IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Not Reportable
Case no: M523/2023

In the matter between:

THE MAHIKENG LOCAL MUNICIPALITY	**Applicant**
and	
P ELLIS N.O.	**First Respondent**
ARBITRATION FOUNDATION OF SOUTH AFRICA	**Second Respondent**
MIAGRA PROPERTY DEVELOPMENT (PTY) LTD	**Third Respondent**
REGISTRAR OF DEEDS, VRYBURG	**Fourth Respondent**

Coram: Wessels AJ

Heard: 20 March 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 15h00 on 2 June 2026

Summary: Application for leave to appeal against an order striking a review application from the roll for lack of territorial jurisdiction – applicant seeking to raise new arguments on appeal based on s 109(2) of the Local Government: Municipal Systems Act 32 of 2000 that were not pleaded in the court below – whether the principle in *CUSA v Tao Ying Metal Industries* [2008] ZACC 15 obliged this Court to raise the point *mero motu* – held that the point was not apparent on the papers – applicant not left without a remedy – application for leave to appeal dismissed with costs.

JUDGMENT

Wessels AJ

Introduction

[1] In this application for leave to appeal, the applicant seeks to appeal a judgment I delivered on 28 November 2025, in which its review application was struck from the roll on the ground that this Court lacks the territorial jurisdiction to entertain it. The applicant seeks leave to appeal the order to the Supreme Court of Appeal ('SCA'), alternatively to the Full Court of this Division.

The order

[2] In the judgment of 28 November 2025, I stated the following:

'The lack of this court's jurisdiction is not dispositive of the application insofar as it served before this Court, but not dispositive of the application in its entirety. I am therefore of the

considered opinion that the proper order to be made would be to strike the matter from the roll due to a lack of this Court's jurisdiction.'

[3] On this basis, I ordered that the application be struck from the roll, as this Court lacked the necessary jurisdiction to hear its merits. I did not dismiss the review application on its merits, I instead held that this Court is not the appropriate forum since the seat of the arbitration, and thus the cause of action for jurisdictional purposes, is located in Pretoria, which falls within the Gauteng Division.

The statutory provision of the applicant's argument

[4] In its application for leave to appeal, the applicant places strong reliance on s 109(2) of the Local Government: Municipal Systems Act[1] ('the Systems Act'), which subsection provides:

'(2) 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.**' (emphasis added)

[5] The applicant argues that the provision precludes a municipality from referring any dispute concerning the validity of its actions or decisions to arbitration. It contends that the arbitration between the applicant and the third respondent concerned the validity of the Sale of Land Agreement, and that the arbitration agreement was therefore void *ab initio*. From this, the applicant seeks to draw two conclusions. First, that the arbitrator had no jurisdiction to make any award. Second, that the choice of Pretoria as the seat of a (presumed) void arbitration cannot confer territorial jurisdiction on any court. The applicant

[1]Local Government: Municipal Systems Act 32 of 2000.

accordingly submits that this Court retains jurisdiction to declare the arbitration proceedings null and void and to set aside the Sale of Land Agreement.

[6] The applicant's arguments raise pertinent questions about the tension between the Arbitration Act, the Systems Act, and the Constitution of the Republic of South Africa ('the Constitution'), as created by the facts of the matter. However, they were not properly argued before me when the jurisdictional point was decided, and it is necessary to examine the arguments advanced in the application for leave to appeal.

The original notice of motion of 21 September 2023

[7] The applicant commenced these proceedings with a Notice of Motion dated 21 September 2023. It prayed for an order reviewing and setting aside the arbitral award, upholding the applicant's counterclaim and declaring the Sale of Land Agreement invalid and, alternatively, for a new arbitration. There was no prayer seeking to declare the arbitration proceedings themselves null and void and no reference to s 109(2) of the Systems Act. After the arbitrator had lodged the record of the arbitration proceedings, the applicant, acting in terms of Rule 53(4) of the Uniform Rules of Court, delivered an Amended Notice of Motion on 1 November 2024. That amended notice prayed for an order reviewing and setting aside the arbitral award, declaring the Sale of Land Agreement invalid and void *ab initio*, and costs. *Ex lege*, the Amended Notice of Motion became the operative Notice of Motion when the matter was argued before me on 29 May 2025.

[8] It is of importance to note that, even in the Amended Notice of Motion, there was no prayer declaring the arbitration proceedings null and void. There was no reliance on s 109(2) of the Systems Act. The entire case remained what it

had always been, a review under s 33 of the Arbitration Act[2] seeking to set aside the arbitrator's award and to have the underlying Sale of Land Agreement declared invalid. That relief depends on the existence of a valid arbitration, as the applicant cannot review an award that is a nullity. It can only seek a declarator of nullity, which the applicant did not.

The proposed further amended notice of motion of 20 June 2025

[9] After the hearing on 29 May 2025 but before I delivered judgment, the applicant filed a Notice of Intention to Amend its Notice of Motion, dated 20 June 2025. The proposed amendment sought to introduce a new prayer declaring the arbitration proceedings null and void. The third respondent opposed this proposed amendment. The applicant never set the amendment application down for hearing, and this Court made no order granting the amendment. The status of the proposed amendment is of no moment as the Further Amended Notice of Motion never formed part of the proceedings before me. It was not before me when I delivered judgment and it follows axiomatically that it is not part of what I have to decide in this application for leave to appeal. The suggestion by the applicant, set out in paragraph 7 of its application for leave to appeal, that I ought to have had regard to a notice of intention to further amend the Amended Notice of Motion filed after judgment was reserved, is misconceived and cannot be sustained.

[10] As counsel for the third respondent correctly submitted during the hearing of this application, the applicant's entire case before me was based on the legal validity of the arbitration proceedings. The applicant sought to review the first respondent's award in terms of s 33 of the Arbitration Act. That relief necessarily assumes the existence of a valid arbitration. The applicant cannot

[2]Arbitration Act 42 of 1965 s 33(1).

now, on appeal, seek to convert its case into one in which the arbitration proceedings were a nullity from the outset, as such a case was never set out in its founding affidavit and never adjudicated.

The applicant's case on leave to appeal

[11] The applicant's heads of argument on leave to appeal advance a radically different case from that presented at the hearing. The applicant now contends that s 109(2) of the Systems Act precludes it from submitting to arbitration any matter involving the validity of its actions; that the arbitration agreement was therefore void *ab initio*; that the arbitrator's award is a nullity; that the choice of Pretoria as the seat of a void arbitration cannot confer territorial jurisdiction on any court; and that this Court accordingly had, and retains, jurisdiction to declare the arbitration proceedings null and void and to set aside the Sale of Land Agreement.

[12] In support of the case that the applicant now wants to establish on leave to appeal, the applicant relies heavily on the SCA judgment in *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Another*[3] where it was held that where a municipality raises a defence that a contract is invalid for want of compliance with constitutional procurement requirements[4], that issue falls within the exclusive jurisdiction of the courts and cannot be decided by a private arbitrator. The applicant also relied on the principle articulated by the Constitutional Court in *CUSA v Tao Ying Metal Industries*[5] that where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled but obliged

[3] *NAD Property Income Fund (Pty) Ltd v Bushbuckridge Local Municipality and Another* (422/2024) [2025] ZASCA 184 (4 December 2025).
[4] Section 217 of the Constitution.
[5] *CUSA v Tao Ying Metal Industries* [2008] ZACC 15 para 67-68.

to raise that point of law *mero motu* and require the parties to address it. The applicant contends that s 109(2) of the Systems Act constitutes such a point of law, namely, that the arbitration agreement was void *ab initio* because it concerned the validity of municipal action. In *CUSA*, the Constitutional Court stated:

'[67]…A party that seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review…

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.'

[13] The applicant argues that this principle obliged this Court to raise the s 109(2) point of my own accord, even though it was not part of the applicant's case. I cannot accept this argument for a pertinently obvious reason. This point of law was not apparent from the papers before me. The principle in *CUSA* applies only where the facts necessary to sustain the point of law are already before the court, and the only missing element is the legal argument. In *CUSA* itself, the facts giving rise to the legal question before that court were all set out in the record. The only missing element was the legal characterisation. That is not the position in the present matter.

[14] The factual allegation that the arbitration agreement was prohibited by s 109(2) of the Systems Act was never pleaded. The founding affidavit does not mention s 109(2) and neither does it allege that the dispute concerned the validity of the applicant's actions in a way that triggered the statutory

prohibition. The record contains no facts from which I could have concluded, *inter alia*, that the arbitration agreement was void *ab initio*. The fulcrum of the applicant's case before me was conducted on the premise that the arbitration was valid and that the award was susceptible to review in terms of s 33 of the Arbitration Act.

[15] In these circumstances, I had no basis on which to raise the s 109(2) point of my own accord as the point was not apparent on the papers. The applicant cannot now invoke *CUSA* to remedy its own failure to properly present its case before this Court in the first place. The applicant's case was a review application under s 33(1) of the Arbitration Act, with jurisdiction asserted solely on the basis of the property's location. This Court was bound to apply the settled principles of territorial jurisdiction in arbitration matters. In *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company Sarl*[6], the SCA held that the court of the seat of the arbitration exercises supervisory jurisdiction over the arbitration proceedings.

[16] The seat of the arbitration in this matter was Pretoria. The arbitrator resides and practises in Pretoria. The award was made in Pretoria. The cause for a review under the Arbitration Act, the arbitration proceedings themselves, arose in Pretoria. The location of the immovable property that formed the subject matter of the underlying dispute is irrelevant to the question of territorial jurisdiction over a review of an arbitral award.

The test for leave to appeal

[6] *Zhongji Development Construction Engineering Company Ltd v Kamoto Copper Company Sarl* 2015 (1) SA 345 (SCA) para 51.

[17] Section 17(1)(*a*)(i) of the Superior Courts Act[7] provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, which constitutes a high threshold. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal[8]. A mere possibility, or what may be described as an arguable case, is insufficient. On the record that was before me, the applicant's appeal has no reasonable prospect of success.

[18] The new case that the applicant seeks to advance on appeal was never pleaded before me and cannot be introduced for the first time in the SCA or the Full Court. The applicant cannot, for the first time on appeal, now change the nature of its case. The SCA has long held that it is not bound to entertain a new point of law raised for the first time on appeal unless certain conditions are met. In the often-referenced judgment of *Cole v Government of the Union of South Africa*[9], it was stated:

'If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.'

[19] The principles enunciated in *Cole* have been consistently applied in our law. They require that the existing pleadings cover the new point of law and that the relevant facts be common cause or clearly established on the record. Neither

[7]Superior Courts Act 10 of 2013.
[8]*Smith v S* (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) (15 March 2011) para 7, against the modified statutory framework under s 17 of the Superior Courts Act 10 of 2013.
[9] *Cole v Government of the Union of South Africa* 1910 AD 263 at 272.

of these conditions is satisfied in this case. The point of law now sought to be advanced, that the arbitration agreement was void because it offended s 109(2) of the Systems Act, is not covered by the application as it served before me.

[20] The SCA further clarified this principle in *Workmen's Compensation Commissioner v Crawford and Another*[10], where the court stated:

'So the appellant had chosen his own battle-ground, as it were, and he has no cause for complaint if on appeal the Court declines to move on to a different terrain. This is not a case in which this Court is constrained to decide a point of law and to deal with the appeal accordingly, whatever the position taken up by the parties may have been, on the basis that it is clear that all the relevant facts had been fully canvassed (cf Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 23B-G). It is, on the contrary, in my opinion, a case where, if this Court were to accept the belated submission of counsel for the appellant on the point of law raised in argument, it would be wrong to decide the appeal on the basis thereof, for it would run counter to what was common cause in the Court a quo, and if the point had been taken there timeously, whether in the pleadings or otherwise, the possibility cannot be excluded that the respondents' conduct of their case would have been different.'

[21] The observations of the SCA[11] are apposite. The applicant chose its battleground. It elected to pursue a review under s 33 of the Arbitration Act, asserting jurisdiction solely on the basis of the property's location. It did not plead the invalidity of the arbitration agreement. It did not seek a declarator of nullity. It cannot now, on appeal, move to a different judicial basis. That would be unfair to the third respondent, which might have conducted its case differently had this new point been raised timeously.

[22] I have also considered whether there is a compelling reason within the meaning of s 17(1)(*a*)(ii) of the Superior Courts Act to grant leave despite the

[10] *Workmen's Compensation Commissioner v Crawford and Another* 1987 (1) SA 296 (A) at 307 F-H.
[11] *Ibid.*

absence of reasonable prospects of success. The applicant argues that the interpretation of s 109(2) of the Systems Act and its interaction with the Arbitration Act raise important questions of public law that warrant the SCA's attention. However, these points are not properly before this Court, and they cannot be properly raised before the SCA simply by granting leave to appeal, based on papers that do not support them.

[23] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*[12], the Constitutional Court held that whether a court should grant leave depends on what the interests of justice demand. Deciding whether it is in the interests of justice to hear and resolve the matter requires a careful weighing of all relevant factors. However, the court remarked that the phrase 'interests of justice' lacks a clear, concise definition of its meaning, and ultimately, what serves the interests of justice will vary, based on a thorough assessment of all relevant factors in each specific case.

Conclusion

[24] To grant leave to appeal on the present papers would be to countenance an irregularity, in that I would be allowing a party to now advance a case that was never made in this Court initially. I conclude that granting leave to appeal would not serve the interests of justice and the application for leave to appeal must be refused.

Costs

[12] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34 paras 34 – 35.

[25] There is no reason to depart from the general rule that costs follow the result. The applicant has been unsuccessful in its application for leave to appeal and the third respondent is entitled to its costs, including the costs of two counsel on Scale C, given the complexity of the matter.

Order

[26] Accordingly, I make the following order:

1 The application for leave to appeal is dismissed.

2 The applicant shall pay the costs of this application, such costs to include the costs of two counsel on Scale C.

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M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances:

For the applicant:	PG Seleka SC and L Bedhesi
Instructed by:	M E Tlou Attorneys Inc, Mahikeng
For the third respondent:	MC Maritz SC, RF de Villiers and SM van Vuuren

Instructed by:	De Ridder Attorneys, Hartbeespoort
	c/o Smit Neethling Inc, Mahikeng