IN THE SUGAR INDUSTRY APPEALS TRIBUNAL

In the matter between:

NOODSBERG LOGAL GROWER COUNCIL Claimant

and

ILLOVO SUGAR SOUTH AFRICA (PTY) LTD Respondent

RULING

Delivered on:- 19 December 2023

INTRODUCTION

1. The crisp issue in this case is whether the respondent ("Illovo") is contractually obliged to accept and pay for all sugarcane that members of the claimant ("the Council") tender to it at its Noodsberg Sugar Mill ("the Mill"), in the year in which such sugarcane is tendered, regardless of the crushing capacity of the Mill and despite whatever other contractual arrangements Illovo might have in place with growers outside of the supply area of the Mill[1].

2. The issue arises because in the 2022 crushing season and, according to the Council, for at least the next few crushing seasons, sugarcane produced

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[1] Statement of the issues dated 19 September 2022, p115, para 12.

and delivered by members of the Council at the Mill has exceeded and it is anticipated to continue to exceed the Mill's capacity to crush such cane.

3. Members of the Council have tendered sugar cane at the Mill, this being pursuant to the agreements that exist between them and Illovo. However, Illovo has refused to accept more cane than it is able to crush in the year that the cane was tendered, despite the agreements concluded between the parties.

4. The Council asks this Tribunal to declare that regardless of its crushing capacity, Illovo must accept and pay for *all* the contracted sugarcane that members of the Council deliver to it, and to do so in the year that such cane is harvested.

5. Illovo opposes the relief sought.

THE PARTIES

6. The claimant is the Council as earlier defined, a local grower structure in terms of the Sugar Industry Agreement that brings this claim acting in its own interest and as the representative of sugar cane growers within the Noodsberg and surrounding areas of Kwa-Zulu Natal.

7. The respondent is Illovo which is the owner and operator of the Noodsberg Sugar Mill. In this capacity it has concluded a Local Area Agreement with

Illovo ("the LAA") and its members have also concluded individual cane supply agreements with Illovo.

8. Historically, Illovo operated four sugar mills in KwaZulu-Natal, being the Sezela Sugar Mill, the Umzimkulu Sugar Mill, the Eston Sugar Mill and the Mill. In 2020 Illovo decided to discontinue its milling operations at the Umzimkulu Sugar Mill.

THE RELEVANT FACTUAL MATRIX

9. It is common cause on the pleadings[2] that in the 2022 crushing season, the total cane supplied by members of the Council to the Mill exceeded the crushing capacity of the Mill. The Council alleges that for at least the next two seasons the cane supplied by its members to the Mill will continue to exceed the Mill's crushing capacity, an allegation that is not denied by Illovo.

10. The problem of insufficient crushing capacity at the Mill when measured against the volume of cane the members of the Council harvest, is exacerbated by Illovo's decisions:

[2] See Statement of Claim, p3, paras 6-8 read with Answer to Statement of Claim, p59, para 4.

10.1 not to accept *all* the sugar cane tendered by members of the Council at the Mill in the year in which it is tendered;

10.2 to divert cane grown outside the Noodsberg supply area, specifically cane from the Eston region, to be crushed at the Mill; and

10.3 not to divert contracted cane of members of the Council it did not have capacity to crush to other crushing mills (whilst refusing to accept such excess cane at the Mill);

("the Illovo decisions").

11. The Illovo decisions are common cause on the pleadings[3].

12. These facts provide the relevant background to the issues in dispute to which we turn to next.

THE ISSUES

13. The Council asserts that the Illovo decisions breach:

[3] See Answer to Statement of Claim, p60 at para 4.

13.1 the Sugar Industry Agreement, specifically clauses 97, 98, 99 and 100 thereof.

13.2 the LAA concluded on or about 22 April 2005 between the Local Growers and Illovo; and

13.3 the individual cane supply agreements concluded between each member of the Council and Illovo.

14. Further, so continue the assertions by the Council, when properly interpreted the agreements listed above compel Illovo to accept *any and all* of the contracted sugar cane that the its members deliver to the Mill, whether such cane exceeds the Mill's crushing capacity or not, and despite the arrangement that Illovo has with cane growers from the Eston region to divert their cane to the Mill.

15. The Council further contends that the diversion of cane to and from the Mill became necessary because Illovo decided to close the Umzimkulu Sugar Mill. Therefore, Illovo must bear the consequences of this decision. The Council seeks an order that Illovo is obliged to accept and pay for the whole volume of cane tendered by its constituent growers as and when it is tendered. In the alternative, the Council requests a ruling to be made by this Tribunal, that Illovo is obliged to provide for diversion of any excess cane from the Mill beyond its capacity and for an order that Illovo is not permitted to divert cane from other regions to the Mill while it does not crush all contracted cane of the Council's members.

16. Illovo accepts that it is contractually obliged to accept all contracted sugarcane available from all with whom it has concluded agreements and that are represented by the Council, provided such cane meets the applicable cane quality rules. Illovo pleads that this obligation extends beyond the growers in the Mill's supply area to growers in the regions of the Eston and Sezela mills, and that this obligation flows from the LAA and the individual cane supply agreement, *inter alia*.

17. However, Illovo also contends that the diversion of cane from "home mill areas" to alternative sugar mills is necessary as an integral part of the operational requirements of a sugar mill and the realities caused by fluctuating sugar cane production. In light of the extent of the sugar cane production and the capacity of Illovo's sugar mills, it is impossible for it to accommodate in a season, the entire season's production across its mills. Illovo proposes a purposive approach in the interpretation of the applicable agreements that permits for recognition of the respective contractual rights of all individual sugar cane growers with whom cane supply agreements have been concluded and the equal treatment of local grower councils and their members. Illovo requests the Tribunal to refuse the relief sought by the Council.

18. During the hearing it became apparent that the central question was not whether the sugar cane grown by the members of the Council must be accepted by Illovo, but rather whether the cane must be accepted in the year in which it becomes available for delivery. To answer this question it

is necessary to describe the applicable contracts.

THE RELEVANT CONTRACTS

19. In argument the Council informed the Tribunal that it seeks an amendment to the relief that was initially sought by it against Illovo. At the outset, the orders sought read as follows:

> "*Wherefore the (Council) seeks an order from the Tribunal declaring that:*
> *29.1 (Illovo) is obliged to accept the full supply of the (Council) members by reason of:*
> *29.1.1 The Sugar Industry Agreement.*
> *29.1.2 The Local Area Agreement.*
> *29.1.3 The individual Cane Supply Agreements in the form set out in SOC2.*
>
> *29.2 (Illovo) is obliged to provide for diversion of any excess cane from (the Council) members beyond the capacity of (the Mill).*
>
> *29.3 (Illovo) is not permitted to provide for diversion to (the Mill) of Eston cane in circumstances where it does not meet its obligations set out in 28.1 and 28.2 above*".

20. For the sake of completeness, the obligations set out in paragraph 28 in the Statement of Claim are the obligations to take all of the cane made available by the members of the Council[4] and precluding Illovo from allowing inward

[4] Statement of Claim, para 28.1.

diversion of cane to the Mill in circumstances where it does not crush the entirety of the Noodsberg cane supply[5].

21. During argument the Council sought and was granted the following amendments to the order sought:

21.1 Replacing the word “is” in the first line of sub-paragraph 29.1 with the word “was”.

21.2 Inserting the word “tendered” after the word “full” in the first line of sub-paragraph 291; and

21.3 Deleting sub-paragraph 29.1.1 in its entirety and making the consequent changes to numbering.

22. Therefore, the Sugar Industry Agreement is no longer pertinent and the relevant agreements remain the LAA and the individual cane supply agreements.

THE LOCAL AREA AGREEMENT

23. The LAA is deemed to have commenced on 1 April 2001 for a period of 10 years, and it enables the parties to meet, not later than 31 March 2010, with a view to renegotiate or extend the contract beyond 31 March 2011. If no new agreement is concluded following renegotiation, clause 3.3 of the LAA provides that clauses 6 and 8 shall be considered ‘evergreen’ and shall not

[5] Statement of Claim, para 28.2.

be terminable by either party for as long as RV remains the basis for the payment of cane in the sugar industry. RV is short for 'recoverable value' and it is defined in the Sugar Industry Agreement to mean "*the mass of recoverable content of cane delivered by a grower to a mill for crushing, which mass represents recoverable sugar moderated by the value of recoverable molasses of such cane, taking into account adjustments in respect of the sucrose, non-sucrose and fibre content thereof, and which mass of recoverable content shall be calculated in terms of the procedures contained in the Official Methods Manual*".

24. It is common cause that the LAA was not renegotiated and RV remains the basis for the payment of cane in the sugar industry, and therefore clauses 6 and 8 became evergreen clauses. Clause 6 explains the length of the milling season and clause 8 specifies the calculation of compensation based on the RV. For purposes of this matter it is unnecessary to detail the provisions of these clauses.

25. Clause 5 in the LAA, which is not included in the evergreen provisions and entitled 'cane supply', granted to Illovo:

25.1 The right to temporarily close the Mill "*in the event that it is prevented from operating in the normal and ordinary course as a result of any occurrence of force majeure, or a cane supply insufficient to warrant*

the economic operation of the Mill, or as a result of any other basis agreed with the Mill Group Board".

25.2 The obligation to "*accept for crushing the cane of the growers contracted to it either pursuant to (the LAA) or to any cane supply agreement, which is harvested and tendered to the Mill for crushing during the milling season and any extension thereof*". The LAA defines the 'milling season' to mean "*the period of time during any year in which the Mill is open for the acceptance and crushing of Cane as determined by the Miller*". The LAA imposes the reciprocal obligation on each grower to deliver all can (other than seed cane) harvested from the area under cane on his property to the Mill.

25.3 The right to divert cane to another mill or to accept cane from another mill in accordance with the provisions of the Sugar Industry Agreement.

26. Moreover, the LAA is concluded on the basis that, *inter alia*, in addition to cane which Illovo agrees to accept from each individual grower in accordance with a Cane Supply Agreement concluded in respect of that grower, Illovo shall be entitled to accept cane from all other growers who deliver cane to the Mill from the supply area. In essence, the LAA defines the 'supply area' to mean the total of all areas farmed by the existing growers listed in Annexure D to the LAA which we have not been provided with, and all growers who became contracted to deliver cane to the Mill after the start of the 2005/2006 milling season.

27. Finally, the LAA contains a non-variation clause that states that no additions to, variation or consensual cancellation of the contract shall be of any force and effect unless in writing and signed by or on behalf of the parties. There is no evidence of any variation that accords with this clause in this matter.

28. These are the pertinent provisions in the LAA. We turn to the form of cane supply agreement that is included in the papers.

THE CANE SUPPLY AND SUPPLEMENTARY PAYMENT AGREEMENT

29. The Cane Supply and Supplementary Payment Agreements ("the Supplementary Agreements") are referred to in the pleadings as the individual cane supply agreements. Mr Eggers testified that the Supplementary Agreements form part of the relevant contractual obligations on Illovo that the Council relies upon.

30. The Tribunal was referred to two Supplementary Agreements. The first was concluded during June 2012 between the Council and Illovo, the second was concluded between each farmer and Illovo during or about September 2018. The commencement or effective date of the 2018 Supplementary Agreement is 1 March 2019.

31. Both these Supplementary Agreements contain similar provisions and are referred to interchangeably, however whereas the 2012 Supplementary

Agreement was concluded for a period of three years, the 2018 Supplementary Agreement was concluded for an indefinite period and shall be terminated in accordance with the terms of the 2018 Supplementary Agreement.

32. Clause 4 in the 2018 Supplementary Agreement is central. It obliges each grower to "*deliver or procure the delivery of all cane grown on the properties to the Mill (other than registered seed cane)*". In turn, clause 5 imposes on Illovo the obligation to accept the grower's cane deliveries to the Mill subject to the right of Illovo to refuse to accept cane which is non-compliant with the cane quality rules, to divert cane to any other mill and to temporarily close the Mill.

33. In return, Illovo agreed to pay the growers a supplementary payment in the amount of R4.50 per ton in the 2012 Supplementary Agreement, to be adjusted annually, over and above the RV price. By 2018 the offer from Illovo to growers at Eston and at Noodsberg was to increase the participation of the growers to supply cane to their 'home mills', being the mills in the region where the farms are situated, provided it retains all the cane at no less than 34 500 hectares being signed up, and in return Illovo would pay R9.00 per ton over and above the RV price.

34. Growers could choose between either:

34.1 Receiving an upfront payment of R45.00 per ton on the average of the supply over the previous three season, and if a grower delivered in excess of the average such grower would be paid a ‘top-up’ amount at R9.00 per ton, conversely where the supply was less that the average Illovo would claw back at a rate of R9.00 per ton; or

34.2 Receiving payment on actual deliveries made to the home mill for each season, as opposed to an average, escalating at 5% per annum on the rate of R9.00 per ton.

35. The 2018 Supplementary Agreement in the papers is an example of the first option elected by the relevant grower, namely to receive an advance payment calculated at an average supply over three seasons plus additional top-up payment over and above the average, and it records the increased supplementary rate of R9.00 per ton during the period 1 April 2019 to 31 March 2024.

36. By all accounts, the 2018 Supplementary Agreement reflects the current arrangement in relation to the supplementary payment, and the LAA reflects the contractual arrangements pertaining to the RV pricing structure.

37. Having outlined the relevant clauses in the contracts we are required to interpret, we turn to summarise the evidence led.

SUMMARY OF EVIDENCE

38. Mr Heinrich Eggers, the Chairman of the Mill Group Board in Noodsberg and an elected member of the Council, testified on behalf of the Applicant. He testified that:

38.1 90-95% of cane crushed by the Mill is delivered by sugar cane growers contracted to the Mill. These growers submit a rough estimation of the number of tons of cane they have in their fields to the Local Mill Group Board specifying the variety of cane grown, the area under cane and the estimated tonnage of cane over the milling season, which commences in March and ends in December. The estimate that is provided by each grower is updated monthly, until by September the final figure is provided which becomes the actual tonnage of cane that the grower will deliver. Upon receipt of the estimate the Mill Group Board gives the grower a 'daily rateable delivery' to deliver (a DRD) which is a figure the Mill Group Board obtains by aligning the grower's submitted estimate with the miller's crush plan. Typically, the miller accepts the grower's estimate at the first Mill Group Board meeting held in March of each year. If a grower delivers less cane than what is estimated or more than the estimate the grower is penalised in the following season. Cane that exceeds the DRD will not be permitted over the weighbridge at the Mill.

38.2 As set out above, Illovo also previously concluded the Supplementary Agreements with the Council and later with individual growers depending on the option chosen by the grower between the two options set out above.

38.3 Illovo decided to close the Umzimkulu sugar mill in the 2019/2020 season. The growers were not consulted regarding this decision.

38.4 In respect of the 2022/2023 season, it is estimated that Noodsberg sugar cane growers had 1 585 548 tons of sugar cane available to be crushed. The Mill only has capacity to crush 1 480 000 tons of sugar cane.

38.5 It is not practical for sugar cane growers to deliver sugar cane in the next season and therefore, if sugar cane is not crushed in the season it becomes available, the growers forego income and growth in the ensuing crop cycle[6] because the cane that the Mill is unable to accept due to its limited capacity stands in the fields, it gets old and in some instances rot, resulting in a loss to the growers.

38.6 Illovo had implemented an inward diversion of sugar cane to the Mill, mostly from growers in the Eston sugar mill supply area. The Mill

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6 While this evidence was not seriously challenged, the Tribunal is of the view that there is more to say about the consequences of carrying over cane to an ensuing season. We do not make a finding in respect thereof.

cannot crush all cane produced by Noodsberg growers and the inward diversion makes matters worse.

38.7 In cross examination the case put to Mr Eggers in relation to the obligation to accept the full estimate of contracted cane is that Illovo accepts the obligation, but it wishes to extend the obligation in a season to subsequent seasons so that it accepts some, and not all of the cane in the field. Illovo's case is that whilst the agreements do not specifically permit a carry-over of the cane that the Mill is unable to crush into the following season, they do not specifically preclude such carry over. *Mr Troskie* also challenged the restriction the Council seeks to place on the Mill in relation to its freedom to divert cane or to accept diverted can, suggesting that the relief in clause 29.3 restricting Illovo from diverting cane from other regions to the Mill is contrary to the provisions of all agreements relied upon by the Council. Finally in relation to the relief in paragraph 29.2 of the statement of claim, being a declarator that Illovo is obliged to provide for diversion of any contracted cane that cannot be crushed at the Mill, Illovo's case is that the problem that confronts the Mill is not unique to it, it extends to all of Illovo's mills and there is no other mill that such cane can be diverted to. Moreover, Illovo's case is that external factors such as the health tax, the July 2021 riots, flooding and the closure of the Umzimkhulu Mill all adversely affected Illovo's crushing capacity at its mills, inclusive of the Mill, which problems confronted Illovo's competitors such as Tongaat-Hullet which also closed a mill. All of these external

factors have been compounded by a weather pattern that has resulted in a record production of cane. Mr Eggers did not take issue with any of these propositions.

39. Mr Edgar Bruggeman, currently the General Manager of Illovo's alcohol business and previously (between 2014 and 2021) Illovo's Agricultural Head, testified on behalf of the Illovo. He testified that:

39.1 During 2010/2011 the sugar industry in KwaZulu-Natal had experienced sugar cane shortages that came about as a consequence of drought conditions at the time. This state of affairs prompted Illovo to embark on an ambitious sugar cane expansion program to ensure a greater volume of sugar cane so that its sugar mills could operate profitably. Illovo needed enough sugar cane to operate four mills profitably.

39.2 In the period between 1997/1998 to 2021/2022 crushing capacity reduced due to the closure of the Umzimkulu sugar mill and reduced efficiencies at the sugar mills of Illovo.

39.3 In January 2019, shortly after the conclusion of the 2018 Supplementary Agreement with Noodsberg sugar cane growers, Mr Bruggerman became aware of the decision to close the Umzimkulu sugar mill. The decision was made to preserve Illovo's sugar business

and, had the Umzimkulu sugar mill not been closed, it might have had disastrous consequences for Illovo.

39.4 Following the closure of the Umzimkulu sugar mill, a working committee (referred to as the “Diversion Forum”) was established. The Diversion Forum was not a committee that was established in terms of applicable regulations. It was established by Illovo to coordinate diversion of sugar cane between sugar mills and to manage the operational impacts of diversion decisions. It was not a structure which could competently conclude a collective agreement.

39.5 It frequently happened that sugar cane was diverted from the Mill to the Eston sugar mill. In the 2022/2023 season, the Mill crushed 1,037 million tons of sugar cane, with a net inward diversion of 60 thousand tons.

39.6 The dynamics at the Mill are such that the crush plans reduce. For example in the most recent season the crush plan reduced by 400 000 tons whilst the grower’s crop estimate increased by 120 000 tons, resulting in an inability by the Mill to all crush harvested cane. The variance was unprecedented and Illovo tried to share the carry over cane equitably between milling regions.

39.7 Under cross examination Mr Bruggerman conceded that the context within which the 2018 Supplementary Agreement was concluded in

particular, was one where Illovo wanted to secure as much cane as possible for its four mills, inclusive of Umzimkhulu. It was also conceded by Mr Bruggerman that, whatever consensus was reached by the Diversion Forum, the non-variation clauses in the relevant agreements meant that unless changes were made to the agreements in compliance with the non-variation clause, the 'agreements' reached at the Diversion Forum were of no consequence, and that the Diversion Forum was not a forum where binding agreements could be concluded between the parties. Mr Bruggerman testified that the Diversion Forum was, in fact, an operation forum but it could not reach agreements that override the written contracts.

39.8 An adverse ruling against Illovo would have a devastating impact on Illovo and the wider industry.

PRINCIPLES OF INTERPRETATION

40. The legal principles of interpretation are now settled:

> *"…Interpretation is, generally speaking, an objective process of attributing meaning to the words used in a document, read in the context of the document as a whole and having regard to the apparent purpose of the words. It is a unitary exercise which must be approached holistically: simultaneously considering the text,*

context and purpose. In addition, extrinsic evidence may be admitted as relevant context and purpose." [7]

41. The following dictum in *Endumeni* echoes the above reasoning and is particularly relevant in relation to context:

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document*.'

42. To this oft quoted passage from *Endumeni*, in *Capitec Bank Holdings*[8] the

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7 Coral Lagoon Investments and Another v Capitec Bank Holdings [2023] 1 All SA 1 [SCA]; see also Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

8 Supra.

Supreme Court of Appeal added that –

> "*It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '(t)he inevitable point of departure is the language of the provision itself*'"[9].

43. Moreover, in *Norvartis*[10] the Supreme Court of Appeal made clear that "…*a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done*"[11].

44. The submissions made by Illovo regarding the context and purpose of the 2018 Supplementary Agreement do not all find favour with the Tribunal. In particular, the Tribunal is not satisfied that it should accept that a failure to

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9 At para 25.

10 Norvatis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA).

11 At para 31.

source enough cane supply to keep four mills operational could have resulted in the unilateral closure of one of the four mills without any contractual consequences. This matter is of such moment that it is hard to imagine that the parties would not have addressed it in the 2018 Supplementary Agreement if it had been within their contemplation.

INTERPRETATION OF THE AGREEMENT

45. The text of the relevant contracts is the starting point. A consideration of the LAA, and the Supplementary Agreements in 2012 and 2018 leave no doubt that contractually, Illovo agreed to accept for crushing cane of the growers contracted to it harvested and tendered to the Mill for crushing. Illovo accepts this much. The only issue is whether this must be in the year in which the cane is harvested. The text of the LAA states that this obligation arises "*during the milling season*", which is defined to mean "*the period of time during any year in which the Mill is open for the acceptance and crushing of Cane as determined by the Illovo*". Similarly, the 2018 Supplementary Agreement obliges growers to procure the transportation of "*all the cane harvested on the properties to the Mill…over the entire length of the Mill's crushing season*", as may be varied and determined by the Mill Group Board. In this agreement, a season is defined to commence on 1 April in each year and it expires on 31 March of the following year. Illovo's reciprocal obligation in clause 5.1 is to accept the cane deliveries to the Mill subject only to the right to refuse to accept such cane if it does not comply with the applicable cane quality rules, to arrange for any diversion to any

other mill and to close temporarily. Illovo led no evidence as to any of the exceptions in the sub-clauses to clause 5.1, and therefore the obligation to accept the cane deliveries stands. Furthermore, neither party led any evidence that the milling or crushing season was extended in any way, and therefore the references to the milling and / or crushing season is understood to mean the season in which the growers harvest all cane on the field to the Mill for milling. It follows, in both the LAA and the more pertinent 2018 Supplementary Agreement the text leaves no doubt that the obligation on Illovo is to accept all the tendered cane, and the obligation on the growers is to tender all harvested cane in the milling season in which such cane is harvested.

46. It is common cause between the Council and Illovo that the context within which the 2018 Supplementary Agreement was concluded is that Illovo sought to secure as much additional cane to ensure the profitable operation of its mills. Clause 2.5 of the 2018 Supplementary Agreement records that: *"The Company is willing to offer a premium on the price of cane in the form of a supplementary payment to the Grower, subject to the Grower committing its cane supply to the Mill in accordance with the terms and conditions contained herein".* The evidence led by each party's witnesses as to the context is uncontentious: at the time that the 2018 Supplementary Agreement was concluded Illovo wanted all the cane in the field from the growers, and the Supplementary Agreements were concluded to achieve that purpose.

47. As stated, Illovo has admitted the obligation to accept the entirety of the available cane (which meets the applicable cane quality rules) from all growers, not only within the Mill's supply area on but also within the Eston and Sezela mill supply areas.

48. Illovo's obligation to accept cane deliveries from the Council is subject only to the following qualifications:

48.1 Illovo may refuse to accept delivery of cane which is not in compliance with any applicable cane quality rules (clause 5.1.1);

48.2 Illovo is entitled to arrange for any diversion of cane to any other mill in accordance with the provisions of the Sugar Industry Agreement (clause 5.1.2);

48.3 Illovo is entitled to close the Mill temporarily if it is prevented from operating (clause 5.1.3).

49. During the cross-examination of Mr Eggers it was suggested that Illovo did not refuse to accept sugar cane from the Council and that Illovo offered to accept the sugar cane in the ensuing season. The Tribunal does not agree with this. A failure to accept sugar cane when it is tendered for delivery might amount to a refusal, even if that refusal is not maintained indefinitely. It all depends on the prevailing circumstances. *In casu*, the 2018 Supplementary Agreement evidently does not allow even such a

momentary suspension of Illovo's obligation to accept cane deliveries from the Council. The Tribunal also does not accept the contention that the agreements do not preclude a carry-over of cane from one season to the next. For the reasons stated, the Tribunal holds that the text is clear, particularly having regard to the context and purpose of the agreements.

50. In the view of the Tribunal, a finding that the relevant agreements entitle Illovo to postpone the acceptance of contracted cane to an ensuing season would fly in the face of the direction of the Supreme Court of Appeal in the *Endumeni* case referred to above that a "*sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document*". The parties clearly did not consider what would happen in the event of a reduced capacity to crush cane, but *Norvatis* is authority for the principle that such failure to consider different scenarios that might arise does not render the agreement unenforceable.

51. Illovo also submitted that a ruling in favour of the Council would have a devastating effect on millers and, consequently, the industry as a whole and, on this basis, urged the Tribunal to consider the interpretation of the 2018 Supplementary Agreement through this lens.

52. Although the Tribunal accepts that an adverse ruling will have serious financial repercussions for Illovo, the Tribunal is enjoined to apply the legal principles as outlined above, and when this is done the only sensible interpretation to give to the relevant contracts is that the obligation on Illovo

which is not disputed, arises in the season in which the cane in the fields is harvested. Public policy demands that contracts freely entered into must be honoured. In *Beadica*[12] it was held that contracting parties cannot escape the enforcement of contractual terms on the basis that enforcement would be disproportionate or unfair in the circumstances. It is only where the enforcement of contractual term would be so unfair, unreasonable or unjust so as to be contrary to public policy that a court may refuse to enforce it.

53. *In casu*, there is insufficient evidence to support a finding that enforcement of the contractual terms would be contrary to public policy. The contrary appears to be the case.

THE ALLEGED IMPOSSIBILITY OF PERFORMANCE

54. In accordance with the maxim *lex non cogit ad impossibilia*, specific performance will never be ordered if compliance with the order would be impossible[13]. Illovo's led evidence as to why the obligation on it, if found to be in favour of the growers, is impossible of performance. However, the

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12 As per the first judgement, Beadica 231 CC and Others v Trustees of the Oregon Trust and Others (CCT109/19) [202] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020).

131313 Christie's The Law of Contract in South Africa (8th ed), Lexis Nexis, p656.

impossibility of performance was self-created by Illovo as a consequence of its decision to close the Umzimkhulu mill, it is it that wanted to get as much cane as possible from the growers and did not consider what would happen in the event that it met with the exigencies of business such as flooding, riots and similar calamities which are not *force majeure*, the purported impossibility was self-created.

55. Accordingly, the Tribunal finds that Illovo's impossibility defence is not sustainable. We agree with the Council's contention that, objectively speaking, taking delivery of tendered sugar cane and paying for it is not impossible. Moreover, Illovo has for its own commercial reasons decided to close the Umzimkulu sugar mill, creating a significant reduction in crushing capacity. Illovo's own conduct cannot constitute a basis for it to avoid its contractual obligations.

RULING

56. In the result and for the reasons set out above, the Tribunal finds that, on a proper interpretation of the 2018 Supplementary Agreement, Illovo is obliged to pay for (even if it does not wish to accept) the whole volume of cane in the season in which it becomes available for delivery by the Council and its constituent growers to Illovo for as long as the 2018 Supplementary Agreement, read with the LAA, subsists.

57. This conclusion renders it unnecessary for the Tribunal to make a ruling in respect of the alternative relief claimed by the Council regarding the diversion of cane to and from the Mill.

58. Finally, the Tribunal accepts that nothing in the 2018 Supplementary Agreement precludes Illovo from diverting cane from other regions to the Mill, but this does not cancel the rights of the growers contracted to supply cane, as stipulated in the relevant agreements, to the Mill.

59. In the result, the following ruling is made:

    1. It is declared that properly interpreted, the relevant contracts oblige Illovo to accept, and even if it does not accept to nevertheless pay for, the full estimate of cane tendered by the Council and its members pursuant to the LAA and the 2018 Supplementary Agreement.

MR AHDITYA K KISSOON SINGH SC (Chairperson)

MR BHEKABANTU WILFRED NGUBANE (Vice-Chairperson)

MS JABU THOBELA-MKHULISI (Member)

MR GRAEME DERING STAINBANK (Member)

MR JAN FREDERIK DE VILLIERS (Member)

Dates of Hearing: 18 January 2023 and 3 March 2023

Date of Delivery of Ruling: 19 December 2023 (via e-mail correspondence)

For the Appellant:

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For the Respondent:

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