THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 418/2018

In the matter between:

TERMICO (PTY) LIMITED	**APPELLANT**

and

SPX TECHNOLOGIES (PTY) LIMITED	**FIRST RESPONDENT**
PETER SOLOMON SC NO	**SECOND RESPONDENT**
CHRIS ELOFF SC NO	**THIRD RESPONDENT**
MICHAEL VAN DER NEST SC NO	**FOURTH RESPONDENT**

Case No: 413/2018

And in the matter between:

SPX TECHNOLOGIES (PTY) LIMITED	**APPELLANT**

and

TERMICO (PTY) LIMITED	**FIRST RESPONDENT**

Neutral citation: *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)

Bench: Ponnan, Leach, Swain, Molemela and Mbatha JJA

Heard: 15 August 2019

Delivered: 6 September 2019

Summary: Arbitration – application to set aside award – no gross irregularity in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965 – counter-application to make arbitration award an order of court in terms of s 31 and for a money judgment – not constituting an impermissible 'hybrid order'.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Ismail J sitting as court of first instance):

(a) Termico's appeal is upheld with costs, including those of two counsel.

(b) Paragraphs 1 to 3 of the order of the court below is set aside and substituted by:

'(1) SPXT's application to review and set aside the arbitration award is dismissed with costs, including those of two counsel.

(2) Termico's counter-application succeeds with costs, including those of two counsel.

(2.1) The award of the arbitration tribunal dated 5 July 2016 is made an order of court.

(2.2) SPXT is ordered to pay Termico the sum of R255 846 850.25, together with interest at the rate of 9% per annum from 20 July 2016 to date of payment.'

(c) SPXT's repudiation appeal is dismissed with costs, including those of two counsel.

JUDGMENT

Ponnan JA (Leach, Swain, Molemela and Mbatha JJA concurring):

[1] The first respondent, SPX Technologies (Pty) Ltd (SPXT), is a wholly owned subsidiary of SPX Corporation, a multinational company incorporated in the United States of America and listed on the New York Stock Exchange. SPXT is the majority and controlling shareholder in DBT Technologies (Pty) Ltd (DBT), a South African company that provides products and services to firms in the power generation and petrochemical industries. In 2006, SPXT engaged the appellant, Termico (Pty) Ltd (Termico), a company with the requisite black economic empowerment (BEE) credentials, to become the BEE shareholder in DBT. Termico subscribed for 25.1% of the shares in DBT (the BEE shares) and financed the purchase through a loan granted by SPXT (referred to as Loan B). SPXT held the remaining 74.9% shares.

[2] On 15 December 2006 Termico, SPXT and DBT entered into a shareholders' agreement (the shareholders' agreement), which provides *inter alia* that:

(i) Termico was not entitled, except in very limited circumstances, to dispose of the BEE shares for seven years after 1 January 2007 (the lock-in period);

(ii) After 1 January 2014, if Termico wanted to sell the shares, it was entitled to exercise a Put Option in accordance with the provisions of clause 19 of the shareholders' agreement; and

(iii) At any time, SPXT could exercise a call option to acquire the BEE shares from Termico, the effect of which would be that the latter would be obliged to sell its shares to the former at the value calculated in terms of clause 18.1 of the shareholders' agreement. Once exercised there would be a binding agreement between the parties in terms of the call option.

[3] Clause 19 of the shareholders' agreement, headed 'Put Option', reads:

'SPX hereby grants to the BEE Partner the irrevocable right and option ("Put Option") to put the total Equity of the BEE Partner ("the BEE Equity") to SPX after the expiration of the Initial Period, upon the following terms and conditions:

19.1 the BEE Partner will give 60 (sixty) days written notice to SPX of its intention to exercise the Put Option ("Put Option Notice"), after the expiry of the Initial Period;

19.2 the purchase price ("Put Price") payable to the BEE Partner for the BEE Equity shall be the higher of:

19.2.1 the Fair Market Value of the BEE Equity; and

19.2.2 an amount determined in accordance with the following formula:

A = [(BxC)-D]*E%

Where:

A, is the cash consideration in South African currency payable to the BEE Partner:

B, is the EBITDA Multiple;[1]

C, is the EBITDA of the Company as per the latest audited annual financial statements of the Company at the time of the Put Option Notice;

D, is the net debt in the Company based on the latest audited annual financial statements of the Company at the time of the Put Option Notice;

E, is the percentage of Shares held by the BEE Partner which, at the Effective Date, will be 25.1%;

19.3 within 10 Business Days of the Put Price being agreed or determined, the Parties shall meet at the offices of the Company for the purposes [of] concluding the Put Option;

19.4 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;

19.5 upon payment of the Put Price by SPX to the BEE Partner, the BEE Partner shall deliver to SPX all the share certificates in relation to its Shares (together with duly signed transfer forms in respect thereof and left blank as to the transferee) and a written transfer of the Shareholders' Loans;

19.6 SPX and the Company will use their reasonable endeavours to support the BEE Partner's exercising of its Put Option, including but not limited to providing the BEE Partner with the relevant annual financial statements and management accounts.

[1] EBITDA is defined in clause 1.23 as 'the earnings before interest, taxes, depreciation and amortization of the Company'. And, the 'EBITDA Multiple' is defined in clause 1.22 as 'a multiple of six'.

[4] The capital amount of Loan B was R19 700 000. Interest applied at a rate linked to the prime rate.[2] It was anticipated that the capital and interest would be repaid using dividends received by Termico from DBT. During the lock-in period, Termico remained a shareholder in DBT. Relying on its BEE credentials through the involvement of Termico, DBT successfully tendered for major contracts. Despite DBT's revenue having grown from R250m (in 2007) to R2.4bn (in 2012), and an amount of approximately R1,26bn having been paid out as fees and other charges by DBT to the SPX Group, hardly any dividends were declared to the shareholders of DBT. Termico accordingly did not receive the dividend stream that it anticipated would assist in repaying Loan B.

[5] On 3 June 2014 and after the expiry of the lock-in period, Termico exercised the Put Option by sending a written notice to SPXT, as contemplated by clause 19.1. In the notice, Termico asserted that the Put Price to be paid was the amount to be determined in accordance with the formula in clause 19.2.2 of the shareholders' agreement, and that the audited financial statements to be applied were the annual financial statements of DBT for the year ending 31 December 2012 (the 2012 annual financial statements). On 12 June 2014, SPXT acknowledged receipt of the Put Option Notice but contended that reliance had to be placed on the 2013, and not the 2012 annual financial statements, as the appropriate source of data for the formula. Later, SPXT raised further disputes, including that: (i) the 3 June 2014 notice did not constitute an effective Put Option Notice; (ii) a valid Put Option had not been exercised by Termico; and (iii) it (SPXT) could enforce a Call Option, which it purported to exercise in September 2014, and defeat any enforcement of the Put Option.

[6] The matter proceeded to arbitration before the second to fourth respondents (the arbitrators)[3] in accordance with the dispute resolution process set out in the shareholders' agreement. No additional arbitration agreement was concluded between the parties. They simply exchanged pleadings, which identified the unresolved disputes and set out their respective contentions. On 17 June 2016, the parties agreed to a procedure that had the practical effect that no oral evidence was led at the arbitration hearing. Instead, they

[2] Being 11% at the date of the agreement and then adjusted with effect from the first adjustment to the prime rate after the effective date, on a quarterly basis, at the prime rate less 1%.
[3] Advocates PA Solomon SC; CM Eloff SC and M van der Nest SC. The arbitrators did not participate in the court *a quo* and they do not participate in this appeal.

agreed to exchange heads of argument and address argument to the arbitrators on the correct interpretation of the shareholders' agreement.

[7] The arbitrators (three experienced senior counsel) identified the core issues in the arbitration as: (i) the enforceability of the Put Option exercised by Termico in terms of clause 19 of the shareholders' agreement; (ii) the calculation of the Put Price; (iii) whether the audited 2012 financial statements or the 2013 financial statements were the applicable and relevant financial statements for the determination of the Put Price; and (iv) the enforceability of the Call Option purportedly exercised by SPXT. The arbitrators decided each of these issues in Termico's favour. On 5 July 2016, the arbitrators delivered the following award:

'It is declared that:

1.1 The claimant [Termico] validly exercised its put option in terms of clause 19.1 of the shareholders' agreement between the parties 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.

2. The defendant's [SPXT's] counterclaim [that it validly exercised the call option] is dismissed with costs . . . .

3. The defendant is directed to pay the claimant's costs of the arbitration . . . .'

On 7 July 2016, Termico asked the arbitrators to supplement their award by adding *mora* interest on the Put Price of R287 337 807. The arbitrators explained on 17 August 2016 that they had not made an award sounding in money, and had accordingly not awarded *mora* interest, because the net amount payable to Termico still had to be determined in terms of clause 19.4 of the shareholders' agreement by setting off the outstanding balance of Loan B.

[8] Following upon the award, Termico's attorney wrote to SPXT's attorney on 11 July 2016 calling for the meeting contemplated in clause 19.3. Included in that letter was a request for disclosure of the value of Loan B. SPXT refused to attend a meeting or to provide a schedule setting out the outstanding balance of Loan B. SPXT also refused to accede to a second request for a meeting made on 25 July 2016. Instead, on 29 July 2016, SPXT applied to the South Gauteng High Court, Johannesburg to set aside the

award in terms of s 33(1)*(b)* of the Arbitration Act 42 of 1965 (the main application).[4] Termico opposed the application. It also launched a counter-application to make the award an order of court in terms of s 31(1) of the Act and for judgment against SPXT in an amount exceeding R250m, being the Put Price less the balance owing to SPXT on Loan B (the counter-application).

[9] During November 2016, SPXT informed Termico that a firm called Empowerdex would be performing its BEE evaluation. It asked Termico to meet with or speak telephonically with Empowerdex for purposes of the evaluation. Termico responded in a letter dated 7 December 2016 that it no longer regarded itself as SPXT's BEE partner and it had remained a shareholder of DBT only because SPXT had failed, for some 30 months, since June 2014 to honour its contractual obligations pursuant to Termico's exercise of its Put Option. On 29 December 2016, SPXT's attorneys replied that Termico's letter of 7 December 2016 constituted a repudiation of the shareholders' agreement; that SPXT both accepted the repudiation and purported to exercise a Call Option, that is, an option to buy Termico's shares, in terms of clause 14.5 of the shareholders' agreement. On 26 May 2017, just days before the specially allocated hearing of the main and counter-applications in June 2017, SPXT launched what has come to be described as the repudiation application (the repudiation application). It was launched almost three years after Termico had exercised its Put Option in June 2014 and some 10 months after the arbitrators' award upholding Termico's exercise of the Put Option.

[10] Judgment was delivered on all three applications on 22 January 2018. Ismail J issued the following order:

'1. The review application succeeds, with costs. Such costs to include the costs of two counsel.

2. The counter application is dismissed with costs, such costs to include the costs of two counsels.

---

[4] Section 33 (1)*(b)* reads:
'Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers 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.'

3. The dispute is referred to arbitration to be determined by a new panel of arbitrators in terms of 33(4) of arbitration Act. The arbitrators are to be appointed as previously, namely each party would nominate an arbitrator and the nominated arbitrators will appoint the third arbitrator.

4. The amendment which was sought in respect of the repudiation agreement was granted.

5. The repudiation application is dismissed with costs – such costs to include the costs of two counsel.

6. The Applicant is to pay the costs of two days during June 2017 when the matter was postponed and the repudiation application was launched.'

[11] The applicable legal principles as to when a court can set aside an arbitration award for reason of gross irregularity are well-settled. They were the subject of detailed consideration by Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd*[5] and more recently summarised by this court in *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd*.[6] The party alleging the gross irregularity must establish it.[7] In the main application, SPXT set out a number of grounds of review in its founding papers, but these were not pressed in argument before Ismail J or before this court on appeal. The ground advanced by SPXT, namely, that the arbitrators failed to deliver a 'final' award, thereby committing a gross irregularity as contemplated by s 33(1)*(b)* of the Act, was raised for the first time in its heads of argument before Ismail J. That ground of review, which was not set out as an identifiable ground of review in SPXT's founding papers, found favour with the learned judge.[8]

[12] In my view, no case has been made out to support a finding that the arbitrators misconceived the nature of the enquiry, with the result that SPXT was denied a fair hearing.[9] The court *a quo* failed to identify the nature of the gross irregularity contemplated by s 33(1)*(b)* of the Act that warrants the setting aside of the arbitration award in its entirety. As I shall presently show, the contention that an irregularity arises because of a 'lack of finality' is devoid of substance. In any event, even if it could

---

[5] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).
[6] *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* 2018 (5) SA 462 (SCA); [2018] ZASCA 23.
[7] Ibid at para 8.
[8] As *Telcordia Technologies Inc v Telkom SA Ltd* above fn 5 at para 32 made plain: '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'.
[9] Supra fn 6 at para 8 (citations omitted).

legitimately be concluded that the arbitrators committed a gross irregularity in failing to finally decide an issue, there was no warrant for setting aside the award made on the other issues. Those issues were properly and finally decided.[10] What is more, the court *a quo*'s order that 'the dispute is referred to arbitration to be determined by a new panel of arbitrators' is meaningless without any clear indication as to precisely what 'dispute' is being referred back.

[13] In *SA Breweries Limited v Shoprite Holdings Limited*,[11] this court considered the issue of finality in the context of an expert determination. Albeit not in the context of an application for review under s 33 of the Act, the *dicta* in that matter are relevant as this court held that the requirements for a valid arbitral award are equally applicable to an expert determination. Scott JA stated (at para 22):

'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 or 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'.

[14] Despite the fact that the expert in *SA Breweries* left matters to be addressed after the expert determination, the court found that the decision of the expert was adequate and enforceable. The court *a quo* did not follow this approach. Instead, Ismail J reasoned:

'[29] The arbitrators were of the view that they could not make a monetary award for two crucial reasons. Firstly the provisions of clause 19.3 of the shareholders agreement had to be complied with and secondly the value of Loan B was not determined between the parties.

. . .

[31] The panel of arbitrators did not give a money judgment because any money judgment was subject to a set off of the amount of Loan B. Since the arbitral panel were not called upon to

---

[10] Above fn 6 at para 48.

[11] *SA Breweries Ltd v Shoprite Holdings Ltd* [2007] ZASCA 103; 2008 (1) SA 203 (SCA); [2008] 1 All SA 337 (SCA).

determine the value of loan B it was not able to make a money judgment or award. It did not have the jurisdiction to determine the value of loan B.

. . .

[48] The court is called upon to complete an order which should have been completed by the arbitralpanel, albeit that they did not have the information available, to make the set off of loan B and that clause 19.3 had not taken place, when they made their finding regarding the put price of the shares. It might well be so that the court can complete the "puzzle" now that missing information is available to it in order to complete the picture of the jigsaw. However, I pose the rhetorical question whether the order sought in the counterclaim would not be an order that consist (sic) partially of the arbitration award and an order partially of the court. This would fly in the face of the full court judgment in *Britstown*, namely that it would be a hybrid order.

[49] In my view the arbitrators, as was submitted by applicant's counsel did not make an award that was final, albeit because 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 of their mandate.'

[15] The reasoning in paragraphs 48 and 49 rests on Ismail J's categorisation of the order sought in the counterclaim by Termico as an 'hybrid order' found to be impermissible by the full court of the Cape Provincial Division in *Britstown Municipality v Beunderman (Pty) Ltd*.[12] In *Britstown*, Beyers JP (Watermeyer and Diemont JJ concurring) held:

'It seems to me that the learned Judge *a quo* erred in taking upon himself the function of deciding these outstanding matters. Apparently he was under the impression that there was a discretion vested in him whether or not to decide outstanding points of difference between the parties. I can find no basis in law for such a discretion. . . .[13]

. . .

But certain other questions were still open to arbitration, questions which were fundamental to the appellant's liability. Those questions had never been finally arbitrated upon, because it is quite clear that under [the arbitration clause] . . . those questions could not be finally settled by the arbitrator . . . and the Court *a quo* then found that it had a discretion to oust further arbitration and itself decide the outstanding questions of interpretation. . . .[14]

. . .

[12] *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154 (C).
[13] Ibid at 156 A.
[14] Ibid at 156 F-G.

But there is, in my view, no room in law for a hybrid order such as the one under appeal, which is partially a finding made by an arbitrator and partially a finding made by a Court of law.'[15]

[16] In my view, the *Britstown* judgment is wholly distinguishable from the present matter. The facts of that case are set out in the judgment of the court of first instance (per Van Zyl J).[16] Once the decision of the full court is read against the backdrop of the facts set out in the judgment of Van Zyl J, it is clear that the reference to an 'hybrid order' in the current matter is wholly misplaced. The facts in the *Britstown* matter were: B was contracted to install power lines (and the supporting poles) for Britstown Municipality. The contract allowed for additional amounts to be paid by the Municipality if B encountered solid rock when digging holes to plant the poles (because of the additional costs of drilling and blasting). A dispute arose as to whether the Municipality was liable for an amount of £6,634 5s claimed by B for the excavation of hard rock when planting poles. In challenging the claim, the Municipality *inter alia*: (i) denied that hard rock was encountered and put B to the proof of its allegations in relation to the quantity of rock excavated; and (ii) relied on a clause in the agreement that 'no poles shall be planted under such [hard rock] conditions, without the consultant's prior approval' – it alleged that the consultant's prior approval had not been obtained and therefore it was not liable for the additional costs associated with planting the poles in hard rock.

[17] Importantly, the arbitration clause in the *Britstown* matter provided that:

'(1) In the event of a dispute as to the quality and/or the measurement of quantities of materials and workmanship, the consultant/s' decision shall be accepted.

(2) Upon any other matter connected with this contract, the consultant/s will act as arbitrator in the first instance, in the adjustment of any difficulties arising between the contractor and the client.

(3) Should, however, the decision arrived at in this latter case be unacceptable to either party, the point of difference shall be submitted to the arbitration (in terms of the Arbitration Act . . .) by two nominees, one from each party'.[17]

The disputes were referred to the consultant, who determined them in favour of B. Dissatisfied with the award, the Municipality gave notice that it required a further

[15] Ibid at 157 A-B.
[16] *Beunderman (Pty) Ltd v Britstown Municipality* 1965 (3) SA 111 (C).
[17] Ibid at 113 C-E.

arbitration in terms of the arbitration clause. A single arbitrator was agreed upon. The Municipality formulated the 'statement of case' for the arbitrator. B asserted that the Municipality's contentions related to the measurement of quantities and were consequently not subject to further arbitration proceedings under the arbitration clause. B then approached the court to have the consultant's award made an order of court.

[18] The hybrid nature of the order granted by Van Zyl J and criticised by the full court is therefore quite different from that sought by Termico in the counter-application. What Van Zyl J did was to usurp the power given to an arbitrator, in respect of a matter which was still the subject of a further arbitration that had not finally run its course. The critical statements made in the full court judgment quoted above were aimed at this approach, not at a situation where the arbitration is complete and the court is asked to deal with issues that were not issues in the arbitration. Unlike Van Zyl J, the court below was not asked, in the counter-application, to decide matters which remained undecided by the arbitrators or that were still 'live' in a pending arbitration. In the circumstances, the reliance placed on the *Britstown* decision by SPXT and the court below was wholly misplaced.

[19] Here, the arbitrators had decided that, on their interpretation of clauses 19.3 and 19.4 (particularly the latter), they could not make an award compelling SPXT to make payment to Termico. On their interpretation of clause 19.4, determination of the amount to be paid required determination of the value of Loan B, which fell to be deducted from the Put Price. As the value of Loan B was not an issue to be decided in the arbitration, the arbitrators determined that the amount of Loan B would need to be established and the Put Price applied to Loan B before payment could be ordered. The arbitrators also highlighted the provisions of clause 19.3. On their interpretation, having held that there was a valid exercise of the Put Option, which brought about a binding sale at the Put Price determined in accordance with clause 19.2, the arbitrators recorded: '[w]hat remained to be done was (and still is) that a meeting was to be held as prescribed by clause 19.3 in order to implement the agreement of sale'. Thus none of the issues referred for determination by the arbitrators were left undecided.

[20] Neither 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. 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.

[21] It remains to consider whether Termico is entitled to the further relief sought in the counter-application, namely a judgment sounding in money. The court below used the fact that it was called upon to order a money payment as a reason to set aside the arbitrators' award. That flowed directly from the finding that the order claimed in the counter-application is an impermissible 'hybrid order'. That finding, as I have shown, cannot be supported. Termico originally also sought payment of R287 337 807, less such amount as the arbitrators determine may be due to SPXT in terms of Loan B. SPXT excepted to this claim. It contended *inter alia* that any dispute in relation to Loan B was not subject to the dispute resolution processes in clauses 29 and 30 of the shareholders' agreement and consequently the determination of Loan B was not an issue competently before the arbitrators. The arbitrators upheld the exception. Termico then amended its claim to delete the reference to Loan B.

[22] The arbitrators' refusal to grant a money judgment did not preclude Termico from claiming such a judgment from a court that has jurisdiction to set-off the value of Loan B, after the meeting contemplated in clause 19.3 had been held (or the meeting is deemed to have occurred). Once the arbitrators had determined the Put Price, the meeting contemplated in clause 19.3 ought to have been convened. In response to the requests from Termico for such a meeting to be convened, SPXT's attorney stated that they had

instructions to 'bring an application to have the award set aside' and that '[i]n the circumstances, no purpose [would] be served in holding the requested meeting, at this time'. However, it is unclear why the fact of an application to set aside the award meant that SPXT was free to simply ignore the request for a meeting. The purpose of the meeting was to determine the value of loan B. Loan B was not one of the issues before the arbitrators. Not having been the subject of the arbitration, the challenge to the award did not relieve SPXT of its obligation to meet. In my view, SPXT's refusal to meet constituted a deliberate frustration of Termico's right, with the result that the meeting must be deemed to have occurred.[18]

[23] SPXT contends that the value of Loan B, which falls to be deducted from the Put Price, cannot be decided by this court, but must go back to arbitration in terms of the dispute resolution provisions of the shareholders' agreement. It is so that the dispute resolution, mediation and arbitration provisions of the shareholders' agreement (clauses 29-31) are also applicable to the Loan Agreement. However, clause 31.2 of the shareholders' agreement provides:

'31.2 Notwithstanding the provisions of this clause 31:

. . .

31.2.2 In the event of either Party having a claim against the other Party for a liquidated amount or an amount which arises from a liquid document, then the Party having such claim shall be entitled to institute action therefor in a court of law rather than in terms of the above clauses, notwithstanding the fact that the other Party may dispute such claim.'

Termico's counter-application is a claim for a money judgment in a liquidated amount (i.e. the Put Price less the amount of Loan B). That, this court can determine. In any event, as the deponent to SPXT's affidavits in both the main application and counter-application, Mr Travis Schmeling made plain:

'Although there is a binding dispute resolution process, which includes an arbitration procedure in force between the parties, the applicant is also of the view that the issues raised in the main application, linked to those arising from the counter application concerning the issues in dispute in the arbitration (prayers 2 to 4), ought to be decided by this court. On this basis the applicant agrees with the relief sought by Termico in prayer 9 of the counter application (paginated page

[18] *Du Plessis NO & another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) at para 26 (citations omitted).

563). To this end, this court must have regard to the pleadings, witness statement and documents before the Tribunal.'

[24] Moreover, there appears to be no dispute as to the amount outstanding on Loan B. Accordingly, there is no dispute to go to arbitration.[19] SPXT has consistently refused to set out what it contends is the balance of Loan B. There is undisputed evidence of the balance of Loan B on the papers. The calculation appended to Mr Schmeling's witness statement delivered on 15 June 2016 shows the balance owing on Loan B, as at 12 April 2016, as R30 624 550.79. This schedule was attached to Termico's answering affidavit in the main application. In order to place the court in a position to order payment in a specific amount, Termico prepared a schedule that accepted all of the assumptions in the schedule to Mr Schmeling's affidavit. Although SPXT's replying affidavit makes a number of arguments as to why the schedule should not be considered, SPXT puts up no contrary version and so the amounts reflected in the Termico schedule must be accepted as undisputed evidence in these proceedings.

[25] In terms of clause 19.3 of the shareholders' agreement, 'within 10 Business Days of the Put Price being agreed or determined, the Parties shall meet at the offices of the Company for the purposes concluding the Put Option.' The arbitral award determining the Put Price was delivered on 5 July 2018. The ten days contemplated in clause 19.3 expired on 19 July 2018. On Mr Schmeling's schedule, the balance owing on Loan B on 20 July 2018 is R31 490 949.76. If that amount is deducted from the Put Price determined by the arbitrators of R287 337 803, it yields a net amount of R255 846 853.24. This is the amount that was payable by SPXT to Termico on the date of set-off, namely 20 July 2016. Termico is accordingly entitled to a money judgment in the sum of R255 846 850.25, together with interest at the rate of 9% per annum from 20 July 2016 to date of payment.

[26] Counsel for SPXT accepted that if Termico's appeal in respect of the main application is upheld and the arbitrators' award reinstated, the appeal in respect of the repudiation application must fail. This is because the arbitrator's award confirmed the validity of the Put Option exercised by Termico in June 2014 and the effective sale of the

[19] *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 (1) SA 301 (D) 304E-H.

shares[20] and excluded any possibility of SPXT exercising its Call Option over the same shares in 2016, the exercise of both the put and call options being mutually incompatible.

[27] In the result:

(a) Termico's appeal is upheld with costs, including those of two counsel.

(b) Paragraphs 1 to 3 of the order of the court below is set aside and substituted by:

'(1) SPXT's application to review and set aside the arbitration award is dismissed with costs, including those of two counsel.

(2) Termico's counter-application succeeds with costs, including those of two counsel.

(2.1) The award of the arbitration tribunal dated 5 July 2016 is made an order of court.

(2.2) SPXT is ordered to pay Termico the sum of R255 846 850.25, together with interest at the rate of 9% per annum from 20 July 2016 to date of payment'.

(c) SPXT's repudiation appeal is dismissed with costs, including those of two counsel.

_____

V M Ponnan

Judge of Appeal

[20] *Grey Global Group Inc v Khumalo & another* [2011] ZASCA 161 at para 18.

APPEARANCES:

For Appellant:	W H Trengrove SC (with him D A Turner and M Mbikiwa)
	Instructed by: Bowman Gilfillan Inc., Sandton McIntyre van der Post, Bloemfontein
For Respondent:	J P Daniels SC (with him H Martin)
	Instructed by: Malan Scholes Inc., Johannesburg Claude Reid Attorneys, Bloemfontein