IN THE SUGAR INDUSTRY APPEALS TRIBUNAL

In the matter between

RCL SUGAR AND MILLING (PTY) LTD Appellant

and

MALELANE CANE GROWERS ASSOCIATION Respondent

RULING

Delivered on:- 18 July 2016

The appellant, RCL Sugar and Milling (PTY) LTD ("RCL"), brought this appeal before the Appeal's Tribunal ("AT") under the provisions of clause 34(d) of the Sugar Industry Agreement ("SIA"), alleging that the Administration Board ("AB") failed to resolve a dispute regarding the meaning to be ascribed to the expression *"additional costs"* which appears in clause 128 of the SIA. In addition, RCL also seeks to appeal a positive finding made by the AB to the effect that the Malelane Mill Group Board ("MMGB") is not, in the first instance, responsible for payment of costs in relation to the diversion of cane to the Komati Mill and that any additional costs must be recovered from the mill or grower concerned.[1]

[1] Notice of Appeal, B, Page 2

The allegation that the AB failed to resolve an issue brings the appeal squarely within the provisions of clause 34(d) of the SIA, which reads:-

> *"34. The Appeals Tribunal shall perform the following functions –*
>
> *(a) … ;*
>
> *(b) … ;*
>
> *(c) … ;*
>
> *(d) undertake and resolve any matter which in terms of this agreement, falls to be undertaken by the Administration Board if the Administration Board is unable to or fails to duly resolve the matter owing to a deadlock or for any other reason; and*
>
> *(e) … ."*

The matter was originally referred to the AB by the respondent, the Malelane Cane Growers Association ("MCGA"), under the provisions of clause 128(d) of the SIA which provides that any dispute between a grower and the home mill in relation to the costs of cane diversion, which is not resolved by negotiation between the parties, must be referred to the AB which will have jurisdiction to determine the dispute. There is no specific provision, within clause 128 of the SIA, which permits an appeal from a decision of the AB to the AT. It is accordingly not clear on precisely what basis RCL brings its appeal to the AT against what it alleges is an incorrect decision made by the AB.

That notwithstanding, clause 34(c) of the SIA gives the AT jurisdiction to hear and decide any dispute which may arise between a mill and a grower arising from a cane supply agreement or any agreement between those parties relating to the supply or delivery of cane. This particular provision is indicative of the unusual jurisdiction given to the AT under the SIA in that although the AT, on the face of it, carries the nomenclature of an appeals body, it also has original jurisdiction in certain instances. In my view, there can be little doubt that the question of which party is liable for the additional costs associated with cane diversion must be a matter which arises from a cane supply agreement or the delivery of cane and accordingly the AT has jurisdiction to hear the matter relating to the allegedly incorrect decision taken by the AB in respect of which party is liable for the additional costs attendant upon cane diversion. In my view it would be placing form above substance if the AT were to conclude that, simply because RCL did not correctly specify the relevant clauses of the SIA, the AT should decline to consider this aspect of the matter.

In any event, by the time that the matter was heard on 1 and 2 June 2016, the dispute had evolved somewhat such that the parties confirmed to the AT that, in effect, what the parties were seeking was akin to declaratory relief premised upon an interpretation of the SIA and more specifically an interpretation of clause 128 thereof. Clause 35 of the SIA provides, *inter alia,* that the AT has exclusive jurisdiction to determine any dispute relating to the interpretation of the SIA and of any dispute relating to any right or obligation arising out of a cane supply agreement or an agreement relating to the delivery of cane.

In all the circumstances, I am persuaded that the matters for determination are properly before the AT and that the AT has the necessary jurisdiction to rule in this matter.

As indicated, it was the MCGA that referred a dispute against RCL to the AB. The AT was provided with all the material which was placed before the AB. Such material was constituted by a submission from the MCGA to the AB dated 2 September 2015, a response from RCL dated 25 September 2015 and a reply from the MCGA dated 19 October 2015.

After setting out the background to the dispute, the MCGA, it its submission, dated 2 September 2015, posed three questions to the AB. These were:-

1. What is considered as the 'additional cost' of cane testing as per clause 128(a)?

2. Who should bear the 'additional cost' of cane testing given that the choice of diversion was that of the miller?

3. Given that Malelane Mill Group Board paid the full cost of diversion in the past, can the additional cost be recovered backwards for the past 10 seasons, based on the AB ruling of question one above, from RCL?

In the detailed response from RCL, dated 25 September 2015, RCL raised a host of what might be described as jurisdictional or procedural complaints contending that the MCGA had not provided sufficient factual information to enable the AB to make any

determination in the matter and that the MCGA ought to have joined Cane Testing Services ("CTS") and others such as the Komati Mill Group Board and the Komati Cane Growers. Whilst Mill Group Boards are given legal personality by the SIA[2] and whilst cane growers in a particular region are joined together under the umbrella of an Association, which Associations have constitutions (with MCGA being an instance of such an Association), CTS lacks any independent existence in that it is a working division of the South African Sugar Association ("SASA"). In the circumstances, although RCL complained that CTS ought to have been joined to the matter before the AB, in substance what RCL was really contending was that SASA ought to have been joined.

RCL adopted the position that arising from its jurisdictional or procedural complaints, the dispute referred by the MCGA ought to be dismissed by the AB. RCL, however, went on to furnish its submissions on the merits to provide for the eventuality that the AB might not so dismiss the matter.

By the time the matter reached the AT, RCL no longer persisted with its jurisdictional or procedural complaints. As indicated earlier, by this time the matter had evolved somewhat such that the parties were effectively seeking an interpretation of clause 128 of the SIA. That notwithstanding, on the second day of the hearing, that is on the morning of 2 June 2016, the AT raised with the parties whether it was not in fact necessary that other interested persons be joined to the proceedings. The raising of this matter by the AT did not occur in a vacuum but arose from a draft consent order handed

[2] Clause 54 of the SIA

up by the parties to the AT at the end of the first day of the hearing. It would be useful to set out herein the terms of that draft consent order which reads as follows:-

"Draft Order

1. *Setting aside the decision of the Sugar Industry Administration Board in this matter;*

2. *Declaring that when cane is diverted from one mill to another, the mill group board of the crush mill may only charge the additional cost of testing the diverted cane – that is the cost incurred as a direct consequence of the diversion and not any portion of the costs which would have been incurred by the crush mill group board in absence of the diversion;*

3. *Declaring that the term "additional costs" in respect of cane testing services for the purposes of clause 128(a) and (c) of the Sugar Industry Agreement means the additional costs charged by the crush mill group board in accordance with paragraph 2 above, less the saving which is made by the home mill group board as a consequence of not having to test the cane at the home mill."*

When it was pointed out to the parties that, in terms of the draft consent order, what the parties were seeking was a declaration on a default position under the provisions of clause 128 of the SIA in that clause 128 of the SIA expressly provided for a default position save insofar as it might otherwise be agreed between a grower and the home mill, a second version of the draft consent order was handed up to the AT by the parties which was on the same terms as the first version of the draft consent order save that paragraph two of the second version now made provision for the default position to pertain in the absence of any agreement between the grower and the home mill as contemplated by clause 128.

It was arising from these consent orders, tendered at the end of the first day of the hearing as aforesaid, that the question of the necessity of joining, at least, the Komati Mill Group Board was raised with the parties by the AT on the morning of the second day of the hearing. As a consequence of that issue being raised by the AT, the parties considered the matter further and on the morning of the second day of the hearing a fresh draft consent order was tendered by the parties. Again, it is relevant to set out the terms of that fresh draft consent order which reads:-

"Draft Order

1. *The decision of the Sugar Industry Administration Board in this matter is set aside;*

2. *If the Malelane Cane Growers Association wishes to proceed with this matter before this Tribunal, they should supplement their papers and join the Komati Mill Group Board within a period of six months from the date of this order."*

When the AT conveyed to the parties its *prima facie* reluctance to set aside the decision of the AB at that stage of the proceedings, on the assumption that the fresh consent order would be granted, RCL then asked that the decision of the AB should at least be suspended for the six month period contemplated in the fresh consent order.

At that juncture, the AT retired to consider the further conduct of the matter and resolved that the parties should be directed to complete their arguments, which had commenced on the morning of the first day of the hearing, and so the matter proceeded to its conclusion. In so resolving and in so directing, the AT was actuated by several different considerations. Firstly, the AT held the view that the issue of the non-joinder of parties had been raised by RCL even before the matter was determined by the AB and that, notwithstanding, the MCGA took no steps to join such parties or at least to give them notice that a dispute had been referred to the AB for determination. Secondly, RCL was the appellant in the matter before the AT and could and should have sought to join the necessary parties, or at least given them notice, even in respect of the appeal itself but RCL had failed to do so. Thirdly, it was in fact the relief sought by RCL on appeal that required the joinder of the Komati Mill Group Board and RCL ought to have joined that party or at least given it notice of the appeal. Fourthly, the AT, being an in house quasi-

judicial body, sat and heard disputes at considerable cost to the Sugar Industry and matters should not, save in exceptional circumstances, be permitted to be adjourned unnecessarily or permitted to limp along as it were. Fifthly, if the ultimate finding by the AT on the merits did have an impact on parties such as the Komati Mill Group Board, such finding could not and would not be binding on such parties considering that they were not joined to the proceedings.

It was on the aforegoing basis that the parties were directed by the AT to complete their arguments on the second day of the hearing, which the parties duly did. In light of this direction, the MCGA indicated that since the fresh draft consent order, tendered on the morning of the second day of the hearing, was not going to be given effect to by the AT, the MCGA wanted to reconsider its position in respect of the draft consent order which had been tendered at the end of the first day of the hearing. The AT advised the MCGA that the AT would not hold the MCGA to the draft consent order in question but that if the MCGA did not want to be bound to that draft consent order, the MCGA should furnish the AT with its own draft order. This was in fact done on 6 June 2016. The draft order which the MCGA sought is on the following terms:-

> *"Draft Order*
>
> 1. *Parties seem to be in agreement that the additional cost associated with diversion means "the cost incurred as a direct consequence of the diversion in respect of cane testing".*

2. *Where a MGB incurs any additional cost as a consequence of diversion the mill must bear any such additional cost.*

3. *If RCL feel that the Komati MGB profited unfairly with their charge to the Malelane MGB, then it must be a separate issue that RCL must take up with the Komati MGB and declare a dispute."*

Effectively then, RCL seeks an order in terms of the revised version of the first draft order handed up to the AT at the end of the first day of hearing, and which order has been referred to above, whilst MCGA seeks an order in terms of the draft furnished to the AT on 6 June 2016 and which order has been set out above. Although the order furnished to the AT by the MCGA on 6 June 2016 does not make provision for the order of the AB to be set aside, it must follow that by seeking an order on those terms the MCGA is indeed asking for the order of the AB in the matter to be set aside.

In my view, the respective orders sought by RCL and the MCGA raise more questions than answers and both orders fail to address what is at the heart of the matter which came on appeal before the AT and neither order can or should be granted by the AT.

Part of the difficulty in this appeal was self-created (by the parties thereto). This, is turn, arose from a failure to properly identify the various role players in regard to cane testing services as well as the role to be played by each, and from a liberal use of the wrong description of such role players. This was not only during the course of argument. Post the hearing I again read through all the documentation furnished to the AT and found

numerous instances of this in the various submissions. I believe that there would have been a much clearer understanding of the issues, had the parties avoided this.

What is also a bit perplexing is why, after having complained at some length in the submissions before the AB that parties such as CTS (I refer to CTS cognisant that it does not have an independent legal standing and do so for the sake of convenience only) would have been able to throw very useful light on the issues in the dispute, RCL was of the view, at the commencement of the hearing before the AT, that the matter could be resolved on pure argument alone and without the benefit of hearing from CTS. In any event, the parties accepted that the AT is clothed with inquisitorial powers[3] and the AT advised the parties that the AT had requested CTS to be on standby for the duration of the hearing. Furthermore, very soon into the argument on the morning of the first day of the hearing, it became rather apparent that it would be extremely useful if CTS could provide some factual information to the AT as well as to the parties and, in the circumstances, CTS was called upon to do so.

As it transpired, CTS in fact did so, intermittently, over both days of the hearing. This information was provided by Mr Gonaseelan Naidoo ("Naidoo"), the general manager of CTS. The AT did not consider it necessary to administer the oath to Naidoo and both parties indicated that they saw no reason why Naidoo should provide sworn testimony. The members of the AT raised various matters with Naidoo and the parties were also afforded an opportunity of putting questions to Naidoo.

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[3] Clause 43 of the SIA

The salient features of the information provided by Naidoo, during the course of the two days of the hearing, may be summarised as follows:-

1. There is no uniform practice within the Sugar Industry in regard to the calculation of additional costs for cane testing arising from cane diversion.

2. Mill Group Boards recover the costs and expenses of cane testing, whether in respect of cane testing arising from deliveries by cane growers contracted to the home mill of the Mill Group Board or in respect of costs for cane testing arising from cane diversion.

3. At the beginning of each season, each Mill Group Board considers the volume of cane that it is anticipated will be crushed at the home mill of that Mill Group Board and that volume is then discussed with CTS which provides the Mill Group Board with a budget for the costs of cane testing at that mill.

4. The Mill Group Board then, as is required by the SIA[4], apportions those costs between the mill and the growers in accordance with the percentage share of the divisions of proceeds ("DOP") which currently stands at approximately 64% growers and 36% millers.

5. Some Mill Group Boards, in respect of diverted cane, only seek to recover marginal costs associated with testing the diverted cane coming into the home mill of a

[4] Clauses 68 and 157 of the SIA

particular Mill Group Board while other Mill Group Boards, in respect of diverted cane, seek to recover the full cost of such cane testing service as levied against the home mill and its contracted growers.

6. Naidoo has been seeking to persuade various role players within the industry that the equitable manner of recovering costs for cane testing in respect of diverted cane is to recover the marginal costs as opposed to an amount equivalent to the full levy which is recovered from the home mill and its contracted growers.

7. Cane testing is a very labour intensive exercise, with labour making up about 75% of the costs of cane testing, with most of these costs in fact being fixed as specialised labour is required and such labour cannot be constantly employed and dismissed but has to be retained on a continuous basis.

8. The capital expenditure component of cane testing is in the region of about 10% of the total costs. When determining a requisite levy, some Mill Group Boards include depreciation in the calculation while others do not.

9. The cost of cane testing varies considerably from Mill Group Board to Mill Group Board and is a function of a host of factors such as the capacity of the home mill and the like. So, for example, although the Malelane Mill and the Komati Mill are both owned by RCL, the cost of cane testing is considerably different within the Malelane Mill Group Board and the Komati Mill Group Board.

10. In determining the levy that a Mill Group Board must raise from its home mill and the growers contracted thereto, some Mill Group Boards take into consideration the diverted cane while others do not.

11. Generally, diverted cane quantities are agreed upon at the beginning of each season albeit that there can be unscheduled diversions during the course of a season.

12. Mill Group Boards operate what are referred to as UPE accounts with SASA and these accounts are used to make adjustments. So, for example, if the actual cost for cane testing at a home mill of a Mill Group Board is higher than the original budget, the Mill Group Board in question will then requisition an adjustment to SASA from its UPE account.

13. Mill Group Boards, as juristic persons, maintain books of account and are required to prepare annual financial statements which are tabled with the AB. Many Mill Group Boards, if not all, have capital reserves for future expenditure.

14. Although diversion of cane is permitted at the instance of growers, at a practical level this almost never happens because a huge component of expenditure in the industry is that relating to the costs of the delivery of cane and growers do not want to be saddled with such additional costs of delivery.

Whilst clause 128 of the SIA deals with the additional costs of both cane delivery as well as cane testing in consequence of the diversion of cane, the issue of the additional costs of cane delivery do not arise in the present matter.

At the heart of the complaint of the MCGA are two issues:-

1. For many years, the additional costs of cane testing arising from the diversion of cane from the Malelane Mill to the Komati Mill have been borne by the MCGA in circumstances where the diversions have taken place at the instance of the Malelane Mill and not of the growers and this should not be so because clause 128 of the SIA is plain on its terms that in such a situation the additional costs should be borne by the Malelane Mill and not by the MCGA.

2. The additional costs of cane testing attendant upon the diversion of cane should be only the marginal costs incurred by the Komati Mill Group Board in testing the diverted cane.

Insofar as the first issue is concerned, the MCGA has referred to a ruling of the AB dated 9 February 2011, involving the Umzimkulu Mill Group Board, the Sezela Mill Group Board and the Eston Mill Group Board, in terms of which the AB found that the additional costs should be paid by the home mill and not by the Mill Group Board of the home mill. In regard to the present dispute, the AB has again ruled, in terms of its decision of 6 November 2015, that it is not the Mill Group Board that should bear the

additional costs of cane diversion but that such costs should be borne by the home mill or the growers concerned depending upon whose convenience was satisfied as a result of the diversion.

There can be no question but that the AB was correct, in this regard, both in its ruling of 9 February 2011 as well as its ruling of 6 November 2015. Clause 128 of the SIA could not be clearer on its terms. It is surprising that this should be an issue at all. It is further surprising that the MCGA should have permitted such additional costs to be paid by the Malelane Mill Group Board over such an extended period of time. When I say paid by the Malelane Mill Group Board, I do not mean thereby physically paid but rather I mean paid from the resources of the Malelane Mill Group Board. And perhaps herein lies the rub of the matter.

It is clear from the SIA that the Mill Group Boards are required, *inter alia,* to undertake the specific functions in relation to cane testing described in clause 53 of the SIA[5]. Clause 53 of the SIA, in turn, provides that each Mill Group Board shall, at the mill concerned, be responsible for providing all sampling and analysing facilities and equipment and shall determine the total mass of recoverable value of the cane entering the mill and the recoverable value of the individual consignments of cane. Clause 55 of the SIA elaborates further on the powers of Mill Group Boards in respect of cane testing.

Furthermore, at an operational level, although the SIA talks of the additional costs being payable by the home mill or the grower concerned, such recovery takes place between

[5] Clause 52(c) of the SIA

Mill Group Boards. It would appear that, in the process, the Mill Group Boards have confused and conflated one responsibility with another. When a Mill Group Board recovers the costs and expenses of cane testing from its home mill and the growers contracted to it, it is required to do so by apportioning such costs based on the DOP and raising a levy therefor. However, when a Mill Group Board seeks to recover costs associated with cane diversion and does so from the Mill Group Board of the diverting mill, the Mill Group Board of the diverting mill can, without doing any violence to the SIA, make such payment to the Mill Group Board of the crush mill but may not do so using the general resources of the Mill Group Board of the diverting mill. What the Mill Group Board of the diverting mill is required to do, in respect of additional costs, is to specifically raise same from the home mill, or the grower concerned, depending on whose convenience was served by the diversion.

If this much is not clear within the industry then it is imperative that the AB, to whom a copy of this award will be furnished, takes steps to ensure that this is properly understood by all concerned.

I turn to consider what it is that RCL seeks to appeal in respect of this particular issue. This appears as the second part of the decision of the AB of 6 November 2015 that RCL purports to appeal as referred to earlier. In effect, what RCL asks is that the AT makes a ruling that when a diversion takes place the Mill Group Board of the diverting mill is obliged to make payment of the costs for cane testing services to the Mill Group Board of the crush mill, after which the Mill Group Board of the diverting mill must recover any additional costs from the mill or grower concerned.

In my view, it would not be competent for the AT to make such a ruling. Even given the fact that it is clear from the SIA that the Mill Group Boards have the responsibility for cane testing at their home mills and that such Mill Group Boards must recover the costs and expenses of such cane testing from the home mill and the growers contracted thereto, there is nothing in the SIA that even remotely suggests that it is mandatory or peremptory that for the recovery of costs in respect of diverted cane the Mill Group Board of the diverting mill is primarily responsible for making payment and then recovering thereafter. In all likelihood, this is probably what happens in practice. However, that is not the only expedient by which this can take place. For example, the Mill Group Board of the crushing mill might find it more convenient to recover directly from the diverting mill or the grower concerned. The AT cannot make a ruling which precludes that.

For the aforegoing reasons, RCL's appeal on this issue must fail. Furthermore, regard being had to numbered paragraph 2 on the second page of the award of the AB made on 6 November 2015, which deals with the question of who should bear the additional costs of cane testing, this ruling is unimpeachable and must be confirmed by the AT which does so in terms hereof.

Moving on then to the second issue which was originally raised by the MCGA, namely what it is that should be considered as additional costs of cane testing as countenanced in clause 128(a) of the SIA. The AB ruled, as part of its decision of 6 November 2015, that the SIA provides no definition of additional costs and there has been no agreed

interpretation of that expression within the industry. In addition, the AB held that the parties affected by such diversion are required to negotiate and agree on what encompasses additional costs. Furthermore, that there may be different considerations by different parties and there is no prohibition on what may or may not be included under the rubric of additional costs[6].

It is in regard to this particular ruling that RCL brings its appeal under the provisions of clause 34(d) of the SIA, alleging that the AB failed to make a ruling on this issue as already indicated earlier.

This particular issue resonates in the draft orders sought by both parties to this appeal as appears from the terms of those orders set out earlier. At its heart, lies a sharp dispute between the parties in regard to what it is that constitutes *'additional costs'* as countenanced in clause 128(a) of the SIA. From the documents and papers on appeal, from the argument tendered and from the draft order submitted by the MCGA, it is no longer clear to me what it is that the MCGA contends such additional costs should be. I have difficulty in reconciling the position of the MCGA. On the one hand, it seeks to do no more than restate what is said in the SIA. On the other hand, it seeks to contend for marginal costs only. Yet further, it appears to be indifferent as to what such costs are. In regard to RCL, its position is somewhat clearer in that it asks the AT to rule that the Mill Group Board of the crush mill may not recover, as part of the costs for cane testing in respect of diverted cane, an amount equivalent to the full levy, as it were, that is

[6] Numbered paragraph 1 on the second page of the ruling of the AB delivered on 6 November 2015

recovered by that Mill Group Board from its home mill and the growers contracted thereto.

At first blush, it is somewhat difficult to understand why the MCGA should be interested in what constitutes the additional costs of cane testing, under clause 128(a) of the SIA, in respect of diverted cane. It is the position of the MCGA that all the cane diverted from the Malelane Mill to the Komati Mill was so diverted for the convenience of the Malelane Mill. In those circumstances, the SIA is plain on its terms that such additional costs must be borne by the Malelane Mill. It should thus not really matter to the MCGA as to what those additional costs are. The position might be very different if a diversion took place at the behest of one of its grower members and a dispute arose as to what additional costs that grower should be liable for.

However, having heard Naidoo and having listened to the fact that there is no uniformity within the industry in regard to how this issue is dealt with at a practical level, it does seem to me that there is one aspect of the matter which is directly relevant to the MCGA even premised on its contention that all diversions in question were for the convenience of the Malelane Mill. It is clear to the AT, and it appeared that this was well understood by the parties as well, that the mischief behind clause 128 of the SIA is to ensure that a grower is not prejudiced, cost wise, if cane is diverted for the convenience of the grower's home mill and that the mill is not prejudiced, cost wise, if cane is diverted for the convenience of a grower. In the circumstances, it seems that, taking the present parties as an example, no grower belonging to the MCGA should be required to pay for any additional costs of cane testing as a result of a diversion (for the convenience of the

Malelane Mill) which are greater than the costs which the grower would have paid had the diversion not taken place.

In those circumstances, it would be wrong for the Malelane Mill Group Board to deduct the volume of cane to be diverted in calculating the levy which it must raise from the Malelane Mill and the growers contracted to it in order to recover its costs and expenses for cane testing. If the diverted volume is deducted before obtaining a costing from CTS, this would have the effect of increasing the cost of cane testing for both the mill and its contracted growers. This would serve to prejudice either the mill or the growers when any additional costs are calculated. (The position would be exacerbated if in fact there was a savings achieved in regard to the costs of cane testing arising from the diversion).

If the diverted grower contracted to the Malelane Mill or the Malelane Mill are not to be prejudiced cost wise by any diversion of cane, it is essential that in calculating the levy to be raised by it the Malelane Mill Group Board take into account all the cane contracted for delivery to the Malelane Mill because that is the levy that the diverted grower and the mill would have had to pay but for the diversion. Everything over and above and beyond that, the diverted grower or the Malelane Mill, depending on whose convenience is served, will become responsible to pay to the Komati Mill Group Board in respect of the costs of cane testing in regard to the diverted cane.

Once again, I believe it is imperative that this be understood and implemented uniformly across the industry and the AT will once more request the AB to ensure that this

knowledge is properly disseminated within the industry. It must be emphasised that any such deduction of the volume of cane which is to be diverted, and which results in an increase in the cost for cane testing, would be unfair to both the home mill and the growers concerned bearing in mind that neither the home mill nor the growers concerned are to be prejudiced with respect to additional costs for cane testing arising from the diversion of cane to suit the convenience of one or the other.

In regard to both instances where the AT asks the AB to ensure that the necessary is cascaded to the relevant role players within the industry, the AT does so with the express caveat that this pertains as the default position only in the absence of a contrary agreement between the grower and the home mill concerned as this is expressly countenanced in the preamble to clause 128 of the SIA.

Turning then to the more vexed issue of the position taken by RCL, namely that the SIA does not countenance that the Mill Group Board of the crushing mill may charge, under the rubric of costs for cane testing services in respect of diverted cane, an amount equivalent to the full levy which it raises against its home mill and the growers contracted thereto. RCL put forward many arguments in support of its contentions in this regard.

Its opening submission, so to speak, was its reliance on the provisions of section 5 of the Sugar Act No.9 of 1978 ("Act") and which section provides for the equal treatment of growers and millers under the SIA. In my view, this does not assist RCL in respect of this issue. It would, following on this section of the Act, be impermissible, for example,

for a Mill Group Board, once it has established a levy for recovery of the costs for cane testing services, to raise a different levy therefor amongst some of the growers attached to the home mill of that Mill Group Board. If the postulation put forward by RCL is taken to its logical conclusion, this would mean that, for instance, every grower in South Africa must be charged the same levy in respect of the costs for cane testing. We know from the information furnished by Naidoo that the quantum of costs attendant upon cane testing is different from Mill Group Board to Mill Group Board. On the argument put forward by RCL, this would amount to a violation of section 5 of the Act. This is simply untenable. It is worth noting that the AT rejected a similar argument that was put forward to it in the matter between The Melmoth Growers and Others-v-Tongaat Hulett Limited, as appears from the reported ruling of the AT delivered in that matter on 29 September 2008 and more particularly at page 15 thereof. This judgment is published on the website of the AT.

RCL's second argument, so to speak, is that clause 128 of the SIA expressly limits the recovery of costs associated with cane testing in regard to diverted cane to additional costs only. However, this loses sight of the fact that clause 128 of the agreement is addressing itself to the diverted grower and his or her home mill. This is expressly provided for in the preamble to clause 128 and is reiterated in sub-clauses 128(a) and (d) of the SIA. Clause 128 does not purport to speak to or address the relationship between the mills in question and more particularly between the Mill Group Boards in question. In the circumstances, RCL's reliance on the wording of clause 128 is of no assistance to it.

RCL's third argument is based upon the clause of the SIA which deals with the expenses of Mill Group Boards. RCL points to the fact that under the provisions of clause 68 of the SIA, Mill Group Boards have the power to recover their costs of cane testing from the growers and the mill concerned. RCL maintains that the only amount that may be recovered in respect of such services is that limited to the costs and expenses of providing that service. Here again, the reliance of RCL is misplaced. What clause 68 of the SIA deals with is recovery, by a Mill Group Board, of the costs and expenses of providing cane testing services, from its home mill and the growers contracted thereto. It does not purport to deal with the recovery by a Mill Group Board of costs arising from the diversion of cane. It expressly provides that the Mill Group Board may raise a levy in respect of the recovery from its home mill and the growers concerned. When a Mill Group Board recovers costs in respect of diverted cane, it does not raise a levy therefor.

RCL's next argument is that the power of Mill Group Boards is, pursuant to the provisions of clause 55(e) of the SIA, limited to a recovery only of the costs incurred by the Mill Group Boards in the discharge of their obligations. Once again, this reliance is erroneous. Firstly, it is clear from the preamble to clause 55 of the SIA that it is dealing with the power of a Mill Group Board in respect of its home mill only. The question arises as to what happens if a Mill Group Board has to recover costs for cane testing services in respect of diverted cane from a grower? Clause 55 cannot, on any basis, be construed as purporting to deal with the recovery of costs in respect of diverted cane by

a Mill Group Board. Secondly, the suggestion that a Mill Group Board is not permitted to make profits or gains is contradicted by the provisions of clause 56 of the SIA which expressly countenances that a Mill Group Board may indeed have surplus funds or that it might make profits or gains. Whilst recognising those facets of a Mill Group Board, what clause 56 of the SIA provides is that such surpluses, profits or gains may not be distributed but must be retained to fulfil the objects of the Mill Group Board. This is precisely what Naidoo explained occurs at a practical level.

RCL further argued that a reference to 'growers concerned' in clause 55(e) of the SIA is a reference to the mill or grower who brought about costs as a result of the diversion of cane. However, it is readily apparent that the reference to growers concerned is a reference to the growers contracted to deliver cane to their home mill. If regard is had to clause 51 of the SIA, it will be noted that it defines growers concerned, with reference to the establishment of Mill Group Boards under clause 50 of the SIA, as comprising those growers who at that time are contracted to deliver cane to that mill or who have delivered cane to that mill during the previous year unless at that time they are contracted to deliver all their cane to another mill. In other words, certainly for purposes of clause 50, the reference to growers concerned clearly excludes a grower whose cane has been diverted. There is no suggestion in the SIA that the expression 'growers concerned' as it appears in clause 55(e) is to be given any other meaning. On the contrary, clause 50 is the starting point in terms of which Mill Group Boards are established and the functions of such boards, which appear from clauses 52 to 57 of the SIA, flow naturally from clauses 50 and 51 of the SIA.

RCL also argued that the powers of Mill Group Boards must be expressly provided for in the SIA and that sans any express provisions empowering Mill Group Boards to make a profit when recovering the costs of cane testing in respect of diverted cane, the AT must find that Mill Group Boards have no such power. At the request of the AT, RCL furnished the AT with post hearing submissions dealing with that particular argument. This was also received by the AT on 6 June 2015. No useful purpose will be served if I were to refer to the various authorities relied upon by RCL. Suffice it to say that the authorities relate to the exercise by functionaries exercising public power in the classical sense. This relates to administrative and constitutional law and may be summarised by saying that the import of those authorities is that a functionary exercising a public power may not purport to do so in the absence of express authorisation.

The misconception here, on the part of RCL, is to equate the functions performed by Mill Group Boards within the Sugar Industry with the exercise by a functionary of an administrative public power. Whilst it is correct that the Sugar Industry, in many ways uniquely, is regulated by legislation, this does not alter the nature of the beast. The Sugar Industry continues to be made up of various role players in the private sector as opposed to the public sector. Simply because the industry is governed by legislation, does not axiomatically transform what is in essence private enterprise into some kind of public institution.

There are many such examples and instances of this in our law. So, for example, the Schools Act 84 of 1996 deals with both public and independent schools. It cannot be argued that independent schools do not, in some senses, perform a public function in that the public attends those schools. Furthermore, the existence and operation of such schools is governed by legislation. However, the suggestion that this somehow transforms independent schools into public institutions whose officials exercise a public power and perform a public function has been rejected by the High Court which has also held that there is no room, in such a situation, for the importation of the principles of natural justice.[7]

This is precisely the position with regard to the Sugar Industry and its regulation by legislation. In other words, there is no scope for the argument that before a Mill Group Board might be allowed to make a profit, so to speak, arising from the recovery by it of the costs of cane testing as a result of the diversion of cane, there must be express provision therefor in the SIA.

There is clearly no express provision in the SIA dealing not only with the question of the making of profit as aforesaid but also in regard to the very act of recovery itself. On the argument of RCL, in the absence of express authority, the Mill Group Board of the crush mill would not be able to recover costs for cane testing in respect of diverted cane at all. In my view, the recovery of such costs is clearly covered by the provisions of clause 55(n) of the SIA which empowers Mill Group Boards to undertake any other matter

[7] Khan v Ansur and others [2009] JOL 23080 (D)

incidental to the proper performance of their functions. Quite evidently, Mill Group Boards are responsible, under the SIA, for providing cane testing services at their respective home mills and are empowered to recover the costs of providing such services, and it must be incidental thereto that these bodies have the power to recover the costs of cane testing arising from the testing of cane diverted to the home mill of the Mill Group Board in question.

RCL would appear to have confused issues somewhat by its liberal reference to the distinction between fixed costs and variable costs in its various submissions. It was constrained to concede, at the hearing, that the divide between fixed and variable costs was not as neat as that which it originally countenanced. It conceded that, for example, even on its postulation of what was recoverable, it was incorrect to contend that no fixed costs were recoverable under the rubric of additional costs. The position which RCL maintained in its submissions was that fixed costs could only be recovered in exceptional circumstances where, as RCL put it, the normal range of output was exceeded and additional equipment would be required. This argument lost sight of the reality of depreciation of equipment in the process of cane testing. Granted, Naidoo informed the AT that insofar as cane testing is concerned, capital equipment plays a relatively minor role. But that does not alter the principle, namely that it is simply conceptually wrong to contend, even on the postulation of RCL that only marginal costs may be recovered, that no fixed costs can be so recovered.

However, having carefully re-read the various submissions put forward by RCL it appears to me that the aforegoing error is not of any great moment in this matter. No matter how inelegantly or otherwise RCL might have expressed itself, I am satisfied that it raised what it considered to be its fundamental problem which is what it contends is an impermissible double recovery by the Mill Group Board of the crushing mill. In effect, what RCL maintains is that if the Mill Group Board of the crush mill to which cane has been diverted is permitted to recover, under the rubric of costs for cane testing, the equivalent of its standard levy for cane testing, then the Mill Group Board of the crushing mill is recovering its fixed costs, more particularly those not affected by depreciation (such as rent, licence fees and the like), twice, once from the home mill of the Mill Group Board and the growers contracted thereto and a second time from the mill or grower whose convenience was served by the diversion of the cane.

It appeared from the hearing of the matter that although the Malelane Mill and the Komati Mill are both owned by RCL, the challenge that RCL is facing is that the Komati Mill Group Board, in seeking to recover the costs of cane testing as a result of diversion of cane from the Malelane Mill to the Komati Mill, requires such costs to be paid on the basis of an equivalency to the full levy calculated by the Komati Mill Group Board as being the levy that the Komati Mill Group Board raises in respect of the Komati Mill and the growers attached thereto. What presumably exacerbates the matter for RCL is that once it is established that the Malelane Mill Group Board should not be paying for any additional costs from its resources, if the diversions are at the instance of the Malelane Mill, RCL will now be saddled with meeting all such additional costs from RCL's resources.

Insofar as the latter issue is concerned, it is only right and proper that RCL pay any additional costs if in fact the diversions are for the convenience of its Malelane Mill. It can simply have no complaint with that, irrespective of what might have happened in the past. Insofar as RCL having to pay an amount equivalent to the full levy which the Komati Mill Group Board calculates as the levy which it wants to raise against the Komati Mill and the growers contracted thereto, that is a matter not regulated by the SIA and is subject to commercial discussion and negotiation. What RCL would have is that the AT make a contract for it. This authority, even if it were disposed to exercising it, the AT simply does not have. It has adjudicative authority and no power to make agreements for parties.

Whether or not there is in fact a double recovery by the Komati Mill Group Board is something that the AT cannot definitively comment on. It depends very much on the methodology used by the Komati Mill Group Board to determine its levies in respect of its costs for providing cane testing services. Naidoo explained that there is no uniformity in the industry in regard to the manner in which this levy is calculated. For all the AT knows, the Komati Mill Group Board might be taking into account all the volume of inward diverted cane it anticipates that its home mill will have to crush when it calculates such levy. In such a case, this would not result in a double recovery. On the other hand, it is equally possible that, having established its levy, it recovers, in respect of costs for the testing of diverted cane, an amount equivalent to the levy, from the diverting mill or grower and thereby makes a profit. Naidoo explained that this does indeed occur in the industry.

Be that as it may, however, nothing turns on it for purposes of this award considering that the SIA does not prescribe a methodology in terms of which such costs are to be calculated. Just as there must be a commercial agreement between the respective mills in respect of the diverted cane[8], so too must there be a commercial agreement in regard to the costs to be paid in respect of the testing for diverted cane.

What RCL would have the AT do is to interpret the SIA on the basis that, within the South African dispensation, we operate on the basis of a highly centralised and controlled economy reminiscent of the political experience of foreign jurisdictions over the last century. That is not the dispensation that the social pact that was concluded, for better or for worse, and which resulted in the South African Constitution, provides for. For good reason, the Sugar Industry is regulated by legislation. But that does not mean that every aspect must necessarily be so regulated. There are many issues within the industry that demand and require negotiation and agreement. And this is not unique to the Sugar Industry. The same principle is to be found pervading our labour legislation. The draftsmen of the legislation governing the Sugar Industry did not attempt to prescribe and regulate every facet. That is simply not possible.

There is accordingly no violence done to the overall mischief of the legislative framework governing this industry that various matters are left for negotiation and agreement. There is nothing that obliges a diverting mill to divert cane to a particular crushing mill or for a crush mill to accept such diverted cane. It is a matter of election and is obviously a

[8] Clause 127 of the SIA

decision that will be taken regard being had to all of the commercial exigencies attendant thereon. Just like the diverting mill has to agree the commercial aspects of the diversion with the crushing mill, so too must the diverted grower or the diverting mill negotiate, either directly themselves or through the expedient of their Mill Group Board, what additional costs, if any, will be required to be paid in respect of cane testing arising from such diversion.

On the face of it, it might be contended that leaving the issue to negotiation and agreement has the potential for oppressive conduct on the part of the Mill Group Board of the crush mill. Whilst that is notionally correct, it is well understood that the entire framework of the Sugar Industry is a symbiotic one and the old adage of 'what goes around comes around' is very apposite to it. One can only assume that an industry as old as this has the experience and the savvy to know that the shoe, over time, is invariably on the other foot and that common sense and responsible conduct would be in the overall and long term best interests of all parties.

In all those circumstances, the AT cannot uphold RCL's contention that an objective meaning must be given to the expression *'additional costs'.* (Whilst clause 128 of the SIA does not purport to deal with the relationship between the party providing the cane testing services and the party responsible for the payment therefor arising from the diversion of cane, as I have already found, thus rendering RCL's attempt to seek to place a meaning on the expression '*additional costs*' misconceived, in substance what RCL contends is that the SIA countenances an objective measure of what may be charged for cane testing arising from the diversion of cane). Furthermore, the AT can

find no basis upon which it might be contended that the ruling of the AB on this question was either wrong or amounted to a failure to resolve an issue or a dispute regard being had to RCL's contentions. The AB held that the parties affected by such diversion are required to negotiate and agree upon what encompasses *'additional costs'*. (Clearly, parties cannot be forced to agree. It follows that if they fail to do so, there will be no agreement on diversion of cane.). Furthermore, it held that different considerations may be considered by different parties and that there is no prohibition on what may or may not be included under this rubric. The conclusion of the AB in this regard is in fact correct and unobjectionable on any basis. In the circumstances, I find that the ruling of the AB on this issue is correct and should be confirmed by the AT as an answer to the issue of costs for cane testing arising from the diversion of cane as raised by RCL.

That said, however, I do not find that such ruling, as confirmed by the AT, is a ruling appropriate to the issue raised with the AB by the MCGA. The MCGA specifically raised the issue of additional costs in regard to cane testing services arising from the diversion of cane, under clause 128 of the SIA. In the circumstances, whilst I find that the AT should confirm the ruling of the AB on the question of costs for cane testing arising from the diversion of cane, I cannot find that this ruling is an appropriate or correct one in so far as the question that was put, by the MCGA, to the AB is concerned.

Even though it is no longer clear to me as to what it is that MCGA contends for, in this regard, as aforesaid, I am of the view that the AT should provide some clarity with regard to precisely what it is that clause 128 of the SIA has in contemplation when it

talks about the additional costs of cane testing arising from the diversion of cane in the absence of an agreement between the home mill and the grower concerned.

For purposes of clause 128 of the SIA, such additional costs of cane testing arising from the diversion of cane are those costs that constitute the difference between the amount charged for cane testing in respect of diverted cane (whether the charge in question emanates from the Mill Group Board of the crush mill or a third party service provider) and the amount that would have been paid (either by the grower or the mill concerned) if such diversion had not taken place.

Pursuant thereto, I believe that the following needs to be substituted for the ruling of the AB, of 6 November 2015, on this question:-

> *"In the absence of an agreement between the mill and the grower concerned, additional costs in respect of cane testing arising from the diversion of cane is the difference between the amount charged for cane testing services, whether such charge emanates from the Mill Group Board of the crush mill or a third party service provider, and the amount that would have been paid by the diverting mill or grower concerned if such diversion had not taken place."*

In respect of the third issue that was originally raised by the MCGA, namely that relating to past payments made by the Malelane Mill Group Board to the Komati Mill Group Board, and which payments were made from the resources of the Malelane Mill Group Board, in respect of costs for cane testing in regard to diverted cane, this issue was not

pursued by either party to the appeal. There appears to be some acceptance on the part of the MCGA that the defence of prescription might indeed have validity in respect of some payments. However, the parties indicated that following on the ruling of the AT, the parties would deal with that matter between themselves. In the circumstances, there is nothing further for the AT to add in this regard. As it stands, the ruling of the AB on this question remains intact. There is nothing offensive or problematic with the ruling of the AB on this issue and the AT proposes not to interfere with it.

That then leaves over the question of costs. Neither party advanced any argument on the issue of costs. As appears from the Rules for the Hearings of the AT, the general rule is that each party before the AT will be required to bear its own costs and that only in cases of extreme vexatiousness, tardiness, sloppiness and/or abuse of the AT's processes will the AT award costs. I am clear that there are no grounds to conclude that any of the aforegoing exists in the present matter and there will accordingly be no order as to costs.

In all the circumstances, the appeal is dismissed, the rulings of the AB, in paragraphs 2 and 3, of 6 November 2015 are confirmed whilst the ruling of the AB in paragraph 1 thereof is to be substituted on the terms set out on page 34 of this ruling. For the avoidance of doubt, the ruling of the AB in paragraph 1 of 6 November 2015 is also confirmed but as the correct ruling on the issue of costs for cane testing arising from the diversion of cane as raised by RCL.

Adv OA Moosa SC

I concur

Adv A Kissoon Singh SC

I concur

Mr Wilfred Ngubane

I concur

Mr Jack Wixley

I concur

Mr Walter Visser

Dates of Hearing:	1 and 2 June 2016
Date of Delivery of Ruling:	18 July 2016

For the Appellant:
Adv Steven Budlender

For the Respondent:
Mr Nic Theussien