THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

***Termico (Pty) Ltd v SPX Technologies (Pty) Ltd & others*; *SPX Technologies (Pty) Ltd v Termico (Pty) Ltd* (418/2018; 413/2018) [2019] ZASCA 109 (6 September 2019)**

From: The Registrar, Supreme Court of Appeal

Date: 6 September 2019

Status: Immediate

The following explanatory note is intended to assist media in the reporting of this case and is not binding on either the Supreme Court of Appeal or any member of the Court.

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal from the Gauteng Local Division of the High Court, Johannesburg (Ismail J) in which it upheld the appeal of Termico (Pty) Ltd (Termico) and dismissed the appeal of SPX Technologies (Pty) Ltd (SPXT).

In 2006, Termico purchased 25.1% of the shares in DBT Technologies (Pty) Ltd (DBT), a South African company controlled by SPXT who held the remaining 74.9%. The purchase was financed through a loan granted by SPXT (Loan B). Termico had been approached to acquire the shares because of its black economic empowerment (BEE) credentials, which would in turn bolster DBT's chances of successfully tendering for major contracts.

Termico, SPXT and DBT entered into a shareholders' agreement later that year. Amongst other things, the shareholders' agreement provided that Termico was not entitled to dispose of the shares for a period of seven years (the lock-in period); that Termico was thereafter entitled to dispose of the shares by exercising a so-called put option in the terms provided in the shareholders' agreement; and that SPXT was entitled, at any time, to acquire Termico's shares by exercising a so-called call option, the exercise of which would bring into existence a binding agreement that obliged Termico to sell its shares to SPXT at a value calculated in terms of the shareholders' agreement.

It was anticipated that the DBT dividends received by Termico would assist in repaying SPXT the capital of Loan B and interest. However, despite DBT's revenue having grown,

from R250m in 2007 to R2.5bn in 2012, hardly any dividends were declared to its shareholders. After the lock-in period, Termico decided to dispose of its shares by exercising the put option and submitting to SPXT the requisite written notice, as contemplated in the shareholders' agreement.

SPXT duly acknowledged receipt of the put option notice, but disagreed with Termico's calculation of the value to be paid. It asserted that Termico's exercise of the put option was invalid, whereafter it purported to exercise its call option and defeat any enforcement of Termico's put option.

The matter proceeded to arbitration in accordance with the dispute resolution process contemplated in the shareholders' agreement. The arbitrators identified the four issues to be decided as the enforceability of the put option by Termico; the calculation of the put price; the specific data to be applied in the determination of the put price as determined by the shareholders' agreement; and the enforceability of the call option purportedly exercised by SPXT. All of the issues were decided in Termico's favour.

In order to determine the precise amount owed by SPXT to Termico, the value of Loan B fell to be deducted from the put price. Termico made two attempts to convene a meeting with SPXT, but to no avail. SPXT thereafter applied to the court *a quo* to have the arbitration award set aside in terms of s 33(1)(*b*) of the Arbitration Act 42 of 1965 (the Act). Termico opposed the application and launched a counter-application to have the arbitration award made an order of court in terms of s 31(1) of the Act.

When SPXT informed Termico that a firm would be performing their B-BBEE evaluation, and requested it to communicate with that firm for these purposes, Termico responded in a letter informing SPXT that it no longer regarded itself as SPXT's BEE partner; that Termico remained a DBT shareholder only by virtue of SPXT's failure to honour its contractual obligations pursuant to Termico's exercise of the put option. SPXT regarded this as a repudiation of the shareholders' agreement by Termico, which SPXT accepted and sought to rely on when purporting to exercise its call option. Thus, on 26 May 2017, almost three years after Termico had exercised its put option and some ten months after the arbitrators upheld the same, SPXT launched the so-called repudiation application.

On 22 January 2018 the court *a quo* delivered judgment on all three applications. SPXT's application to have the arbitration award set aside was granted, while Termico's counter-application as well as SPXT's repudiation application were dismissed. The order referred the dispute to arbitration, to be determined by a new panel of arbitrators in terms of s 33(4) of the Act. SPXT's ground of review was that the arbitrators failed to deliver a 'final' award, thereby committing a gross irregularity in terms of s 33(1)(*b*) of the Act. The court *a quo* agreed, categorising the order sought in Termico's counterclaim as a 'hybrid order' found to be impermissible in *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154.

The SCA found the reliance placed on *Britstown*, by both SPXT as well as the court *a quo*, to be misplaced. What Termico sought in the counter-application could not be

considered a ‘hybrid order’. *Britstown* is authority for the proposition that a court may not usurp the power of an arbitrator in respect of a matter that is still the subject of an arbitration not yet concluded. It is not authority for the proposition that a court is precluded from deciding issues not decided in a completed arbitration. Termico had not asked the court *a quo* to decide issues that remained undecided by the arbitrators, or that were ‘live’ in a pending arbitration. The SCA found that SPXT’s application ought to have been refused, and Termico’s counter-application upheld.

Termico also sought a judgment sounding in money in its counter-application. This was used by the court *a quo* as a reason to set aside the arbitrators’ award, after it found the order claimed in the counter-application to be an impermissible ‘hybrid order’. The SCA disagreed. It found that SPXT’s refusal to meet for purposes of determining the value of Loan B constituted a deliberate frustration of Termico’s right with the result that the meeting contemplated in the shareholders’ agreement was deemed to have occurred. Although the value of Loan B was a matter subject to the dispute resolution, mediation and arbitration provisions of the shareholders’ agreement, there was also a clause allowing the parties’ claims for liquidated amounts to be determined by a court of law. In addition, the amount outstanding on Loan B was not disputed. The SCA found that Termico was thus indeed entitled to a money judgment.

In the result, Termico’s appeal was upheld with costs; and SPXT’s appeal was dismissed with costs.
