THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 04 December 2025

Status: Immediate

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NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Another (422/2024) [2025] ZASCA 184 (04 December 2025)

Today the Supreme Court of Appeal (the SCA) upheld an appeal, with costs against the decision of the Mpumalanga Division of the High Court (the high court). The order of the high court was replaced and substituted with an order that (a) the arbitration award published by the second respondent on 7 June 2021, in the arbitration proceedings between the applicant and the first respondent, is reviewed and set aside (b) the first respondent is ordered to pay the costs of the application, on a party and party scale including cost of counsel.

On 27 November 2017, the appellant, NAD Property Income Fund (Pty) Ltd (NAD) instituted an action in the high court against the first respondent, Bushbuckridge Local Municipality (the Municipality) for payment of approximately R23.5 million for the building of three driveway roads and water supply infrastructure. The three roads would serve as driveways into a shopping mall known as the Dwarsloop Mall that NAD was in the process of constructing at the time. The claim was based on a construction agreement ('the agreement') concluded between NAD and the Municipality on 16 February 2016, in terms of which NAD undertook to construct the abovementioned works. The agreement was concluded even though both parties were aware that the Municipality did not have money in its budget to pay for the construction of the infrastructure.

Instead of proceeding to trial, the parties had agreed to refer the matter to arbitration. The Arbitrator declared the agreement unlawful and made the following findings: first, that the construction agreement was invalid, unlawful and therefore unenforceable; second, that it was unlawful for non-compliance with the legal regulatory framework which governs procurement by national, provincial or local governments such as the Municipality, together with the prescribed supply chain management process; third, that NAD had failed to make out a case for unjustifiable enrichment in respect of two of the three roads that it had built and fourth, that the Municipality had been unduly enriched by the construction of one of the three driveways at the cost of NAD and that NAD was therefore entitled to the payment incurred in the construction of that road. NAD brought review proceedings before the high court. NAD claimed that the Arbitrator had exceeded his powers by declaring the agreement invalid for non-compliance with s 217 of the Constitution and the relevant provisions of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA). In the alternative, NAD averred that the Arbitrator committed gross irregularities in the manner in which he had conducted the arbitration proceedings.

The high court on review decided that the agreement between the parties to refer the matter to arbitration conferred the power upon the Arbitrator to deal with the issue of constitutional invalidity of the agreement. It further concluded that the arbitration agreement did not specifically bar the Arbitrator from dealing with the central issue in dispute, that is, the question regarding the constitutional invalidity of the agreement.

The issues before the SCA were whether the Arbitrator exceeded his powers by declaring the agreement invalid, and whether it was proper for the high court to determine the Municipality's conditional counterclaim, and to set the agreement aside on the basis of his finding on the counterclaim, given that the Arbitrator had only determined the merits of the main claim and not the counterclaim?

The SCA found that s 33(1)*(b)* of the Arbitration Act 42 of 1965 (the Arbitration Act) provides that arbitration proceedings may be set aside where the tribunal has committed a gross irregularity in the conduct of the proceedings or where the Arbitrator exceeded his or her powers. Furthermore, that the Arbitration Act must be read in light of the provisions of s 172 of the Constitution.

The SCA held that the arbitrator erred and exceeded his powers. Furthermore, that s 2 of the Arbitration Act does not give the power to an arbitrator to pronounce on the validity of an agreement in circumstances where the validity of that agreement falls to be declared invalid and unenforceable where there was a direct frontal challenge to the constitutional validity of that agreement.

The SCA held further that, whilst the source of an arbitrator's powers is the arbitration agreement concluded between the parties, only a court, is the arbiter of legality in constitutional matters. This is so because conformity with procurement requirements by an organ of state constitutes a public authority in terms of s 217 of the Constitution. Section 217 of the Constitution and the legislation to which it gives rise, require an evaluation of the fairness, equity, transparency, competitiveness and the legality of public procurement. Where non-compliance is found, the court must declare the procurement contract invalid as provided for in s 172(1)*(a)* of the Constitution and may then exercise its discretion to grant just and equitable relief under s 172(2)*(b)* of the Constitution.

Consequently, the consequential or ancillary relief granted by the Arbitrator on defences raised and issues pertaining to lack of authority on the part of the Municipal Manager to conclude the agreement and unjust enrichment cannot stand.

The appeal was accordingly upheld with costs. The order of the high court was set aside and replaced.