IN THE SUGAR INDUSTRY APPEALS TRIBUNAL

In the matter of:

THE APPEAL OF MR C ROUX AGAINST THE DECISION OF THE SUGAR INDUSTRY ADMINISTRATION BOARD

RULING

This is an appeal from a decision of the Administration Board given on appeal to it. The matter came on appeal to the Administration Board arising from an order made by the Lowveld Local Pest and Disease Control Committee directing the appellant, Paradise Creek Investments 18 (Pty) Ltd, to plough out approximately 11.3 hectares of farm under cane, more specifically Field 10B.

The Respondent is cited as the Administration Board. It is clear from the Sugar Industry Agreement that the Administration Board is not a legal persona. However, two material reasons militate against any issue being made of this. Firstly, the Appeals Tribunal is enjoined under the Industry Agreement to be far more flexible than a court of law. Secondly, even in a court of law it is permissible to cite the trading name of a legal personality. Perhaps the more correct respondent would have been the Sugar Association of which the Board is a high level committee. In any event, the Respondent makes no issue of this and prefers to deal with the merits of the dispute.

The appellant was not present at the hearing, either personally or by legal representation. The Respondent, or more correctly the South African Sugar Association, was represented by Mr Nick Theunissen of Shepstone and Wylie attorneys.

The Appeals Tribunal was scheduled to meet on 22 November 2010. Pursuant to a request from the Sugar Association, this appeal was put on the agenda of the Appeals Tribunal for 22 November 2010. All that the Tribunal did was to grant a preference in regard to the enrolment of the appeal with the question of urgency being held over for determination in the event of urgency being opposed. Urgency was indeed opposed and the respective contentions of the appellant and respondent were considered in regard thereto with the Appeals Tribunal holding that the matter was indeed urgent and should proceed to hearing immediately. An *ex tempore* ruling on urgency was delivered and is accordingly of record. The reasons for that ruling appear from that award and no purpose would be served in repeating those reasons herein.

Proceeding to the merits of the appeal, due regard was had by the Tribunal to the various submissions and contentions raised and made by the respective parties in their written submissions. Regard was also had to the oral argument tendered by Mr Theunissen on behalf of the Respondent.

Stripped of all surplusage, the appeal can be reduced to the following contentions of the Appellant:

a. The second test undertaken by the local committee revealed a smut infection level of 5.233%, which is only fractionally or marginally above the acceptable benchmark of 5%.
b. It would have been far less invasive of the Appellant's rights to order a third test pursuant to further smut roguing carried out by the Appellant after the second test conducted on 7 October 2010.
c. The Appellant stands to suffer severe financial prejudice from the plough-out order and that order should be deferred until after the harvesting season around April 2011.

We will proceed to consider each one of these contentions in turn.

MARGINAL DEVIATION

It is true that the second test revealed no more than a marginal deviation from the benchmark norm of 5% infestation. It is also true that had the second test come out at 4.99% then the Appellant would not have been visited with a plough-out order. In those circumstances and on first blush it accordingly appears that the plough-out order is unduly harsh. However, as against that must be weighed up the notion and importance of certainty in the industry. Whilst the Agreement as it stands is no doubt statutory in nature, it had its origins as an agreement in terms of which the industry comes together and reaches an accord on the manner in which the industry must be managed and operated. If the Appeals Tribunal were to find that 0.233% was an acceptable deviation from the benchmark, then what does the Respondent do if on the next occasion the deviation is 0.25%? There is no way of delineating an acceptable deviation. If that reasoning is taken to its logical conclusion, the whole idea of having a benchmark agreed to within the industry will become totally emasculated. There will simply be no point in having such a benchmark and each case would have to be decided on its own facts which would lead to total chaos in the industry.

Assume for example that an examinations body determines that a pass mark on a multiple choice test is 40%. A candidate gets 39%. Must that candidate then get passed on the

basis that his or her deviation from the pass mark is only 2.5%. That would render the pass mark of 40% meaningless.

It must also be borne in mind that the argument of a minimal deviation loses force when one considers that the minimal deviation relied upon by the Appellant arose at a point in time after the Appellant was given an opportunity of bringing the infestation level below the 5% benchmark. It is not as if the minimal deviation is being held against the Appellant simply on a first round test.

In all the circumstances, even though it might appear that the Appellant is being treated unduly harshly, the fact of the matter is that the industry, of necessity, operates with rules and these must be adhered to in order to make the industry workable.

What must also be pointed out is that whilst the industry operates on averages, it cannot be entirely unmindful of the process by which the average is arrived at. The Appellant argues on the basis that the maximum deviation from the benchmark was only 0.233%. What the Appellant loses sight of is that the average was arrived at by a range of data points that went as high as 17%. It is self-evident as to the danger posed to neighbouring farms and the area generally by a percentage infestation as high as the aforegoing. The resort then to a deviation of 0.233% in isolation is misplaced.

The Appeals Tribunal accordingly finds that there is no merit in the complaint of the Appellant in regard to the minimal extent of its deviation from the benchmark.

A FURTHER RETEST

The Appellant has contended that a far less invasive and prejudicial step would have been for the Respondent to have undertaken, through the local control committee, a further test after the second test of 7 October 2010 considering that the Appellant had smut rogued field 10B again after 7 October 2010. This on the basis that the probabilities were that the smut infestation would have dropped below the benchmark of 5% after that re-roguing.

The parity of reasoning applied earlier to the minimal deviation argument is equally apposite here. It is common cause that the actions of the local committee, acting on behalf of the Sugar Association, are administrative in nature considering that legislation is being implemented. Those actions would accordingly fall under the purview of the administrative laws of the country. If a further test was ordered in the case of the Appellant, then such a test could not be denied another grower in the future based on fair administrative action and

the creation of legitimate expectations. This would apply even if the second test with another grower revealed an average smut infestation rate of say 15% because it could still be argued that aggressive smut roguing might have brought the smut infestation rate down below 5%. It will not be possible for the industry to then set a new deviation limit within which it will be permissible to ask for or insist on a further test.

Furthermore, the Sugar Association would be faced with the further difficulty of more tests even beyond the so-called second test. Whilst the present Appellant appears to contend that if a further test in its case reveals that the infection level has not dropped below 5% it will accept the plough-out order, what happens if, for example, tomorrow another grower asks for a further test and his infestation level comes out at 5.1%? What is the Association to do if that grower then asks for an even further test on the basis that he has smut rogued again and is more than confident that the infection level has dropped below 5%? This will lead to a never ending spiral of uncertainty and chaos.

In the circumstances, the Appeals Tribunal finds that it cannot uphold the Appellant's contentions in regard to a further test.

FINANCIAL HARDSHIP

The Appellant contends that its crop is well into the season and that it will suffer severe financial prejudice if it is required to comply with the plough-out order. In effect, it is asking that the plough-out order be deferred until after the end of the harvest of the present crop which is anticipated to be in April 2011.

What is required here is a balancing of the interests and prejudice of the Appellant *vis-a-vis* other neighbouring farmers and indeed the entire farming area. It is not in dispute that the smut spore is airborne and is easily carried across distances. The provisions dealing with disease and pest control are designed to protect the industry which is why there is provision for requiring or ordering a grower to either rogue or plough his land. It is a fundamental imperative that the greater good of the larger body be protected. The Appellant contends that by its further smut roguing the prospect of the infestation being carried across has been reduced. Even if that is accepted at face value, the Appellant does not give any assurance or guarantee, as indeed it cannot, that the prospect of such infestation has been eliminated. In essence then what the Appeals Tribunal has to balance is the financial hardship to the Appellant against the prospect of possible widespread smut infestation to neighbouring farms and the area. In such a balance, there can only be one answer which is that any financial prejudice of the Appellant must yield to the much greater concern of possible widespread infestation.

In any event, it is apparent that the industry was not unmindful of financial hardship which might befall a grower were it to be required to effectively eradicate the current crop. Express provision is made in the Sugar Industry Agreement, more particularly at clause 87, for compensation by the Association to an affected grower where that grower is able to demonstrate that is was through no fault of the grower that the requirement for eradication came about.

In all the circumstances, the Tribunal finds that the Appellant's contentions in regard to financial prejudice are not sufficiently weighty to justify a reversal of the decision of the Administration Board.

GENERAL

The Tribunal finds it unnecessary to canvass every argument and contention raised in this matter. Suffice it for present purposes for the Tribunal to touch upon a few of these.

Much of the submissions and contentions of the Appellant are of a generic nature without any regard or reference to actual facts. What one sees is a plethora of complaints based on clichéd and well worn expressions of administrative justice. Regrettably, these are not connected to the facts of this matter.

The Appellant has complained that the Administration Board did not furnish it with reasons for dismissing the appeal brought before the Board. As pointed out by Mr Theunissen for the Respondent, there is no evidence that reasons were requested. Had they been so requested and refused, that might have been an entirely different matter. The Tribunal is in agreement with this contention.

Whilst the emphasis in this appeal has been on the second test of 7 October 2010, sight must not be lost of the fact that the first test was conducted on 24 August 2010. That test and the level of infection as at that date was and has been the precursor to all subsequent events in this matter. It is almost three months to the date since the first test was conducted. While it is correct that if the second test had yielded a result favourable to the Appellant that might have been the end of the matter, it is an altogether different proposition when the second test does not do so. In the latter circumstance, the situation is considerably exacerbated and regard must be had to the fact that an unacceptable level of smut infestation has been present on Field 10B for almost three months. This is disturbing and should be of grave concern. This is why the Tribunal, having resolved the appeal in its

collective mind, decided that its ruling must be delivered with some measure of urgency failing which its ruling that the matter was indeed urgent would be rendered nugatory.

The Appellant has, at least in its correspondence if not in its formal submissions, questioned why the appeal was being heard in Durban as opposed to Malelane. The short and obvious answer is that the Appeals Tribunal is based in Durban and parties before any Tribunal go to the seat of the Tribunal and not *vice versa*. In any event, there are five Tribunal members, with a secretary and alternate secretary and it is simply impractical and uneconomical for all these persons to be transported and possibly housed in a location outside of Durban. All the records of the Tribunal are based in Durban. As opposed to that, the Appellant in this matter, or any party to any matter before the Tribunal, can very easily be legally represented in Durban by the appointment of an attorney and/or an advocate.

CONCLUSION

In all the premises, it is the unanimous finding of the Appeals Tribunal that the appeal before it in this matter should be dismissed.

Advocate OA Moosa (Chairman) _____

Mr ME Ngubane (Vice-Chairman) _____

Mr CM Linnett _____

Mr TJ Murray _____

Mr JH Wixley _____

22 November 2010