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LEGAL UPDATE

When Is A Final Award Final?

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One of the cardinal sins an arbitration tribunal can commit is to deliver a final award that is not in fact final, meaning that it does not dispose finally of all remaining issues outstanding in the arbitration – bearing in mind that one or more issues may have been finally disposed of prior to the final award by means of partial or interim awards. A tribunal that delivers a non-final "final" award will have committed an irregularity that will render the award susceptible to being set aside on review. In *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and 3 others*[1], the Supreme Court of Appeal (SCA) considered an appeal against an order of the High Court reviewing and setting aside an arbitration award, and dismissing the counter-application for the award to be made an order of court and for payment of an amount of money flowing from the award. The central issue in the SCA was what constitutes a "final" award.

Termico was the minority shareholder in a company providing products and services to firms in the power generation and petrochemical industries. SPX was the majority and controlling shareholder. In accordance with the shareholders' agreement, Termico had exercised a put option in respect of its shareholding after the agreed lock-in period had ended. SPX at first disputed which year's annual financial statements (AFS) were to be used in calculating the purchase price to be paid to Termico for its shares. Subsequently, SPX raised further disputes, including that: (i) the notice exercising the put option was defective; (ii) a valid put option had not been exercised by Termico; and (iii) SPX could enforce a call option, which it purported to do, and defeat any enforcement of the put option.

The disputes went to arbitration before a tribunal of three, and all issues were decided in favour of Termico. The award contained a declarator that Termico had validly exercised its put option, a declarator about which AFS were to be used in calculating the purchase price, and dismissed SPX's counterclaim that it had exercised a call option over the same shares in terms of the shareholders' agreement. Notably, the award did not contain a monetary award in favour of Termico, because a meeting was still required to be held in terms of the shareholders' agreement to conclude the put option, and the net amount of the purchase price still had to be determined in accordance with the shareholders' agreement by setting off the balance of a loan from SPX to Termico against the price of the shares.

After the award had been delivered, SPX refused to attend the required meeting or to provide a schedule setting out the balance of the loan, and instead took the award on review in the High Court. SPX set out a number of grounds of review in its founding papers, but these were not pursued. The ground advanced by SPX in argument, namely, that the arbitrators failed to deliver a "final" award, thereby committing a gross irregularity as contemplated by s 33(1)*(b)* of the Arbitration Act, was raised for the first time in its heads of argument in the High Court.

That ground of review found favour with the Court. In a self-defeating piece of reasoning, the Court held that the tribunal had not made a final award because the scope of its mandate did not permit it to make a final award, since the determination of the value of the loan to be set off against the purchase price was not part of its mandate. It appears that the Court assumed, incorrectly, that only a monetary award could constitute a "final award" in this case, and that the existence of any further issues between the parties that had not been resolved in the arbitration somehow rendered the award non-final, even though those further issues had not been part of the tribunal's mandate.

The SCA set the position right on appeal, noting that neither SPX nor the High Court was able to identify a single issue that had been referred to the tribunal, but not finally decided by it. The arbitrators' inability to grant a monetary award did not preclude Termico from later approaching a court, as it did, for a money judgement after the necessary meeting in terms of the shareholders' agreement had been held. Furthermore, since the amount of the loan to be set off against the purchase price had subsequently been determined (i.e. after the award), there was nothing precluding Termico's counter-application in Court for a money judgement from being upheld. It would not lead to an impermissible "hybrid order" (i.e. relief that consists partially of a finding of an arbitrator and partially a finding of a Court), as argued by SPX. Rather, this was a situation where the arbitration was complete, the issues in the arbitration had been finally determined, and the Court was

subsequently asked to deal with separate and discrete issues that were not issues in the arbitration – in this case, an order to pay a specific amount of money. The SCA accordingly upheld the appeal, made the award an order of Court, and granted a monetary award in favour of Termico. The lesson is that the finality or otherwise of an award is determined with reference only to the issues that are actually before the arbitration; the existence of other disputes, even if they are related to or flow from the issues before the arbitration, is irrelevant.

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[1] Case number 418/2018 (SCA)



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