22 December 2010

DISPUTE UMFOLOZI SUGAR MILL (PTY) LTD – *vs* – CANE TESTING SERVICES

The Appeals Tribunal sat on two occasions to hear argument in respect of the dispute between Umfolozi Sugar Mill (Pty) Ltd (USM) and Cane Testing Services (CTS) where CTS is an arm of the South African Sugar Association. There are a number of factors which are important in this case.

Respondent:

There was discussion as to who the Respondent should be in this case. The initial call for help came from the Umfolozi Mill Group Board (MGB) seeking help with the fact that the two parties at the MGB could not agree on an amendment to the mass balance of mixed juice (mj) at the Umfolozi mill. The miller would not agree to "sign the claim."

Various views were expressed as to who should be the respondent when USM did not agree to the "claim". Was it the Growers who should respond, after all it would be the Growers who would be financially effected, was it the MGB who should respond or was it CTS who should respond?

The fact that these discussions were held is, in itself, evidence that the basic procedures in cases like this are not clearly understood by the parties. In the end the correct two parties contested the debate i.e. CTS and the appellant, USM. The Sugar Industry Agreement (SIA) is clear that in respect to clause 134(a) read with clause 138 the MGB does not have a decision to make in regard to amendments ordered by CTS. It is not for the miller to agree (sign off the claim), nor is it for the MGB to sit in judgement to agree or disagree with the order made by CTS, if CTS determines that the Volume of RV entering the mill is incorrect.

Clause 138 simply put says that CTS must make an adjustment, notify the MGB, who must implement that adjustment. If, there after, either party to the MGB (i.e. either the miller or the growers) feel aggrieved, they may appeal that amendment to the Admin Board. In turn the decisions of the Admin Board can be taken on appeal to the Appeals Tribunal.

In the end it was the decision by CTS to amend the volume of mj by 170. 887 t that the USM took on appeal and so finally the Appellant is USM and the Respondent is CTS, he who ordered the amendment.

The Dispute:

Both parties to this issue have written a lot. USM and CTS have both written a number of papers expressing many differing views on the validity of an adjustment being made to the volume of mj for which the growers were to be paid.

Sifting through the points made by USM, the "crisp" outcome is that USM feel aggrieved that the deterioration of mj quality as determined by CTS was not their fault. USM contend that the cause of the quality change between the direct analysis of cane (DAC) sample and the mj sample was as a result of poor "quality" sugar cane having been delivered by the growers.

"Quality" in the sugar cane industries of the world is related to the fibre content and or ash content and the purity where purity is measured as the ratio of sucrose content to the content of total sugars. The total content of sugars is primarily the sucrose and non-sucrose sugars.

USM further contend that CTS acted outside of their own (USM's) interpretation of clause 138, which USM interpret as implying that CTS must first determine the cause of any change in mj quality before they can order one or the other party to make good any loss.

On the other hand, CTS contend that the mj quality deteriorated because of actions taken by USM and not as a result of the quality of the sugar cane that was delivered to USM by the growers.

USM further contested CTS's choice of proxy for the calculations of the amendment and were unclear as to why CTS chose 170 .887 t as the volume of mj to add to the volume of mj that growers should be paid for.

Each of the above made points will be discussed and ruled upon separately and in the order discussed above.

mj – DAC purity difference caused by cane quality

In reviewing the information submitted to the Administration Board by the parties in respect of the USM appeal, the Appeals Tribunal called for more detailed information in respect of the "mill balance adjustment claims" as part of Addendum 3 of Annex 2 of the Agenda that went to the Admin Board.

This additional information was asked for because USM contended that quality of the incoming cane caused the problems that resulted in the mj quality deteriorating. USM offered no evidence in support of their claim and so the Appeals Tribunal called for the more detailed information to determine for themselves that no evidence existed in that detail that would, none the less, support USM's contention. The additional information of both a daily and even hourly analysis did not provide any additional support for USM's contention that the quality of the incoming cane would have been the cause of the mj deterioration. The only evidence the data provided was that the moisture content of the bagasse did vary considerably and that in its self would cause problems in the firing of the boilers, but that had no bearing on the cane quality. Unfortunately there is insufficient data pertaining to the ash content of either the cane or bagasse to elucidate the impact of soil in the cane and what impact that could have had in support of USM's contention.

In the papers provided by USM, they contend that to reject cane they believe is poor quality is "practically difficult" and secondly they believe that it is the responsibility of the MGB to reject the cane! As a call for further information, the Appeals Tribunal also called for the current MGB rejection rules to determine why this would be "practically difficult" as contended by USM.

Second point first! The SIA specifically provides that the miller is responsible for rejecting cane on the basis of rules determined by the MGB (clause 117). The point made by USM that it is the MGB responsibility to reject cane is therefore not valid.

The point made by USM that the rejection is "practically difficult" also appears not to be true as the evidence provided by USM (Section M of the documents) show that the system of cane rejection is functional and does work, although the examples provided were for the 2010/11 season and not the period under review.

The evidence provided therefore does not give any credit to USM's contention that cane rejection is "practically difficult."

The supplying grower and the miller enter a *de facto* purchase and sale agreement on the delivery of the grower's consignment to the weighbridge. The terms and conditions, unless otherwise agreed, are dictated by the SIA. Neither party can renege on the sale agreement post the event. So a miller must not accept sugarcane that he believes he cannot crush efficiently. (Clause 117)

Therefore in the light that USM did not provide any evidence that cane quality was the cause of the quality of mj deteriorating and that the Appeals Tribunal could also not find any "smoking gun" in the detailed information called for, the contention that the deterioration of the mj was not at the cause of USM, is rejected.

Interpretation of clause 138

As a general principle, a miller can expect to pay only for the quantity and quality of the sugarcane that is delivered across the weighbridge by the supplying Grower. Likewise the Grower can expect to be paid for the same quantity and quality of sugarcane that was delivered to the miller at that time. The Grower can expect that neither the quantity nor the quality of the sugarcane (or its components) should deteriorate whilst in the custody of the miller. It is this broad thesis that clause 134 and 138 seeks to address.

USM's letter, which is Annex 2 of the Agenda to the Admin Board, is the clearest expression of their interpretation of clause 138. USM state: *"in the absence of a remedy that is available to USM as suggested in clause 138….."* and they go on further to suggest CTS *"is required to furnish the steps required to remedy the associated amendment"* these statements illustrate that their contention in respect of the interpretation of clause 138 is that CTS must be able to tell a miller or grower what they must do, to result in the quantity of RV entering a mill being corrected.

The Appeals Tribunal realised that this and any other possible interpretation of this clause 138 could have far reaching implications for the Industry, therefore all stakeholders were invited to contribute comment in respect to this interpretation. Other than the protagonists, nobody other than the SA CaneGrowers Association chose to comment to the hearings on a view about the interpretation of clause 138.

The Appeals Tribunal does not accord with USM's interpretation that CTS must advise the miller or grower what "technical measures" must be employed to correct the situation that has given reason for CTS to be dissatisfied with the quantity of RV entering the mill.

The Appeals Tribunal, however, read into clause 138 that if CTS determines, by all the measurements and analysis available to it, in following the processes as laid out from time to time in the Official Methods Manual, that the determination of the quantum of RV entering the mill is not correct, or is unfair to one party or the other, then CTS will advise the MGB of its findings. CTS must advise, as well, the steps it requires to be taken to remedy, (put right) the situation. These steps could include amending the determinations by adding or subtracting, calculated amendments, to the volume of RV as determined by the MGB. Some of these amendments could be ordered to be applied retrospectively. The MGB must implement the steps that CTS orders.

Clause 138 to the SIA makes it sufficient for CTS to identify any parameter that may be untoward and to order an amendment to that parameter to restore equity to the parties.

The Appeals Tribunal does read into clause 138 that it envisages a cessation of the cause of the discrepancy that CTS has identified. That is to say that it is not good enough for either the miller or the grower to continue to cause the discrepancy to happen and to simply "pay the fine", so to say, by accepting an on-going amendment to the volume of RV. (This view was shared by the Growers in their submission dated 17 September 2010 in respect of clause 138)

The reading of clause 138 does not afford CTS the discretion of choice as to make an amendment or not as the clause says "shall". The quantum of the amendment is not specified and as such CTS does have the discretion as to what proxy they would use to calculate any such amendment. This issue of the appropriate proxy was part of USM's appeal. USM's letter of 22 February 2010 raises the question of what proxy should be used in calculating an amendment. CTS go into considerable detail in their document dated 23 June 2010 as to what proxy could and should be used and, in this case, the Appeals Tribunal agrees that the season average, excluding the measurements that are under question, should be used as the proxy for those measurements that are under dispute. (This assumes of course that the season average is itself within the range of what is acceptable.) This data, it is understood, can only be finally determined once the season has been completed, and can therefore be used to determine any corrections by the end of the season.

(In an attempt to assist future such cases, CTS should agree with the parties what they would recommend as proxies for the many different parameters that need to be amended from time to time.)

Therefore, given the above discussions, the Appeals Tribunal does not support USM's claim that the change in the mj purity was caused by incoming sugarcane quality. The Tribunal does not agree with USM's contention that CTS must advise of the cause of the deterioration of mj purity, it is sufficient that CTS determines that the quality has deteriorated. The Tribunal agrees with CTS's use of the season average proxy resulting in a correction of 170.887t of RV to be added to the mj for payment to the growers.

USM's appeal of the Administration Board's ruling is therefore not supported.