Termico (Pty) Ltd v SPX Technologies (Pty) Ltd & others; SPX Technologies (Pty) Ltd v Termico (Pty) Ltd (418/2018) [2019] ZASCA 109

The factual background:

This judgement of the Supreme court of Appeal (**SCA**), delivered on 6 September 2019, has its origins in a dispute that arose out of a shareholders' agreement (**the shareholders' agreement**) concluded between the parties, Termico (Pty) Ltd (**Termico**) and SPX Technologies (Pty) Ltd (**SPXT**), on 15 September 2006, almost some ten years earlier.

SPXT, a South African company, is a wholly owned subsidiary of SPX Corporation, a multinational company incorporated in the USA. SPXT was also the majority and controlling shareholder in DBT Technologies (Pty Ltd (**DBT**), another South African company that carries on the business of providing products and services to business entities engaged in the power generation and petrochemical Industries.

The shareholders' agreement concluded between Termico and SPXT related to their respective shareholding in DBT. SPXT had persuaded Termico, which had the requisite black economic empowerment (**BEE**) credentials, to become its BEE partner in DBT. Termico subscribed for 25.1% of the shares in DBT (**the BEE shares**), while SPXT held the remaining 74.9% shares.

Termico's acquisition of the BEE shares in DBT was financed through a loan of some R19.7 million (plus interest thereon at the prime rate) - referred to as '*Loan B*' - granted by SPXT. At that time, it was anticipated that this loan would be repaid with dividends received by Termico from DBT.

The shareholders' agreement between Termico, SPXT and DBT prohibited Termico – save in very limited circumstances - from disposing of its BEE shares for a period of seven years after 1 January 2007 (**the lock-in period**). If, after 1 January 2014, Termico wanted to sell the BEE shares it was entitled to exercise a Put Option[1] in accordance with the provisions of clause 19 of the shareholders' agreement. On the other hand, SPXT could at any time exercise a Call Option[2] that would oblige Termico to sell its BEE shares for a certain or determinable price under clause 18 of the shareholders' agreement.

The dispute between the parties, that eventually wound its way to the SCA, first emerged after Termico exercised the Put Option by sending a written notice (**the Put Option Notice**) to this effect to SPXT on 3 June 2014.

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[1] In this context, a '*Put Option*' is essentially a contract (or a contractual provision such as the one here) giving the holder of shares (Termico) the right, but not the obligation, to sell them at a pre-determined, of pre-determinable, price within a specified time frame.

[2] A call option, on the other hand, is essentially a contract (or a contractual provision such as the one here) giving the buyer (SPXT) the right, but not the obligation, to buy an agreed quantity of shares from the seller (Termico) of the option at a certain time for a certain or determinable price.

After acknowledging receipt of Termico's Put Option Notice, SPXT contended that Termico had relied on the incorrect annual financial statements[3] of DBT as a source of data for the application of the formula provided in clause 19 of the shareholders' agreement for the Put Price of the BEE shares. At some later stage, SPXT raised further disputes. Such further disputes included the following: (i) Termico's notice of 3 June 2014 did not constitute an effective Put Option Notice; (ii) a valid Put Option had not been exercised by Termico; and (iii) it (SPXT) could therefore enforce its right of a Call Option, which it purported to do in September 2014.

The arbitral proceedings and the award made therein:

After the exchange of pleadings, the parties then embarked on arbitral proceedings before the second to fourth respondents - a panel of three senior counsel, who did not participate in the subsequent court proceedings that followed upon the arbitral process - in accordance with the dispute resolution processes outlined in the shareholders' agreement.

The arbitral panel identified the core issues in the arbitration as:

a) the enforceability of the Put Option, as exercised by Termico in terms of clause 19 of the shareholders' agreement;
b) the calculation of the Put Price;
c) whether DBT's audited 2012 annual financial statements, or those for 2013 were the applicable ones for the determination of the Put Price; and
d) the enforceability of the Call Option SPXT purported to exercise in September 2014.

Each of these issues was determined in Termico's favour by the arbitral panel, which delivered an award on 5 July 2016 that provided as follows:

> '*It is declared that:*
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> *1.1* *The claimant* [**Termico**] *validly exercised its put option in terms of clause 19.1 of the shareholders' agreement on 3 June 2014;*
> *1.2* *The put price, computed in terms of clause 19.2 of the shareholders' agreement, is an amount of R287 337 807.00;*
> *2* *The defendant's* [**SPXT's**] *counterclaim*[4] *is dismissed with costs …;*
> *3* *The defendant is directed to pay the claimant's* [**Termico**] *costs of the arbitration …*'

After its success in the arbitral proceedings, Termico approached the arbitrators on 7 July 2016 to supplement the award by adding *mora* interest to the Put Price of R287 337 807.00. The arbitrators declined to do so, explaining that they had not made an award sounding in money and, in consequence, had not added such interest, because the

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[3] Termico had relied on the Company's (i.e. DBT's) 2012 audited annual financial statements, while SPXT contended that the 2013 annual financial statements ought to have been relied on.

[4] The counterclaim related to the fourth core issue identified by the arbitrators, i.e. the enforceability of SPXT's purported exercise of its Call Option.

net amount payable to Termico still had to be determined in terms of clause 19.4[5] of the shareholders' agreement by setting off the outstanding balance of Loan B.

Termico's attorney next wrote a letter to SPXT's attorney on 11 July 2016 calling for a meeting contemplated in clause 19.3[6] of the shareholders' agreement. This letter included a request for the disclosure of the value of Loan B. SPXT refused both these requests and it subsequently also refused to accede to a second request for a meeting that was made on 25 July 2016.

The proceedings in the court *a quo*:

On 29 July 2016, SPXT applied to the South Gauteng High court in Johannesburg for the review and setting aside of the arbitral award (**the main application**). The main application was made in terms of s 33(1) (b)[7] of the Arbitration Act No 42 of 1965 (**the Arbitration Act**).

Apart from opposing the main application, Termico, in turn, also instituted a counter-application in which it sought the following relief: (i) an order that the arbitral award is made an order of court in terms of s 31 (1) of the Arbitration Act; and (ii) judgement against SPXT in an amount not exceeding R250 million, being the Put Price less the balance owing to SPXT on Loan B (**the counter-application**).

The main application and the counter-application had specially been allocated for hearing in June 2017. However, on 26 May 2017, shortly before specially scheduled hearing, SPXT launched, what subsequently came to be described as '*the repudiation application*' (**the repudiation application**).

On 22 January 2018 the court *a quo* (*per* Ismail, J) granted an order in terms of which:

(a) the main application, i.e. for the review of the arbitral award, succeeded resulting in the setting aside thereof with costs, inclusive of the costs incurred in the employment of two counsel;

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[5] Clause 19.4 of the shareholders' agreement provides that: '***the Put Price shall firstly be applied in repayment of any balance outstanding in relation to Loan B*** *(whether as to capital or interest thereon) and any balance of the Put Price after repayment of Loan B shall be paid to the BEE Partner*'. (Emphasis added).

[6] Clause 19.3 of the shareholders' agreement provides that: '*within 10 Business Days of the Put Price being agreed or determined, the Parties shall meet at the offices of the Company* [***DBT**] *for the purposes [of] concluding the Put Option*.' (*Insertion added)

[7] S 33 (1) (b) of the Arbitration Act provides as follows: '*Where—*

(a) …;

(b) ***an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers****; or*

(c) ….,

the court may*, on the application of any party to the reference after due notice to the other party or parties,* ***make an order setting the award aside***.' (Emphasis added).

(b) the counter-application, i.e. for making the arbitral award an order of court, failed resulting in the dismissal thereof with costs, inclusive of the costs incurred in the employment of two counsel;

(c) The dispute[8] was again referred to arbitration for determination by a new panel of arbitrators in terms of s 33 (4) of the Arbitration Act, with directions as to how the arbitrators were to be appointed;

(d) The repudiation application was dismissed with costs, inclusive of the costs occasioned by the employment of two counsel; and

(e) SPXT was ordered to pay the wasted costs relative to the two days the applications had been scheduled to be heard in June 2017 and when the matter was postponed after the repudiation application was launched.

Termico then appealed to the SCA against the judgement of, and the orders granted against it, by the court *a quo*.

The appeals before the SCA:

The SCA, after referring to the well-established legal principles applicable to the review of arbitral awards on the grounds of gross irregularity (*Cf*. ***Telcordia Technologies Inc v Telkom SA Ltd*** 2007 (3) SA 266 (SCA); and ***Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*** 2018 (5) SA 462 (SCA)), again emphasised that a litigant alleging gross irregularity was obliged to establish it.[9]

Although several grounds for review were set out in SPXT's founding affidavit none of them had been pressed before the court *a quo*, or subsequently before the SCA. Instead, SPXT relied on a ground for review that was raised in its heads of argument for the first time before the court *a quo*. This latter ground of appeal was that the arbitral panel had failed to deliver a '*final*' award. This is the ground of appeal that found favour with the judge *a quo*.[10]

The SCA considered the court *a quo's* reasoning in relation to its finding that the arbitral panel had not made a '*final*' award. Paraphrased, the court *a quo's* reasoning boiled down to this:[11]

(a) The arbitral panel concluded that it could not make a monetary award. This was because clause 19.3 of the shareholders' agreement had to be complied with in the first instance (i.e. a meeting had to be held at DBT's offices within 10 Business Days

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8 The '*dispute*' was not precisely delineated or defined by the court *a quo.*

9 At para [11]. In the *Telcordia* matter, at paragraph [32], p. 287A – B, Harms, JA, expressed this requirement in no uncertain terms: '*The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely* ***have to be set out in the founding affidavit***' (Emphasis added).

10 At para [11].

11 At para [14], where paragraphs [29], [31], [48] and [49] of the Court *a quo's* judgement is quoted.

of the Put Price being agreed or determined, for the purposes of '*concluding the Put Option*') and, second, the value of Loan B had not yet been determined either;

(b) The arbitral panel did not give a money judgment. This was because any money judgment was subject to a set-off of the remaining balance of Loan B. Since the arbitral panel was not called upon to determine the value of Loan B, it evidently was not able to make a money judgment or award. It simply did not have the jurisdiction to determine the value of Loan B;

(c) This meant, according to its reasoning, that the court *a quo* was now called upon '*to complete an order which should have been completed by the arbitral panel in the first instance*' – i.e. notwithstanding the fact that (i) it did not have the requisite information available to make the required set-off of the balance owing under Loan B, and (ii) the meeting envisaged in clause 19.3 also had not taken place, at the time the arbitral tribunal made its finding regarding the put price of the shares;

(d) Even though the court *a quo* could complete the '*puzzle*', now that all the missing information was available to it, it questioned whether the order sought in the counter-application would not be an order that consists '*partially of the arbitration award and an order partially of the court*', which, it stated '*… would fly in the face of the full court judgment in Britstown,*[12] *namely that it would be a hybrid order*';

(e) It concluded that the arbitrators, as was submitted by SPXT's counsel, did not make an award that was '*final*', even though the mandate given to them did not permit them to make an order since the determination of the value of Loan B was not part of their mandate. '*The reality is that they were not mandated to determine the value of loan B and that issue fell outside the purvey* [**sic**][13] *of their mandate*.'

The SCA (*per* Ponnan, JA, with whom Leach, Swain, Molemela and Mbatha, JJA concurred) made short shrift of the court *a quo's* reasoning.

In this regard, the SCA found that:

(a) The court *a quo* had failed to identify the nature of the gross irregularity contemplated by s 33 (1) (b) of the Arbitration Act that warranted the setting aside of the arbitral award in its entirety;[14]

(b) The contention that an irregularity had arisen because of a '*lack of finality*' was devoid of substance;[15]

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12 ***Britstown Municipality v Beunderman (Pty) Ltd*** 1967 (3) SA 154 (C).

13 Self-evidently the use of the word '*purview*' was envisaged.

14 At para [12].

15 *Ibid.*

(c) Even if the arbitral panel supposedly had committed a gross irregularity in failing to finally decide an issue, there was no warrant for setting aside the entire award made on other issues;[16] and

(d) The court *a quo's* order referring the '*dispute*' back for arbitration to be determined by a new panel of arbitrators, was meaningless without it having given any clear indication as to precisely what the '*dispute*' was that was so being referred.[17]

In dealing with the issue of '*finality*' of an arbitral award, the SCA:

(a) First, referred to an earlier judgement it had given in ***SA Breweries Ltd v Shoprite Holdings Ltd*** 2008 (1) SA 203 (SCA).[18] That judgement, although given in the context of an expert determination - and not specifically in the context of an application for review under s 33 of the Arbitration Act – was nonetheless relevant in the present matter since the SCA had held that the requirements for a valid arbitral award are equally applicable to expert determinations. In the relevant part of that judgement, the court (*per* Scott, JA) stated:[19]

> '*In summary, what is required is that* ***all issues submitted must be resolved in a manner that achieves finality and certainty****. The award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve. It must also be capable of implementation. On the other hand, what must be determined are the matters submitted and no more.* ***Depending on the questions, therefore, the determination may not necessarily result in a final resolution of a dispute between the parties****. Generally, a court will be slow to find non-compliance with the substantive requirements and an award determination will 'be construed liberally and in accordance with the dictates of common sense' … A court will, therefore, as far as possible construe an award or determination so that it is valid rather than invalid. It will not be astute to look for defects*'
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> (Own emphasis);

(b) Second, pointed out that, despite the expert determination in *SA Breweries* having left matters for later determination, such determination nevertheless was adequate an enforceable in that instance;[20]

(c) Third, after analysing the *Britstown* matter,[21] it proceeded to distinguish that case from the present one on the basis that the court of first instance (*per* Van Zyl, J) in

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16 *Ibid.*

17 *Ibid.*

18 At para [13].

19 *SA Breweries*, *supra*, at para [22], p. 213 G – p. 214E (Citations omitted).

20 At para [14], presumably with reference to para [28], p. 217A – F, of the judgement in *SA Breweries*.

21 ***Britstown Municipality v Beunderman (Pty) Ltd*** 1967 (3) SA 154 (C), which the SCA then proceeded to analyse in paras [16], [17] and [18].

Britstown[22] had actually usurped a power that still was required to have been exercised by an arbitrator in arbitral proceedings that had not yet finally run their course.[23] It was against this background that the SCA considered the judgement of the full court (*per* Beyers, JP, with Watermeyer and Diemont, JJ, concurring)[24] in the *Britstown* matter and proceeded to conclude that the court *a quo's* reference to a '*hybrid order*' in the present matter was '*wholly misplaced*', as was SPXT's reliance thereon;[25]

(d) Fourth, in further emphasising the above-mentioned distinction between the present case and the *Britstown* matter, it considered all the features in and relevant to the shareholders' agreement that precluded the arbitral panel from making an award compelling SPXT to make a payment to Termico. These features included (i) the lack of information on the remaining balance of Loan B, which balance necessarily had to be deducted from the Put Price (as determined by the arbitral panel); (ii) the fact that the value of Loan B was not an issue that had been referred to the arbitral panel for determination; and (iii) the fact that the meeting contemplated in clause 19.3 had not taken place.[26] In summary, the SCA stated that '[*n*]*either SPXT, nor the court a quo, were able to identify an issue that had been referred to the arbitrators but not finally decided by them*'.[27]

(e) Fifth, it then proceeded to state:[28]

> '*What was still to be decided, before SPXT could be ordered to pay Termico, was the value of Loan B, which fell to be deducted from the Put Price, but it is common cause that this issue fell outside of the jurisdiction of the arbitrators.* ***The additional issues that the court a quo recognised as being necessary to grant a money judgment in the counter-application, namely, the application of the Put Price to Loan B and the meeting to implement the sale, had not occurred at the time of the arbitration and were not issues before the arbitrators. They were accordingly not issues that the arbitrators could decide****. The counterclaim relied on a cause of action that was only capable of prosecution when the facts relevant to Loan B and the implementation meeting could be taken into account****.*** *The order sought by Termico is accordingly not one in the nature of the 'hybrid order' referred to in the Britstown Municipality matter. It follows that not only should SPXT's review application have failed before Ismail J, but Termico's counter-application to make the arbitration award an order of court in terms of s 31 of the Act, ought to have succeeded*'

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22 ***Beunderman (Pty) Ltd v Britstown Municipality*** 1965 (3) SA 111 (C).

23 *Beunderman*, supra, at p. 120E – H.

24 At para [16].

25 *Ibid*.

26 At para [19].

27 At para [20].

28 *Ibid*.

(Own emphasis)

The SCA then proceeded to consider whether Termico was entitled to the further relief it had sought in the counter-application, namely a judgment sounding in money. It pointed out that it was this very order, as sought by Termico, that had prompted the court *a quo* to set aside the arbitral panel's award. That followed from the court *a quo's* finding that the order claimed constituted an impermissible '*hybrid order*'.[29]

Since that finding could not be sustained, the SCA found that Termico was not precluded from claiming a judgement from a court with the requisite jurisdiction to set off the value of Loan B, after the meeting contemplated in clause 19.3 of the shareholders' agreement had been held. In this regard, the SCA also found that SPXT's refusal to meet with Termico, after the grant of the arbitral panel's award constituted a '*deliberate frustration of Termico's right with the result that the meeting must be deemed to have occurred*.'[30]

Moreover, since there was no longer any dispute as to the amount outstanding on Loan B, the SCA, found that the balance owing on this loan, as at 20 July 2018, was R31 490 949.76 and held that Termico was entitled to payment of the difference between the Put Price (i.e. R287 337 803.00), as determined by the arbitrators, after the balance of Loan B had been deducted therefrom. Accordingly, it held that Termico was entitled to a money judgement in the sum of R255 846 850.00 (i.e. R287 337 803.00 minus R31 490 949.76) together with interest thereon at the rate of 9% per annum from 20 July 2016 to date of payment.

In consequence, Termico's appeal was upheld with costs (including those of two counsel); the court *a quo's* order was set aside and substituted with one in terms of which: (i) SPXT's main application to review and set aside the arbitral award was dismissed with costs (including those of two counsel); (ii) Termico's counter application succeeded with costs (including those of two counsel); (iii) the arbitration award dated 5 July 2016 was made an order of court; (iv) SPXT was ordered to pay Termico the sum of R255 846 850.00 together with interest thereon, as set out above; and (v) SPXT's repudiation application was dismissed with costs (including those of two counsel).

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[29] At para [21].

[30] At para [22].