THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 422/2024

In the matter between:

NAD PROPERTY INCOME FUND (PTY) LTD **APPELLANT**

and

BUSHBUCKRIDGE LOCAL MUNICIPALITY **FIRST RESPONDENT**

B M NGOEPE N O **SECOND RESPONDENT**

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

Coram: DAMBUZA, HUGHES and UNTERHALTER JJA, STEYN and HENNEY AJJA

Heard: 27 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 11:00 on 04 December 2025.

Summary: Arbitration – Arbitration Act 42 of 1965 (Arbitration Act) – whether an arbitrator, in arbitration proceedings, is empowered to declare invalid, in terms of s 172 of the Constitution, a construction agreement concluded between a private company and a Municipality – powers of an arbitrator – s 33(1)*(b)* of the Arbitration

Act – reviewability of an arbitrator's award – when an award can be set aside and the appropriate relief in such circumstances – application of s 20 of the Arbitration Act.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Mashile J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and substituted with the following order:

(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, including the costs of two counsel where so employed.

JUDGMENT

Henney AJA (Dambuza, Hughes and Unterhalter JJA and Steyn AJA concurring)

Introduction

[1] This is an appeal against an order of the Mpumalanga Division of the High Court (the high court) per Mashile J, in terms of which the appellant's application to review and set aside arbitration proceedings conducted by the second respondent, the Arbitrator, was dismissed. The appeal is with the leave of this Court.

Factual background

[2] 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. In terms of the agreement, NAD would meet these costs, and the Municipality would refund it from its budget in the following financial year(s).

[3] The Municipality raised a number of defences to NAD's summons and also filed a conditional counterclaim. The defences included the following: First, that the written agreement was concluded in contravention of the provisions of s 217 of the Constitution and ss 111 to 116 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA), because it was not preceded by a competitive bidding process, and therefore constituted an unsolicited bid which, under s 113 of the MFMA, the Municipality had not been obliged to consider. Second, that the municipal manager was never authorised to conclude the agreement. Third, that no consensus was ever reached on the price of the works. In its counterclaim the Municipality sought an order that the agreement be declared unlawful, that it be set aside, and that the three driveways be declared to be for the exclusive benefit of NAD[1].

[4] Instead of proceeding to trial, the parties agreed to refer the matter to arbitration. The second respondent, retired Judge President Ngoepe (the Arbitrator), was appointed as the arbitrator by the parties. At the pre-arbitration meeting held on 28 October 2020, the parties agreed that the combined summons of NAD would stand as its statement of claim and the Municipality's plea would stand as its statement of defence. An issue arose as to whether the Arbitrator was empowered to make a finding of constitutional invalidity or unlawfulness in relation to the agreement. The Arbitrator found that he was empowered to make such a finding and declared the agreement unlawful. The Arbitrator in his reasoning stated that he was satisfied that he was competent to make a finding as to whether or not the agreement was invalid and unlawful. And he opined, it would 'be idle to suggest that being an arbitrator as opposed to being a court', that he should countenance the enforcement of an agreement that is invalid and unlawful and thus void. According to the Arbitrator,

[1] Before us on appeal this claim was not pursued.

because the issue of invalidity and unlawfulness of the agreement was one of the disputes the parties required him to resolve, he was competent to make the finding that he did.

[5] The Arbitrator then 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.

[6] In the review proceedings brought by NAD 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 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 decided that the agreement between the parties to refer the matter to arbitration, considered in the light of s 2 of the Arbitration Act 42 of 1965 (the Arbitration Act) conferred the power upon the Arbitrator to deal with the issue of the 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.

[7] The questions to be considered in this appeal are as follows. Did the Arbitrator exceed his powers by declaring the agreement invalid, and was it proper for the high court to determine the Municipality's conditional counterclaim, and to set the agreement 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?

[8] NAD persists in its argument that the Arbitrator exceeded his powers in declaring the agreement invalid in terms of s 172 of the Constitution. Alternatively, it

argues, if the counter claim be upheld, and if some irregularity is found to vitiate the agreement, this Court should exercise its remedial discretion not to invalidate the agreement. NAD also contends that even if the Municipality's defence on the main claim is not sustained, the Municipality never made out a proper case to support its conditional counterclaim for the agreement to be declared invalid. Furthermore, the Municipality's counterclaim should fail because of the unreasonable delay in launching its collateral challenge.

[9] The Municipality on the other hand contends that: First, in terms of the arbitration agreement, the powers of an Arbitrator to decide a dispute are derived from an agreement between the parties. It is the parties themselves who drew the contours and the limits of the powers of the Arbitrator. Second, that the Arbitrator did not declare the conduct of the Municipality unlawful and unconstitutional as contemplated in terms of s 172 of the Constitution. Instead, he found that the contract was invalid, unlawful and therefore unenforceable. The Arbitrator arrived at his finding not because he was bound by s 217 of the Constitution to do so, but because the unlawfulness had been squarely raised in the pleadings and was a fact that the Arbitrator could not ignore. This was one of the disputes on the pleadings the parties agreed to have determined by the Arbitrator. The Arbitrator therefore did not exceed his powers.

Discussion

Did the Arbitrator exceed his powers?

[10] Section 33(1)*(b)* of 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. In this context, the Arbitration Act must be read in light of the provisions of s 172 of the Constitution. The defence raised by the Municipality is essentially one of a collateral or reactive challenge to the constitutionality of the agreement. Public entities conduct procurement under exacting laws for reasons of transparency, fairness, competitiveness, accountability and public service delivery. The procurement laws, binding upon organs of state, flow from s 217(1) of the Constitution. Section 217 of the Constitution provides as follows:

'217 Procurement

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[11] In this particular case we are concerned with the constitutional legality of the agreement, based on the non-compliance with s 217 of the Constitution, as well as the provisions of the MFMA. This was at the heart of the dispute that the Arbitrator was required to adjudicate upon. It involved the procurement of services that were unavoidably a matter of public law and could not fall in the domain of issues to be determined other than by a court. The Arbitrator was well aware of the fact that the validity of the construction agreement was challenged on the basis of its constitutional invalidity for lack of compliance with the provisions of s 217 of the Constitution and the provision of MFMA and on no other basis.

[12] Public procurement is subject to laws that concern the exercise of public powers. When the municipality contracted with NAD, it was not merely exercising a private law competence, but its public powers as an organ of state. The ground of invalidity pleaded was that the agreement was invalid by virtue of its failure to comply with the duties of the Municipality to adhere to the requirements of lawful procurement as a matter of public law. The question is thus whether the lawful exercise of public powers and the remedies for their unlawful exercise are matters that can be decided by a referral to arbitration. The general answer is no because it is courts that supervise the exercise of public power and provide remedies under the Constitution, and the scheme of review provided for by legality and the Promotion of Administrative Justice Act 3 of 2000.

[13] There may be circumstances in which conformity with the legal requirements of public law is an incidental question that arises in arbitration and how that is to be dealt with within the remit of an arbitration, is a matter we can leave open. But here the ground of invalidity that was raised falls squarely into the domain of a public law challenge, and hence the courts have exclusive jurisdiction over this domain. A referral, in terms of s 20 of the Arbitration Act, may be warranted if the issue arises in the course of the arbitration. It is only a power that only the arbitration tribunal can exercise. Section 20 states:

'An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.

This section only gives an arbitration tribunal such powers. In *Telcordia Technologies Inc v Telkom SA Ltd*[2] this Court stated that '[m]oreover, s 20 can be used only if the legal question arises "in the course of" the arbitration.'

[14] The Arbitrator was aware of this when he stated that one of the issues to be considered was: 'an order declaring the resolution and/or disputed agreement to be constitutionally invalid…'. He found, with reference to *Gobela Consulting CC v Makhado Municipality* (*Gobela*)[3], that he was not precluded from making a finding that the agreement was invalid or unlawful. In this regard, the Arbitrator erred and therefore exceeded his powers. In his reasoning, the Arbitrator distinguished the two declaratory orders in the Municipality's counterclaim and the determination as to whether the agreement was invalid.

[15] In arriving at his conclusion, that he could determine the validity of the agreement, relying upon *Gobela,* the Arbitrator fell into error. In *Gobela,* this Court dealt with the question whether an organ of state can raise a collateral or reactive challenge to the validity of an agreement concluded by it. In *Gobela* this Court decided that a *court* is entitled to declare a contract invalid despite an organ of state having not

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[2] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) para 154.

[3] *Gobela Consulting CC v Makhado Municipality* [2020] ZASCA 180; 2020 JDR 2796 (SCA) ; 2020 JDR 2796 (SCA) (*Gobela*).

launched a counter application to review and set aside that contract. This Court, in *Gobela*, held that '[t]he decision that the contract was unlawful, and invalid was a decision by a *court*'[4]. In *Gobela*, this Court never found that an arbitrator is endowed with the power to declare an agreement unlawful and invalid for non-compliance with the Constitution.

[16] The reliance by the high court on the decision of this Court in *Close-Up Mining v Boruchowitz NO* (*Close-Up*)[5] is similarly unhelpful. In *Close-Up* this Court was concerned with the ancillary powers of an arbitrator within the meaning of an arbitration agreement as defined in the Arbitration Act. Section 2 of the Arbitration Act regulates which matters cannot be referred to Arbitration and it states that '…[a] reference to arbitration shall not be permissible in respect of – *(a)* any matrimonial cause or any matter incidental to any such cause; or *(b)* any matter relating to status.' This Court in *Close-Up* referred to the definition of 'arbitration agreement', in the Arbitration Act, as 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement …' and include disputes arising 'in the course of arbitration proceedings that the arbitrator is given a discretion to entertain'.[6]

[17] What the high court omitted to mention is that in *Close-Up* this Court held that in addition to matters excluded in s 2 of the Arbitration Act is an arbitral determination of any constitutional matter.[7] Section 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.

[18] The law in this regard is well established. The Constitutional Court in *Department of Transport and Others v Tasima (Pty) Ltd* (*Tasima*)[8] considered whether an extension of an agreement was in violation of s 217 of the Constitution and treasury

[4] Ibid para 22, own emphasis added.
[5] *Close-Up Mining v Boruchowitz NO* [2023] ZASCA 43; 2023 (4) SA 38 (SCA) (*Close-Up*).
[6] Ibid para 12.
[7] Ibid para 35.
[8] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima*).

regulations with specific reference to arbitration proceedings. The Constitutional Court stated the following:

'The question whether the extension was constitutional or not fell outside the arbitrator's mandate. The constitutionality or legality of the extension was an issue pre-eminently within the competence of the Court.'[9]

In the majority judgment in *Tasima,*[10] Khampepe J held that a constitutional challenge, reactive or otherwise, to the validity of any law or conduct that is inconsistent with the Constitution '. . .[must] be made by a *court*. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality.'[11]

[19] Whilst the source of an arbitrator's powers is the arbitration agreement concluded between the parties[12] only a court, as s 172 of the Constitution requires, is the arbiter of legality in constitutional matters, as pointed out by the Constitutional Court in *Tasima.* This is so because conformity with procurement requirements by an organ of state constitutes a public authority in terms of s 217. 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. The determination of these issues must be undertaken before the courts, rather than private arbitration proceedings. 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. Section 172(1) of the Constitution provides that:

'172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, *a court* –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make an order that is just and equitable*…'* (Own emphasis)

Only a court can exercise its discretion to grant a just and equitable remedy where an agreement is found to be invalid.

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[9] Ibid para 39 of the first, minority, judgment by Jafta J.
[10] Ibid paras 133-208.
[11] Ibid para 147, own emphasis added.
[12] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA); [2008] 2 All SA 132 (SCA) para 30.

[20] I agree with the position of the high court expressed in *Independent Development Trust v Bakhi Design Studio CC and others (IDT)*[13] that the procurement of goods and services in terms of s 217 of the Constitution is primarily a constitutional issue and such procurement must be fair, equitable, transparent, competitive and cost effective. And where there is non-compliance with these provisions the procurement process must be declared invalid by a court, in terms of s 172 of the Constitution. In general, conformity with the statutory regime is a question of whether administrative or executive action are in conformity with these standards, which solely is a question which falls within the realm of public law over which a court has the exclusive competence to decide.

[21] Apart from the fact that s 172 of the Constitution, read with s 2 of the Arbitration Act, does not permit an arbitrator to pronounce on the validity of any law or conduct that is inconsistent with the Constitution, s 109(2) of the Local Government: Municipal Systems Act 32 of 2000 states:

'A municipality may compromise or compound any action, claim or proceedings, and may *submit to arbitration any matter other than a matter involving a decision on its status, powers or duties or the validity of its actions or by-laws'*. (Own emphasis).

[22] There may well be cases in which disputes relating to the conduct of organs of state could be resolved by means of arbitration. This however is not such a case, because the question of the legality of the contract raised a direct question of invalidity, which is a public law dispute that relates to conformity with s 217 as a norm of constitutionally compliant procurement. As pointed out by Hoexter and Penfold[14] it is not always clear when a dispute can be regarded as private law or a public law dispute that involves administrative action. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* (*Cape Metro*)[15] this Court said the following:

'It follows that whether conduct is "administrative action" would depend on the nature of the power being exercised. Other considerations which may be relevant are the source of the power, the subject-matter, whether it involves the exercise of a public duty and how closely related it is to the implementation of legislation. The appellant is a public authority and,

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[13] *Independent Development Trust v Bakhi Design Studio CC and Others* [2023] ZAGPPHC 363; 2023 JDR 1750 (GP) (*IDT*).

[14] C Hoexter and G Penfold *Administrative Law in South Africa* 3 ed (2021) at 278-288.

[15] *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* [2001] ZASCA 56; 2001 (3) SA 1013 (SCA); 2001 (10) BCLR 1026 (A) (*Cape Metro*).

although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position as a public authority. They were agreed to by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position, than the position it would have been in had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the *consensus* of the parties, in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from a position no different from what it would have been in had it been a private individual or institution'.[16] (Citations omitted)

[23] After *Cape Metro,* followed *Logbro Properties CC v Bedderson NO and Others* (*Logbro*)[17]. It seems that in *Logbro*[18] it was held that *Cape Metro* did not purport to provide a general answer to the question whether a public authority in exercising powers derived from a contract is in all circumstances subject to a public duty to act fairly.[19] What *Logbro* however confirmed, was that *Cape Metro* established the proposition that the public authority's invocation of a power of cancellation in a contract concluded on equal terms with a major commercial undertaking, without any element of superiority or authority derived from its public position, does not amount to an exercise of public power.[20]

[24] Municipalities, as organs of state, are bound by s 217 of the Constitution and the Preferential Procurement Policy Framework Act 5 of 2000. Such contracts are subject to public procurement principles of fairness, transparency and cost-

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[16] Ibid paras 17-18.
[17] *Logbro Properties CC v Bedderson NO and Others* [2002] ZASCA 135; [2003] 1 All SA 424 (SCA); 2003 (2) SA 460 (SCA) at 467 D-H *(Logbro).*
[18] *Logbro* para 9.
[19] See the critique of Hoexter and Penfold fn. 14 above at 279 as well as C Hoexter 'Contracts in administrative law: life after formalism?' (2004) 121 (3) *SALJ* at 595.
[20] *Logbro* para 10.

effectiveness. What is of importance in this case is that, as stated earlier, the issue whether the Municipality failed to conclude the construction agreement in accordance with the provisions of s 217 of the Constitution and the applicable provisions of the MFMA, could only be determined by a court and not by the Arbitrator. Contrary to the finding of the high court, NAD's consent or acquiescence to referral of the dispute regarding the constitutional invalidity of the agreement could not confer on the Arbitrator power he did not have in law. In addition, in terms of s 172 of the Constitution, only a court is empowered to grant a just and equitable remedy pursuant to an order of constitutional invalidity. 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.

[25] A further question that was debated with counsel during the hearing of this appeal was, whether this Court may make an order in terms of s 20 of the Arbitration Act that the matter be referred to the high court for the determination of the issues we found the arbitrator was not empowered to decide. In the light of the order, we propose to make, it will be for the parties to engage one another as to how they wish to proceed. As a result, a referral order in terms of s 20 of the Arbitration Act would be inappropriate.

[26] In the result I make the following order:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the high court is set aside and substituted with the following order:

(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 to pay the costs of the application including the costs of two counsel where so employed cost of counsel.

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R C A HENNEY

ACTING JUDGE OF APPEAL

Appearances:

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