



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 6811/16

In the matter between:

SPECIAL NEW FRUIT LICENSING LIMITED

First Plaintiff

ANDREW JAMES PEAR N.O.

Second Plaintiff

MICHAEL STEPHEN ELLIOT SOLOMONS N.O.

Third Plaintiff

**SPECIAL NEW FRUIT LICENSING (SOUTH AFRICA)
(PTY) LTD**

Fourth Plaintiff

and

COLOURS FRUIT (SOUTH AFRICA) (PTY) LIMITED

First Defendant

RE: INC INNOVATION (PTY) LIMITED

Second Defendant

ADRIAAN REEDER VAN WYK

Third Defendant

LIEZEL KRIEGLER

Fourth Defendant

VOOR-GROENBERG KWEKERY CC

Fifth Defendant

OLYVENBOOM BOERDERY (PTY) LIMITED

Sixth Defendant

BOSMAN ADAMS (PTY) LTD LIMITED

trading as **LELIENFONTEIN NURSERY**

Seventh Defendant

DE FYNNE KWEKERY CC

Eighth Defendant

WESTCAPE BIOTECH (PTY) LIMITED

Ninth Defendant

Court: Acting Justice CS Hendricks

Heard: 11, 12, 13, 14, 18, 19 March 2019 and 3 May 2019.

Delivered: 8 July 2019

JUDGMENT

INTRODUCTION:

- [1] The plaintiffs claim by way of action declaratory and interdictory relief against the first, second and third defendants the ownership and plant breeders' rights in respect of certain plant materials.
- [2] The plaintiffs contend that the disputed plant materials belonged to Vitis Limited ("Vitis"), a company registered in the United Kingdom and which was subsequently liquidated. The first plaintiff, Special New Fruit Licensing Limited ("SNFL"), acquired the rights to the disputed plant materials from Vitis in terms of an asset sale agreement concluded with the second and third plaintiffs, the duly-appointed liquidators of Vitis.
- [3] According to the first, second and third defendants, the disputed plant materials were not created in terms of an agreement between Vitis and first defendant ("Colors SA"). Instead, the disputed materials were created by Colors SA for its

own account and benefit since the service agreement with Vitis was non-exclusive and because the service agreement was varied during January 2011.

[4] The fourth defendant, Liezel Kriegler, agreed to an order in terms of which she acknowledged the validity of the plaintiffs' claims. The fifth to ninth defendants did not oppose the plaintiffs' claim.

RELEVANT BACKGROUND:

[5] The first plaintiff is a company registered and incorporated under the laws of England and Wales.

[6] The fourth plaintiff, Special New Fruit Licensing South Africa (Proprietary) Limited ("SNFL (SA)"), is a wholly-owned subsidiary of Special New Fruit Licensing (SNFL) registered in South Africa. SNFL is a wholly-owned subsidiary of MM (UK) Limited ("MM (UK)"), a company also registered and incorporated under the laws of England and Wales, which in turn is a wholly-owned subsidiary of AMC Group Fresh & Juices S.A. (formerly AMC Grupo Alimentación Fresco y Muñoz S.A) ("AMC"), a company registered and incorporated under the laws of Spain.

[7] Vitis was incorporated as a special-purpose vehicle for a joint venture between SNFL and another UK-based company, Colors Fruit (UK) Limited ("Colors UK") for the purpose of breeding, developing, testing and exploiting new table-grape varieties ("the Vitis breeding programme"), for which Vitis acquired the grape-breeding programmes of Schachar Karniel ("Karniel"), an Israeli breeder of

grapes, as well as the rights to use certain plant material from the so-called “Sheehan varieties”.

[8] SNFL and Colors UK each held 50% of the issued share capital in Vitis and each was entitled to appoint two directors to the board of Vitis. Although Colors UK was not associated with Colors SA, it was not disputed that the third defendant, Mr Riaan Van Wyk (“Van Wyk”) was the principal directing mind behind Colors UK.

CENTRAL ISSUES FOR DETERMINATION:

[9] The issues that arose for determination were: first, whether the disputed plant materials, being projects 7 to 9 were produced in terms of a Vitis breeding programme and for the benefit of Vitis or whether it was produced for Colors SA’s own account and benefit with the knowledge and approval of Vitis and SNFL; and secondly, the ownership of the disputed plant materials and all intellectual property rights attached to it.¹

[10] Depending on which of the above competing contentions ultimately prevailed, the court has to pronounce on the first and second defendant’s conditional counterclaims, alternative counterclaims of unjustified enrichment and the plaintiffs’ special plea of prescription.

THE EVIDENCE:

[11] I will first set out what was common cause and thereafter deal with the evidence relevant to the central issues in dispute.

[12] Vitis and Colors SA concluded a sub-licence agreement in terms of which Colors SA would render table-grape breeding and related services to Vitis and recharge the costs for such services to Vitis. The grape breeding, in its essence, entailed the producing of plant material in the form of seedlings from crosses. In terms of the aforesaid agreement Colors SA conducted breeding projects for the benefit of Vitis. The rights granted by Vitis to Colors SA entailed:

- (a) an exclusive right (to the exclusion of both AMC and any third party) “to obtain from AMC all the propagating samples of all new vegetative material bred and/or developed by Sheehan Genetics and received by AMC from time to time, so that Colors Fruit may (i) test, plant and cultivate them; (ii) obtain their products; and (iii) secure their statutory protection in the form of registration of plant breeders' rights in the name of Sheehan Genetics within the defined territory (“Planting and Cultivation Rights”); and
- (b) a non-exclusive right to use the intellectual property rights of which Sheehan Genetics was the proprietor, to market and distribute the products in the agreed distribution territory (“Marketing and Distribution Sub-Licence”).

[13] It was common cause that the plant material produced during projects 1 to 6 and DAFB belongs to Vitis. The plant material produced by Colors SA during projects 7 to 9 formed the subject matter of these proceedings.

[14] It is the plaintiffs' case that a tacit agreement existed between Vitis and Colors SA on, *inter-alia*, the following terms:

- (a) Colors SA agreed to carry out breeding and render related services in South Africa on behalf of Vitis and recharge the costs incurred to Vitis;
- (b) All plant material used in or produced as a result of the South African breeding programme ("the South African plant materials"), including therefore all plant material of the Sheehan varieties used as "parent plant" material for breeding purposes and all plant material bred from such ultimate "parent plants", would be owned by Vitis;
- (c) All intellectual property rights, including the right to file applications for plant breeders' rights in South Africa and elsewhere, attaching to the South African plant materials, would be owned by Vitis;
- (d) Colors SA would protect, maintain and not alienate the South African plant materials;
- (e) Colors SA would account to Vitis *inter-alia* in respect of the location of the South African plant materials, the parent plants of the South African plant materials and the source of such parent materials and all and any

other records of any nature pertaining to the breeding of such plant materials;

- (f) Colors SA would give all necessary assistance to Vitis and its agents to apply for and obtain the appropriate intellectual property registration and/or protection for the South African plant materials in any jurisdiction in the world in which Vitis in its absolute discretion required such registration and/or protection;
- (g) In the event of the tacit agreement's termination or of Colors SA no longer providing services to Vitis for the purposes of the South African breeding programme, Colors SA would return all the South African plant materials and breeding records to Vitis.

[15] I propose firstly to summarize what I regard as the relevant evidence and to evaluate certain of the witnesses in question. In doing so I must emphasise that such assessments have been made after a consideration of all the evidence heard and in the light of the arguments advanced by counsel in relation to the probabilities and credibility of their respective witnesses.

Plaintiffs' Case:

[16] Plaintiffs led the evidence of Ian Duncan Macintyre ("Macintyre") and James Nelson ("Nelson"). Macintyre holds a degree in Horticulture from the University of Strathclyde, Glasgow. He became a director of SNFL during 2004 and a director of Vitis in 2006. He was also a director of Sheehan Genetics LLC from

2007 to 2014. At the time of the hearing he occupied the position of chairman of the board of managers of Sheehan Genetics LLC. I understand under Californian law a company may either have a board of directors or a board of managers. According to him a board of managers is essentially the same as a board of directors.

[17] Nelson was initially appointed as commercial manager and later progressed to commercial director of Colors UK around early 2009. He became a director of Vitis on 1 March 2011 and resigned on 9 June 2014. Liezel Kriegler (“Kriegler”) became a director of Vitis on 9 June 2014 and she resigned on 14 January 2015. Gerrit Nieuwoudt (“Nieuwoudt”) later replaced Kriegler.

[18] Nelson explained that the reason behind having a Colors entity registered in the UK was threefold. Firstly, the idea was to take control of the shipping, the UK cost centre and supply chain. Secondly, to lodge any intellectual property or brand value in the UK and thirdly to manage sales and monies within the UK. Nelson confirmed that Colors UK is ultimately owned by the Jersey based Re: Inc Trust and that the beneficiaries of that trust include the shareholders of Colors Holdings.

[19] Macintyre broadly described the different phases of grape breeding which include hybridisation, crossing, evaluation and ultimately commercial exploitation. It was not in dispute that plant material was bred in California, USA. It was then dispatched as small pieces of Budwood directly from California or via Spain to Colors SA. Colors SA would receive, plant, monitor and evaluate the

plant material in South African growing conditions. Colors SA performed these services in terms of the abovementioned sub-licence agreement and was effectively a service provider to Vitis. Macintyre confirmed that he was the main person who acted on behalf of Vitis during the meetings with Colors SA when the proposed grape-breeding projects were discussed. Either Van Wyk, Deon Coetzee (“Coetzee”) or Barbara Malan (“Malan”) attended meetings on behalf of Colors SA. Although there were other persons, Van Wyk was the main person acting for Colors SA.

[20] Under the sub-licence agreement Colors SA contracted with third parties to provide certain services to it. Genetwister was one of the service providers who provided services in respect of projects 1 and 6 and although they also provided services in respect of project 7, Colors SA averred that those services were for its own account and not that of Vitis. Colors SA was expected to prepare monthly accounts for expenses incurred on behalf of Vitis and present same for payment to the latter. Clause 4.2 of the sub-licence agreement provides that the sub-licence would last only for as long as the head licence agreement between Sheehan and AMC existed.

[21] According to Macintyre the head licence was terminated on 3 December 2010 because Sheehan could no longer provide the services.² He confirmed the acquisition by SNFL of Sheehan’s interest in Sheehan Genetics LLC.³ On 21 January 2011 Macintyre informed Mr Ian Carstens (“Carstens”), the then CEO of Colors SA, that the head licence had terminated and that that event

automatically led to the termination of the sub-licence.⁴ The salient parts of the letter reads:

“As you know, AMC Grupo Alimentacion, Fresco y Zumos, S.A. (“AMC”) has served notice of termination, based on irredeemable breach by Sheehan Genetics LLC, of the head licence dated 10th May 1998 between AMC and Sheehan Genetics governing the commercialisation of Sheehan Genetics plant varieties. When the head license terminates, which will be on 3rd March 2011, this will automatically terminate the sub license dated 10th March 2003 that Colors has with AMC.

Sheehan Genetics recognises the support provided by Colors in the development of our plant varieties in South Africa. We are now considering proposals as to how our two companies may work together in the future although it is not our plan to offer any exclusive licenses for planting and cultivation rights in the territory.

On the termination of the sub license on 3rd March 2011 Sheehan Genetics needs to be ready to take on the responsibility of controlling all the plant material and rights that it owns in South Africa and Namibia. To do this we will need Colors to work with us over the next few weeks.....

I can also confirm that SNFL Ltd was successful in its negotiations with the estate of the late Tim Sheehan and has now acquired the estate’s shareholding – SNFL Ltd now owns 100% of Sheehan Genetics LLC...

(own emphasis).

[22] Macintyre stressed that they neither had knowledge of Colors SA breeding for its own account nor did they approve that Colors SA might do so. He denied having given approval personally or through SNFL. According to him, the only company

that was legally entitled to use Sheehan material was Vitis. On 3 March 2011 he reminded Colors SA of the termination stating:⁵

“As previously advised, the sub licence dated 10th March 2003 between AMC and Colors, terminates today, 3rd March 2011.

As of today, please make sure that any matters to do with Sheehan Genetics varieties are addressed to me at Sheehan Genetics, including enquiries from growers who were licensed by Colors for either commercial production or trials. Also please confirm that you no longer hold or control any Sheehan Genetics plant material and that you have handed over all the information that you have on the development of the varieties and the information on the steps that you have taken to protect the intellectual property in the varieties” (own emphasis).

[23] Macintyre referred to a chart⁶ dated November 2011 wherein reference was made to project 7. He confirmed that the plant material referred to in the chart belonged to Sheehan which Vitis provided to Colors SA. Macintyre identified a further chart relating to project 8 and confirmed that the crosses were either 100% Sheehan or 50% Sheehan.⁷ The aforementioned evidence was not challenged by the defendants. In Macintyre’s view at some stage an employee of Colors SA, Gerrit Nieuwoudt, (“Nieuwoudt”) was working with Sheehan and Vitis material unlawfully. Macintyre stressed that projects 7 to 9 were simply a continuation of projects 1 to 6 and DAFB and that genetics constituted a key element linking all the projects.

[24] Macintyre conceded during cross examination that the Sheehan sub-licence and the Vitis agreement were not linked to each other. He further conceded that

Colors SA also embarked upon other breeding projects that were not linked to the sub-licence. Macintyre further confirmed that the decision to partner with Colors SA was influenced by the fact that Colors SA operated in a country with the right climate and had the right staff with the ability and skills for grape-breeding. Macintyre conceded that no written service level agreement was concluded in terms of which Colors SA would become a service provider to Vitis. To his mind the parties had an “*understanding*” and he understood that to be an agreement.

[25] The witness conceded that the crossings done in respect of project 7 could not have started before the judgment of Davis J on 16 September 2011. However, according to Macintyre, the planning for project 7 would have started before that date. Macintyre also conceded that, insofar as it relates to the judgment of Davis J and the appeal judgment of Griesel J, project 7 to 9 were not relevant. As I understood the concession, the witness confirmed that those judgments did not concern the plant material used in projects 7 to 9. The witness also confirmed that the arbitration dispute in the UK was principally about the cancellation of the Sheehan sub-licence. It did not concern projects 7 to 9.

[26] According to Macintyre, the reference to non-exclusive right to the intellectual property in the sub-licence agreement meant that the intellectual property rights had to be registered in the name of Sheehan. To the question whether it was his understanding that Colors SA would breed exclusively for Vitis, Macintyre

responded: *“I do not believe the word exclusively was used, it may well have been understood.”*

[27] Macintyre denied that the sub-licence was cancelled in order to take Colors SA out of the market insofar as it related to Sheehan. According to the witness the late Tim Sheehan’s knowledge and experience in terms of growing the varieties and getting the best out of them was irreplaceable. He disagreed with the proposition that the termination of the sub-licence could have been interpreted by Van Wyk as a breach of trust between Colors SA, Vitis and the AMC Group. Macintyre denied the averment that Van Wyk informed him on 6 February 2012 that Colors SA was conducting grape breeding for its own account. In his words:

“If that is true, and I have no recollection of this, then almost certainly, there would have been a number of questions about what that breeding programme involved, what the parental material being used in it was, and it would almost certainly, because Mr Barber, although he gets a few things wrong, is quite a diligent note taker, and I do not see in the minutes of the meeting”.

[28] Macintyre impressed as an honest and credible witness. He was consistent in his testimony and unshaken during cross-examination. Where necessary he made the appropriate concessions and where he could not remember something, he was candid. At the stage when the plaintiffs closed their case his credibility remained intact.

[29] Nelson corroborated Macintyre’s version that neither Van Wyk nor Kriegler, who were directors of Colors SA and Colors UK at various times, informed him that

Colors SA embarked upon grape-breeding programme for its own account. He was not aware of any Vitis board resolution to that effect. He wrote to Macintyre, copying Van Wyk, on 22 December 2011, stating:

“As Colors is a partner and financial investor in the Vitis programme, we’ve had a report on how the programme has progressed in the last 12 months every year as well as a budget that we have used in our accounts to justify the long-term valuation of the breeding programme. To this end I wonder if you and Deon could update Colors and indeed the Vitis board on how things are going?” (own emphasis).

[30] Nelson emphasized that Van Wyk was a director of Vitis from 1 March 2011 until its liquidation during 2015 and that Van Wyk never informed the Vitis board that Colors SA had embarked on project 7 for the benefit of itself rather than Vitis. He further confirmed that he attended the meeting at the Bridge in the UK during February 2012 and could not recall that it was ever brought up during that meeting that Colors SA was breeding for its own account. The witness testified that it raised doubt that project 7 was not a Vitis project if one considered the content of paragraph 4(i) of the 6 February 2012 minutes stating that *“the existing varieties to be split between Colors and MM (UK) (1/ 2, 3/4, 5/6, 7 etc)”*. It was put to Nelson that the reference to project 7 in the sequence was a mistake.

[31] Nelson conceded that projects 7 to 9 were not in plots as at 21 February 2012 when the parties discussed proposals to take Vitis forward. Thus, the split of

genetic plant material that was proposed in the proposal of 21 February 2012 did not concern projects 7 to 9. Nelson disagreed with the proposition that projects 7 to 9 were not varieties because they were not classified as varieties at the time when the parties discussed their respective proposals. According to Nelson, “*a variety is a biological entity at whatever stage, it becomes a named variety when it is named so....*” He also testified and referred to various correspondence and notes of discussions about the splitting or sharing of assets. The discussions, as he understood it, were intended to form the basis for an agreement on how the parties should proceed.

[32] There was nothing in the demeanour of Nelson to suggest that he was being untruthful. My impression was that he was giving honest evidence based on the best of his recollection from his engagements with the defendants. When he testified about matters within his direct knowledge his evidence was clear and credible. His evidence was concise and I have no hesitation in accepting it in full. The contradictions between his and Macintyre’s versions were not material. There is no reason to find that he was not a credible witness.

Defendants’ Case:

[33] Van Wyk studied law at Stellenbosch University and practised as an attorney for 13 years. Family farming operations presented him with an opportunity to make a career change and he started out planting plums and citrus fruits. He started

Colors SA with four friends during 1997 and their first export of fruit to the UK occurred during October 1997. Colors SA soon became involved in a number of breeding programmes which included apples, pears, pomegranates, figs and passion fruit. Colors SA, in addition, acted as intellectual property managers for breeders around the world on products such as peaches, nectarines and plums.

[34] Colors SA sought to focus on top-end supermarkets in the UK and then later across the world. During 1998 one of their UK customers gave Van Wyk the names Alvaro Muñoz (“Muñoz”) and David Haresign (“Haresign”) as persons to contact to get South African citrus into the UK markets. A meeting was arranged with Muñoz and Haresign which culminated into an agreement in terms of which Colors SA commenced supplying their company with fruit from 1998 until 2011. The business with MM (UK), as they were later called, was very lucrative for Colors SA. The UK sales value of the fruit that Colors SA exported over the years was in the region of R1.8 billion.

[35] During 2002 Muñoz invited Van Wyk to travel with him to the USA to look at a breeding programme called Sheehan Genetics which was funded by the Muñoz’s group. They travelled to the USA and met up with Tim Sheehan. The idea was to add grape breeding to the portfolio of Colors SA. Van Wyk understood that, once one had Sheehan varieties, one had access to the best customers in the world. The programme provided Colors SA with the right to supply Sheehan and also the right to supply other standard varieties which supermarkets around the world wanted.

- [36] Having observed the breeding programme, which was still in its infant stage, a decision was made to commit an investment of \$20 000 per annum. Van Wyk confirmed that Sheehan Genetics issued AMC the head licence to exploit Sheehan varieties and that AMC then concluded a sub–licence agreement with Colors SA.
- [37] The breeding in South Africa commenced during 2008. Kriegler was responsible for the research and development and Deon Coetzee (“Coetzee”) was responsible for table-grape breeding. The sub-licence allowed Colors SA to receive Sheehan plant material in South Africa, take it through quarantine, plant it in trial plots, evaluate the varieties, convince producers to plant these varieties on their farms and market those varieties around the world. Colors SA would draft budget or management accounts and issue invoices for services rendered on behalf of Vitis who would in turn reimburse Colors SA for such services. These were all expressly agreed terms of the agreement.
- [38] The last invoice which Colors SA presented to Vitis for services rendered was delivered during late February 2011. Invoices submitted after February 2011 to Vitis were unrelated to the services rendered under the sub-licence because it concerned expenses incurred on the Karniel varieties. The sub-licence agreement did not include the Karniel varieties. Over the years the Sheehan varieties proved to be very good on a local and international scale.
- [39] Tim Sheehan stopped breeding during 2000, filed for bankruptcy during 2004 and passed away during 2009. Muñoz initially bought a 49% shareholding of

Sheehan Genetics LLC and when Tim Sheehan passed away acquired the other 51% shares from the deceased estate. During September or October 2010 Muñoz told Van Wyk that they wanted to buy back their sub-licence on the Sheehan varieties. No price for the proposed buy-back was discussed. Van Wyk informed Muñoz that he intended to advise the board of Colors SA not to sell and Muñoz lost his temper in response thereto.

[40] AMC Group served its notice of termination based on the irredeemable breach by Sheehan Genetics LLC of the head licence. Van Wyk described the turn of events as “*being stabbed in the back*” and being “*betrayed*”. The cancellation of the head licence and the sub-licence presented a total breakdown of trust between the AMC Group and the Colors Group. The termination meant losing the Sheehan export of varieties and losing access to certain top-end retailers. According to Van Wyk, Colors SA lost a lot of money. The termination brought about the loss of the opportunity to supply fruit to MM (UK) which translated to R3.6 million in commission. Colors SA further lost a strategically important part of its business operations.

[41] On 12 June 2013 Muñoz and his team visited South Africa to discuss how the parties were going to deal with the Sheehan and other Vitis varieties and the proposed new entity styled, *New Vitis* or *New Generation Vitis*. The parties managed to produce a document which represented a settlement proposal with regard to the Sheehan varieties and a further document dealing with other Vitis varieties. Those settlements were co-signed by Van Wyk and Muñoz. The idea was that their respective lawyers would draft and present the parties with the

“*legal documents*” for signature. The parties understood that the two documents co-signed by them were still subject to final agreements. The final agreements were never finalized and signed.

[42] During September 2013, the majority shareholders in the Colors Group appointed additional external directors as well as an independent chairman to the board, Manie Marais (“Marais”). For reasons irrelevant to these proceedings, Van Wyk and Marais could not see themselves working together and Van Wyk asked Marais to facilitate an exit package for him. Van Wyk stepped down as CEO and informed Marais that he would no longer be part of Colors SA. Van Wyk left and a number of people resigned and left soon thereafter. According to Van Wyk, Colors SA was in chaos, as he put it, “ *it was the beginning of the end...*”.

[43] In response to Van Wyk’s departure and with reference to the provisional agreements concluded of 12 June 2013, the attorneys of SNFL informed Colors SA that Van Wyk’s departure amounted to a material breach of his duty to act in good faith and a destruction of the goodwill. SNFL expressed the view that they did not have confidence that the new management under Marais had the necessary relationship with the growers or that they would be able to provide the necessary technical support to the joint venture as initially envisaged. Van Wyk understood that the two settlement agreements were cancelled as a result of him leaving Colors SA.

[44] Following Van Wyk's departure Colors SA were looking for buyers for the Sheehan varieties. Kriegler, Van Wyk and his family trust did not have enough money to buy the Sheehan assets from Colors SA. Proceeding from one of the proposals that the parties would agree to split ownership of the Sheehan rights by giving 50% to the AMC Group and 50% to the Colors Group, AMC offered to pay Colors SA R20 million for their 50%. Van Wyk confirmed that it was understood that on receipt of the payment of R20 million, he and Colors SA would have no further rights or license to the Sheehan varieties. AMC Group paid the R20 million. However, Van Wyk stressed the point that this sale did not include projects 7 to 9. Van Wyk was willing to sell the 49% shares, which included projects 7 to 9 and other varieties, to the AMC Group for a further consideration of R980 000.00 The latter proposed sale never materialised.

[45] Van Wyk referred to a final meeting held at Cluver and Markotter Attorneys, Stellenbosch. According to Van Wyk all that was left was to decide whether AMC was going to invest and buy 49% of the proposed new entity, which would include projects 7 to 9 and whether the parties would transfer Vitis from England to South Africa. Muñoz, Haresign, Kriegler and Van Wyk attended the meeting. Van Wyk was informed that the due diligence exercise performed by Macintyre was unsuccessful and that Muñoz were no longer interested in doing business with the Colors Group. According to Van Wyk he subsequently acquired the 49%.

[46] Insofar as the counterclaim is concerned, Van Wyk testified that during the period 2011 to 2014, Colors SA incurred costs amounting to R3 560 635 in performing the breeding and related services. The amount represented the total cost that Colors SA spent on projects 7 to 9. The expenses included research, development, grape breeding, grape-breeder salaries and overhead salaries. Van Wyk instructed his financial manager, Mariechen Van Eck (“Van Eck”), a qualified accountant, to calculate the costs. She used their Pastel program which was set up to differentiate between grape breeding and other types of breeding. She produced a full list of costs and Van Wyk, Kriegler and Nieuwoudt worked through it. They applied their minds and decided where the respective costs should be allocated.

[47] Regarding the alternative claim based on unjust enrichment, Van Wyk testified that Colors SA incurred a portion of the costs totalling an amount of R2 825 531 during the period 2011 to 23 July 2014 in the *bona fide* but mistaken belief that Colors SA was the owner of the disputed plant materials. He explained that over the period 1 May 2014 to 30 April 2016 Re: Inc incurred costs amounting to R1 137 481 in performing breeding and related services in respect of the disputed plant materials. The composition of that cost was set out in annexure CC2.

[48] I will deal with the assessment of the probabilities and Van Wyk’s overall evidence later hereunder.

DISCUSSION:

The pleadings:

[49] It is apposite to preface the consideration of the evidence on the claim and counterclaims with reference to the basic principles applicable to pleading. The law in this regard is fairly settled. The Supreme Court of Appeal in *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 (SCA) at para [11] held as follows:⁸

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at a trial. It is equally not permissible for the Trial Court to have recourse to issues falling outside the pleadings when deciding the case.”

[50] This dictum has been cited with approval by the Constitutional Court in *Molusi v Voges* 2016 (3) SA 370 (CC) at paragraph 28. See also *Lipshitz and Shwartz, NNO v Markowitz*⁹ where the court remarked as follows:

“A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice which is designed and which still evolves as a means of accurately identifying issues and conflicts so that the Court and the litigants should be properly apprised of the relevant conflicts, would be destroyed.”

- [51] A party must be properly informed of the case he has to meet. Consequently, a party has a duty to allege in his pleadings the material facts upon which he relies.¹⁰
- [52] It is unfair to ambush one's opponent at trial by facing him with a case different to the one presented in the pleadings. Rule 22(2) of the Uniform Rules of Court provides: "*The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.*" If a party has no knowledge of assertions made by his opponent, he is not in a position to either admit or deny the averments. Hence, he may plead that he does not admit certain facts. If a party pleads in this manner, he must in terms of rule 22(2) of the Uniform Rules of Court "*clearly and concisely state all material facts upon which he relies.*"
- [53] I will, nevertheless, evaluate defendant's pleadings with a measure of permissiveness and I accept that parties are not strictly bound to it where it may prevent me from fully investigating the facts.¹¹
- [54] The defendants *in casu* submitted a list of admissions shortly before the trial commenced which narrowed the issues in dispute. It became common cause that an agreement between Vitis and Colors SA existed in terms of which the latter conducted grape breeding in South Africa on behalf of Vitis and that the parties did not affix a timeframe to such an agreement. It was also no longer

disputed that the plant materials relating to projects 1 to 6 and DAFB and the rights thereto belonged to Vitis.

[55] In light of the defendants' list of admissions, plaintiffs' counsel submitted that the defendants' case, unavoidably so, had to be that the agreement had been terminated. As such, so the argument goes, it was incumbent on the defendants to satisfy the Court that the agreement was indeed terminated and that the defendants failed to discharge that onus. The plaintiffs further submitted that the pleadings and evidence presented on behalf of the defendants were inconsistent and contradictory as to whether the agreement was terminated by way of consensus between Vitis and Colors SA, or by Colors SA on the basis of material breach. The evidence was further contradictory as to what the material breach was on which Colors SA relied and whether the breach was committed by Vitis as a party to the agreement or by a non-contracting party.

[56] It is well established that the purpose of permitting a party to call for further particulars for trial is to prevent surprise.¹² In this case the plaintiffs made use of the opportunity to call for further particulars long before they received the defendants' list of admissions. Whilst I accept that the defendants' list of admissions curtailed the need for evidence on certain issues, it was filed shortly before the trial commenced. The plaintiffs would no doubt have prepared their evidence and witnesses in accordance with the many issues disputed on the pleadings. The window to call for particulars was long gone and the admissions raised more questions about the exact basis of the defendants' defence. The

defendants' litigation strategy ultimately had a bearing on my evaluation of costs.

[57] Insofar as it related to the service agreement that existed before January 2011 between Vitis and Colors SA, defendant's counsel argued that the service agreement was varied subsequent to February 2011 so that it subsequently had limited application which did not encompass conducting plant-breeding activities on behalf of Vitis. That stance, according to plaintiff's counsel, was also inconsistent with when exactly the agreement was terminated as well as the suggestion that the agreement was terminated in part only. As an alternative argument, defendant's counsel submitted that Vitis released Colors SA from its primary obligations in terms of the service agreement and that the service agreement was terminated, save for measures aimed at winding up the Vitis breeding activities.

[58] Van Wyk could not explain why the existence of the agreement that Colors SA would provide services to Vitis was not specifically pleaded and why it was not admitted. Van Wyk said he relied on his attorneys to draft the pleadings. On being reminded that the denial of the agreement would have come from him and not his attorneys, Van Wyk repeated the response that he relied on his legal team. Van Wyk could also not explain why the express agreement which he testified about was not pleaded. The conclusion of the head licence was at all material times within Van Wyk's personal knowledge. Yet, it was pleaded that defendants had no knowledge of the head licence.

[59] The defendants' difficulty on the pleadings was that they did not admit that an agreement existed. There could thus be no averment of termination. On the point that a termination of an agreement must at the very least be communicated to the other party, Van Wyk replied that he was not a legal expert. Blame was thus shifted to his legal team. Van Wyk's response to how he terminated the service agreement was telling:

"We did not speak to them at all. We did not send them invoices of any kind. We did not discuss with them the breeding parents that we should use for the next year. We did not send them a budget for the next year. We did not send them management accounts. We did not send them any reports at the end of every month...."

[60] I understood Van Wyk to aver that the agreement was terminated by conduct. Having practiced as an attorney for 13 years, Van Wyk's responses to questions relating to why his evidence in court contradicts the pleadings did not impress. When pushed during cross-examination to deal with how and when the termination was communicated, the witness took a mendacious approach. His responses were evasive and at times suggestive of an afterthought.

[61] I am required to evaluate the credibility of Macintyre, Nelson and Van Wyk with reference to their reliability, consistency and the probabilities.¹³ I consider such evaluation to be necessary because the issue of credibility is inextricably bound up with the consideration of the probabilities. To the extent that the respective parties' evidence gave rise to two mutually conflicting versions of the facts, the proper approach to deciding which to prefer is that described in the oft cited

analysis by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie SA and others*.¹⁴

[62] I take from the above *dicta* that where versions collide, the three aspects of credibility, reliability and probability are intermixed. All three must be examined to find the truth of what transpired. I got the impression that Van Wyk struggled to reconcile his evidence with the pleaded case. The pleadings caused Van Wyk to give contradictory and highly unsatisfactory evidence. On the other hand, there was nothing inherently improbable about the evidence of the plaintiffs' witnesses and in respect of core aspects they corroborated each other. I deal with some of the core aspects next.

The tacit agreement between Vitis and Colors SA:

[63] In our law, there are currently two supposedly conflicting tests for determining the existence of a tacit contract. The one is the "*no other reasonable interpretation test*" and the other the "*preponderance of probabilities test*". The "*no other reasonable interpretation test*" was established in the *Ocean Commodities*¹⁵ case where Corbett JA stated:

"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."

[64] Subsequent to criticism that that test created a higher standard of proof than the usual standard in civil cases, in *Joel Melamed*¹⁶, Corbett JA suggested the preponderance of probabilities test, stating:

“[A] court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence.”

[65] In the judgment of *Nurcha*¹⁷, the Supreme Court of Appeal held that the two supposedly conflicting tests could be reconciled. The test to be applied is whether the party alleging the existence of the tacit contract “*has shown on a balance of probabilities unequivocal conduct*” on the part of the other party that proves that it intended to enter into a contract with it.

[66] In this case there is no dispute as to the sequence of events leading up to the conclusion of the head licence and subsequent sub-licence. Although the defendants denied the existence of a tacit agreement in their plea, Van Wyk contradicted the pleading by averring that an express agreement had in fact been concluded between Vitis and Colors SA during a Vitis meeting on 1 September 2008. According to Van Wyk the express agreement continued until at least February 2011.

[67] The parties were thus *ad idem* as to the existence of an agreement and that the issue of duration was never discussed. Van Wyk in fact conceded that the service agreement would have endured for a lengthy period and that it would

have remained in place until it was terminated. It follows that either party could have given reasonable notice of termination as long as such notice was given in a clear and unequivocal manner.

[68] But for emphasizing the point that the agreement between Colors SA and Vitis only lasted until February 2011, Van Wyk did not dispute the plaintiffs' pleaded terms. One of the terms were that Colors SA would return all the South African plant materials and breeding records to Vitis if and when the tacit agreement was terminated or if Colors SA no longer provide services to Vitis for the purposes of the South African breeding programme. It is common cause that the agreement was terminated by plaintiffs and that the consequent dispute settled. The evidence of the two witnesses who testified about the existence of the tacit agreement was not seriously challenged in cross-examination.

[69] Defendants further failed to prove that they terminated the tacit agreement and that ownership of the plant material had been transferred to Colors SA. No factual or legal basis on which a termination of the agreement could be based was alleged.

[70] On a conspectus of all the evidence I find that the plaintiffs have shown, on a balance of probabilities, unequivocal conduct on the part Colors SA that proves the existence of a contract on the terms and conditions pleaded by plaintiffs.

[71] In my view the plaintiffs proved the existence of an agreement between Vitis and Colors SA on the pleaded terms.

The defendants' submissions relating to the "exclusivity term":

- [72] I agree with defendant's counsel that Colors SA, prior to the conclusion of the sub-licence agreement and subsequent to its termination, conducted various breeding projects. It was common cause that Colors SA's portfolio of breeding projects included apples, pears, pomegranates, figs and passion fruit. The idea of accompanying Muñoz to the USA during 2002 was to look at the Sheehan grape-breeding program and to consider adding grape breeding to Colors SA's existing portfolio. Thus, as I understand it, the other breeding programs continued in conjunction with the added Vitis grape-breeding program.
- [73] Having carefully considered the content of the sub-licence agreement, I find that there is no merit in the submission that, because the agreement did not contain an exclusivity term obliging Colors SA to exclusively breed for Vitis, Colors SA could simply decide to breed for its own account with Vitis plant material. Such a submission is not borne out by the pleadings and it is further at odds with how the parties conducted their affairs under the sub-licence from 2003 until the letter of termination was dispatched.
- [74] I accept Macintyre's evidence that Colors SA did not have a grape-breeding programme of its own and would not have had the rights to breed with any Sheehan material except through the Vitis breeding programme. Vitis had permission to use Sheehan and Colors SA was appointed as the service provider who conducted the breeding on behalf of Vitis.

The defendants' submissions relating to the variation of the agreement:

[75] Defendant's counsel submitted that the agreement between the parties was varied subsequent to the cancellation of the sub-licence. It was argued that the service agreement was varied during January 2011 and/or June 2011 to the extent that Colors SA no longer bred on behalf of Vitis, but was only co-responsible for the maintenance of the existing Vitis assets and plant material, being projects 1 to 6 and DAFB. According to the defendants, the variation relieved Colors SA from the obligation to provide breeding services to Vitis.

[76] No variation of the service agreement was pleaded. This omission should have been addressed by an appropriate amendment. On the pleadings it was not disputed that the plant material used in projects 1 to 6 and DAFB at all times belonged to Vitis. Paragraphs 40 to 48 of plea makes no reference to a variation.

[77] The argument of a variation is in any event improbable in circumstances where Van Wyk's evidence did not dispute that:

“All plant material used in or produced as a result of the South African breeding programme (‘the South African plant materials’), including therefore all plant material of the Sheehan varieties used as ‘parent plant’ material for breeding purposes and all plant material bred from such ultimate ‘parent plants’ would be owned by Vitis.”

[78] And further that:

“All intellectual property rights, including the right to file applications for plant breeders’ rights in South Africa and elsewhere, attaching to the South African plant materials, would be owned by Vitis.”

[79] The plaintiffs pleaded that between June 2008 and January 2014 Colors SA performed breeding services on behalf of Vitis. The plaintiffs pertinently referred to *“all plant material used in or produced as a result of the South African breeding programme”* and *“all intellectual property rights”* and this could only have meant the plant material used in projects 1 to 6, DAFB and 7 to 9. I find the plaintiffs’ version to accord with the probabilities. There was no variation that altered the contractual consequences of the pleaded tacit agreement.

[80] Furthermore, the letter penned by Van Wyk’s attorneys on 24 October 2014, makes no reference to a variation of the agreement as contended by the defendants during argument.¹⁸ Having considered the correspondence exchanged between the parties after February 2011, I agree with the plaintiffs that they were led to believe that the purported passing of ownership of the disputed plant material from Vitis to Colors SA was premised on a termination and not a variation of the agreement. The defendants’ written correspondence is largely incompatible with the assertion that the parties continued with their initial arrangement regarding grape breeding, albeit in a varied manner.

[81] During Van Wyk’s testimony he stressed that the cancellation of the sub-licence agreement led to a total breakdown of trust. It was put to Van Wyk that the

pleadings contained no allegation that it was a term of the agreement between Vitis and Colors SA that if a breakdown in trust occurred, Colors SA could terminate the agreement with Vitis. Van Wyk at first accepted the proposition by responding that “*there was no tacit or implied or express terms that if we lose faith M’Lord that we could walk away*”. Van Wyk subsequently altered his response stating that “[t]here was no express term that we could walk away, whether there could be a tacit or implied term M’Lord that is for you to decide”. It was those and similar responses that brought Van Wyk’s credibility into question.

[82] In support of its variation argument the defendants, *inter-alia*, referred to the testimony of Macintyre that (during the early part of 2011) there was a change in circumstances and accordingly the “*arrangement*” had to change. According to Macintyre, Colors SA no longer had the staff to continue with the breeding programme. Macintyre testified that the inevitable change was that Coetzee and Malan, who were the experts, would continue to do what they did while they were employed at Colors SA. They would henceforth receive their “*paychecks*” from SNFL. The defendants’ argument for variation was based on some of the aforementioned occurrences.

[83] The defendants’ counsel also referred me to *Van As v Du Preez*¹⁹ as authority for the following principle:

“A variation entails an alteration of the legal consequences of the contract by mutual agreement of the parties”

84. Whilst the general principal relied on by defendants’ counsel may be correct, I find that authority to be of no assistance to the defendants *in casu*. I agree that the parties may have reached an agreement that only certain of its contractual provisions would continue. In our law this would be regarded as either a variation of the existing contract or as a termination of the existing contract in its entirety and its substitution by a new contract. On the one hand Van Wyk testified that the service agreement came to an end during January 2011 but on the other hand he averred that the evaluation part of the breeding stopped during June 2011 and that the maintenance continued until the liquidation of Vitis during 2015. This was not sensible evidence.
85. The case of *Clemans v Russon Brother (Pty) Ltd*²⁰ do not support defendant counsel’s proposition that *“it is not a requirement for the defendants to have specifically pleaded a variation of the service agreement to be successful”*. The defendant in *Clemans* in fact pleaded the factual basis for relying on a variation of a written agreement of lease. The plaintiff in that case clearly knew the case it was called on to meet.
- [86] I conclude that the variation of the service agreement was not proved by Van Wyk through reliable evidence.

The defendants' pleaded case based of knowledge and/or approval:

- [87] Colors SA pleaded that it undertook the breeding programme associated with projects 7 to 9 for its own benefit “*with the knowledge and approval of Vitis and SNFL*”. That constituted a material part of defendant’s case. As alluded to above, the sub-licence agreement was between Colors SA and Vitis. As such, whether or not SNFL had knowledge is irrelevant. SNFL could not give approval to Colors SA if the latter in fact sought such approval. A contracting party would ordinarily not request another contracting party’s “*approval*” if such approval is not required.
- [88] In answering the plaintiffs’ request for further particulars on the issue of knowledge and approval, the defendants replied that both Vitis and SNFL acquired knowledge at a board meeting of Vitis held on 6 February 2012. According to Van Wyk, the approval was given on behalf of Vitis and SNFL by Macintyre, Haresign, Barber and Muñoz. To the question of how Vitis and SNFL expressed their approval the defendants replied that “*Vitis and SNFL expressed their approval expressly, alternatively, tacitly.*” This was not cleared up during the trial.
- [89] Van Wyk confirmed during cross-examination that the breeding relating to projects 7 to 9 started during October–November 2011. Thus, on defendants’ own version Colors SA commenced breeding for their own account some four months before there was any knowledge and/or approval by Vitis.

[90] The parties compiled minutes of the meeting of 6 February 2012.²¹ The minutes contain no disclosure or discussion relating to the fact that Colors SA was breeding for its own account and that it accordingly sought approval or some acknowledgement of that fact.

[91] As indicated above, the 50% shareholder in Vitis was Colors UK and not Colors SA. I understood that the parties focussed their energies on the attempt to resolve certain issues within Vitis and that the proposals therefore came from SNFL on the one hand and Colors UK on the other hand. I find it unlikely that Colors SA, being a different legal entity, would have raised and discussed such an important issue at that meeting without anybody commenting or recording it in writing. According to Van Wyk, he attended as representative of both Colors UK and Colors SA. The minutes of the meeting contain no such indication. In any event, Van Wyk's evidence was that Colors SA did not require the permission of Vitis or any other party to breed with the Vitis and Sheehan varieties.

[92] Macintyre testified that he had no recollection of a disclosure that Colors SA was breeding for its own account. According to him, if it was true that the disclosure was made, he would have had a number of questions about the breeding programme. I prefer Macintyre's version of what transpired during the meeting to that of Van Wyk. Macintyre's version is corroborated by the minutes of the meeting and the correspondence that ensued. Macintyre and Haresign were

only two of the four Vitis directors who could have provided approval. There would have been a record of the decision and resolution to that effect. No evidence of such was presented. In my view it is highly improbable that Vitis would simply have handed over commercially valuable plant material to Colors SA for free.

[93] Macintyre has substantial experience in the breeding business. It seems to me that Macintyre's evidence as to why he would not have approved Colors SA breeding for their own account with Vitis plant material are eminently sensible and logical. It is improbable that, in the face of the very real and obvious financial implications, Macintyre would have consented or approved that Colors SA may breed for its own account with Vitis plant material.

[94] On the question of knowledge and approval, I find that no disclosure was made to the effect that Colors SA was breeding for its own account at the meeting of 6 February 2012. Van Wyk had a fiduciary duty to make the disclosure. The hallmark of a fiduciary relationship is trust and confidence. It extends not only to actual conflicts of interest but also to those which are a real and sensible possibility.²²

Colors SA's right to use varieties in its lawful possession:

[95] It was submitted on behalf of the defendants that they were entitled to use the Sheehan varieties for their own breeding program because they were in "*lawful possession*" of the varieties as envisaged by section 23(6) of the

Plant Breeders Rights Act, Act 15 of 1976 ("the Act"). Section 23(6) of the Act reads as follows:

- “(6) Notwithstanding the provisions of section 23A (a), a person who procured any propagating material of a variety in a legitimate manner shall not infringe the plant breeder’s right in respect of the variety if he or she —*
- (a) resells that propagating material;*
 - (b) subject to the provisions of subsection (2), sells any plant, reproductive material or product derived from that propagating material for purposes other than the further propagation or multiplication thereof;*
 - (c) uses or multiplies that propagating material in the development of a different variety;*
 - (d) uses that propagating material for purposes of bona fide research;*
 - (e) uses that propagating material for private or non-commercial purposes; or is a farmer who on land occupied by him or her uses harvested material obtained on such land from that propagating material for purposes of propagation: Provided that harvested material obtained from the replanted propagating material shall not be used for purposes of propagation by any person other than that farmer”*

- [96] It was further submitted that Colors SA legitimately obtained the Sheehan and Vitis varieties in terms of its “*independent licences and rights*” and created the disputed plant material, as it was allowed to do in terms of section 23(6)(c) of the Act.
- [97] Defendants’ counsel argued that the decision of the full bench of appeal in *Voor-Groenberg Nursery CC and Another v Colors Fruit South Africa (Pty) Ltd*²³ were distinguishable from the matter *in casu*. Writing for the full bench, Griesel J, with Fortuin J and Samela J concurring, considered whether Colors SA was entitled to possess and exploit plant materials originally bred and developed by Sheehan Genetics in terms of and to the extent allowed by those provisions 23(6) of the Act. The Full Court found, with reference to sections 23(6) and 23A(a), that the provision “*refers to persons who perform certain infringing acts without a licence obtained from the plant breeder in question*” and that Colors SA was not such a person because it obtained the plant material pursuant to a valid licence. The full bench further found, like estoppel, section 23(6) is meant to be utilised as a shield, not as a sword. According to the defendants, the aforementioned case was distinguishable because the plant material *in casu* was “newly bred” material.
- [98] Whilst it is true that the defendants made no reference to section 23(6) in its plea and that Van Wyk did not pertinently rely on the statutory provision to assert ownership of the disputed material, in my view, defendant’s counsel referred to the section mainly to make the point that the plant material in that case differed from those *in casu*. Thus, as I understand the defendants’

submission, the issue of ownership of the disputed material remained undecided.

[99] It was not disputed that the plant material used in projects 7 to 9 included plant material of the Sheehan varieties. Van Wyk conceded that, but for the fact that after February 2011 Colors SA was no longer breeding on behalf of Vitis, the ownership of the disputed plant materials would have remained with Vitis. On the critical question of whether Colors SA was entitled to breed for its own account with Sheehan variety plant materials, Van Wyk testified that Colors SA had been advised by its attorneys that it was entitled to do so, and did not require any additional permission to do so.

[100] Macintyre testified that in circumstances where a specific variety was bred by Vitis, with the appropriate permission from Sheehan, the new variety would be a Vitis variety. When a breeder used Sheehan genetic or plant material when making crosses, the breeder would have to go back to Sheehan and work out what percentage of the royalties was payable to Sheehan. The need to go back to Sheehan to quantify the payment of royalties was not disputed. Inasmuch as Van Wyk did not dispute that he used Sheehan in projects 7 and 8, it was rather strange that he did not proffer any reasons why Colors SA would be exempted from the payment of such royalties. This factor militates against the veracity of the Colors SA's version.

[101] I find Colors SA's reliance on section 23(6) of the Act to be unfounded in the circumstances of this case.

Acquisition of ownership through specification and the settlement agreements:

[102] Insofar as it relates to ownership of the disputed plant material, the defendants' counsel argued that unless the breeding was done in terms of an agreement to the contrary, the starting point is always that the breeder (Colors SA) was the owner of the plant material. In this respect, I was referred to the following extract from Silberberg & Schoeman²⁴ in support of the aforementioned proposition:

“Acquisition of ownership by specification takes place by the ‘working up thing [belonging to another] into a new product. Specification, as defined by our common-law writers, takes place by the giving of a new form to or the manufacture of a new species out of the material of another, provided the material used ceased to exist as such and cannot be restored to its original form, and provided further, according to some authorities, that the manufacturer (specificans) was under the impression that the material in question belonged to him or her. That is to say, the manufacturer (specificans) who creates the new product - whether by his own labour, of, if he is an employer of labour, by that of others - becomes owner of the thing he has manufactured, his title being independent of that of any previous owner”.

[103] It was not in dispute that Colors SA asserted ownership of the disputed plant material. Van Wyk's e-mail to Macintyre on 1 August 2014 made its stance clear:

“...The ownership to the physical part of material and intellectual property vests in Colors and it was never agreed that same will be transferred to Vitis.”

[104] The intention to acquire and to pass ownership is a factual, not a legal, issue. Neither the head licence nor the sub-licence deals pertinently with the ownership of the physical plant material. Plaintiffs' counsel argued that the absence of a clause in the sub-licence dealing with the transfer of ownership or the reservation of ownership was therefore a strong factor in favour of Vitis.

[105] The passages in the record²⁵ to which defendant's counsel referred me firstly addressed the use of different varieties, with permission, and the acknowledgement that royalties may have to be paid. Secondly, it dealt with Van Wyk's understanding of the International Union for the Protection of New Varieties of Plants (UPOV) legislation and what he knew about plant breeders' rights. Neither Macintyre nor Van Wyk suggested in those sections of their evidence that, unless the breeding was done in terms of an agreement to the contrary, the starting point would always be that the breeder (Colors SA) was the owner of the plant material.

[106] Colors SA did not plead that it acquired ownership of the disputed material through way of specification. Counsel for the defendants' argument of acquisition by specification was thus not foreshadowed by the pleadings. The argument was neither properly substantiated by the evidence. Colors SA received Sheehan and Vitis plant material in terms of an agreement it had with Vitis. I did not understand Macintyre and Van Wyk's evidence to suggest that a "new product" was created by Colors SA subsequent to February 2011. Both witnesses agreed that it takes several years of monitoring, evaluation, testing and selecting before a new variety will emerge from those selections that can be

launched into the market. Van Wyk's evidence was that the process may take even up to 15 years.

[107] On the facts of this case, nothing had happened to the disputed plant material to make it difficult to identify as the plant material provided by Vitis. That is so because Colors SA itself identified the genetic make-up of the plant material used in projects 7 and 8. Put differently, the "new product" can be genetically identified with the old. I have not heard evidence that the disputed plant material lost its identity or that it can no longer be identified. No evidence of a *nova species* was presented. Van Wyk testified that Colors SA usually made the crossers and thereafter provided bunches to Genetwister. He confirmed that Colors SA and Vitis would know who the parents of the plants were. Genetwister would not know the parents of the plant material because it constitutes, in Van Wyk's words: "*intellectual property and you cannot show that to everybody, otherwise somebody else will make those crosses and then be a competition to you*".

[108] I am of the view that the rule of non-reducibility is dependent on contemporary technological expertise and knowledge. Neither party led expert evidence. I am further not convinced that the reducibility rule finds application when one deals with objects of natural growth. This is because virtually everything that grows is irreducible, and applying the rule mechanically would almost always give ownership to the *specificans*.²⁶

[109] I find that acquisition of ownership through specification did not take place in this case.

[110] Even if I am wrong on the issue of specification, there is still another reason why Colors SA's claim of ownership is unsustainable. It is common cause that Colors SA, first plaintiff and a host of other parties concluded a settlement agreement²⁷ on 12 July 2013. It is necessary to quote the most salient terms of that agreement:

“2.3.1.6 Colours irrevocably acknowledges that to the best of its knowledge and belief all plant variety and breeders’ rights relating to Sheehan Varieties, including but not limited to the plant variety and breeders’ rights that Colors has applied for in RSA on behalf of SG LLC, have been correctly applied for and are valid applications or granted rights, whichever is applicable. AMC and SG LLC warrants that to the best of its knowledge and belief the plant variety and breeders’ rights that Colours has applied for in RSA on behalf of SG LLC, have been correctly applied for and are valid applications or granted rights, whichever is applicable.

2.3.1.7 The Colors irrevocably accept that all Sheehan Variety plant material in RSA and Namibia, with the exception of any plant material that has been incorporated into the vines and sold to growers, is owned by SG LLC;

2.3.1.8 Colors undertakes that it shall not make any attempt, and shall not procure or otherwise assist any other party to make any attempt, to revoke, invalidate or otherwise challenge any

intellectual property rights registered in the name of SG LLC or AMC relating to the Sheehan Varieties including, without limitation, the plant breeders' rights registered and/or pending registration in RSA and the plant patents registered in the USA. AMC and SG LLC warrants that to their best knowledge and belief, all intellectual property rights registered in the name of SG LLC or AMC relating to the Sheehan Varieties including, without limitation, the plant breeders' rights registered and/or pending registration in RSA are lawfully owned by SG LLC and AMC, respectively;

2.3.1.9 *The Parties irrevocably accept, in so far as they are parties to them, that the Head Licence and the SLA are now terminated, and that no term of the Head Licence or the SLA survives the execution of this Agreement;*

2.3.1.10 *This agreement is in full and final settlement of all and any claims and dispute between the relevant Parties, whether in contract, common law, tort or their equivalent, in any jurisdiction arising from the RSA Action, the Costs Award, the US Action, the Asset Purchase or the Arbitration and/or the performance or termination of the Head Licence and/or the SLA, and no Party has any claims against the other arising from their actions taken in respect of or dealings with the Sheehan Varieties prior to the Signature Date.”*

[111] The settlement agreement represents the outcome of the dispute between Colors SA, AMC and Sheehan Genetics LLC in the UK regarding the termination of the sub-licence agreement. The settlement agreement envisaged the setting up of a joint venture and an attempt to try to deal with the breeding and

propagation of grapes going forward. The proposals in that settlement did not come to fruition and the parties concluded a further agreement on 7 March 2014 (“the assignment agreement”).

[112] The assignment agreement provides that Colors SA agreed to sell, cede and assign the Sheehan rights to SNFL for a purchase consideration of R20 million. The Assignment agreement describes Colors SA as the seller and SNFL as the purchaser. It further defines Sheehan rights as:

“Any and all rights, title and interest of any nature whatsoever, including legal, beneficial, contingent and / or vested rights, title and interest that the seller may have in and to the Sheehan variety at the signature date, including but not limited to the right to test, plant and cultivate the Sheehan varieties in South Africa and Namibia and the right to market the fruit produced from the Sheehan varieties, it shall include the goodwill symbolised by the Sheehan varieties, that will go to trademarks. Such rights further include any application for any registration that anywhere in the world of any nature, including but not limited to plant variety rights, plant breeders’ rights and trademarks in respect of the Sheehan varieties.”

[113] The term Sheehan varieties is also defined as:

“the grape varieties owned by Sheehan Genetics on the signature date, including all registered and unregistered rights.”

[114] It is common cause that SNFL paid the R20 million. As I understand Van Wyk’s evidence, projects 7 to 9 did not form part of the sale and the possible acquisition of those projects was still subject to a due diligence exercise.

Significantly, neither settlement agreements drew a distinction between the plant material used in projects 1 to 6, DAFB and that used in projects 7 to 9. On a sensible reading of the agreements the parties did not intend to draw such a distinction. The agreements refer to all plant variety and breeders' rights relating to Sheehan varieties as well as all rights, title and interest in and to the Sheehan varieties in South Africa and Namibia respectively. I accordingly reject Van Wyk's version that the agreements excluded projects 7 to 9 as improbable. In my view the content of the agreements materially corroborates the plaintiff's case.

[115] I agree with plaintiff's counsel that Van Wyk's own evidence regarding the "express" agreement and its terms are sufficient to establish that Vitis own the plant materials in projects 7 to 9. Defendants contend that, if the owners of the parent plant material are aggrieved by the use thereof, the appropriate recourse would be to bring an action or application to interdict the alleged infringement of their plant breeder rights in terms of the Plant Breeders Rights Act. I can see no reason why the plaintiffs' ownership claim must be delayed or referred to another forum. Further delays on the issue would not be in the interest of justice.

[116] I find SNFL to be the lawful owner of all the plant materials used in or produced as a result of projects 7 to 9. It follows that Colors SA's purported cession and assignment from Colors SA to Re: Inc was invalid because it was not possible for Colors SA to cede that which it did not own.

The defendants' conditional claims in reconvention and the plaintiffs' special plea of prescription:

- [117] The first and second defendants raised two conditional claims in reconvention. Colors SA claims payment of R3 056 635 for certain costs incurred, alternatively, payment of R2 825 531 based on unjustified enrichment. The second defendant claims payment of R1 137 481 for costs incurred in performing breeding and related services.
- [118] According to Colors SA its main and alternative claim arose during the period 2011 to December 2014. The claim in reconvention was served on the plaintiffs on 29 June 2016. The plaintiffs argued that Colors SA's claim prescribed in respect of any amounts allegedly payable to Colors SA prior to 29 June 2013. It was further submitted that, since Colors SA failed to distinguish the claim that arose before 29 June 2013 from that portion of its claim subsequent to 29 June 2013, the effect of prescription defeated the whole of the claim for that year. No authority for the aforementioned proposition was presented. The plaintiff, in addition, submitted that neither Colors SA nor the second defendant established the quantum of their respective claims.
- [119] On the pleadings, the plaintiffs specifically pleaded that neither Colors SA nor the second defendant made out a case in law for a claim in unjustified enrichment, more particularly, in that the allegations that have been made were insufficient to sustain any *condictio*. The correctness of the computation of the claimed amounts was disputed on the pleadings. The plaintiffs admitted that the

second defendant was under no obligation to incur costs on behalf of Vitis or any other plaintiff. Colors SA and the second defendant did not file a replication to the plaintiffs' aforementioned averments.

[120] I deal with the quantification issue first since, in my view, my finding in this regard is dispositive of the prescription defence. Colors SA's claim reads as follows:

“Over the period of 2011 to December 2014, Colors SA incurred cost amounting to R3 056 635 in performing breeding and related services in respect of the disputed plant materials, the composition of such costs being set out in annexure “CC1” hereto.”

[121] Colors SA pleaded in the alternative that it incurred part of the costs in the main claim totalling R2 825 531, during the period 2011 until 23 July 2014 in the bona fide but mistaken belief that it was the owner of the disputed plant materials. Colors SA, further in the alternative, sought to base its claim on enrichment pleading that it would be impoverished in the amount of R2 825 531.

[122] The quantification of the main and alternative claims was set out in annexure CC1 to the counterclaim which presented as follows:

Summary of expenses on grape-breeding projects 7 – 9 by Colors

	Before 24 July 2014				After 24 July 2014
	2011	2012	2013	2014	2014
Expense type					
General and overhead expenses	32,427	166,356	195,723	306,894	48,834
Research, Development and Innovation	2,685	24,880	29,458	26,734	10,267
Specific grape breeding expenses	14,706	160,759	191,516	415,160	2,755
Grape breeder salaries	43,591	246,451	391,896	97,974	104,400

Overhead salaries	42,264	199,739	203,307	33,011	64,848
Total	135,673	798,185	1,011,900	879,773	231,104
Total per period	2,825,531				231,104
Grand total Colors	3,056,635				

[123] According to annexure CC1 Colors SA incurred expenses in respect of projects 7 to 9 categorized as “general and overhead expenses, research, development and innovation, specific grape breeding expenses, grape breeder salaries and overhead salaries” in the amount of R3 056 635, alternatively, R2 825 531 on the grounds pleaded.

[124] The second defendant’s main claim reads:

“Over the period of 1 May 2014 until 30 April 2016, Re: Inc incurred costs amounting to R1 137 481 in performing breeding and related services in respect of the disputed plant materials, the composition of such costs being set out in annexure ‘CC2’ hereto.”

[125] The quantification of the second defendant’s main and alternative claims was set out in annexure CC2 presenting as follows:

Summary of expenses on grape-breeding projects 7 – 9 by Re: Inc

	Before 24 July 2014	After 24 July 2014 until 30 April 2016		
	2014	2014	2015	2016
Expense type				
General and overhead expenses	-	1	-	-
Research, Development and Innovation	15,943	33,231	123,595	54,610
Specific grape breeding expenses	832	26,115	42,944	14,507
Grape breeder salaries	69,600	139,200	404,400	94,976

Overhead salaries	-	21,882	59,580	36,065
Total	86,375	220,429	630,519	200,158
Total per period	86,375			1,051,106
Grand total Re: Inc				1,137,481

[126] The second defendant alleged that it incurred costs totalling R86 375 during the period 1 May 2014 until 23 July 2014 in circumstances where it was under no legal or natural obligation *vis-à-vis* the plaintiffs to do so. It incurred further costs totalling R1 051 106 in the *bona fide* but mistaken belief that it was at the time the owner of the disputed plant material, alternatively, in circumstances where it was under no legal or natural obligation *vis-à-vis* the plaintiffs to do so. The second defendant also advanced an alternative claim based on enrichment.

[127] Van Wyk did not compile annexures CC1 and CC2. It was compiled by Ms Mariechen Van Eck (“Van Eck”), a chartered accountant and financial manager of Colors SA at the time. Van Eck was not called to testify. There was no suggestion that she was not available to be called as a witness. Material parts of the evidence attributed to her thus remained hearsay. They were material witnesses to the quantification, yet the defendants failed to call them. It is a well-established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn.²⁸

[128] The counterclaim, as I understood it, was based on actual expenses incurred during the grape-breeding projects 7 to 9. Van Wyk explained that Van Eck would have relied on underlying source documents such as invoices. Those

source documents were loaded on to Pastel. Although the original documents were destroyed those loaded on Pastel were still available at the time Van Wyk testified. The source documents were not discovered.

[129] Van Wyk conceded that the underlying calculations for determining the pro rata amounts were not before the Court. Van Wyk denied the suggestion that annexures CC1 and CC2 comprised of rough calculations. According to him the calculations were made over many weeks.

[130] In *Mkwanazi v Van der Merwe*²⁹, Van Winsen AJA said:

“Die algemene benadering dat die hof met die getuienis tot sy beskikking sy bes moet doen om die bedrag van gelede skade te bereken is aan dergelike voorbehoud onderhewig gestel in die saak van Klopper v Mazoko 1930 TPD 840 op bl. 865, waar Reger Tindall opgemerk het dat:

‘... when a plaintiff is in a position to lead evidence which will enable the court to assess the figure he should do so and not leave the court to guess the amount.’”

[131] In *Esso Standard SA [Pty] Ltd v Katz*³⁰ the Court stated the following:

“Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial...The critical question then is whether the plaintiff... has produced all the evidence that he could reasonably have produced to enable the court to assess the quantum of damage.”

[132] See also *Aaron’s Whale Rock Trust v Murray & Roberts Ltd and Another*:³¹

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss.”

[133] The extent of expenses incurred is solely within the knowledge of the defendants. No one was called to support the reasonableness of the costs reflected in annexures CC1 and CC2. Applying the principles enunciated in the abovementioned cases, my view is that the defendants had a duty to prove the expenses which they incurred but they made little effort to place available evidence before this Court. Their claim is not one for damages, where it might be sufficient to place the best available evidence before the Court. The claim is a contractual one that requires precise calculation.

[134] The defendants, in any event, failed to satisfy the requirements for the application of the best-evidence rule. That rule finds application where damages cannot be assessed with certainty or precision or are difficult to estimate. It does not apply where a party has failed to adduce evidence, even though such evidence could have been adduced. Indeed, the Court in *Esso Standard* went on to say exactly that:

“The critical question then is whether the plaintiff, having successfully proved that he has suffered damage through loss of petrol and that that damage was caused by the defendant, has produced all the evidence that he could reasonably have produced to enable the Court to assess the quantum of damage” (own emphasis).

[135] In a leading case of this division the following was said in regard to best evidence:³²

“Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss.”

[136] Annexures CC1 and CC2 are by no stretch certificates of balance or sufficiently detailed to allow for a reliable quantification. There were no detailed appendices to the two annexures furnishing a full breakdown of the claims. The annexures were not supported by documentary evidence. Macintyre testified about a dispute over invoices for services during the latter part of the service agreement. Whether the issues raised by Macintyre over those invoices were justified or not, the point is that the plaintiffs were afforded the opportunity to interrogate the invoices and source documents. Since no source documents were discovered and Van Eck was not called to testify, the plaintiffs were at a distinct

disadvantage in the presentation of their case. Van Wyk did not rely on estimates. On his own evidence the expenses relied upon were “*precisely*” calculated.

[137] During cross-examination Macintyre was referred to exhibit B62 being a “*typical monthly invoice that Colors SA would send to Vitis*”. The witness was asked whether he was able to produce similar invoices for the period February 2011 to July 2013. Macintyre testified that, although his finance director requested the invoices on a number of occasions, he had none to show. The letter from Nelson to Van Wyk dealing with the issue of unpaid invoices read:³³

"Vitis is holding invoices back from payment at the moment, as Duncan Macintyre has some queries on them. Re, travel expenses, was the journey all Vitis business, et cetera. And then the salary questions re Deon and Barbara. As either of you are aware of this, and if so, do you know the answers? Who do I need to talk to get them cleared, resolved? Bill said he would dig them out to show me, but I want to know if anyone in Paarl is aware that they are on hold."

[138] Macintyre was concerned that Vitis was being charged for expenses incurred by Colors SA which were not fairly attributable to Vitis. Van Wyk confirmed the issues regarding the disputed invoices were not resolved at the time of the hearing. Nelson also testified about queries on Colors SA invoices and said that some invoices were corrected and that he was still trying to locate credit notes on others. Queries were also raised regarding VAT, travel expenses, salaries and certain rental charges on invoices. Nelson referred to a credit invoice issued because Colors SA only invoiced 50% of the expenses it incurred on

behalf of Vitis. This occurred during August and October 2012 and according to Nelson Colors SA was not entitled to do so because it was work done under the Vitis program and the cost split was done in the UK. According to Van Wyk, each of the respective parties was doing their own thing and that is why only 50% of the invoice was paid. The split was affected at Colors SA level and not Colors UK level. It was put to Nelson that the invoice concerned the Karniel varieties and that there were already “*two separate programs*” operating at that stage. Nelson disagreed. Van Wyk subsequently corrected the proposition by agreeing that the full amount should have been reflected on the invoice. Van Wyk credited Nieuwoudt with the mistake. It is noteworthy that Colors SA knew, before this action was instituted, that its right to retain and breed with Sheehan and Vitis material was being challenged and that it may have to surrender it. It continued nevertheless.

[139] In my view, considering scant particulars and the manner in which the defendants pleaded their counterclaims, it is not possible to form a realistic view of the counterclaims’ merits in the absence of reliable evidence.

[140] First and second defendant failed to place sufficient evidence before me to determine the quantum of the main and alternative counterclaims in reconvention.

[141] Colors SA and Re: Inc raised, in the alternative, claims based on unjustified enrichment. To assess their claims, one has to consider whether the following general enrichment elements were present:³⁴

- (a) whether SNFL had been enriched;
- (b) whether Colors SA and Re: Inc had been impoverished;
- (c) whether SNFL's enrichment was at the expense of Colors SA and/or Re: Inc;
- (d) whether the enrichment was unjustified.

[142] The enrichment action must consequently embrace an inquiry not only into SNFL's enrichment, but also into the Colors SA and Re: Inc's impoverishment.

[143] Neither defendants identified the specific *condictio* on which they rely and neither party referred me to specific authority underpinning their respective submissions. These omissions are not critical.

[144] It seems to me that reliance was placed on a general action of unjustified enrichment. The facts of this case are not on all fours with the requirements of a general action of enrichment.

[145] On the facts of this case, I am asked to calculate claims for unjust enrichment in the context of the provision of services and the incurring of expenses. I have addressed the deficiencies in the evidence relating to the services and expenses above. As a starting point, there was no evidence on the objective values of the services allegedly rendered. In this case the plaintiffs disputed both services and expenses. Further, it must be established whether the expenses incurred by the Colors SA and Re: Inc were reasonable and necessary. A residual question,

which only arises if the first questions are positively decided, is the precise quantum of such expenses.

[146] Whilst I am mindful that the calculation of the claimed amount must be done according to unjustified enrichment principles, which differ from contractual principles, the lack of evidence prevents me from exercising my judicial discretion in favour of Colors SA and Re: Inc. Where there was no proven impoverishment in the form of necessary breeding and related services expenses, there could have been no question of corresponding enrichment. It is incumbent on a party who alleges unjust enrichment to establish it by means of credible and reliable evidence. It was not done in this instance.

[147] The defendants' counterclaims and alternative claims fall to be dismissed. In light of this finding, I do not consider it necessary to make a finding on the issue of prescription save to state that plaintiff's defence is not without merit.

Withdrawal of the defendants' special plea of *lis alibi pendens* and costs:

[148] The common cause facts leading up to the withdrawal of the special plea of *lis alibi pendens* were that the plaintiffs instituted action proceedings in the High Court of Justice, Chancery Division ("the derivative action"). On 6 July 2016 SNFL's attorneys addressed correspondence to defendant's attorneys placing on record that their client will not be requesting leave of the UK court to reopen derivative action proceedings. The aforementioned undertaking was only given

on behalf of SNFL UK. On 13 July 2016 defendant's attorneys replied stating that Colors SA's special plea will only be withdrawn if the derivative action was withdrawn by SNFL and a tender for costs is made.

[149] The defendants' current attorneys came on record on 23 August 2018. On 5 October 2018 the defendants' attorneys suggested to the plaintiffs that they withdrew the derivative action and tender the defendants' costs, alternatively, only withdrew the derivative action. On 12 October 2018 the defendants' counsel proposed that the defendants would withdraw its special plea if the plaintiffs provided a written undertaking not to continue with the derivative action in the UK.

[150] On 15 October 2018 the plaintiffs confirmed in writing that:

"The purpose of this letter is to hereby confirm that Special New Fruit Licensing Limited, the claimant in the derivative action, has to date, not taken any steps to apply to have the stay in the derivative action lifted or approached the court for any other relief as provided for in the consent order, nor does it have any intention of doing so in future."

[151] On 16 October 2018 the defendants withdrew its special plea.

[152] The plaintiffs argued that the undertaking of 6 July 2016 was within a week of the defendant's special plea and that there was no material difference between the 6 July 2016 undertaking and the one given on 15 October 2018. Van Wyk sought to distinguish the two letters by stating that the undertaking given on 15 October 2018 was made an order of Court. According to Van Wyk his new

attorneys were unaware of the 6 July 2016 undertaking. In my view the refusal to consider SNFL's first undertaking had nothing to do with the fact that it was not made an order of Court.

[153] Van Wyk testified that a decision was taken between the legal representatives in the UK that the derivative action would be stayed because plans were afoot to liquidate Vitis. The current proceedings were instituted subsequent to the agreement to stay the UK proceedings. Van Wyk testified that they had already spent approximately R1.6 to R1.7 million on the UK proceedings. It is also common cause that the defendants also tendered the plaintiffs' wasted costs for the postponement of this case on 6 September 2018.

[154] I cannot conclude that, in the context of this case and the circumstances preceding it, the defendants' special plea was unreasonable. I do not intend to go into all the criticisms which each side levelled at the other. Both parties could and should have done more to resolve the *in limine* defences timeously. The defendants' conduct before the withdrawal of their special plea does not warrant a punitive cost order. It is true that Defendant could have reverted sooner to plaintiffs' undertaking. I however cannot find that that omission in itself was vexatious or unscrupulous.

[155] On a consideration of all relevant circumstances, justice and fairness would best be served if each of the parties were ordered to pay their own costs in relation to the cost reserved for the special plea of *lis pendens* and the subsequent withdrawal thereof.

[156] It is a trite principle of our law that a court considering an order of costs exercises a discretion. In *Norwich Union Fire Insurance Society Ltd v Tutt*³⁵, *Holmes AJA* said in relation to the determination of an award of costs:

“[T]he basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is a question of fairness to both sides.”

[157] Equally trite is the principle that where the costs order sought includes the costs for the employment of two counsel, here too, the court exercises a discretion. In *Geerdts v Multichoice Africa (Pty) Ltd*³⁶ it was said:

“In awarding costs on the attorney and client scale, the Court has a discretion, to be exercised judicially upon a consideration of all the facts. As between the parties, it is a matter of fairness to both sides. Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs”

[158] In this case Colors SA had experience in acting as intellectual property managers for breeders around the world. Colors SA could therefore not have misunderstood its legal obligations when dealing with plant material belonging to another. In considering whether to award attorney-client costs against a party, *Stegmann J*³⁷ concluded that the defendant in that case had conducted the litigation “*in a tricky way*”, a way calculated to make the plaintiff’s case “*extremely difficult to prove and uncertain in its outcome*”. The Judge further commented that the “*low level of commercial morality*” displayed by the

defendant in its contractual dealings with the plaintiff deserved the court's condemnation.

[159] Similar criticisms can be levelled at the defendants in the present case.

ORDER:

[160] In the result, the following order will issue:

- i. SNFL is declared to be the lawful owner of all plant materials used in or produced as a result of projects 7 to 9;
- ii. SNFL is declared to be the lawful owner of all intellectual property rights vesting in the aforesaid plant materials, including but not limited to the right to apply for plant breeders' rights in respect of any of the said plant materials;
- iii. It is declared that the said plant materials located at Lelienfontein Nursery, Voor-Groenberg Nursery, De Fynne Nursery and West Cape, or at any other location, are held on behalf of SNFL;
- iv. It is directed that the said plant materials be delivered to SNFL in the following manner:
 - a) by Colors SA, Re: Inc, and Van Wyk providing peaceful and undisturbed possession of the plant materials to SNFL (SA) as the duly-authorized agent of SNFL;

- b) by Colors SA, Re: Inc, and Van Wyk providing SNFL with a detailed account of all breeding conducted by Colors SA and/or Re: Inc as part of the South African breeding programme;
 - c) by Colors SA and Van Wyk providing SNFL with details regarding the specific parent varieties used in such breeding, the number of grape bunches, and details of the plant materials that have resulted from such breeding; and
 - d) by Colors SA and Van Wyk providing SNFL, alternatively the liquidators, with an itemised whereabouts of all such plant materials.
- v. It is directed that Colors SA account to SNFL in respect of the location of the aforesaid plant materials, the parent plants of such plant materials and the source of such parent materials and all and any other records of any nature pertaining to the breeding of such plant materials;
- vi. It is directed that Colors SA, Re: Inc, and Van Wyk are hereby restrained and interdicted from transferring possession or control or disposing of, or in any other manner dealing with, the aforesaid plant materials;
- vii. The deed of cession and assignment entered into on 24 July 2014 between Colors SA and Re: Inc and the purported transfer pursuant thereto is hereby declared to be invalid, void and of no force and effect;

- viii. It is directed that each party pay its own costs in relation to defendant's special plea of *lis pendens* and the subsequent withdrawal thereof;
- ix. First and second defendant's conditional counterclaims is dismissed with costs;
- x. It is directed that first to third defendants shall pay plaintiffs costs of suit on a scale as between attorney and client, jointly and severally, the one paying the others to be absolved, including the costs consequent upon the engagement of two counsel.

HENDRICKS AJ

Appearances:

For the plaintiffs: E Fagan SC, with him S Fergus
 Instructed by Adams & Adams Attorneys

For the defendants: A De Villiers, with him M De Wet
 Instructed by Van Wyk Van Heerden Attorneys

¹ Colors SA do not expressly state in its plea that it is the owner of the project 7 to 9 plant materials. Colors SA simply averred that ownership is in dispute.

² EXHIBIT A, page 339

³ EXHIBIT A, page 308

⁴ EXHIBIT A, pages 340-341

⁵ EXHIBIT A page 348

⁶ EXHIBIT A, page 560 H

⁷ EXHIBIT A, page 560 J

⁸ Minister of Safety and Security v Slabbert (668/2009) [2009] ZASCA 163; [2010] 2 All SA 474 (SCA)

⁹ 1976 (3) SA 772 (W) at 775-6

¹⁰ Minister of Safety and Security v Slabbert 2010 2 All SA 474 (SCA) 475

¹¹ As the Appellate Division said in *Shill v Milner* 1937 AD 101 at 105: “[t]he importance of pleadings should not be unduly magnified. See also *Butters v Mncora* [2014] 3 All SA 259 (SCA) at para 107: were the Court held that: “Pleadings are for the Court and the Court is not for Pleadings. A Court is bound to consider the substantial issues between the parties”.

¹² In *Ruslyn Mining and Plant Hire Ltd v Alexcor Ltd* [2012] 1 All SA 317 (SCA) at para [18] Heher JA gave the following exposition regarding further particulars for trial:

“To deal first with the principle, the case as cited by the learned Judge all deal with applications to amend pleadings. Further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: Uniform Rule 21 (2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action or create a new one (as the trial Judge appears to have believed). The purpose of particulars for trial is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponements to seek evidence to meet a case. See for example, Thompson v Barclays Bank DCO 1965 (1) SA 365 (W) at 369 D – E ... Such particulars are only required if and when the other party asks for them and what will be furnished is to a large extent dependent on the skill and foresight adopted in the formulation of the request. Because they are not pleadings they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause and defence and, save within the parameters set by the purpose of such particulars insofar as ensuring a fair trial is concerned, no stultification of that right should be permitted. Thus, unless there is clear evidence of bad faith in furnishing of the original further particulars or in the withholding of the intention to change the thrust of the evidence or irremediable prejudice to the other party caused by reliance on incorrect or insufficient particulars furnished by his opponent relevant evidence which goes beyond the terms of particulars for trial should be admitted subject to a postponement, if necessary and an appropriate award of costs to clear the element of surprise.”

- ¹³ In *National Employers General Insurance v Jagers* 1984 (4) SA 437 (E) at 440 D – G the approach of determining credibility in isolation from probabilities was dealt with as follows:

“It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.”

- ¹⁴ 2003 (1) SA 11 (SCA)

“The technique generally employed by courts in resolving factual disputes of this nature [i.e. where there are two irreconcilable versions] may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’s reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court’s credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equiposed probabilities prevail” See also e.g. *Dreyer and another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at para 30 and *National Employers’ General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-H.)

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- ¹⁵ Standard Bank of South Africa Ltd v Ocean Commodities Inc [1984] ZASCA 2; 1983 (1) SA 276 (A)
- ¹⁶ Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd 1984 (3) SA 155 (A); [1984] 2 All SA 110 (A)
- ¹⁷ Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd [2018] ZASCA 122
- ¹⁸ EXHIBIT A, page 965
- ¹⁹ 1981 (3) SA 760, at 764 H
- ²⁰ 1970 (3) 686 (ECD), at 690C.
- ²¹ EXHIBIT A, page 494
- ²² Heher JA in Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA) See also Companies' 4(2) LAWSA para 116): "*Directors may not: (a) exceed their powers; (b) exercise their powers for an improper or collateral purpose; (c) fetter their discretion; or (d) place themselves in a position in which their personal interests conflict, or may possibly conflict, with their duties to the company.*"
- ²³ Voor-Groenberg Nursery CC Colors Fruit South Africa (Pty) Ltd (A21/12) [2012] ZAWCHC 157 (23 August 2012), also exhibit A 521
- ²⁴ Silberberg & Schoeman: The Law of Property in South Africa; 5th Edition at pp 156- 159
- ²⁵ Transcript 310 to 312; and 644
- ²⁶ See Metzger, E. (2004) Acquisition of living things by specification. Edinburgh Law Review, 8 (1). pp. 112-115. ISSN 1364- 9809 - <http://eprints.gla.ac.uk/3107/>
- ²⁷ EXHIBIT A, page 608
- ²⁸ Tshishonga v Minister of Justice and Constitutional Development and Another 2007 (4) SA 135 (LC); Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A); ABSA Investment Management Services (Pty) Ltd v Crowhurst [2006] 2 BLLR 107 (LAC)
- ²⁹ 1970 1 SA 609 (AD) 631H
- ³⁰ 1981 (1) SA 964 (A) at 970 E-H
- ³¹ 1992 (1) SA 652 (C) AT 655 H – J
- ³² Aaron's Whale Rock Trust v Murray & Roberts Ltd and another 1992 (1) SA 652 (C) at 655H-J.
- ³³ EXHIBIT B, page 64
- ³⁴ Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA)
- ³⁵ 1960 (4) SA 851 (AD) 854
- ³⁶ Geerdts v Multichoice Africa (Pty) Ltd (JA88/97) [1998] ZALAC 10
- ³⁷ Lovemore Mining Pty Ltd v International Shipping Co (Pty) Ltd 1987 (2) SA 149 (W) at 216-217