IN THE SUGAR INDUSTRY APPEALS TRIBUNAL

In the matter of:

THE APPEAL OF JW HORN AGAINST THE DECISION OF THE SUGAR INDUSTRY ADMINISTRATION BOARD

RULING

Mr J W Horn is a grower of sugarcane in Mpumalanga and has been allocated the grower code number 135436A. On 17 January 2013, the Appeals Tribunal received a notice of appeal from the Administration Board, lodged with it by Mr Horn, in terms of which he noted an appeal to the Appeals Tribunal against a decision of the Administration Board. That decision was one made by the Administration Board on appeal to it (by Mr Horn) of a decision of the Lowveld Pest, Disease and Variety Control Committee ("the Committee"). The decision of the Committee appealed to the Administration Board was one in terms of which Mr Horn was required to destroy the standing crop on field number 9B and plough out the field with immediate effect as a result of a second inspection for smut-infected sugarcane undertaken by the Committee or at its instance on 19 November 2012.

In terms of Section 33 of the Sugar Industry Agreement ("the Agreement"), any person having a direct interest in a decision, order, ruling or determination of the Administration Board shall have the right to appeal to the Appeals Tribunal against the decision, order, ruling or determination. It is evident that it matters not whether the decision, order, ruling or determination of the Administration Board is one which it arrives at as a body of first instance or whether it does so on an appeal to it. Furthermore, it is clear that Mr

Horn has a direct interest in the decision of the Administration Board considering that he is the grower of cane on the field in question. However, Section 33 of the Agreement requires the affected person to lodge, with the Administration Board, a written notice of appeal within twenty one [21] days of the date on which the decision, order, ruling or determination is notified to him or her, failing which the right to appeal shall lapse and the decision, order, ruling or determination of the Administration Board shall be final and binding. It therefore becomes imperative to examine the lodging of the notice of appeal in this matter.

The notice of appeal lodged by Mr Horn deals with the merits of the appeal and does not purport to canvass any jurisdictional compliance with the requirements of the Agreement. Under its inquisitorial powers, the Tribunal has established that the decision of the Administration Board or the reasons for the decision, in terms of which Mr Horn's appeal from the decision of the Committee was dismissed, was furnished to Mr Horn on 13 December 2012. (The decision was taken by the Administration Board on 11 December 2012 and communicated to Mr Horn on the same day. However, in terms of that notification he was invited to request further reasons if he wished to do so. He did so and these further reasons were communicated to him on 13 December 2012. On first principles of law, a person is only considered to be in a position to appeal once he is in possession of reasons. In the circumstances, it will only be fair and just to regard the date from which *dies* began to run as being 13 December 2012.). Indeed paragraph 1 of Mr Horn's notice of appeal refers to the decision of the Administration Board of 13 December 2012. Mr Horn accordingly had twenty one [21] days from 13 December 2012 within which to lodge his notice of appeal.

The word "*days*" is not defined in the Agreement and therefore the default position in law must apply, namely that the days are reckoned to be calendar days. This is, in any event, supported by the fact that when the Agreement wants to reckon days which would normally constitute what is known in law as *"court days*", it is not reticent to do so. Sections 21(b) and 96(c) of the Agreement have reference.

The notice of appeal was lodged by Mr Horn with the Administration Board on 17 January 2013, which is also the day on which the Administration Board referred the appeal to the Appeals Tribunal. Calculating twenty one [21] calendar days from 13 December 2012, it is readily evident that the notice of appeal was lodged well out of time. Even if Mr Horn had applied for condonation for the late filing of his notice of appeal, it is doubtful if the Appeals Tribunal could grant such condonation. The Appeals Tribunal clearly has the authority to condone non-compliance with its rules of procedure because it has made provision for that in the Rules, bearing in mind also that the Agreement permits the promulgation of such rules. Unlike the High Court, the Appeals Tribunal has no inherent jurisdiction but is very much a creature of statute. In those circumstances, if the Agreement provides that on a failure to lodge the notice of appeal timeously the decision of the Administration Board becomes final and binding, as Section 33 of the Agreement does, then the Appeals Tribunal is just as bound to that finality.

That should be *cadit questio* and the end of the matter.

However, on enquiry from the Appeals Tribunal it has been established that Mr Horn attempted to lodge a notice of appeal with the Administration Board on 17 December 2012. It appears that Mr Horn attempted to do so by addressing it to an email address which does not exist. This was only discovered when Mr Horn telephoned the South

African Sugar Association to enquire as to the fate of his appeal. Following on this discovery, Mr Horn then lodged the notice of appeal with the Administration Board on 17 January 2013 and this was in turn referred to the Appeals Tribunal as aforesaid. Ignoring for a moment that if Mr Horn sent the notice of appeal to a non-existent email address he must have received a non-delivery notice, what his actions do demonstrate is an intention to appeal the decision of the Administration Board. It is doubtful whether that attempt at lodging a notice of appeal constitutes substantial compliance with the provisions of the Agreement and the Appeals Tribunal expressly records that it makes no finding of any such substantial compliance. However, it is prepared to assume, for purposes of this ruling that there was substantial compliance.

Mention must also be made of the fact that an email was addressed by the Administration Board to Mr Horn advising him that he had until the 18th of January 2013 by when to lodge his notice of appeal. It appears that this email from the Administration Board arose from the Administration Board mistakenly reckoning days under Section 33 of the Agreement as being court days. Again it is doubtful whether such incorrect interpretation of the Agreement can give rise to any form of estoppel considering that the statutory enactment is clear and that a meaning cannot be ascribed to it by word or action which is inconsistent with its correct meaning. However, the fact that this email was sent cannot be ignored and the Appeals Tribunal is prepared to assume that Mr Horn is entitled to a judgment on the merits of his appeal.

In his notice of appeal, Mr Horn indicated that he did not believe that there was any reason for the appeal to be heard on a priority basis. In terms of Rule 55 of the Appeal Tribunal's Rules any appeal in regard to a plough-out order is considered *prima facie* to warrant a priority hearing. There was nothing on the appeal record to dissuade the

Appeals Tribunal from this position and it was accordingly resolved that the appeal be heard on Tuesday, 5 February 2013, that being the earliest date on which the Appeals Tribunal was practicably able to congregate.

Mr Horn elected not to attend the appeal, as was his right to do. (He was also content to confine his appeal to the documents of record before the Administration Board). It appears that he so elected out of concern for the costs attendant upon travelling from Mpumalanga to Durban. He cannot be faulted or criticised for choosing not to attend. The Appeals Tribunal does not want itself to be confined to hearings where parties are represented by batteries of legal representatives. The Appeals Tribunal is designed to serve the sugar industry and must strive to do so within all reasonable parameters. In the circumstances, the Appeals Tribunal, having due regard to its inquisitorial powers, resolved to satisfy itself, one way or another, in regard to the merits of Mr Horn's appeal.

The background to the appeal is that the inspection team of the Committee inspected Mr Horn's field 9B, being 3.9 hectares in extent, and did so on 17 October 2012. The cane in the field was found to be infected with smut with a concentration of 7.6%. On the basis of the threshold scales applied consistently by the Committee, Mr Horn was issued, on 18 October 2012, with a plough-out order. However, he was invited to rogue the field and to ensure that the infection level was less than 4% by the time of a second inspection to be carried out a month later. The second inspection was carried out on 19 November 2012 and the level of infestation was found to be at 4.13%. In terms of the threshold table, this then required an immediate plough-out of the field and on 27 November Mr Horn was served with an immediate plough-out order.

It is against that immediate plough-out order that Mr Horn appealed to the Administration Board, which, as aforesaid, dismissed his appeal. It is against that dismissal of his appeal to the Administration Board that Mr Horn has lodged an appeal to the Appeals Tribunal as is his right to do under the Agreement.

The substance of Mr Horn's basis of appeal is that, having regard to the fact that he succeeded in bringing the smut infestation level down from 7.6% to 4.13%, he should not be required to immediately plough-out his field. This on the basis that he continues to rogue the field and that if the Appeals Tribunal were to direct the Committee to undertake a further inspection of the field, it is likely to be found that the infection level has indeed fallen within the acceptable threshold, namely below 4% infection, and if that is so then the plough-out order should be deferred until after harvest of the crop. Mr Horn's concern is that should the plough-out order not be deferred, he stands to be financially prejudiced.

Having understood the substance of Mr Horn's appeal, the Appeal's Tribunal was anxious to satisfy itself in regard to the level of confidence that could be placed on the methodology employed by the Committee in reaching its findings. The Appeals Tribunal called for more information in the form of the raw data that had been used to calculate the level of incidence of the field at the two inspections undertaken by the Committee. In addition, two technical specialists from the South African Sugarcane Research Institute ("SASRI"), Ms Sharon McFarlane and Mr Rowan Stranack, attended the hearing, at the request of the Appeals Tribunal, to add clarity on technical issues. Furthermore, Ms Karlien Trumpelmann, the Pest and Disease Officer of the Committee availed herself telephonically to the Appeals Tribunal.

The Appeals Tribunal enquired about the sampling process and Mr Stranack advised that a process was recommended by SASRI that specified the number of inspection sites that a 3.9ha field would require for the result to be statistically reliable. He also furnished information as to how the particular inspection sites were chosen in the field. He explained that SASRI has a proposed pattern of location of inspection sites such that an evenly distributed pattern would be followed that would ensure the field was tested over a well distributed area.

When questioned about the quality of the resulting data and the means of 7.6% and 4.13% yielded by the two tests, Ms McFarlane pointed out that on both occasions there were incidence of observed smut on each and every one of the 15 sites inspected. She therefore concluded that the statistic was reliable.

When asked if the level of infection in the Horn field could have resulted from a previous infection of a neighbouring farm, Ms McFarlane was of the view that because the smut infection was widely distributed in the field that the infection may well have been in the seed cane used in establishing the field but added that the field was now a 7th ratoon and therefore one cannot be certain about how the infection occurred.

Ms Trumpelmann was asked the same question and she likewise could not be specific about how the field became infected. Ms Trumpelmann, when asked about the effort Mr Horn had put into reducing the increase of the smut form the initial observation of 7.6%, commented that other growers had successfully reduced infections in fields of greater concentration than 7.6% to below the 4% threshold and that it very much depended on how vigorously a grower attempted to rogue his field. She added that the Committee had extended an offer to Mr Horn to train his personnel to undertake the roguing exercise effectively, but he declined this offer.

In more general terms, all three individuals, when questioned by the Appeals Tribunal, explained that smut was a particularly endemic pest infestation in the Mpumalanga region and that the industry as a whole was striving to reduce, over a period of time, what was considered to be acceptable threshold levels of infestation. It appears that the present threshold of below 4% infestation was in fact previously higher and that it is intended, over the next few years, to reduce the present threshold even further. They explained that this was a very serious problem and had to be constantly monitored as it had the potential to ravage the growing industry. They argued that it was imperative that once a threshold was set, that the boundaries thereof be respected. In effect, they contended that whilst it might appear harsh, when looking at an individual case such as Mr Horn's, that he should be required to immediately plough-out the field because the second inspection yielded a result which was only marginally higher, this would lead to a chaotic situation in that the industry would not know how much of a deviation from the established threshold was acceptable and what was not. The only way to properly regulate the industry in a fair and organised manner was to adhere to established norms.

It must be borne in mind that when an infestation level is above 7%, as was the case with the result of the first test on Mr Horn's field, it is considered serious enough for a plough-out order to be issued. In the interests of balancing financial prejudice to a grower against protection of the growing industry, what then happens is that, provided the grower can successfully rogue his field to below 4% within a month, he will effectively earn a deferment of the plough-out order until after the crop has been harvested. This is to be contrasted, for example, where on a first inspection the smut infection level is between 4% and 7% and where a rogue out order is issued. When the first inspection yields an infection level above 7%, there is a plough-out order. But this

order is held in abeyance for a month in order to give the grower an opportunity of roguing his field to below 4%. If he fails to do so then an immediate plough-out order is served on the grower.

On fairly intense interrogation of the three persons mentioned aforesaid, the Appeals Tribunal satisfied itself that there are no impediments to a successful roguing exercise. Assistance in the form of training at no cost is offered by the industry. There is a great deal of anecdotal and empirical evidence of growers with smut infection levels far higher than 7.6% who, through vigorous roguing, have succeeded, within the window of one month, of bringing the infection levels down to well below 4%. The Appeals Tribunal has not heard from Mr Horn any reason or explanation as to why this was not possible in his case.

In all the circumstances, the Appeals Tribunal is persuaded that there is considerable merit in the manner in which this issue is dealt with by the industry. They employ a system which is fair and balanced and which is applied consistently. To allow deviations from that would lead to a chaotic situation. The Appeals Tribunal accordingly concludes that it must dismiss Mr Horn's appeal against the decision of the Administration Board and it does so in terms hereof. The plough-out order of the Committee dated 27 November 2012 must accordingly be implemented immediately.

As pointed out earlier, Mr Horn's complaint, at its heart, is that he will suffer financial prejudice. His relief does not lie in seeking to avoid the plough-out order. As a responsible grower, he must abide by the rules of the industry and his field in question must immediately be ploughed-out. His relief, if any, lies in seeking to invoke, in his favour, the provisions of Section 87 of the Agreement. Under that Section, if it can be established to the satisfaction of the Sugar Association that Mr

Horn has become obliged to plough-out the field because of the pest and disease control provisions of the Agreement (which is clearly the position in this case) and that any loss suffered by him due to this occurred in circumstances beyond his control, the Sugar Association, in its discretion, may compensate him for his loss. It is also worth noting that any decision of the Sugar Association in this regard may also be appealed to the Appeals Tribunal.

In all the circumstances, Mr Horn's appeal to the Appeals Tribunal is dismissed.

Advocate OA Moosa (Chairman)

Advocate AK Kissoon Singh (Vice-Chairman)

Mr CM Linnett

Mr TJ Murray

Mr JH Wixley

11 February 2013