# IN THE SUGAR INDUSTRY APPEALS TRIBUNAL

In the matter between

**TONGAAT HULETT LIMITED** Claimant

and

**EVEN GRAND TRADING 51 CC** First Respondent

**GLEDHOW SUGAR COMPANY (PTY) LTD** Second Respondent

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## RULING

Delivered on:- 24 AUGUST 2011

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1. This matter was heard by the Tribunal on the 11th, 13th and 14th of July 2011. The dispute concerned a Cane Supply Agreement ("CSA") and presented before the Tribunal as an adjudicator of first instance pursuant to the provisions of clause 34(c) of the Sugar Industry Agreement 2000 ("the Agreement") which was promulgated under the provisions of the Sugar Act of 1978. Although styled and titled as an agreement, the Tribunal has previously held, following on binding authority, that the Agreement, once promulgated, lost its status as an agreement and became part of domestic legislation.

2. No relief was sought by the Claimant ("Tongaat Hulett") against the Second Respondent and the Second Respondent delivered a notice of intention to abide the Tribunal's ruling. In its statement of claim Tongaat Hulett had only sought an order of costs against the Second Respondent in the event of the Second Respondent opposing Tongaat Hulett's claims. In light of the notice to abide, Tongaat Hulett confirmed that it sought no cost order against the Second Respondent pursuant to which the Second Respondent, other than maintaining a watching brief, played no further part in the proceedings.

3. The claim concerned the validity of a long-term CSA ("the first CSA") in terms of which the First Respondent ("Even Grand") was required, *inter alia*, and subject to certain caveats, to do the following:-

   (a) maintain at least 820 hectares of its farm known as Hyde Park Sugar Estate under cane;

   (b) deliver to Tongaat Hulett's mill at Darnall all of the sugar cane harvested from the 820 hectares;

   (c) grant to Tongaat Hulett a right of first refusal to take delivery of any additional sugar cane produced on the said farm over and above the sugar cane produced on the 820 hectares.

4. As appears from a true copy of the first CSA annexed to the statement of claim, it was concluded on 11 February 2004. It provides that it would commence on 1 April 2003 and would continue indefinitely with the right of either party to terminate it by giving not less than 2 [two] years written notice of an intention to terminate provided that no such notice could be given so as to terminate the first CSA prior to 31 March 2018. In other words, although the first CSA was to endure indefinitely, subject to a right of termination, it had a minimum period of 15 [fifteen] years. Even Grand described the first CSA as having a minimum period of 17 [seventeen] years on the basis that clause 9.2 of the first CSA could be read such that no notice to terminate could be given prior to 31 March 2018. In our view, the grammatical reading of clause 9.2 of the first CSA does not admit of such an interpretation. In our view the plain meaning of clause 9.2 is that no notice may be given such that the first CSA would terminate prior to 31 March 2018. In other words, on a proper interpretation the first CSA has a minimum period of 15 [fifteen] years. The relevance of this finding will become evident later in this ruling.

5. In the statement of claim Tongaat Hulett sought the following relief:-

   5.1 "A declaration to the effect that there is a valid Cane Supply Agreement between the Claimant and the First Respondent, a copy of which is annexed marked "B", in terms of which:

(a) the First Respondent is obliged to maintain under sugar cane at least 820 hectares of the properties defined as the **"FARM**" in the said Cane Supply Agreement;

(b) the Respondent is obliged to deliver to the Claimant's mill at Darnall and the Claimant is obliged to accept at its mill in Darnall all of the sugar cane harvested from the said 820 hectares, excluding any cane which is so unsuitable that it would be uneconomic to mill and that quantity of seed cane which is:

(i) required in terms of normal agricultural practice for replanting of the cane lands on the said farm from time to time; and/or

(ii) sold to other growers within the jurisdiction of the Darnall Mill Board for seed purposes.

(c) if the First Respondent produces additional cane on the said **"FARM**" over and above that which is produced on the said 820 hectares the Claimant will have a right of first refusal to take delivery of such additional cane or such part thereof as the Claimant may elect.

5.2 An order directing the First Respondent that the sugar cane grown on 820 hectares of the said farm must be delivered by the First Respondent to Claimant's mill at Darnall.

5.3 An order directing the First Respondent to offer to deliver to the Claimant any sugar cane grown on the said farm other than on the 820 hectares referred to above.

5.4 An order directing the First Respondent to pay the Claimant's costs of suit, such costs to include the employment of counsel."

6. Even Grand sought the following in terms of its further amended answer to the statement of claim:-

"the First Respondent seeks an order:-

(a) dismissing the Claimant's claims;

(b) directing the Claimant to pay the First Respondent's costs of suit, such to include those consequent upon the employment of two counsel."

7. In terms of the rules for the hearings of the Tribunal, published in February 2010 and amended thereafter from time to time, proceedings before the Tribunal are intended to be accessible to all parties subject to the Agreement. Furthermore, as a general rule each party is required to bear its own costs and only in cases of extreme vexatiousness, tardiness, sloppiness and/or abuse of the Tribunal's process will the Tribunal award costs. To the notion of accessibility can also be added the consideration that the Tribunal, being a domestic body, serves parties within the same industry and environment who, notwithstanding disputes from time to time, are generally required to live with each other on a day to day basis. This added consideration also militates against the award of costs other than in the circumstances set out in the rules as cited above.

   In the circumstances, and considering that both Tongaat Hulett and Even Grand had each sought a cost order from the other, they were questioned as to whether they persisted in doing so. Both parties considered the question and took instructions and at the end of the day were agreed that the sound basis upon which the Tribunal is generally reluctant to award costs was not disturbed, sufficiently so or otherwise, on the facts of the present dispute and in the final analysis neither side sought a cost order against the other.

8. Even Grand's defence to the admittedly signed first CSA consisted of 6 [six] defences in the alternative:-

(a) The first was that its signatory to the first CSA lacked the requisite authority to bind Even Grand.

(b) The second was that undue influence had been exerted on the signatory such that it vitiated the first CSA.

(c) The third was that Tongaat Hulett's right to claim under the first CSA had become prescribed in law.

(d) The fourth was that a subsequent 1 [one] year Cane Supply Agreement for 2009 ("the second CSA") had the effect of novating the first CSA.

(e) The fifth was that Tongaat Hulett had waived its right to rely on the first CSA.

(f) The sixth was that Tongaat Hulett was estopped from relying on the first CSA.

Before the hearing commenced on the morning of 11 July 2011, Even Grand advised the Tribunal that the only defences it would be relying upon were those of novation and waiver. Furthermore, that Even Grand would not be leading any evidence but would simply identify to the Tribunal those documents in the combined bundle of documents upon which it would rely. In response to this, Tongaat Hulett indicated that it had been taken by surprise

in that it had assumed that Even Grand would be dealing with all the defences in the sequence in which they had been pleaded and was not quite prepared to deal with this development. It accordingly asked for the matter to stand down until the morning of 13 July 2011 in order that it might refocus its energies on the only live defences in the matter. Even Grand accepted that Tongaat Hulett had been taken by surprise and that it might well need time to re-orientate and did not object to the request for the adjournment. In the circumstances, the Tribunal acceded to Tongaat Hulett's request for the adjournment and the matter was stood down until the morning of 13 July 2011.

Before adjourning on 11 July 2011, however, both parties indicated to the Tribunal that there might well be a skirmish if and when Tongaat Hulett led evidence in regard to the live defences in that Even Grand would object to any evidence in terms of which Tongaat Hulett sought to establish the subjective intention of Tongaat Hulett in concluding the second CSA by way of a witness or witnesses who would purportedly say what that subjective intention was. As Tongaat Hulett was still formulating its position in the matter, it was agreed that the parties would at least keep each other informed of their respective positions in order to allow the matter to proceed without further delay on 13 July 2011.

Having regard to the manner in which novation and waiver had been pleaded by Even Grand, Even Grand was asked to unequivocally clarify that its defences of novation and waiver would proceed on the basis that Even Grand accepted the validity of the first CSA. Even Grand confirmed that the Tribunal was to assess the merits of those 2 [two] defences on the basis that Even Grand accepted that the first CSA was indeed valid.

A further issue canvassed before the adjournment on 11 July 2011 was the question of onus. According to the pre-hearing conference minute, signed on 7 July 2011, and tendered to the Tribunal, there was no agreement between Tongaat Hulett and Even Grand in regard to this issue. It was suggested to the Tribunal that in light of the position adopted by Even Grand in only relying upon the defences of novation and waiver, the question of onus was somehow thereby dealt with. That was not understood by the Tribunal at the time and it is something that the Tribunal still does not understand. There can be no dispute that the onus on the defences of novation and waiver fall upon the party alleging same and, as will appear from what is hereinafter set out, the question of onus in this dispute does indeed feature significantly.

The last issue of moment that occurred before the matter was adjourned was the identification by Even Grand of the documents upon which it would rely in the matter. The page numbers are a reference to the pagination in the combined bundle of documents set out over 2 [two] volumes and were identified as pages 5, 10/13, 283, 284/289, 306, 309/321, 328, 340/341, 363, 388, 416A, 417, 418B1/418B7, 419, 421, 422, 431, 433, 438, 534/561 and 578/587. Tongaat Hulett indicated that it would separately identify any documents, additional to those identified by Even Grand, upon which it would seek to rely and would do so before the hearing commenced on 13 July 2011. The parties indicated to the Tribunal that they wanted the reliance on documents by the Tribunal to be confined to those identified by the parties themselves.

9. At the commencement of the hearing on 13 July 2011, Tongaat Hulett indicated to the Tribunal that it did not intend to lead any evidence on the basis that any witness for it would say to the Tribunal what he or she believed was the subjective intention of Tongaat Hulett in concluding the second CSA. Tongaat Hulett then proceeded to identify the additional documents upon which it would seek to rely and these are pages 331, 350, 350A, 352, 359/362, 371, 383/385, 418, 418A, 420, 427, 577A/577E and 593.

The parties again clarified that they required the Tribunal to confine itself to the jointly identified documents insofar as the Tribunal placed reliance on the documents before it in assessing the matter. It was also agreed that the usual admissions applied to these documents, namely they were what they purported to be and were sent and received as indicated on the documents and that there would be no need to prove the documents themselves, subject to the right of either party to object to the production of any particular document without it being first proved. There was no admission in regard to the truth of the documents.

It is trite that in any hearing before the High Court, that Court is not entitled to engage in an independent exercise of considering evidence not tendered before it and that if a Court does so it would constitute an irregularity. Such an irregularity does not axiomatically vitiate the proceedings as it is always a question of what prejudice, if any, has been occasioned by the irregularity. The statutory provisions set out in the Agreement in regard to the conduct of proceedings before the Tribunal specifically and expressly vest on the Tribunal powers not generally associated with the High Court. Clause 42 of the Agreement provides, *inter alia*, that the Tribunal at any hearing shall not be bound by the strict rules of evidence and may inform itself in relation to any matter before it in such manner as it deems fit and that the Tribunal shall not be limited to a consideration of the evidence before the Administration Board or other body and that the Tribunal may in its discretion re-hear

evidence or hear or receive additional evidence so as to inform itself fully of the relevant facts.

It is accordingly clear that the Tribunal is not limited to the evidence presented to it and that it is at large to do whatever it considers necessary in the circumstances of any matter to fully apprise itself of all that is relevant, that it is not confined to the documents identified by the parties and that it would not be committing any irregularity were it to go outside the ambit thereof. At the end of the day, however, that being said, the Tribunal did not find it necessary to go outside of the identified documents and the evidence presented to it in this matter.

10. At the commencement on 13 July 2011, Even Grand closed its case.

11. Tongaat Hulett then led the evidence of 3 [three] witnesses. The first was that of Mr Mike Fell, the commercial manager in the Sugar Division of the South African operations of Tongaat Hulett, Mr Martin Mohale, the managing director of the Sugar Operations of Tongaat Hulett and Mr Rennie Reddy, the regional procurement manager of Tongaat Hulett's Darnall mill.

Mr Fell's evidence was that he occupied the same position in 2008 and he oversaw the procurement of cane supplies. He was part of the process that gave rise to the fertilizer scheme initiated by Tongaat Hulett in 2008. In 2007

there was a tussle between competing millers on the KwaZulu-Natal North Coast for cane supply. In the middle of that year he was part of a strategic planning exercise directed at the retention of growers supplying cane to Tongaat Hulett's Darnall mill as some of these supplies were being moved to the Gledhow mill by the growers in question. The strategic planning led to a fertilizer scheme to be given effect to in the spring of 2008. The price of fertilizer had gone up consonant with the increase in fuel price. He was referred to the document at page 10 [ten] of the bundle of documents which sets out various facets of the scheme. The idea behind the scheme was to extend an interest free loan based on the area to be fertilized at a rate per hectare for the purchase of fertilizer, with the loan being repaid from the sale proceeds of cane sold by the growers in 2009. The rationale behind that is that fertilizer does not have a benefit beyond 1 [one] year. The Darnall mill had suffered a significant loss of cane supply in 2007 as a result of the shortage of cane supply referred to by the witness as resulting in a cane war. The intention behind the scheme was to retain the loyalty of the Darnall growers. The major competitor to the Darnall mill was the Gledhow mill. The scheme was offered to all growers whose home mill was Darnall, irrespective of whether those growers had long term cane supply agreements in place or not. Any grower with a pre-existing Cane Supply Agreement would not be required to sign a new Cane Supply Agreement but would be required to sign an acknowledgment of debt and a cession of payment of the cane proceeds.

Even Grand applied to participate in the scheme and was accepted as a participant. He was not cross-examined.

Mr Mohale's evidence was that Tongaat Hulett's Darnall mill had experienced problems over the 2007/2008 season. He was part of the strategic initiatives discussions aimed at retaining the loyalty of growers to the Darnall mill. In 2007 it was brought to his attention that Even Grand had moved 10'000 [ten thousand] tonnes of cane to the Gledhow mill. He, together with one Leslie James Munro, on behalf of Tongaat Hulett, had executed a one year Cane Supply Agreement with Even Grand. He said that although in terms of the delegation of authority there were other managers who could have signed the one year Cane Supply Agreement, he was not precluded from doing so as managing director. He did not know why this agreement was sent to him for signature and recalled having signed 15 [fifteen] to 20 [twenty] of such types of agreements. He usually received a file note with a bundle of agreements and would check the top agreement in detail after which he would only but glance at the agreements below. At the time that he executed the one year Cane Supply Agreement in regard to Even Grand he made no connection with the fact that it had been brought to his attention in 2007 that Even Grand had supplied 10'000 [ten thousand] tonnes of cane to Gledhow in that year. He was not cross-examined.

Mr Reddy testified that he was the regional procurement manager for Tongaat Hulett at its Darnall mill. He was referred to the email at page 416A which talked about the fertilizer scheme and the fact that the forms would be available from 1 September 2008 and could be collected from Mr Reddy himself. He was then referred to a pro forma application form which appears at page 13 and identified that as the form in question. He was also referred to page 10 which set out the criteria of the scheme. He said that the applications in question were submitted to him and that there were about 200 applications in all. He was then referred to page 417 and he identified that as being the application form executed by Mr Keval Bodasing on 9 September 2008. His role when he received the applications was to do an assessment of the application. He submitted his findings in a form and the form in regard to Even Grand appears at page 418. He confirmed that the manuscript on page 418 was his. He said that he was present when Mr Bodasing read the document setting out various aspects of the fertilizer assistance scheme as appears at page 10. He said that Mr Bodasing expressly mentioned that Mr Bodasing had not previously signed any Cane Supply Agreement in Mr Bodasing's personal capacity. A week or so before the scheme was launched, Mr Reddy had obtained a list of persons or entities that had Cane Supply Agreements with Tongaat Hulett and this is set out from page 418B onwards. He said that when he looked at the listing for Even Grand as it appears at 418B3 he saw that the grower number there of 212488 did not match the grower number 223765A placed on the form by Mr Bodasing as

appears at page 417. The assessment forms which he completed were handed over to Mr Nigel Simmons the author of the email at page 416A. He was then referred to page 420 which was an acknowledgment of debt executed by Even Grand on 29 September 2008 and to pages 422 to 425 which is a cession of cane payments executed by Even Grand in favour of Tongaat Hulett on the same day. Under cross-examination he was referred to page 388 which was an email sent by him on 21 June 2007 to Mr Fell in terms of which he advised, *inter alia*, that Even Grand was taking cane from land under the first CSA with Tongaat Hulett and sending it to Gledhow (at the time referred to as the Ushukela mill). On questioning from the Tribunal as to his choice of language in his assessment form at 418A, more specifically his reference to *"No Cane Supply Agreement*", he responded by saying that he had so reflected in the assessment form as he was not able to find a Cane Supply Agreement under grower code 223765A.

After leading this evidence, Tongaat Hulett closed its case.

12. The parties then respectively argued the matter. Both parties put up heads of argument. Despite having advised the Tribunal on 11 July 2011 that it would be relying on novation and waiver, Even Grand indicated that it would rely on novation alone.

13. Even Grand contended that the Tribunal could have no regard to the evidence led by Tongaat Hulett. The evidence it said was irrelevant and inadmissible. Tongaat Hulett, having accepted the validity of the second CSA, had put itself into an impossible situation in terms of seeking to rely on the first CSA. In the absence of seeking any rectification of the second CSA or of seeking to have it set aside on the grounds of *justus error*, it was precluded from relying on the first CSA. Its argument was that the parol evidence rule precluded any consideration of anything outside the four corners of the second CSA. A consideration of the second CSA made it evident that it contained the sole and exclusive memorial of the agreement between the parties. Its terms were clearly inconsistent with the first CSA and both CSA's could not co-exist. When questioned on whether it was being contended by Even Grand that the parol evidence rule trumped the general proposition that in the absence of any express provision for novation, novation must be found as a necessary inference regard being had to all the circumstances of the matter including the conduct of the parties, its response was that it was so contending.

14. Tongaat Hulett on the other hand argued that the parol evidence rule did not preclude a consideration of all relevant circumstances including the conduct of the parties in determining whether or not a novation had occurred. It argued further that novation constituted a waiver of rights and that such a waiver is not easily established because people do not lightly abandon rights.

It contended that it was not necessary for it, in the circumstances of the matter, to have sought to either rectify the second CSA or to seek to have it set aside on the basis of *justus error*. It was sufficient if all relevant circumstances, including the conduct of the parties, demonstrated that the parties did not intend to replace the first CSA with the second CSA. It argued further that the 2 [two] agreements were able to coexist and that the second CSA could be viewed as a written variation of the first CSA with perhaps the first CSA being suspended for the duration of the second CSA. It submitted that the onus to establish novation was clearly on the party who alleged it and that it was not an onus that was lightly discharged and furthermore that Even Grand had failed to discharge the onus on it in the present matter. It argued that it was a jurisdictional requirement of novation that a first valid agreement existed failing which novation could not take place and that considering that Even Grand had disputed the validity of the first CSA, novation was not a defence open to it in the circumstances of the present matter.

15. It was not in dispute that the second CSA contained no express provision novating the first CSA. This is hardly surprising. As the learned authors of Christie, The Law of Contract in South Africa, Fifth Edition, say at page 450:-

> "*Only the very exceptional contract will expressly state that its purpose is to novate a previous one, so the intention and consensus that must be sought is a common intention to cancel the old contract so that it can no*

*longer be enforced and no longer exists, and replace it with the new one.*"

16. In ***Electric Process Engraving and Stereo Company –v- Erwin 1940 AD 220 at pp 226 – 7***, the then Appellate Division said the following:-

*"The law on the subject was clearly enunciated as far back as 1880 in the well-known case of Ewers –v- The Resident Magistrate Oudtshoorn and Another, Foord 32*, *where De Villiers, CJ, said: 'The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to novate cannot be held to exist by way of necessary inference from all the circumstances of the case*.'"

17. In the matter of ***French –v- Sterling Finance Corporation (Pty) Ltd 1961 (4) SA 732 (AD)***, the then Appellate Division held as follows at ***736H***:-

"*The 'circumstances of the case' of course include the conduct of the parties.*"

18. After a careful consideration of a host of cases dealing with the question of novation in the absence of an express declaration to that effect, the Tribunal is satisfied that the submission of Even Grand to the effect that the parol

evidence rule precludes any consideration of relevant circumstances including the conduct of the parties is entirely wrong. The Tribunal can find no authority to support such a proposition. That contention arises from a conflation of very distinct concepts. The parol evidence rule is designed to avoid parties seeking to avoid their contractual obligations by premising the interpretation, ambit and extent of those obligations on the actual wording used by the parties in their written agreement. It is to avoid that type of mischief that the rule has been established that the intention of the parties must be garnered from the 4 [four] corners of their written document. The parol evidence rule does not extend, and has not been extended in any reported matter, to an assessment of the question as to whether a second written agreement between the parties was intended by them to replace their first written agreement. On the contrary, such a contention does violence to the established principle that in the absence of an express declaration novation can only be found as a necessary inference regard being had to all the relevant circumstances including the conduct of the parties. The rationale behind this is fairly evident. Just like the parol evidence rule is calculated to prevent parties from arbitrarily seeking to renege on their obligations, similarly the rule in regard to establishing novation is designed for that purpose. What the law in effect is saying is that you are faced with 2 [two] documents, with each purporting to be the sole or exclusive memorial of the agreement between the parties and the only way to determine which one is, is to have regard to all relevant circumstances including the conduct of the parties.

19. When one considers the evidence of Mr Fell, it is quite clear that the one year Cane Supply Agreements were concluded by Tongaat Hullet both as a form of security and as a *quid pro quo* for the monies advanced to growers in order to purchase fertilizer. Of course it is clear that Tongaat Hullet devised the scheme of fertilizer financing as a means of retaining grower loyalty to its Darnall mill whose very existence was being threatened by the then prevailing cane war. In other words, Mr Fell contextualised the circumstances under which the second CSA came to be concluded. Those circumstances would point strongly against any intention on the part of Tongaat Hullet to replace the first CSA with the second CSA.

20. A similar view can be expressed in regard to the evidence of Mr Mohale. He was not challenged on his testimony that at the time when he executed the second CSA he did not, in effect, think about the first CSA. It was not suggested, other than on the basis of the overall submission that all Tongaat Hullet's evidence was irrelevant and inadmissible, which submission has been rejected, that Mr Mohale's evidence should be rejected on any other basis and the Tribunal has no reason to do so. Considering that novation is juridically described in our law as amounting to a waiver of rights and that there is a factual presumption that a party is not likely deemed to have waived his rights and that clear evidence of a waiver is required, that circumstance again strongly points against any intention on the part of Tongaat Hullet to

novate the first CSA when it concluded the second CSA. Now it is true that, in the law of contract, for waiver to occur it is not always an essential requirement that the party waiving does so consciously that is with full knowledge of its rights but that waiver may be established on the basis of election where one right is waived when a party chooses to exercise another right inconsistent with it (see **Xenopoulos –v- Standard Bank of South Africa Limited 2001 (3) SA 498 (W)**), Even Grand did not appear to rely on any election on the part of Tongaat Hullet nor was the Tribunal able to find any evidence before of it of such an election. Assume for example that in 2009 Tongaat Hullet had sued on the second CSA without making any reference to the first CSA, that might well have been a case of an election on the part of Tongaat Hullet.

21. It is not entirely clear to the Tribunal as to what the purpose was of leading Mr Reddy's evidence. Perhaps it was designed to deal with the fact that in his assessment of the application by Even Grand for participation in the fertilizer assistance scheme he remarked at the bottom of the form, which appears at page 418A of the bundle of documents, *"No Cane Supply Agreement*" just above his remark *"No Risk*". He suggested that he had remarked *"No Cane Supply Agreement*" because when he looked at the grower code for Even Grand at page 418B3 of the bundle of documents, he found that the grower number was something else that is 212488. However, his evidence in this regard was not entirely satisfactory. Firstly, he said that he knew who the

larger suppliers of cane to the Darnall mill were and that he knew Even Grand. Secondly, he did not satisfactorily explain why he had not queried the grower code with his head office. The document at pages 383 and 384 of the bundle of documents, which is a letter to the Gledhow Mill Group Board and which was marked as copied to amongst others the Darnall Mill Group Board, explains at the bottom of page 383 that because Even Grand was splitting its cane deliveries between Darnall and Gledhow, Even Grand would remain recorded under grower code 223765A (as reflected by Mr Bodasing in the application form at page 417 of the bundle of documents, and as repeated by Mr Reddy in his assessment form at page 418A of the bundle of documents) in respect of the estimated area of 667,7 hectares under cane. Thirdly, considering that Mr Reddy assessed Even Grand as posing *"No Risk*" to Tongaat Hullet in respect of the fertilizer assistance scheme, his choice of language in the expression *"No Cane Supply Agreement*" would grammatically suggest that in Mr Reddy's assessment no Cane Supply Agreement was required from Even Grand. That appears to be a more logical explanation than the complex one that he gave concerning his apparent inability to identify the grower code provided by Mr Bodasing. But the Tribunal is not required to make any final determination in this regard and refrains from doing so. Even if it was suggested that Mr Reddy thought that no Cane Supply Agreement existed at the time between Tongaat Hullet and Even Grand, that fact alone would not be sufficient to disturb the probability that Tongaat Hullet did not intend to novate the first CSA when it executed

the second CSA. A finding in regard to novation or the absence thereof, as with most issues in law, is made on a conspectus of all the relevant evidence and not on one particular fact in isolation. At the end of the day the Tribunal finds Mr Reddy's evidence singularly unhelpful and no reliance is placed thereon.

22. If regard is had to the document at page 12 of the bundle of documents, setting out the terms and conditions of the fertilizer assistance scheme, it is quite clear from paragraph 2 thereof that if a grower already has a cane supply agreement with Tongaat Hullet with an expiry period longer than the 2009/2010 crushing season, or in exceptional cases the 2010/2011 crushing season, the existing CSA was considered sufficient. Again this is a fact which strongly militates against the suggestion that Tongaat Hullet intended to novate the first CSA when it executed the second CSA. Paragraph 2 of the terms and conditions of the assistance scheme but repeat what Tongaat Hullet set out as the parameters of the scheme in the documents at pages 10 and 11 of the bundle of documents, more particularly under paragraph 2 of the sub-heading "*Criteria*".

23. Tongaat Hullet contended that it was not open to Even Grand to rely on the defence of novation considering that until the morning of 11 July 2011, Even Grand had maintained the position that the first CSA was invalid. This contention is premised on the well-established principle that when parties

novate they intend to replace a valid contract by another valid contract. (See **Swadif (Pty) Ltd –v- Dyke N.O. 1978 (1) SA 928 (A) at 940**). This contention is wrong. The moment that Even Grand accepted, even as late as on the morning of 11 July 2011, that the first CSA was valid and that the Tribunal should regard it as such, it was clearly open to Even Grand to rely on the defence of novation. The aforegoing principle depends on the objective invalidity of an earlier contract and not on the allegation of invalidity of one party. Not only has Tongaat Hullet not accepted that allegation of invalidity but on the contrary seeks to establish or confirm its validity in these proceedings. In the circumstances, the principle contended for does not find application in the present matter.

However, that is not the end of the matter. The fact that Even Grand continuously disputed the validity of the first CSA up until the morning of 11 July 2011 almost conclusively evidences a lack of any intention on its part to novate. Novation requires the consensus of both parties. It would not, for example, be sufficient if only Tongaat Hullet evidenced an intention to novate. There must be such an intention on the part of Even Grand as well. How could it possibly have had that intention when at the material time of executing the second CSA it disputed the validity of the first CSA? Its own position at the time destroys any suggestion of an intention on its part at the time of conclusion of the second CSA to novate the first CSA.

24. The fact that the parol evidence rule does not limit the Tribunal to the four corners of the second CSA in assessing whether the second CSA was intended to novate the first CSA, does not mean that the terms of the second CSA are irrelevant. Quite the contrary. It is clear from the second CSA that it contains terms which appear to be wholly inconsistent with the terms of the first CSA. More specifically the area of the farm covered is different, the duration of each of the first and second CSA's are different and there is furthermore no term in the second CSA which requires Even Grand to give Tongaat Hullet a first right of refusal in regard to cane grown on that portion of the land that Even Grand has under cane in excess of the agreed hectares as there is in the first CSA. In addition, and as correctly pointed out by Even Grand, the second CSA is not terse on its terms but contains a host of other comprehensive provisions dealing with the relationship between the parties. When the 2 [two] Cane Supply Agreements are compared to each other, it is evident that their terms are inconsistent. This militates to a conclusion that, on the face of it, the parties indeed intended to novate the first CSA in concluding the second CSA. In the opinion of the Tribunal, however, despite this indication of an intention to novate, it is simply insufficient on its own to establish a clear intention to novate when all other relevant circumstances are taken into account.

25. This then leads on to a consideration of Even Grand's contention that once Tongaat Hullet accepted the validity of the second CSA, that was really the end of the matter as it then did not lie in the mouth of Tongaat Hullet to argue that the first CSA was extant and continued to operate. Even Grand pointed to the fact that Tongaat Hullet had alleged in its claim that the second CSA had been concluded in error but that Tongaat Hullet had failed to develop this proposition and had not sought to have the second CSA set aside on the basis of *justus error*. In response, Tongaat Hullet argued that it was not necessary for it to rely on *justus error* or to seek to have the second CSA set aside. When pressed on how the two agreements could co-exist, Tongaat Hullet responded by saying that they could live side by side alternatively that the second CSA could be viewed as a variation of the first CSA with perhaps the first CSA being suspended for the duration of the second CSA.

It is difficult to imagine the first CSA co-existing with the second CSA. On Tongaat Hullet's own case, as pleaded, the second CSA was concluded in error. By that the Tribunal understands Tongaat Hullet to mean that it was entered into unnecessarily. It is also possible for it to amount to a variation of the first CSA, albeit a fairly convoluted one. What Tongaat Hullet was trying to say but which it failed to do with the requisite degree of clarity at the hearing was that if it had sued or been sued during the currency of the second CSA, it might and in all probability would have been necessary for Tongaat Hullet to either seek to have the second CSA set aside on the

grounds of *justus error* or to allege a variation of the first CSA or the like, but that considering that the second CSA has expired by effluxion of time as at the time when the present proceedings were instituted and were heard, the issue at the present time as to the ability or otherwise of the 2 [two] Cane Supply Agreements to co-exist is entirely academic and moot. That is no doubt correct. For present purposes, Tongaat Hullet premises its claim for relief on the first CSA. As long as the relevant circumstances establish that there was no intention to novate the first CSA when the second CSA was concluded, there is no need for the parties or the Tribunal to seek to establish precisely how the two agreements could co-exist during the currency of the second CSA. That question would have been relevant only during the currency of the second CSA and it no longer is.

26. The threatened skirmish alluded to by the parties on the morning of 11 July 2011 failed to materialise as Tongaat Hullet disavowed any reliance on the subjective say so of any of its witnesses in regard to Tongaat Hullet's intention or otherwise to novate the first CSA when it concluded the second CSA. It is true that Even Grand argued at the end of the day that all the evidence led by Tongaat Hullet was indeed irrelevant and inadmissible, but it did so on the basis of its argument that the Tribunal was confined in the assessment of the dispute concerning novation to the four corners of the second CSA. Once the Tribunal rejected that argument, by necessary implication it has also rejected the argument that the evidence of Tongaat

Hullet's witnesses was irrelevant and inadmissible. Considering, however, that Tongaat Hullet did not seek to rely on any direct evidence of any of its witnesses in regard to whether at the time of concluding the second CSA Tongaat Hullet had the intention or otherwise to novate the first CSA, the Tribunal finds it entirely unnecessary to consider any dicta in **Proflour (Pty) Ltd and Another –v- Grindrod Trading (Pty) Ltd [2010] 2 ALL SA 510 KZN** it having been suggested by Even Grand that such dicta sanction the reception and admission into evidence of such direct testimony.

27. It was indicated earlier that the question of onus indeed remained significant in this matter. This is not a matter where there was no indication to novate whatsoever. On the contrary the terms of the second CSA when compared to the terms of the first CSA do, on the face of it, point towards an intention to novate. In the view of the Tribunal, however, the indication provided thereby was not sufficient to establish what must be clear evidence leading to a necessary inference that the parties indeed intended to novate. The Tribunal premises this view on a conspectus of all the relevant circumstances of the matter. At the end of the day the onus to establish the defence of novation rested with Even Grand and though it established some *indiciae* in this regard, it clearly failed to discharge the onus on it of establishing that defence on a balance of probabilities. It is a trite principle that when a claimant or plaintiff bears an onus and fails to discharge it, a Tribunal should make an order of absolution from the instance. Where, however, the onus is on a

defendant and the defendant fails to discharge that onus then judgment must be given for the claimant or plaintiff. (See generally **Hoffmann and Zeffertt, The South African Law of Evidence, 4th Edition, Butterworths at pages 507 and 508**).

28. While the parties are free to terminate the first CSA by mutual agreement and while it is possible that the first CSA might be terminated by cancellation based on breach, the Tribunal considers it useful at this stage to pronounce on the duration of the first CSA although it has not been called upon expressly to do so. The fact of the matter is that there was a sharp dispute between the parties as to the meaning to be ascribed to the duration clause of the first CSA. In the absence of any termination or cancellation of the first CSA, the Tribunal is concerned that that sharp dispute should not form the basis of a further proceeding before it. Furthermore, it is important for the parties to have a clear understanding of the duration of their obligations. Pronouncing on the duration of the first CSA is nothing more than an extension of the declaratory relief of validity sought by Tongaat Hullet in this matter. In the Tribunal's view its finding should visit no inconvenience on either party. In the case of Tongaat Hullet, although it sought to establish the validity of the first CSA it accepted throughout the proceedings that the first CSA had a minimum period of 15 [fifteen] years. If it was to the advantage of any party to establish a longer minimum duration, it was Tongaat Hullet. Even Grand sought to avoid the first CSA. In light thereof it could hardly be to

its advantage to contend for a longer minimum duration. In all the circumstances, the Tribunal considers it appropriate to make a formal finding in this regard and accordingly does so. The Tribunal, in doing so, is only interpreting the duration of the first CSA and is not prescribing how long the first CSA should endure for.

29. In the statement of claim, the claimant sought an open-ended order of delivery following upon a declaration of validity of the first CSA. During the course of argument, the Claimant sought to amend its claim for the 2010/2011 season to read as 2011/2012 season. The Tribunal has no difficulty with the amendment on the basis that all parties accept that any order that the Tribunal makes in regard to delivery can only be prospective and not retrospective for obvious reasons. However, the Tribunal does not see the wisdom of limiting or circumscribing the ambit of its order to just one season only. Here again the Tribunal does not purport to prescribe the duration over which the delivery should take place. As previously indicated, the first CSA may well terminate by mutual agreement or otherwise before the minimum period of 15 [fifteen] years has been reached. But for present purposes, it would be singularly unhelpful to grant an order only for the current season as that has the potential to create more disputes at the end of the period in question. The Tribunal considers it appropriate to revert to the terminology used by the Claimant in its statement of claim. Furthermore, whilst declaratory relief is sought in regard to seed cane, there is no reference

thereto in the delivery order sought. The Tribunal will incorporate a reference thereto in the order that it makes.

30. In the circumstances, the Tribunal finds for the Claimant and makes the following order:-

(a) The Claimant is granted the declaratory relief set out in paragraph 16.1 of its statement of claim, which is recited in paragraph 5.1 above, subject to the inadvertent use of the word "*quality*" in sub-paragraph 16.1b in reference to seed cane being amended to read "*quantity*".

(b) It is declared that the Cane Supply Agreement annexed to the statement of claim as annexure "B" is a long-term Cane Supply Agreement of indefinite duration, subject to termination on its terms, with a minimum duration of 15 years.

(c) Commencing not later than 2 [two] calendar weeks from the date of delivery of this ruling, the First Respondent is ordered to deliver to Claimant's mill at Darnall the cane harvested, excluding any unsuitable cane or quantity of seed cane, as contemplated by the Cane Supply Agreement referred to in paragraphs (a) and (b) above.

(d) Commencing not later than 2 [two] calendar weeks from the date of delivery of this ruling, the First Respondent is ordered to offer to deliver to the Claimant any sugar cane grown on the farm in question other than on the 820 hectares as contemplated in the Cane Supply Agreement referred to in paragraphs (a) and (b) above.

(e) The orders in paragraphs (c) and (d) above are prospective orders, having no retrospective effect.

(f) Each party is directed to pay its own costs in the matter.

ADV O A MOOSA SC
MR EDWARD MVUSENI NGUBANE
MR COLIN LINNETT
MR TIM MURRAY
MR GERHARD VAN DER WALT

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| Dates of Hearing: | 11, 13 and 14 July 2011 |
| Date of Delivery of Ruling: | 23 August 2011 |
| For the Claimant: | Cox Yeats Attorneys<br>Adv P Olsen SC<br>Adv R Salmon SC |
| For the First Respondent: | Edward Nathan Sonnenberg<br>Adv F H Odendaal SC<br>Adv A Lamprecht |