

May 2020

## CONSTRUCTION LAW BULLETIN

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### AWARD MUST ACHIEVE FINALITY

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#### INTRODUCTION

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In late 2019 the Supreme Court of Appeal (“SCA”) was called upon to deal with the question as to whether an arbitration award was unenforceable for want of having achieved finality in relation to the issues referred to arbitration.

The arbitration arose out of a dispute between shareholders in a company. The shareholders agreement between the parties required disputes to be determined by arbitration.

#### BACKGROUND FACTS

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SPX Technologies (Pty) Ltd (“SPXT”), a subsidiary of an American multinational company listed on the New York Stock Exchange, established a subsidiary, DBT Technologies (Pty) Ltd (“DBT”), to conduct business in the power generation and petrochemical industries in South Africa.

SPXT identified a company with the requisite black economic empowerment credentials, Termico (Pty) Ltd (“Termico”), to become a BEE shareholder in DBT.

Termico subscribed for 25,1% of the shares in DBT, funding the purchase price by way of a loan in the capital amount of R19,7m granted to it by SPXT (“the Loan”). The Loan attracted interest at an interest rate linked to the prime rate. SPXT retained the balance of 74,9% of the shares in DBT.

The shareholders agreement between SPXT and Termico provided for Termico to have the right to put its shares to SPXT after a seven year lock-in period at a price determined with reference to the company's annual financial statements. The actual amount payable was to be that price less the balance outstanding in respect of the Loan. SPXT reserved the right at any time to exercise a call option to purchase Termico's shares.

In June 2014, after expiry of the lock-in period, Termico sent a written notice to SPXT exercising its put option on the basis that the purchase price be calculated with reference to DBT's 2012 annual financial statements.

SPXT disputed that Termico had properly exercised the put option and contended that in any event the 2013 annual financial statements would be applicable. It then gave notice to exercise its call option.

The disputes between the parties were referred to arbitration before three eminent senior counsel as arbitrators.

The parties agreed that no oral evidence was required and the determination fell to be made by the arbitrators based on the relevant documents and legal argument.

The arbitrators identified the core issues for determination as:

- the enforceability of Termico's put option;
- the calculation of the put price;
- whether the 2012 financial statements or the 2013 financial statements were applicable to the determination of the put price; and
- the enforceability of SPXT's call option.

The arbitrators delivered an award declaring that:

- the claimant (Termico) had validly exercised its put option in terms of the shareholders agreement;
- the put price computed in terms of the shareholders agreement was an amount of R287 337 807,00;
- the defendant's (SPXT's) counterclaim was dismissed with costs; and
- the defendant was directed to pay the claimant's costs of the arbitration.

Termico asked the arbitrators to supplement their award by directing that mora interest should be paid on the put price.

The arbitrators declined to do so on the grounds that the award they had made did not sound in money because the money amount payable by SPXT could only be determined once the balance outstanding in respect of the Loan was either agreed or determined in terms of the shareholders agreement.

## COURT PROCEEDINGS

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SPXT declined to cooperate in agreeing the outstanding value of the Loan but rather launched an application to set aside the arbitrators' award in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965, namely on the grounds of gross irregularity.

Termico counterapplied to make the arbitrators' award an order of court and for judgment in an amount exceeding R250m, being the put price less what it contended was the balance outstanding in respect of the Loan.

SPXT relied on various grounds of review in its application papers but, almost as an afterthought, raised for the first time in its heads of argument before the Gauteng Local Division of the High Court, Johannesburg, the proposition that the arbitrators had committed a gross irregularity in having failed to deliver a final award. In other words, the award did not fix the actual amount payable by SPXT for the shares.

This submission found favour with the High Court which upheld the review application, set aside the arbitrators' award, dismissed Termico's counterapplication and referred the "dispute" for determination by a fresh arbitral tribunal.

Termico appealed to the SCA.

The SCA called into aid an earlier SCA decision dealing with the issue of finality in the context of an expert determination,<sup>1</sup> finding that the same principles applied in relation to finality with regard to arbitral awards.

In summary, what is required is that all issues submitted must be resolved in a manner that achieves finality and certainty. The award must:

- not reserve a decision on an issue before the arbitrator for another person to resolve;
- be capable of implementation; and
- entail the determination of the matters submitted to arbitration and nothing more.

The SCA confirmed that a court will as far as possible construe an award so that it is valid rather than invalid and will not be astute to look for defects in the award.

The SCA rejected SPXT's argument that, because the arbitral tribunal had not issued an award for a money amount, the award as a result did not achieve finality.

The arbitral tribunal had clearly determined all of the issues submitted to it for determination which did not include the determination of the value of the Loan. It therefore did not have jurisdiction to rule on the money amount payable by SPXT after taking into account the Loan value.

The SCA reversed the High Court's decision and ruled that the arbitral tribunal's award was valid and binding.

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<sup>1</sup> SA Breweries Ltd v Shoprite Holdings Ltd 2008(1) SA 203 SCA.

In relation to Termico's counterapplication, the court found that, as SPXT had studiously avoided declaring what it contended the Loan value was and as for all practical purposes the value put up by Termico was uncontested, it was in a position to grant a money judgment in favour of Termico.

It proceeded to grant judgment in favour of Termico for R255 846 853,24 together with mora interest from 20 July 2016.

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