' find for the plaintiff.¹³ If the test for absolution is met, then absolution ought to be granted for the Court would have been satisfied that the interests of justice would not be served by having the defendant to answer the plaintiff's inadequate case. To establish whether the test is met, an evaluation of the plaintiff's evidence is required, to which, and of course, the analysis, I turn.

EVIDENCE AND ANALYSIS

Claim 1

- [16] The plaintiff's evidence, in essence, is in accordance with its pleaded case. Further, it is common cause between the parties that during the year 2016, the agreement central to claim 1 was reached by two entities, namely, the partnership and the defendant. Related thereto is the plaintiff's version, which is that it is a successor in title to the partnership, and this included the taking over of (a) the business of the partnership and (b) the right to sue arising from the running of such business. The defendant pleaded that the plaintiff must prove this, as set out above.
- [17] The plaintiff objected to the defendant's defence on the ground that it is not pleaded. At the trial and in its absolution application, the defendant based and still bases its defence on a cession, namely that the right to litigate vests in Mr Milton and that the said right ought to have been ceded to the plaintiff for the latter to have the title to litigate. It is trite law that a defence must be pleaded. Indeed, there was no special plea of lack of *locus standi* raised in this matter. The defendant's pleaded version is that for alleging that it has the right to institute proceedings, the plaintiff must prove such.
- [18] The defendant, with no knowledge of why the plaintiff alleged that it was entitled to institute proceedings, as appears in the plea, neither denies nor admits the plaintiff's allegation and invited the plaintiff to prove its title in litigation. It did this through non-admission, as ***Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd and Others*** 1985 (3) SA 410

¹² ***Claude Neon Lights (SA) Ltd v Daniel*** 1976 (4) SA 403 (A) at 409H, ***Carmichele v Minister of Safety and Security*** 2001 (4) SA 938 (CC) para 26, and ***I.C.T.M v T.P.M (Appeal)*** (HCA15/2024) [2025] ZALMPPHC 169, para 21.

¹³ *Ibid.*

(C), page 417 authorises a defendant to plead in the manner it did. This should be read together with Rule 22 (2) of the Uniform Court Rules, which permits a defendant to plead 'not admitted' and state the material facts relied on for the plea. In this matter, lack of knowledge is what the defendant pleaded. Following the pleadings, the trial commenced, and the plaintiff's case was closed after it led evidence. Based on the defendant's non-admission, the evidence before me, and what the Court held in **Giant Concerts**, the plaintiff's interest in litigation and the impact of the impugned *decision* on it should be demonstrated. The view I take is that the word '*decision*' should be read to mean 'conduct' in the context of this matter.

[19] As will appear below, only after the leading of evidence was it possible to establish whether the plaintiff was indeed entitled to institute proceedings or not. Following the plaintiff's alleged authority to litigate, in its plea, the defendant invited the plaintiff to prove such authority. This, to me, is not an ambush. See **Kangra Coal**, above. It does not lie in the plaintiff's mouth that it is surprised. When Mr Milton was re-examined, the plaintiff assisted the defendant by further canvassing the issue in that Mr Milton testified that the plaintiff acquired 100% interests from the partnership. This was an attempt to prove title to litigate. Although the defendant did not lead evidence, when the plaintiff's case was closed, title was an issue before me. The plaintiff had to prove its title, although it did not plead (the exception to paragraph 16 above, about its pleaded case) that it purchased 100% interest from the partnership, a point never canvassed by both parties. This, to me, is sufficient for an enquiry to be held regarding the title to institute proceedings. That then takes me to the title enquiry.

[20] The plaintiff called two witnesses. The first was Mr Milton, who testified in support of both claims. He is the only witness who testified about the title to litigate. His evidence was that together with his mother and father, the Miltons ran Macadamia business under a partnership. Under the partnership, they bought macadamia trees from the defendant under the 2016 agreement. Claim 1 rests on this agreement.

[21] Mr Milton, the plaintiff's director, testified that on the 31st of August 2018, the partners resolved to dissolve the partnership. On the written resolution (resolution), there appear to be four partners. Nothing, however, turns on the number of partners. The resolution is at the centre of the applicant's application concerning claim 1. Based on the evidence before the Court, the essential terms of the resolution for the purpose of this judgment are that-
the liquidating partner (Mr Milton) shall have authority to:

- 21.1. sell and transfer partnership assets;
- 21.2. record a statement of dissolution of the partnership;

- 21.3. distribute the partnership assets to the respective partners;
- 21.4. to pursue any legal action if needed;
- 21.5. complete liquidation of the partnership by 28 February 2019, and

the purchasing partner:

- 21.6. is recorded as having 'received all assets, orchards, stock, trade receivable'. (For completeness purposes, the purchasing partner is stated in the resolution as the plaintiff).

- [22] Mr Milton further testified that the plaintiff took the position of the partnership. From the 1st of September 2018, the plaintiff ran the business of the partnership, since the latter was dissolved as a result of the resolution. In support of this, the document relied upon to establish the pleaded transfer of business from the partnership to the plaintiff was the resolution.
- [23] The defendant denied the above under cross-examination. Both under cross-examination and in the application for absolution from the instance, the defendant's version was, and it was argued, respectively, that there had to have been a cession for the plaintiff to have title to institute proceedings.
- [24] On the other hand, Ms Green, for the plaintiff, submitted, in answer to the application, that the right to sue was based on the sale of the partnership assets, including the orchards on Matanda farm on which the trees were planted. Under re-examination, Mr Milton testified that the plaintiff had purchased 100% of the interests in the partnership. Part of the orchards were the trees herein concerned.
- [25] During cross-examination, the defendant's version, in different forms, was put to Mr Milton. It was that the dissolution is denied and that, for the plaintiff to institute proceedings in respect of claim 1, there had to have been a cession of rights to litigate from the liquidating partner to the plaintiff, and none existed. Further, considering that there was no such cession and since there was no evidence of the dissolution of the partnership, the plaintiff was not entitled to litigate, a version put to Mr Milton.
- [26] While Mr Milton conceded during cross-examination that the only document relied upon to establish the transfer of the right to litigate under claim 1 was the resolution, his view was that the partnership was dissolved. His evidence is that on the dissolution of the partnership, he relied on the resolution to hold that the plaintiff was entitled to institute legal proceedings. Sufficient time was spent on the resolution. Regarding same, during cross-examination, the defendant's Counsel put a version to Mr Milton, to wit- that the right to pursue legal action vested in Mr Milton, not the plaintiff. Mr Milton so agreed. Beyond the answer, more should be considered.

- [27] When he conceded, Mr Milton was referred to a part of clause 4 of the resolution. The said clause is summarized in paragraphs 21.1. to 21.4, above. It bears repeating that Mr Milton has the authority to (a) sell and transfer partnership assets (b) record a statement of dissolution of the partnership, and (c) distribute partnership assets to the respective partners. Above all, Mr Milton has the authority to “pursue any legal action”. The right to litigate was regulated by the partners to pass from the partners to Mr Milton.
- [28] Mr Milton had until the **28th of February 2019** to complete the liquidation/ winding up of the partnership. No evidence was led on winding up. The summons was issued on the **06th of October 2021**. The defendant’s argument is that, as on the date of the initiation of these proceedings, it was not the plaintiff who should have instituted claim 1.
- [29] Mr Milton was to execute and record a statement of the dissolution of the partnership. In my view, this, after all, is the last stage of winding-up of a partnership, scheduled on or before the 28th of February 2019, possibly subject to approval by all the partners. In paragraph 22 of its heads of argument, the defendant comes close to this point, without arriving at it. Mr Milton conceded that the only document relied upon to establish transfer was the resolution. Reliance, in my view, should also have been based on a statement of dissolution because only on dissolution could, if all the liquidating partner’s work was completed, the liquidating partner’s mandate possibly end.
- [30] From the evidence, it is the liquidating partner who may have suffered damages, if any damages at all. The damage regarding the trees was noticed in January/February 2019. At that stage, Mr Milton, a liquidating partner, stood in the position of the partnership. He was to, not later than the **28th of February 2019**, produce a statement of dissolution.
- [31] At no stage was evidence led to show at what stage, if any, was Mr Milton, in his capacity as a liquidating partner, divested of the right to pursue legal proceedings. As pointed out above, the purchasing partner is recorded as having ‘received all assets, orchards, stock, trade receivable’. At the risk of repetition, the plaintiff is recorded in the resolution as such a purchasing partner. However, nowhere does the plaintiff acknowledge receipt of all assets, orchards, stock, trade receivable and did not-
- 31.1. plead that following the resolution, it proceeded to agree to what was to the partners a resolution, but to it a potential intended sale;
 - 31.2. lead evidence on whether the liquidating partner did express its intention to sell to it and whether it purchased the relevant subject-matter of sale, and
- when a reading of ***Giant Concerts*** and ***Kangra Coal*** should be understood to require the plaintiff, in the circumstances of this case, to expressly plead and demonstrate that, in the

end, the partnership's sale and its purchase by the plaintiff were the basis of and for title to litigate.

- [32] The defendant, in its plea, notified the plaintiff to prove the transfer of the right to litigate. Mr Milton remains, on the evidence before me, the person with the title to litigate in respect of claim 1.
- [33] Mr Milton's concession that the right to litigate vests with him, the lack of proof of dissolution of the partnership and the lack of evidence of the transfer of the right mean that the rights vesting in Mr Milton were, on the evidence before the court, never transferred to the plaintiff.
- [34] The form of transfer of the right to litigate should only come as a cession, the defendant argued. In my view, cession is not the only basis for acting for and on behalf of someone else. It is just one of the grounds. Section 38 of the Constitution of the Republic of South Africa records the basis upon which one person may act on behalf of another. Those grounds are codification of the common law. I, therefore, do not have to address myself to the defendant in its "cession" version in its absolution application.
- [35] Above all, the resolution records the partners' decision. It is the partnership's resolution, not binding on anyone save the partners. In addition to the lack of evidence, it does not appear, understandably, from the resolution, that the plaintiff agreed to buy the business of the partnership, including the orchards. Although the resolution records that the dissolution agreement is between the partnership and the plaintiff, and lists the plaintiff as a purchasing partner, it is a partnership agreement, entered into by and between Mr Milton and the other partners. It is not between the partnership and the plaintiff. It does not appear from the resolution that the plaintiff knew about the agreement. An agreement concluded by the Miltons under the partnership is not an agreement reached by the same people under the plaintiff. I need to mention that the partners were also part of the plaintiff, the share model of which is not relevant for the defendant's application.
- [36] That, therefore, the plaintiff purchased 100% of the interests in the partnership could not be and is not supported by the resolution. The plaintiff's version that it is the successor in title to the partnership falls to be rejected. Further, there is no evidence of Mr Milton, as a liquidating partner, having transferred the partnership rights to the plaintiff. Interest in litigation not demonstrated, I do not have to conduct the second leg of the inquiry, which is one into the 'impact of the impugned' conduct on the plaintiff, as was held in *Giant Concerts*.
- [37] Resultantly, the defendant succeeds in respect of **claim 1** in its absolution from the instance. I turn to the application for absolution under claim 2.

CLAIM 2

- [38] Unlike claim 1, under claim 2 there is no dispute regarding whether the plaintiff is properly before the Court. Having agreed with the partnership in 2016, the defendant does not dispute that it agreed with the plaintiff in 2018 in respect of claim 2. That said, two sets of agreements were operative simultaneously, under which the defendant supplied the trees to the partnership and the plaintiff, respectively. Indeed, nothing stopped the defendant from agreeing with two different entities, respectively, for the similar supply of trees.
- [39] I need to pause to indicate that the plaintiff's evidence under this claim was as it pleaded. Further, that evidence similar to the one on the table in paragraph 11 above and more tables in support of loss of income was led, a point to which I revert, below.
- [40] The main issue under claim 2 in the defendant's absolution application is the plaintiff's version. It cruxes on the phrase "too small", referring to the delivered trees. The defendant raised objections respecting this issue, and I reserved a ruling on it. The objective size was not pleaded, the defendant submitted. It further submitted that the nursery grade, measurement threshold or agreed contractual standard against which "too small" can be assessed was not pleaded. Indeed, 'too small' is a relative phrase. It must be measured against some yardstick. This, however, is not the end.
- [41] The fact is that the defendant admitted that the "1+-400" trees were small and needed to be brought back to it. This was in an email dated the 14th of March 2019, from the defendant to the plaintiff. That the trees were small was admitted by the defendant before litigation commenced. This was after delivering the said trees. The 400 trees were indeed collected by the defendant. Later, they were redelivered to the plaintiff.
- [42] I did rule during the trial that no evidence could be led on the standard size of the trees in that same was not pleaded. The standard size of a Macadamia tree is, therefore, not an issue before the Court. That said, that the parties, who are in the Macadamia business agreed that the trees were small should be and was enough for the plaintiff to be said to have established his case on the small tree aspect.
- [43] The word "too" is immaterial. The trees were small. The degree to which they were small is insignificant. A turn to the dictionary meaning of the word 'small' may be of help. It means a size that is less than normal or usual.¹⁴ The parties in this matter are on the same page, and this manifests in the parties regulating the small trees being returned to the defendant.

¹⁴ Online dictionary: Of a size that is less than normal or usual. See link-
<https://www.bing.com/search?q=dictionary%2C+oxford%2C+meaning+of+small&form=ANNH01&ref=69b91ef3405f4113a64aba3872a435d2&pc=HCTS>

The latter was to and delivered the trees back to the plaintiff when they had reached the acceptable level of growth. The standard size the parties know would have informed a conclusion that the normal size standard was not met. The trees were below par, hence the defendant had to collect the '400' trees from the plaintiff and return them later. Consequently, the defendant's ground for the application regarding small trees falls to be rejected.

Evidence on both claims-quantification

[44] Already, the defendant has succeeded in respect of claim 1. Only claim 2 remains.

[45] The defendant mainly grounded his application on the 'too small tree'. The other and last issue under claim 2 that falls to be decided is whether the plaintiff may be able to prove that it suffered future loss of harvest, and consequently, loss of future income. Or, at best, whether the Court may, considering the plaintiff's evidence, be able to assess loss of income, if any. I have had to address myself, at length, to this issue, which, on the defendant's application, is a secondary ground of the application.

[46] The question is whether the evidence before me provides the basis for the assessment of damages. I proceed to that enquiry. In doing so, I start with the factual foundation and proceed on the assumption, without conclusion, that future loss of harvest is established.

[47] The plaintiff's claim is based on an allegation that it would have made the same income as on the neighbouring farm over the lost one-year period of non-production. Evidence to that effect was led; the status and possibly the weight of which I still have to determine. Also, evidence on what appears to have been intended to prove overheads for the running of the plaintiff's business was led.

Mr Milton

[48] Mr Milton testified that Dr Joubert collected data from an entity called **Royal Macadamia**, which receives Macadamia nuts from growers of the nuts, processes and sells some of the nuts to the market. Royal Macadamia is, therefore, a trading entity through which the plaintiff's and other growers' Macadamia nuts find their way into the market. For this, Mr Milton relied on Dr Joubert's version. His testimony that Dr Joubert's collection of data being hearsay evidence, such evidence was admitted provisionally, subject to the latter's corroboration. The information from Royal Macadamia involved (a) the costs of processing the nuts and (b) the value of the trees and nuts.

[49] A **second** source of foundational material was **Mr Milton**. This was two-fold. The summary of Mr Milton's evidence is that there was consultation between Dr Joubert and him when

Dr Joubert visited Mr Milton at Matanda farm. He further testified that Dr Joubert obtained the records and data physically from him.

[50] Further evidence from Mr Milton was that the landscape on the neighbouring and Matanda farms is the same, leading to the same yields. Under cross-examination, he stated that there were no photos, when pressed about this, to demonstrate the similarities between the two farms. The established evidence is that the two farms are about 100 metres apart. The version put to Mr Milton was that there was nothing before the Court to demonstrate that the landscape on the two farms is the same. The defendant denied that the landscape on the two farms was the same.

[51] Mr Milton testified that the results of harvesting on the neighbouring farm show what the yield on Matanda farm would have been. The soil type on the two farms is the same, he testified. The defendant denied that the soil type is the same. Under cross-examination, Mr Basson, Counsel for the defendant, put a version to Mr Milton, specifically that there was no expert report filed to that effect. In answer, the latter agreed.

[52] **Thirdly**, the other form of information was computer data. Whilst some records and data were collected physically, the computer data was transmitted by Mr Milton to Dr Joubert through electronic mail (email), he testified.

[53] He further testified that-

53.1. the computer contained more data than the book he used for record-keeping. This computer data was posted from the book. In addition to posting, it was processed material and contained more than what was in the book. It was an improved version of the entries in the book;

53.2. as for irrigation records, they were not on the computer. No record exists of irrigation. Usually, there are six months of rain in a year. The region is very rainy. Therefore, there are no irrigation activities;

53.3. he is the one who did handwritten entries in the book;

53.4. regarding harvesting, Mr Milton collected information from each person who harvested as and when they harvested. Harvesting was done by several people. He would then post such information on the computer, and

53.5. although he referred to the table in paragraph 11, above, he indicated that Dr Joubert will testify on calculations.

[54] Mr Milton further testified that the transmitted data to Dr Joubert was material generated from the Matanda farm. His further evidence is that the computer to which data was

transmitted from Matanda Farm's records, from which it was uploaded to the email facility before it was transmitted to Dr Joubert and following transmission, was stolen during the year 2024. A Police cas number was issued after the incident was reported to the Police.

- [55] Since the data was transmitted through email, I inquired from Mr Milton what happened to the data on the sent item in the email facility. Mr Milton simply indicated that what he did was to send the data to Dr Joubert. He further testified that some of the data was sent back to him by Dr Joubert. Not all of it was sent back, though, he testified.
- [56] The book from which the data on the computer was posted and processed still existed as on the date of trial, Mr Milton testified.
- [57] The **fourth** form of foundational material is information from the neighbouring farm. The plaintiff's approach is that the yields on the two farms would have been the same. He testified that a table reflecting figures of production and income concerning the neighbouring farm demonstrates loss of income under claim 2, and deferred calculations to Dr Joubert.
- [58] Mr Milton further testified that he provided Dr Joubert with information concerning planting, planting dates, variety of trees, number of trees and when harvesting commenced. This information was intended, by Mr Milton, to be used for quantification purposes and was sourced from his book. It is the information pleaded by the plaintiff to have been kept accurately and meticulously, and a record of the neighbouring farm.¹⁵ It was processed and summarized as data in a tabulated form, which table was attached to the particulars of claim and Dr Joubert's report. Evidence was led based on it.
- [59] The plantation on the above farm commenced during the year 2002 and ended in 2004, he testified.
- [60] A Macadamia nuts dispute, involving evidence on, which was led, the types of trees, different stages of grafting, re-grafting plantation, nurturing, growth, detection of the type of the trees, maturity of those trees, harvesting and breakeven, is a scientific matter, within the realm of agriculture. Although the evidence set out in this judgment is focused on aspects relevant to the defendant's absolution application, more detailed evidence was led during the trial concerning aspects not relevant to the defendant's absolution application. The plaintiff led expert evidence.

Dr Joubert

¹⁵ Paragraph 10.1. above.

- [61] The plaintiff's second witness was Dr Joubert, who testified as an independent expert, in her capacity as an Agricultural Research and Ecological Scientist. She studied towards and obtained Bachelor of Science degree and PhD in Environmental and Physiology, amongst others. She is highly qualified and experienced in the Macadamia ecosystem (Macadamia expert). She contributes to publications and public speaking in the Republic of South Africa and elsewhere. She laid out her academic and professional basis for her expertise, and I proceeded on the basis that it is sufficient. From time to time during her testimony, Dr Joubert had to and explained some aspects of her evidence, to which I express gratitude. This assisted me, for the purpose of this matter, to understand the scientific aspects of the trees and processes leading up to the nuts stage.
- [62] As per her testimony, she relied on, as and for facts, the plaintiff, Royal Macadamia, feasibility study, the particulars of claim and pleadings (pleadings) and plaintiff's attorneys. As for the last two, she did not specify how they were relevant for quantification.
- [63] When she attempted to testify on certain aspects, the defendant objected on a number of grounds. The underlying factors for the objections were that the factual foundation was not laid out in the report, and some of the aspects of her testimony were not based on the report. Regarding the reports, there were two of those filed. The expert proceeded on the basis of one filed on the 1st of December 2025.
- [64] To the objections, I ruled, enjoined by settled law, that Dr Joubert could testify on any aspect which required foundation to have been laid out in her opinion expressed in her report, for as long as such testimony was based on the report. For lack of foundational basis in the expert's report, I disallowed any such evidence from Dr Joubert on quantum for as long as it was not based on foundational grounds. Due to the ruling, Dr Joubert did not testify on the loss of income, save in respect of the table in paragraph 58, above, other tables attached to her report and some aspects which I specify below. She testified that the tables were prepared based on data from the neighbouring farm. She is the one who prepared them.
- [65] The witness testified on some aspects which were grounded in the report, as in the case of the tables, and at some points deviated, which led to a number of objections. Counsel for the defendant expressed his reluctance to object from time to time as though he were obstructive. The approach he ended up adopting was that he would deal with what he would have objected to under cross-examination. In addition to that approach, I ruled that I would deal with Dr Joubert's testimony in the judgment that may result from the proceedings.

- [66] Dr Joubert's evidence was that the weather conditions on the two farms were the same. The farms were nearer to each other. The weather may have been the same, considering that the farms were separated by 100 m distance. Weather has, as Dr Joubert testified, an effect on the life of trees, and I do not see how such should be disagreeable.
- [67] As for the email data, Dr Joubert confirmed receipt of same. Her evidence was that she could not use the data for the calculation of the loss of income. She did not disclose why that was so. Dr Joubert further corroborated Mr Milton's testimony regarding her collection of data from the Royal Macadamia.
- [68] Dr Joubert's evidence regarding Royal Macadamia, Mr Milton's neighbouring farm record, the close proximity of the two farms, weather on the two farms and how the latter should be relied on for computation of claim 2 mirrors that of Mr Milton. When Dr Joubert was pressed about not disclosing her consultation with Mr Milton in her report, she answered that Mr Basson did not know the extent of her research.
- [69] As for the feasibility study, it is information from SAMAC, an association of Macadamia in South Africa. The study consists of the costs of maintenance per tree, labour and electricity, as she testified. It also contains what goes on, on a farm where the trees are planted, issues such as trees' spacing, understanding a hectare on which trees are planted and costs per tree.
- [70] In addition to the above, Dr Joubert's evidence on the nature of the information is the same as the evidence of Mr. Milton, to wit the costs of processing the nuts and the value of the trees and nuts.¹⁶ Dr Joubert further testified that the costs of maintenance of the trees were sourced by her from SAMAC. Further, she testified that the information relevant herein is downloadable from SAMAC website.
- [71] Dr Joubert testified that Banks and insurance companies rely on the study. It is used for planning in the Macadamia industry.
- [72] Dr Joubert testified that no research was conducted in the Levubu region (the region where the trees were planted), let alone on Matanda farm. The study was conducted in other regions. She further testified that the regions in Limpopo are not the same.
- [73] On the costs of electricity, Dr Joubert testified about how water is used, affecting electricity usage. Asked under cross-examination whether she dealt with the aspect in her report, she answered that she did not. She further indicated that she used industry figures from SAMAC. On the costs of labour, she testified that it was difficult to determine same

¹⁶ Paragraph 48. above.

and that she could not have and did not utilize the feasibility study. I turn to the analysis. In doing so, some aspects of evidence not set out above are contextually dealt with under the analysis.

Analysis- claim 2

- [74] Save the tabulated material and some aspects I specify below, Dr Joubert's main evidence set out above does not rest on her report. Counsel for the defendant raised objections reluctantly, for he indicated that he did not want to be obstructive. Neither the objections were, nor Counsel obstructive. As a factual foundation, Dr Joubert did not state in her report that she visited Matanda farm, interacted with Mr Milton, relied on the plaintiff's attorneys and collected data from Royal Macadamia. She did not state in her report that she relied on SAMAC feasibility study.
- [75] When asked why Dr Joubert did not state in her report that she visited Mr Milton, Dr Joubert said that Mr Basson did not know the research she conducted. Although she commented, Dr Joubert did not answer the question put to her.
- [76] Having testified that she relied on pleadings, those cannot be factual material. The pleadings may play a role in helping a reader to understand the dispute between the parties. That would be all. As for the plaintiff's attorneys, I do not see how the attorneys may be a source of facts or data. They act for the plaintiff. Their role, if any, would be in their capacity as the representatives of the plaintiff. If, therefore, the attorneys may have played a role, that role would have been the plaintiff's role. Whatever the attorneys may have played as a role, it is not specified in the report.
- [77] In addition to not specifying reliance on the feasibility study, reliance on it was misplaced. No research was conducted on Matanda nor the Levubu region, when the regions in Limpopo are different. There is no evidence before me whether the region or regions where research was conducted is/are the same as Levubu. Dr Joubert, having indicated that the feasibility study is on the SAMAC website, it is not clear whether the Court was expected to look away from its file, download and print the material and admit it into evidence after the trial. Whatever may have been the intention, in the end, the Court does not have the said study. Nothing from the study serves as evidence before me.
- [78] The information from Matanda farm was ignored. This was primary information. The data in the computer processed from the primary information was, too, ignored, even though it was said to be an improved version of the primary information. No reason was provided by Dr Joubert why this was the case. Instead, she relied on material not from Matanda farm.

[79] Having set out the law, in paragraphs 12 and 13 above, upon which I made the ruling regarding evidence on the loss of income and considering that the expert's report relating to quantum is objected to by the defendant, I need to state that the facts and/or data should always be the first to be obtained by an expert. They constitute the foundation. The reasoning, which is a process which flows from the facts, connects the foundation and the opinion. Without reasoning, the factual and/or data foundation, if established, serves no purpose. Absent the facts and/or data, there cannot be proper and sound reasoning, for they will be without a base, a wall or house without foundation type of a situation. Absent logical reasoning, an opinion can never be sound.¹⁷

[80] As appears from the preceding paragraph, I had already ruled as summarized. Further, I made a ruling that I would consider Dr Joubert's entire evidence in the judgment that would follow. In this judgment, I must do so, relating to some of the evidence set out in paragraphs 66-73, above. This is more relevant considering that the plaintiff seeks to make a case in argument to the effect that the expert's filed document on the loss of income is a summary in accordance with Rule 36 (9) (b). To avoid confusion, I must state that during the trial, this expert's document was referred to as a report. See paragraphs 63-73, above.

[81] The plaintiff submitted that the manner in which the evidence was tendered by Dr Joubert was the best possible one. This begs the question whether what served before me was a summary or report. The plaintiff relied on **Cooper SA**,¹⁸ a judgment that is seminal on the Rule 36(9)(b) summaries, distinguished from an opinion. An understanding of the said Rule requires consideration of Rule 36 (8) (b). Before proceeding any further, the two Rules provide, respectively:

81.1. **Rule 36(8)(b)** – a party who obtains an expert report must, 'within five days after receipt of such report, inform all other parties in writing of the existence of the report, and upon request immediately furnish any other party with a complete copy thereof', and

81.2. **Rule 36 (9) (b)** - 'the summary of the expert's opinion and reasons ... shall be compiled by the expert himself or herself.'

[82] In my view, and for practical purposes, a summary may not be filed without the report from which it derives. The textual interpretation is that a report is served¹⁹ or given to the other party in terms of Rule 36(8) (b) after a request from the party notified by the one who obtained the report. On the other hand, a summary is delivered in terms of Rule 36 (9) (b).

[83] Ms Green's submission is that Dr Joubert's document is a summary. The plaintiff's submission from its heads of argument, quoted in the form it appears from the heads, is:

¹⁷ Paras 12-13, above.

¹⁸ **Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH** 1976 (3) SA 352 (A) at 371.

¹⁹ Though the word used is 'furnish'.

'...the testimony that the expert witness intends to give need not be fully set out in the summary.'

[84] Of course, there is a notice titled Rule 36(9) (b) filed by the plaintiff. However, attached to the notice is a CV and a report. A reading of the attached documentation, other than the CV, confirms that it is a report which served before me. In the document, Dr Joubert states that 'I affirm that the contents of this report are based on' and then she states what she says she relies on. When the defendant filed Rule 36 (9) (b) notice, it was aware that it was filing a report, although the Rule is meant for filing a summary. Other than the plaintiff's awareness that it was filing a report, **Cooper SA** assists in assessing whether Dr Joubert's document is a summary or a report.

[85] The Court in **Cooper SA**²⁰ dealt with the difference between an opinion and summary. It is that:

- 85.1. 'summary' means a brief account, abridgement' and with no needless details. The evidence the expert intends to give ought to be set out in the summary, although not fully. The facts or data on which the expert premises his opinion must be included in the summary, and
- 85.2. 'opinion' means a judgment or belief based on grounds short of proof of a formal statement by expert when consulted on what he holds to be the fact. It represents the expert's reasoned conclusion based on certain facts or data.

[86] The judgment further discusses reasons for the opinion. The court held that reasons mean, or at least include, the facts or data on which the opinion is based. They serve as the justification for the opinion. As I have shown, reasoning flows from facts and/or data.

[87] From the above, the opinion expressed in the form of a report and summary are two different documents. The two sub-rules are clear. Rule 36 (8) (b) regulates reports and Rule 36 (9) (b) regulates summaries. That what served before me was a summary is not borne of the evidence. In addition to this, Dr Joubert testified, as I recorded above, that there were two reports and proceeded on the basis of the December 2025 one. This is the same document the plaintiff calls a summary under the absolution application.

[88] In my view, a summary would have been an abridgment of earlier and larger work. In essence, a summary would have been a short version of a report, in the manner and form set out in **Cooper SA**.

[89] In this matter, only a document that was titled a report and of December 2025 was filed and relied on. Not any other document relating to expert evidence. If I were to accept that Dr Joubert's document was a summary, I would have to state what the document was a short version of, when it was not an abridgment of any other document. There was no other document which the December 2025 document was a summary of. If it had been a

²⁰ Pa 371.

summary, it would have been a summary of an existing report, let alone that a summary should be a synopsis also of the reasons for an opinion.

- [90] It goes without saying that there must be an opinion and its reasons before a summary of the two. In this case, only a report was filed, and the matter proceeded on that basis.
- [91] My view is that the said document was a report, not a summary. I am fortified in my view in that both under evidence in chief and cross-examination, the plaintiff approached the document as a report and expressly stated that it was a report. To an objection during the trial, I made a ruling, accepting that the December 2025 document was a report. The ruling I made was that any evidence not grounded in the said report is inadmissible. The plaintiff's approach is- during evidence the document is a report and under an application, a summary. I reject this.
- [92] Even if I were to assume in favour of the plaintiff, for a moment, that the document was a summary, it still would have lacked regarding the contents of a summary, as per **Cooper**, namely, the sum and substance of facts and data which led to the reasoned conclusion (opinion). In short form, a summary, filed after an opinion, ought to contain foundational material. Therefore, both the opinion and summary must set out foundational material. Dr Joubert did not set out any facts in her report, save the tables and some aspects in paragraph 94, below.
- [93] Turning to the next alleged facts, the costs of maintenance, of electricity and of labour, and industry figures from SAMAC are not set out in Dr Joubert's report as the material relied upon or considered for the purposes of her report. The defendant learned for the first time during the trial that such material was relied upon, a form and nature of surprise discouraged by **Cooper**. The very **Cooper** judgment relied on by the plaintiff does not assist its case since it requires foundational material to avoid surprise at trial.
- [94] The ruling I made concerning the lack of foundational basis applies herein and need not be repeated. Save the tables-evidence, the soil and weather conditions (which I shall still decide on), Dr Joubert's evidence falls within the category of inadmissible evidence I ruled on during the trial. I confirm its inadmissibility.
- [95] On the defendant's approach and considering the above, this should be the end for the Court may not be able to determine the value of the loss, if any. The basis for this is that there is no expert evidence on the loss of income, whether from Dr Joubert, who is Macadamia expert or actuarial calculations. I do not agree.

- [96] I am enjoined to state that it does not necessarily mean that, absent expert evidence, the Court may not be able to assess damages (loss of income), a point I ruled on during the trial when the defendant argued that since Dr Joubert could not testify on loss of income, there was no need to proceed further with the trial. That notwithstanding, the nature of science herein concerned required expert evidence. That said, there is still tables-evidence from Dr Joubert. Mr Milton testified on one table, the soil and landscape. Of course, he deferred calculations to Dr Joubert.
- [97] There are, of course, instances when Courts may admit opinion evidence from a witness who is not an expert. *R v Vilbro*²¹ is instructive in this regard. In the matter, a certain Inspector had had reason to apply his mind to a specific issue than the Court. He was a layperson on the issue. The Court ruled that the witness was in a better position than itself to form an opinion, and the opinion was admitted into evidence based on its relevance. Relevance, therefore, is central.²²
- [98] Depending on circumstances, an opinion from a litigant-witness may be admitted into evidence. General rules, such as academic study of the subject and independence, must remain in the case of qualified witnesses. As for laypersons, *Vilbro* provides guidance. Inherently, caution, in my view, should be exercised against such a litigant-witness. In the circumstances of this matter, Mr Milton did testify about the table, but deferred calculation for loss of income to Dr Joubert. His, therefore, is not a laypersons' opinion evidence or evidence I could base the ruling I shall make on.
- [99] If, therefore, Mr Milton was the only person with the knowledge and experience herein concerned, or had not deferred calculations to Dr Joubert after referring to the table in paragraph 11, above, his table evidence may have been admissible, subject to the caution which must be exercised. He was not a person with sufficient knowledge on the subject matter more than Dr Joubert. Dr Joubert was a qualified expert, though her report and evidence were not admitted, subject to consideration of her tables-evidence. One table was attached to the particulars of claim, and others were attached to her report. Of course, also soil and landscape evidence ought to be considered.
- [100] The assessment of damages that is based on expert opinion filed in terms of Rule 36 (8) (b) and per summaries in terms of Rule 36 (9) (b), which meet all the requirements, turns to be helpful to the Courts. In the absence of such evidence, for one reason or another,

²¹ [1957] 3 All SA 200 (A) at 228-9.

²² *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014). footnote 30. Confirming that a layperson may give opinion evidence, provided it is relevant.

Courts which have to assess damages must still do so. For this, consideration should be had to ***Esso Standard SA v Katz***²³

'These principles have been conveniently summarized by DE VILLIERS J in *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA (T). It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty ... In the case of *Arendse v Maher* 1936 TPD 162 GREENBERG J was faced with the problem of assessing damages claimed by a wife arising out of the death of her husband owing to the defendant's negligence. As there was no actuarial or other expert evidence before the Court, it was argued that absolution from the instance should be granted. Having refused absolution the learned Judge went on to say at 165:

It remains, therefore, for the Court, with the very scanty material at hand, to try and assess the damage. We are asked to make bricks without straw, and if the result is inadequate, then it is a disadvantage which the person who should have put proper material before the Court should suffer.'

[101] The above paragraphs show that the mere absence of expert evidence on loss is not a ground to grant absolution from the instance. There is more needed for such an application to be granted. In ***Mutual & Federal Insurance Co Ltd v Da Costa*** 2008 (3) SA 439 (SCA) the SCA held—

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.'²⁴

[102] The Court is not bound to award damages and will be inclined to grant absolution from the instance where—

102.1. evidence is available to the plaintiff, which he/she has not produced; or

102.2. the best evidence available has not been produced.

[103] This Division has added its voice to the above, per the Honourable ***Makgoba JP***, as he then was, with the Honourable ***Madavha AJ***, as she then was, in an appeal matter in ***Le Roux***.²⁵

[104] Part of the evidence believed to be reasonably available to the plaintiff was led. Dr Joubert led evidence based on tabulated information from the neighbouring farm. This was per the plaintiff's pleaded version. I still have to deal with the status of her report read together with the tables. That I did not admit certain evidence that was not based on the report

²³ This is an extract from 1981 (1) SA 964 (A), at 969H – 971A.

²⁴ Para 20, SAFLII version.

²⁵ ***Le Roux v Zeitsman and Another*** (HCA10/2020) [2021] ZALMPPHC 79 (2 November 2021), from paras 38.

does not mean that the report does not stand. It is the rejected evidence which does not stand, not the report, until I do not admit it into evidence, if I shall.

- [105] The plaintiff's computation of its claim would, it was submitted, be based on the yield from the neighbouring farm. Having kept accurate and meticulous records of plantation, progress, production and harvesting on the neighbouring farm, such records, on Mr Milton's evidence, should be utilized to compute quantum in respect of the 400 trees. The basis for this is that the yield on the neighbouring farm would have been the same as on Matanda farm. The returned trees were planted on the latter farm. The other related aspects are the soil type and landscape. Immediately after addressing myself to the two, I revert to the records.
- [106] The plaintiff's evidence is that the soil type and the landscape were the same on both farms, which was disputed by the defendant. As for the soil, none of the plaintiff's witnesses is an expert on soil. No expert report was filed. As a result, the soil issue is disposed of negatively against the plaintiff.
- [107] Turning to the landscape, in my view, photos taken of the farms may have assisted in demonstrating whether the landscape is the same on both farms. Without photos or any material to support Mr Milton's oral evidence, the similarities, if any, are not apparent to the Court. The Court is not assisted in assessing whether the landscape is the same.
- [108] Back to the records, whilst the plaintiff kept accurate and proper records of the neighbouring farm, there is no evidence before the Court of the '*accurate and proper*' records of Matanda farm. This was not explained, when there were primary and secondary sources of facts relevant to and directly from the Matanda farm. There was in no way material not based on the facts of Matanda farm could reasonably have been relied on when there was factual material obtained and/or obtainable from the said farm. In my view, reliance on indirect material when direct material is available is neither sound nor acceptable, especially when such an approach is not explained. In the language of **Mutual** and **Le Roux**, direct material would be the best evidence.
- [109] Further, the neighbouring farm's macadamia trees were planted during the years 2002 - 2004. It has been, at least, 22 years since the last year of plantation. Whilst macadamia trees mature from the 10th year after plantation, which is evidence from both witnesses, no basis was laid for the records of the 2002 to 2004 trees to be utilized for the 2019 trees for the assessment of loss.
- [110] This is a typical case of 'very scanty material' at hand, and of being asked to try and assess the damage from such material. The Court is asked to make bricks without straw. Unfortunately for the plaintiff, the scanty material is drawn from the neighboring farm. The

neighbouring farm projected as the source of calculating the loss of income on the Matanda farm does not assist the plaintiff's case. It was not the best available evidence, and in addition, it was irrelevant. Given that the pool (farm) from which the data is sourced is irrelevant, the conclusion reached by the expert is baseless and unsound.

[111] The best factual evidence **available** to the plaintiff was in Mr Milton's book. As stated elsewhere, this was the primary source. Mr Milton still kept the book. I mention this in order to get to the secondary evidence. I will revert to the best available factual evidence below.

[112] The secondary evidence was book-record processed as data in the computer. As Mr Milton testified, the data contained more than what was in the book. In my view, secondary evidence appears to have stood a chance of supporting the plaintiff's case. Neither did such factual material form part of the expert's report, nor served before me.

[113] From Mr Milton, there is no evidence before me as to what happened to the secondary data evidence in the sent- items in his email. Not to mention that Mr Milton testified that some of the data was sent back to him by Dr Joubert. Not all of it was sent back, as testified by Mr Milton, and it was argued by Ms Green, Counsel for the plaintiff. No evidence led by both witnesses as to whether the data in the folders 'inbox' and 'sent', of both Mr Milton and Dr Joubert, no longer existed, I am bound to find that the evidence was available when the plaintiff closed its case.

[114] When, during the trial, I enquired from Mr Milton about what happened to the data in his email, I did so because an email facility is a common feature. Various items exist in the said facility. When Mr Milton sent the data via his email facility, the same material would have remained saved on the email. Unless deleted, it remains in the sent items folder. Daily use of email bases this, which I take judicial notice of.

[115] Back to the best factual evidence, the evidence in the book was not utilized. Consistent with this, under cross-examination, Mr Milton conceded that he could have prepared the record and elected not to. Dr Jourbert's report fails the foundational test. The primary records from Matanda, the email data and consultation with Mr Milton were not set out her report. Further, reliance on material from the neighbouring farm was misplaced. Consequently, the Court is justified in granting and does grant absolution from the instance. See **Mutual** in paragraph 101, above

[116] For the above reasons, I agree with the defendant. I cannot assess the damages. I am bound to follow the SCA and the Appeal Court of this Division.²⁶ I do not have any material

²⁶ Paragraphs 100-103. above.

on the basis of which to assess the damages. Although there is evidence which, considered by this Court, could or might find for the plaintiff on the trees being small, that is not the case in so far as the quantum of damages, if any, is concerned.

CONCLUSION

[117] The plaintiff did not have the title to institute and prosecute claim 1. Although the plaintiff may, without concluding that it shall succeed in proving that the defendant was in breach in delivering small trees under claim 2, even then, there is no evidence before the Court for the assessment of damages. The evidence before the Court, considered, I cannot find for the plaintiff. Resultantly, the defendant succeeds in its application.

COSTS

[118] As a general rule, a successful party is entitled to costs. I follow the general rule as there are no grounds to deviate from same.

ORDER

[119] The defendant's application for absolution from the instance is granted with costs, including costs of Counsel.


M CHIDI AJ
 ACTING JUDGE OF THE HIGH COURT,
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