IN THE SUGAR INDUSTRY APPEALS TRIBUNAL

In the matter between

MELMOTH GROWERS AND OTHERS Applicants

and

TONGAAT HULETT SUGAR LIMITED Respondent

RULING

Delivered on:- 29 September 2008

This is a Ruling of the Appeals Tribunal in respect of the hearing of the matter on the 4th and 5th of June 2008, the 21st to the 23rd of July 2008 and the 29th of August 2008.

On the 17th of March 2008 the Appeals Tribunal dismissed, at that stage, the Respondent's argument re an absence of jurisdiction on the part of the Appeals Tribunal to hear and determine the application of the Applicants. The matter was then referred for the hearing of oral evidence and which oral evidence was heard on the days aforesaid save for the 29th of August 2008 on which latter day the parties argued the application.

At the commencement of the hearing on the 4th of June 2008 the Respondent brought an application for the recusal of one member of the Appeals Tribunal, Mr Bruce Galloway, the Growers' representative on the Appeals Tribunal. The recusal application was premised on an existing dispute between the Respondent and Mr Galloway which involved the sharing of proceeds which would become payable pursuant to the sale of a farm which was leased by the Respondent to Mr Galloway and which farm was the subject of a land claim.

At the time it was resolved that Mr Galloway would recuse himself and would be replaced by Mr Neil Anderson. It was indicated that reasons would be furnished in due course in regard to why it was resolved that Mr Galloway would step down.

The test in law for a recusal is a reasonable apprehension of bias and not actual bias. The test is whether a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased. See ***President of the RSA –v- South Africa Rugby Football Union 1999 (4) SA 147 (CC)***. There is a difference between grounding a complaint of bias on the conduct of a Presiding Officer and grounding such complain on the relationship between the Judge and one of the parties. It is generally far harder to establish a reasonable apprehension of bias in the former case. See ***S –v- Basson 2007 (3) SA 582 (CC)***. Examples of where recusal has been allowed based on the relationship, good or bad, between the presiding officer and one of the litigants is to be found in ***Moch –v- Nedtravel (Pty) Ltd t/a American Express Travel Service 1996 (3) SA 1 (A)*** and *Ex-parte* ***Pinochet (No 2) (2000) 1 AC 119***.

The Respondent made it very clear in its application that its request for the recusal of Mr Galloway should not be construed as impugning in any way on the integrity and character of Mr Galloway. Rather its application was based on an apprehension of bias. Considering the dispute between the Respondent and Mr Galloway concerning the farm, Mr Galloway felt it proper that he recuse himself.

The matter then proceeded with an opening address by Mr Mullins on behalf of the Applicants followed by the evidence of the Applicants' witnesses. The upshot of the opening address was an explanation of the Sucrose cane payment system which applied before 2000 and which was based on the sucrose content in cane. All cane entering mills was subject to the Direct Analysis of Cane ("DAC"), which measures the sucrose content of the cane, and to this was applied a Pol adjustment to allow for any loss in sucrose content as a result of the milling process. Mr Mullins said that there was no significant difference in the Pol adjustment factor between and amongst the different mills with all such factors being within an acceptable band.

By contrast the Sugar Industry Agreement of 2000 ("SIA 2000") introduced a new cane payment system, with a Recoverable Value ("RV") cane payment system which is based on the sucrose, the non-sucrose and fibre content of cane. This new cane payment system was designed to improve the quality of cane delivered to mills by the cane growing sector of the Sugar Industry and created a positive disincentive for growers to deliver cane with high non-sucrose and fibre content. The content of sucrose, non-sucrose and fibre in cane delivered is still measured via the DAC methodology and is then adjusted by a number of factors which recognise the performance of the particular mill to which the cane has been delivered. One of these adjustment factors is the Brix minus Pol factor which adjusts the level of non-sucrose

content in cane delivered to a particular mill. The Brix minus Pol factor measured at the Felixton Mill has averaged 2.73 over a period of thirteen years and is considered to be out of an acceptable band. Its impact on cane payment had never been contemplated when the SIA 2000 was concluded.

Applicants then led the evidence of Dr Adrian Wynne who holds a Bachelor of Science in Agriculture, a Masters of Science in Agriculture, a Masters in Business and a Doctorate in Business. Dr Wynne is the Director of Industrial Affairs at the South African Cane Growers Association. He has been with Cane Growers since 1999. Dr Wynne gave evidence and explained the DAC methodology applied under the Sucrose cane payment system and the methodology applied under the RV cane payment system. He explained that the industry is structured on the basis that about 64% of the overall proceeds in the industry is paid to the Cane Growers with about 36% being paid to the Millers. The introduction of the RV cane payment system resulted in a redistribution of growing sector proceeds amongst growers in the industry with the average proceeds to the coastal growers decreasing and the average of the inland growers increasing. He also explained that this had resulted in negotiations taking place between a miller and its supplying growers to compensate growers for additional costs associated with farming for maximum RV content in cane which contributed to the growing sector accepting the new cane payment system. The Felixton growers noticed the unusually high Brix minus Pol factor at the Felixton Mill for the first time in the 2001/2002 season. He relied on Section 5 of the Act which provides:-

> "*Unless the agreement expressly provides to the contrary in respect of any particular growers, millers or refiners, or any particular class or category of growers, millers or refiners, any right conferred, or any obligation imposed, upon growers, millers or refiners under the agreement, shall be construed as applying equally and without distinction to all growers, millers and refiners, respectively.*"

for the contention that the SIA 2000 must be interpreted in such a manner that diverted growers are compensated for any losses occasioned by the diversion in addition to any costs incurred consequent thereon.

Applicants then led the evidence of Mr Gonaseelan Naidoo who holds a Masters in Science and Biochemistry and a Masters in Business Administration. Mr Naidoo is the General Manager for Cane Testing Services having been with Cane Testing Services for eleven years. He testified that the unusually high Brix minus Pol factor at Felixton, as with all information concerning Brix minus Pol factors at the other mills, was available to the entire industry. Prior to 2000, that information would not necessarily have been relevant to cane growers. Cane Testing Services had tested for Brix minus Pol for diverted and undiverted cane in regard to growers whose home mill was Amatikulu with the result that there could be no doubt about the higher Brix minus Pol factor at Felixton.

The evidence of Mr Colin Hohls was then led. He is one of the Melmoth Growers affected by the diversion from the Amatikulu Mill to Felixton Mill. He testified that the RV cane payment system had benefited the industry in that it created incentives to improve efficiencies within the industry. He did not know or realise, nor did it ever occur to him, as to what effect the higher Brix minus Pol factor at the Felixton Mill would have been on any cane diverted to the Felixton Mill. The problem with the higher Brix minus Pol factor at the Felixton Mill was only picked up by the diverted Amatikulu Growers at the end of 2006 or early 2007. Its impact on cane payment had been a complete oversight at the time that the SIA 2000 had been concluded. He confirmed that the diversions in issue were undertaken by consensual agreement.

That was the evidence for the Applicants.

The Respondent's first witness was Mr Michael Fell, the Commercial Manager of the Respondent. He gave evidence concerning the length of the milling season which was, on average, a period of time covering two thirds of the year or thirty six weeks. Felixton by contrast had a milling season of thirty five weeks. The benefit to the grower of a shorter milling season was that the cane was delivered over a more optimal time when the RV content in cane was on average at its highest. Mills benefited because more sugar was able to be produced as a result of more RV being received in the cane delivered to the mill. A sufficient mass of cane was necessary to ensure a continued production. He said that it was significant, but difficult to quantify, the impact upon the grower of not having his entire crop milled. The loss of R5.65 per ton claimed by the diverted growers would be a loss in an ideal world. The fact is, he said, that the diverted growers were subsidising the other Amatikulu

growers. He gave evidence that although there would be a change of ratio the overall amount paid to the growers would remain the same. He did not think that the Respondents suffered a loss as a result of the diversion.

The Respondent then called Mr Peter Douglas McKerchar, the Commercial Director of the Respondent. His evidence covered, in broad brush, two areas, namely changes to the Sugar Industry Agreement and the objectives of the RV Payment System. He explained that he had been an integral part of the discussions which led to the SIA 2000. The SIA 2000 was achieved by consensus with there being eleven millers and eleven growers represented on the Council of the Sugar Association. The only change to what is now clauses 126 to 129 of the Agreement was the definition of the cost of cane delivery. The SIA 2000 is a fine balance. He used the analogy of a spider's web and said that any impact on one part of the web reverberated throughout the web. He then went on to explain the considerations which led to the adoption of the RV cane payment system. Fibre and non-sucrose impact negatively on the ability to extract sucrose from cane and the RV formula is an internationally accepted measure. The growers' primary entitlement was collective and not individual and growers always received collectively at least the share of the net divisible proceeds that accrues to growers. Any shortfall in the share of net divisible proceeds accruing to diverted growers had been paid to all other growers in the industry.

That was the evidence for the Respondent.

What was set out in the Ruling of the Tribunal of 17 March 2008 continues to remain relevant and provides the backdrop to this Ruling. As previously determined, the SIA 2000 is subordinate legislation and must be interpreted as such. To this there are two caveats. The Applicants say that in interpreting the SIA 2000, the fact that it had its genesis as an agreement must be borne in mind. The Respondent says that *qua* agreement the Appeals Tribunal does not have the jurisdiction to amend the SIA 2000 as the authority to do so vests with the Minister.

The Applicants originally appeared to rely on clause 133 of the SIA 2000 which deals with the obligation of the home mill to pay to the grower a cane price based on the RV content of the cane. Previously the Applicants sought to contend that because the home mill remained liable for payment, compensation should be on the basis as if no diversion had taken place. The Applicants now accept that diversion is the catalyst which gives rise to any suggestion of compensation under the provisions of clause 128 of the SIA 2000 and seek compensation for losses sustained as a result of the diversion.

Applicants also do not contend for a rectification of the SIA 2000 considering that the Appeals Tribunal has already held that the SIA 2000, as it presently stands, is in fact subordinate legislation and that if there is any scope for relief to the Applicants it must be on the basis of an interpretation of the SIA 2000.

Now what is not in dispute is that the move from the Sucrose cane payment system to the RV cane payment system is to the advantage of the entire industry. It was designed to create and engender greater efficiency and result in a higher tonnage of sugar being produced in the industry. What it did was to create a positive disincentive for growers to deliver high non-sucrose content in cane. This incentivises all growers to deliver cleaner cane with maximum sucrose content.

What is also not in dispute is that the Brix minus Pol factor is abnormally high at the Felixton Mill. This abnormally high Brix minus Pol factor is the result of either:-

(a) Some part of the milling process at Felixton, which would render the non-sucrose content higher in reality. or

(b) An anomaly in the cane testing regime, which would render the non-sucrose content only apparently higher.

There can be no doubt that despite best endeavours the reason for the higher Brix minus Pol factor at Felixton remains unresolved. The Appeals Tribunal is satisfied, more particularly following on the affidavit of Mr David Meadows, the Executive Director of Technology Management at the Respondent, that the Respondent has been totally open and fully co-operative in regard to all efforts made to get to the bottom of the abnormally high Brix minus Pol factor at Felixton.

There is also no dispute that the diversions which form the subject matter of the present dispute were effected by agreement and were not the result of compulsory diversion pursuant to the provisions of clause 126 of the SIA 2000. There can also be no doubt that as a result of the higher Brix minus Pol factor at Felixton the diverted growers are being allocated a lower recoverable value content in their cane. The Applicants contend that they should not be penalised as it were for the vagaries of a particular mill over whose production processes they have no control whatsoever. The Respondent accepts that the Applicants are achieving a lower RV content in their cane than they otherwise would have and that this is through no fault of the Applicants. The Respondent contends, however, that it should not be directed to compensate the Applicants for, *inter alia*, the reasons that:-

(a) The fact that the cane is diverted works to the advantage of all concerned. Because the cane is milled over the optimal months, the sucrose extracted is higher than it would otherwise have been.

(b) There is no change to the overall amount paid to the growers. The growers still receive approximately two thirds of the industry proceeds.

(c) If anything, the diverted growers are subsidising the non-diverted Amatikulu growers, as well as the rest of the growers in the industry, and should be looking to those growers for compensation.

Although very complex, it would appear that the net result is the following:-

(a) The diverted Amatikulu growers are prejudiced by a lower RV content in their cane but are advantaged by a higher RV Price.

(b) The other millers are losing out by paying more for their cane than they otherwise would be.

(c) The other growers in the industry are benefiting at the expense of the Felixton growers and the Amatikulu growers who have their cane diverted to Felixton.

In addition to the aforegoing reasons, the Respondent contends that any direction from the Appeals Tribunal requiring the Respondent to compensate the Applicants would have the effect of disturbing the finely balanced equilibrium within the industry. The Applicants counter this by suggesting that that equilibrium can be left intact by treating the compensation as a payment outside of the Cane Payment System much as the costs of delivery and cane testing are treated. To this the Respondent says that even the Farming for RV cane payment system, which was negotiated on a mill by mill basis in order to get industry buy in into the RV Payment Method, was made part of the cane payment system and is integral to the equilibrium in the industry. The only provision in the SIA 2000 for extraneous payments are those relating to the costs of cane delivery and cane testing.

The Respondent has raised the *causa* upon which the Applicants' claim is based. The Respondent contends that the claim is not delictual nor is it contractual. Clearly, it could only be contractual if the Appeals Tribunal were able to import a term into the SIA 2000 expanding clause 128. The Appeals Tribunal cannot import such a term for, *inter alia*, the reasons that:-

(a) On the grounds on which it has to deal with the SIA 2000, the Appeals Tribunal must do so on the basis that it is subordinate legislation as previously determined.

(b) It is only the Minister who may alter the SIA 2000. That is not a right which vests in the Appeals Tribunal as correctly pointed out by the Respondent.

This then leaves the basis of the Applicants' claim as one which must be predicated on statutory interpretation, more particularly the so-called purposive approach of interpretation. The Applicants have argued, with much vigour, that the provisions of clause 128 of the SIA 2000 are clearly intended to ensure that growers subject to diversion are not in any manner financially prejudiced as a result of such diversion. Applicants point to the provisions of clause 128(c) and contend that it is confined to a situation where diversion takes place mainly to suit the grower concerned. They argue that other than for what is envisaged in clause 128(c), the default provisions of clauses 128(a) and (b) cover the present situation in that the diversion of cane in the present case meets the jurisdictional requirements of clause 128(a) in that the diversion was clearly, *inter alia*, to suit the convenience of the mills.

The short answer to the Applicants' reliance on the default provisions of clause 128 is that it is common cause that the diversions in the instant case were as a result of an agreement and not through any compulsory diversion. The preamble to clause 128 provides for such an agreement. It is also common cause that in concluding that agreement, the Respondent was innocent insofar as it did not note or bring to the attention of the Applicants the negative impact of the abnormally high Brix minus Pol factor at Felixton. At best for the Applicants they could resile from such agreement based on an innocent misrepresentation (if such a beast as an innocent misrepresentation by silence exists). In fact Applicants appear to have done so. But this would not entitle the Applicants to a damages claim, that is, a claim for compensation.

In any event the Appeals Tribunal is not persuaded that the provisions of clause 128 were intended to cover losses in addition to out of pocket expenses incurred in respect of cane delivery and cane testing. Applicants have relied on authority which supports the notion that it is open to the Tribunal to not merely place an interpretation on the language contained in the Statute but to modify it if necessary. See ***Durban City Council –v- Gray 1951 (3) SA 568 (A) at Page 580B***.

However, it appears to the Tribunal that the present is more akin to a situation where the Appeals Tribunal is not being called upon to modify the language of the legislation but to read into it a provision that is not presently there. As was said in ***S –v- McBride 1979 (4) SA 313 (W) at 324C-D***:-

> "*The fact that the result in this case may be unfortunate does not in my view indicate clearly that the legislature must have intended otherwise. It is possible that there is a hiatus in the Act in that the legislature did not clearly contemplate a case such as this and consequently did not provide a means of dealing with a person who has recovered from his mental illness. However, it is not for the Court to fill any such possible gap by inventing its own procedure to meet the case*."

In all the circumstances, the Appeals Tribunal is not persuaded that it is able to read into the Agreement that which is postulated by the Applicants.

Even if the Appeals Tribunal could do so, however, it would be disinclined to do so for, *inter alia*, several other reasons.

There can be no doubt that although the diverted growers do receive a lower payment for their cane than they otherwise would have if their cane had not been diverted, they also stand to benefit from having their cane milled at the optimal time. How one quantifies this exercise is a matter of some considerable difficulty. It is also not in dispute that, in effect, the non-diverted Amatikulu growers (as well as all the other growers in the industry) are subsidised by the diversion. In those circumstances it would be inequitable to require the Respondent to compensate the Applicants. Furthermore, the Appeals Tribunal accepts that the present equilibrium in the industry has been arrived at by compromise and agreement and that it would be iniquitous to disturb that equilibrium by dealing with the present problem in isolation.

In addition to the aforegoing, it is also accepted that the other mills are paying a greater amount for their cane than otherwise would have happened as a result of the abnormally high Brix minus Pol factor at Felixton. To permit the present claim would invite claims from these other mills as well. But perhaps most telling of all is that whilst it is accepted that the Brix minus Pol factor at Felixton is abnormally high, from the graph depicting the five year average Brix minus Pol factor across all the mills as depicted on the very first referral of the matter to the Association, it is clear that there is a great divergence in the Brix minus Pol factor across all the mills. Notionally a diversion from the Gledhow Mill to the Malelane Mill would also result in a negative Brix minus Pol factor approximating a difference of nearly one unit. To give a ruling in favour of the present Applicants would open the floodgates to innumerable such claims, something which the Appeals Tribunal has to guard against for the sake of the industry. To this is added the further complication of what is to happen when a diversion takes place from a mill with a higher Brix minus Pol factor to a mill with a lower Brix minus Pol factor resulting in a net gain for the diverted grower.

In the final analysis also, the Appeals Tribunal is of the view that no violence is done by its finding to the provisions of Section 5 of the Act. It is not as if the Amatikulu diverted growers are being discriminated against. The diversion rules apply to all millers and all growers. Inherent in the diversion regime already is the fact that depending upon the home mill in question, the RV content in cane attributable to each grower's cane is not precisely the same. In fact there is a fair amount of variance. Section 5 does not mean that every grower must receive precisely the same RV content in cane. It cannot for the simple reason that not all cane yields the same RV content nor does every mill do so.

The Applicants, as *dominus*, adopted the sensible approach of notifying interested parties about their application. Considering the result, it does not matter that notice of the application was not given to the Minister. Should the Applicants resolve to take this matter further, they would be well advised to serve notice on the Minister timeously.

As to the question of costs, the Appeals Tribunal is a creature of Statute and has no inherent jurisdiction of its own. No provision is made in the Agreement for any authority or jurisdiction to the Appeals Tribunal to make cost orders. This omission from the Agreement is, in all likelihood, deliberate considering that the entire regime of the Act and the Agreement is to encourage the industry to resolve its differences within the industry itself. Those circumstances do not normally admit of an authority to award costs as that would go against the grain of the regime aforesaid.

In the final result, the Applicants' application is dismissed.

Having so dismissed the application, however, the Appeals Tribunal notes that it has considerable empathy for the plight of the diverted Amatikulu growers. It is so, as it is accepted, that no party realised the impact of the abnormally high Brix minus Pol factor at Felixton when the SIA 2000 was concluded and the RV cane payment system was adopted. That abnormally high Brix minus Pol factor has caused direct grief to the Felixton growers, to the diverted Amatikulu growers as well as all the other millers in the industry as pointed out in this Ruling.

In all the circumstances, the Appeals Tribunal urges upon the Association that it give its urgent attention to this entire matter. Such an urging might be cold comfort to the Applicants in the present matter as they would contend that the matter has been before the Association and has either not received the attention it deserves alternatively no practical solution has been found. Notwithstanding, the Appeals Tribunal would be remiss in its obligations to the industry were it not to urge upon the Association that which it does in terms hereof. It would be highly disappointing if as a result of this directive nothing was done by the Association to address what is obviously a problem within the industry.

ADV O A MOOSA SC
MR EDWARD MVUSENI NGUBANE
MR KEITH DUANE
MR HANS HACKMANN
MR NEIL ANDERSON