***Zamani Marketing and Management Consultants Proprietary Limited and Another v HCI Invest 15 Holdco Proprietary Limited and Others*** (32026/2019) [2020] ZAGPJH 5 (11 February 2020)

**Introduction and basic facts**

1. The first applicant, i.e. Zamani Marketing and Management Consultants (Pty) Ltd (**Zamani**), and the second applicant, i.e. Ithuba Holdings Rf (Pty) Ltd (**Ithuba**) – collectively '**the applicants**' - instituted proceedings in terms of section 33 of the Arbitration Act No 42 of 1965 (**the Act**) to review and set aside an award made by three arbitrators, all retired judges, who were cited in these court proceedings as the seventh, eighth and ninth respondents (**the arbitrators**).

2. The arbitration proceedings over which the arbitrators presided at the time related to a dispute between:

    2.1. On the one hand, the claimants, *viz*., Zamani, Ithuba, the individually named trustees of the '*CM Trust*' (cited as the *third respondent* in these court proceedings), the individually named trustees of the '*EM Trust*' (cited as the *fourth respondent* in these court proceedings), Zamani Gaming (Pty) Ltd (cited the *fifth respondent* in these court proceedings) and Zamani Treasury (Pty) Ltd (cited the *sixth respondent* in these court proceedings); and

    2.2. On the other hand, the first respondent (i.e. HCI Invest 15 Holdco (Pty) Ltd) and the second respondent (i.e. HCI Treasury (Pty) Ltd). For present purposes, the first and second respondents will simply be referred to as '**the HCI respondents**'.

3. The applicants then brought an interlocutory application in terms of rule 30 A of the Uniform Rules of Court (**the Rules**) to compel two of the three arbitrators to dispatch, in terms of rule 53 (1) (b) of the Rules, to the registrar of the High Court (Gauteng Local Division, Johannesburg) all documents containing the manuscript notes that appear on their copies of the pleadings and the combined discovery bundle (**the arbitrators' notes**).[1]

4. The arbitrators' response to this interlocutory application was that they declined to disclose such notes on the basis that rule 53 is not of application to arbitration reviews under section 33 of the Act, which, so they claimed, were *sui generis* proceedings.[2] The arbitrators nonetheless adopted the standpoint that they would abide by the court's judgement.

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1 Para [3], p. 4.

2 *Ibid*.

**The issues**

5. The court (*per* Unterhalter, J) stated that three issues arose for consideration: (i) First, whether rule 53 of the Rules applies to an application for the review of an arbitral award in terms of section 33 of the Act (**arbitration review**); (ii) second, whether the arbitrators' notes form part of the '*record*' in terms of rule 53 of the Rules; and (iii) whether the applicants could compel disclosure of the arbitrators' notes.[3]

**Does rule 53 of the Rules apply to an application for the review of an arbitral award?**

6. In dealing with the first issue, i.e. whether rule 53 applies to arbitration reviews under section 33 of the Act, the court first disposed of the arbitrators' reliance on the case of ***Government of Republic of South Africa v Midkon (Pty) Ltd*** 1984 (3) SA 522 (T) (**Midkon**) at p. 588. After pointing out that *Midkon* was referenced with approval in many commentaries concerning arbitration review, the court stated that closer scrutiny of the judgement yields less certainty, both as to what was decided in the case and the weight of its reasoning.[4] Ultimately the court found that the rationale of the judgement in *Midkon* is unavailing to decide the more general proposition as to whether rule 53 applies to arbitration reviews under section 33 of the Act.[5]

7. The then court held that, in order to properly decide the question underlying the first issue, the analysis necessarily had to begin by examining the provisions of rule 53. In this regard, it pointed out that rule 53 commences by referencing the type of proceedings that could be brought under review, namely the proceedings: '… *of any inferior court and any tribunal, board or officer performing judicial, quasi-judicial or administrative functions*'.[6]

8. After acknowledging that the institutions, functionaries and functions referenced by rule 53 are principally concerned with those involved in exercising public powers, the court stated that the latter observation did not justify the confinement of this rule's application to only those who exercise such public powers[7].

9. The court proceeded to hold that there are four considerations that support the proposition that rule 53 is of application to arbitration reviews under section 33 of the Act. The four considerations are:

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3 Para [5], p. 4.

4 Para [9], p. 5.

5 Para [11], p. 6.

6 Para [12], p. 6.

7 Para [13], p. 7.

9.1. First, the introductory language of rule 53 as to the type of proceedings that could be brought under review (*viz*., '*… of any inferior court and any tribunal, board or officer performing judicial, quasi-judicial or administrative functions*'), which, according to it, bear all the hallmarks of a review.[8] In so concluding, the court stated the following:[9]

> 'The grounds for judicial intervention concern how an arbitration is conducted or an award is obtained, and not at all whether the award or the reasons that support it are correct. The remedy is to set aside the award that is vitiated by irregularity, and, upon request, remit the dispute to a new arbitration tribunal. A court seized with an arbitration review has a proceeding before it to bring under review a decision (the award) or the proceedings (the arbitration proceedings). Furthermore, the Act defines arbitration proceedings to mean proceedings conducted by an arbitration tribunal. And there can be little doubt that an arbitration tribunal performs a quasi-judicial function.
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> [18]. It follows that an application under section 33 is a review proceeding by which a court applies legislative and hence public standards to a tribunal that adjudicates a dispute, and hence exercises a quasi-judicial function. It is true that the arbitration tribunal does not exercise public powers. But the arbitration tribunal is nevertheless held to public standards. It is adherence to these standards that a court is required to determine. **The introductory language of Rule 53 is quite broad enough to reference court proceedings that determine whether a quasi-judicial function that parties have given to an arbitration tribunal has been discharged in conformity with the public standards required by law**.' (Emphasis added).

9.2. Second, the court found justification for the latter conclusion in the number of cases that have applied rule 53 to reviews in analogous proceedings, e.g. ***Jockey Club of South Africa v Forbes*** 1993 (1) SA 649 (A) (**Forbes**) at p. 662, which was concerned with the review of a domestic tribunal supposedly acting under the rights conferred on it by contract. Despite the fact that *Forbes* was not a case concerning the review of public powers or functions that had been exercised, the erstwhile Appellate Division found that the provisions of rule 53 were available to an applicant, although its use was not obligatory.[10] The court then further referred to the cases of ***Telcordia Technologies Inc v Telkom SA Ltd*** 2007 (3) SA 266 (SCA) (**Telcordia**) at [32]; ***Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*** 2009 (4) SA 529 (CC) at [12], [38] and [39], as well as at [263]; and two further High Court cases, namely ***Factaprops 164 (Pty) Ltd v Strydom Bouers CC and Others*** [2003] 2 All SA 509 (T); and ***Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd*** 2016 (1) SA 78 (GJ), as examples of cases where

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8 Para [17], p. 8.

9 *Ibid*.

10 Para [19], p. 9.

it was either accepted or assumed that the record of proceedings could be procured under rule 53 or where the procedure under the said rule was endorsed.[11]

9.3. Third, that *Midkon* is not authority for the proposition that rule 53 does not apply to arbitration reviews. In fact, *Midkon* only decided that the failure to utilise rule 53 is not an impediment to an arbitration review, because it may be inappropriate to be utilised in a given case.[12] In this regard, the court reasoned that - to the extent that *Midkon* might have considered rule 53 to be '*a poor fit*' with the time-related requirements of section 33 (2) of the Act, which enjoins an application for review to be made within six weeks after the publication of an arbitral award – there should be little difficulty in aligning the provisions of rule 53 with the time-related requirements of section 33 (2) of the Act.[13]

9.4. Fourth, the fact that rule 53 is applicable to the review of executive and administrative action, does not mean that it is confined to such reviews. Since the application of rule 53 is to be determined by reference to what the rule states, its application and the procedures ordained by it quite evidently should have utility in arbitration reviews.[14]

**Do the arbitrators' notes form part of the '*record*' in terms of rule 53 of the Rules?**

10. Apart from of the arbitrators' reliance on *Midkon*, they resisted disclosure of the arbitrators' notes on two further grounds, namely: First, that arbitrators exercise a '*private judicial function*' that cannot entail an obligation to disclose the notes of their deliberations or notes made for the purpose of their deliberations;[15] and, second, that the arbitrators' notes do not form part of the '*record of proceedings*' that rule 53 requires the arbitration tribunal to dispatch to the registrar of the High Court.[16]

11. The court proceeded to make short shrift of the first of these grounds by pointing out that it:[17]

> '… **mistakes the proceedings to which Rule 53 has application. Rule 53 is of application to the court's proceedings of arbitration review**. The rule as utility, as I have sought to explain, in making arbitration review fair. The court is given the power to review the exercise of the private judicial function in accordance with public norms. **The court's duty to be fair is required in the exercise of its powers. That duty is not attenuated**

11 *Ibid*., and para [20], p. 9.

12 Para [21], p. 9.

13 *Ibid*.

14 Para [22] to [25], pp. 10 - 11.

15 Para [27], p. 12.

16 Para [28], p. 12.

17 *Ibid*.

**because the subject matter of the review concerns private adjudication**.' (Emphasis added).

12. Turning to the second of grounds upon which the arbitrators resisted disclosure, the court emphasised that although courts had given a wide interpretation to the meaning of '*record of proceedings*' under rule 53, they nonetheless excluded the deliberations of the decision maker from such record.[18] This position was changed by the majority judgement of the Constitutional Court in ***Helen Suzman Foundation v Judicial Service Commission*** 2018 (4) SA 1 (CC) (**Helen Suzman Foundation**), which held that there is no general exclusion of the deliberations of the decision-maker from the record of proceedings in rule 53 either on the grounds of relevance or public policy.[19]

13. The court then quoted the entire paragraph [22][20] in *Helen Suzman Foundation* because of its importance to the case before it and then further proceeded to explain why the *Johannesburg City Council*-principle no longer applied in circumstances such as those it was dealing with. It then considered the passage quoted and, in analysing the content thereof, emphasised that the Constitutional Court:

    13.1. distinguished between the '*deliberations*' of a decision-maker and the '*notes made*' by a decision-maker. Although such notes may be used for the purpose of the deliberations, they do not in themselves constitute the '*deliberations*'. The reason for this, the court explained, is '*… because the notes may record matters that are preliminary, subject to revision, all of no use for the ultimate consideration of the issues that require determination*'.[21]

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18 Para [29], p. 12, with reference to the case of ***Johannesburg City Council v The Administrator Transvaal (1)*** 1970 (2) SA 89 (T) (**Johannesburg City Council**) at p. 91G – p. 92B.

19 *Ibid*.

20 Para [30], p. 13. The important passage of the majority judgement – *per* Madlanga J (Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurring - in *Helen Suzman Foundation* quoted by the court reads (footnotes omitted) reads as follows: '[22] The general exclusion of deliberations as a class of information from rule 53 records in accordance with the *Johannesburg City Council* principle seems to be somewhat arbitrary. Irrelevance and privilege are the usual grounds for excluding information from the record. It cannot be that deliberations, as a class of information, are generally (a) irrelevant for purposes of assisting an applicant in pleading and presenting her or his case; or (b) subject to some form of privilege. **Further, I cannot conceive of any policy or public-interest reasons for excluding deliberations from the record in general**. In the specific example given in *Johannesburg City Council*, of a judicial officer's court book, the notes contained in it certainly do meet the test for being part of the record. That is, the notes are relevant to the judicial officer's decision. Whatever the basis for exclusion may be, it is surely not because the notes are not relevant to the decision. Reasons that have been proffered for the exclusion are based on the existence of strong policy considerations that justify exclusion. They are not based on generalised notions of confidentiality. It cannot be that these strong policy considerations necessarily exist in respect of the deliberations of all decision-makers. That said, the exclusion under this example is not before us for decision. Therefore, I need not pronounce definitively on it.' (Emphasis added).

21 Para [32], p. 14.

13.2. left open the question as to whether notes contained in the equivalent of a judge's bench book are to be excluded from the record.[22]

13.3. found that as the '*decisions*' of the Judicial Service Commission (**JSC**) were distilled from the '*deliberations*' of the JSC, such deliberations were themselves relevant to the decisions and bore upon the lawfulness, rationality and procedural fairness thereof: Hence the deliberations, despite being conducted in closed session, were subject to disclosure.[23]

14. After highlighting the distinctions between the deliberations of the JSC, the court found that such practice was quite different to that of making of an award in arbitral proceedings. In this regard, the court proceeded to highlight the following differences between them:[24]

14.1. The Act requires that an arbitral award shall be in writing and signed by the members of the arbitral tribunal;

14.2. An arbitral award sets out the reasons for the arbitrators' decision - it is not a distillation of, perhaps, disparate views expressed in the course of deliberations and compiled by one of the arbitrators: '*Rather, an award signed by the arbitrators and reduced to writing affords the parties to the arbitration dispositive and authoritative reasons by recourse to which the arbitrators came to the decision that they did*';[25]

14.3. This, the court remarked, constitutes:[26]

> '… a distinction of importance. The deliberations of the JSC are the source of the JSC's reasons hence, the finding of the Constitutional Court that these deliberations are relevant to the decision of the JSC. **The arbitrators' notes bear no necessary relationship to the award. The arbitrators' notes may record diverse subjects: evidence, impressions of a witness, a point of law or fact for consideration, an analogy, a half-remembered authority, a reminder to collect the dry cleaning. Notes of this kind may be fragmentary, provisional, exploratory, and subject to discard or revision. The notes do nothing more than show what an arbitrator was thinking at a point in time in the proceedings**.' (Emphasis added).

14.4. Also, what arbitrators then do with their notes, is entirely contingent. In this regard the court stated that:[27]

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22 Para [33], p. 14, specifically with reference to paras [22] and [29] in *Helen Suzman Foundation*.

23 Para [34], p. 14, specifically with reference to para [24] in *Helen Suzman Foundation*.

24 Para [35], p. 15.

25 *Ibid*.

26 Para [36], p. 15.

27 Para [37], pp. 15 and 16.

> 'The salient consideration is this. The arbitrators are required to make an award. In doing so arbitrators provide the reasons for their decision. **It is the reasons for their award that must survive scrutiny. What an arbitrator was thinking at a point in time when a note was made is not what matters. What matters is what the award contains, and how the proceedings were conducted**. These are the matters relevant to the review grounds set out in s 33 *[*of the Act*].' (Emphasis added and *[*insertion included*]).

14.5. Finally, the court pointed out that:[28]

> 'The arbitrators' notes bear no such relationship to their award. **The award sets out the reasons. The notes have no necessary relationship to the award**. A particular note may or may not be the provenance of some reasoning that is to be found in the award. **But where reasoning germinates (in notes or otherwise) and by what mental process an arbitrator comes to reason his or her award, may be matters of interest to legal philosophers or cognitive science, but provides no probative evidence that supports arbitration review**' (Emphasis added).

15. The court then concluded that the arbitrators' notes do not form part of the '*record of proceedings*'.[29]

**Can the applicants compel disclosure of the arbitrators' notes?**

16. The court further concluded that the applicants could not compel the disclosure of the arbitrators' notes under rule 53 of the Rules.[30] The reasoning for this conclusion, is underscored by the following *policy considerations* articulated by the court:

16.1. First, when parties agree to appoint an arbitration tribunal, they repose adjudicative competences in the panel. Among these competences, is the taking of notes which may or may not cover diverse matters. In this regard the court reasoned that:[31]

> '[40]. … note taking has a function. It allows the arbitrator, under conditions of the greatest freedom, to record something. The notes may be half-formed, first impressions, points for further thought, and the like. But they allow the arbitrator to assemble this rough-hewn timber and later think through what needs to be decided, what may be the right answer and why. What fragments, if any of the arbitrators' notes have utility in this process of getting to a decision is both contingent and opaque, perhaps even for the arbitrator.
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> [41]. **Without the freedom to take note notes in the manner I have described, I apprehend that the adjudicative function would be compromised. The prospect of unmeritorious litigants dissecting an arbitrator's notes for some fragment to support a claim of irregularity would incentivize arbitrators either not to take notes at all or to take them in such a way that stultified the freedom of thought and enquiry that should be encouraged to secure sound adjudication**. A line of reasoning may be wrongheaded but often its ultimate

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28 Para [38], p. 16.

29 Para [44], p. 18.

30 *Ibid*.

31 Paras [40] and [41], pp. 17 and 18

> rejection may be the best route to the correct answer. **An arbitrator should be at liberty to experiment in thinking about the case, without the ultimate burden of having to justify or explain why a note was made, how it might have influenced the ultimate decision, or why it was discarded. It is the outcome of this process that issues in an award that a party may scrutinize for irregularity**. **The raw materials of adjudicative reflection should be produced under conditions of utmost freedom. That freedom would be curtailed if disclosure was the price to be paid for its exercise**.' (Emphasis added).

16.2. Second, although there may be some force in an argument that arbitrators' notes may contain evidence demonstrating irregularity and, also, that the opportunism of an unmeritorious litigant should not be utilised as the standard against which the duty to disclose should be evaluated, prudence and policy dictates that:[32]

> '… **the arbitrators' notes are too remotely connected to the award and the systemic harm to the freedom with which arbitrator should be permitted to approach their task of adjudication is of greater importance than the outlying case where an arbitrator *notes*[33] his unblemished bias**. **Nor should arbitrators be burdened with a duty to explain their notes**, not least in the face of a litigant who chose the arbitrator for his or her attributes but now finds that an adverse award requires the dissection of the arbitrator's notes to build a case of irregularity. **That is the greater policy danger and it counts against the rule of disclosure**.' (Emphasis added).

17. In the result, the court dismissed the applicants' interlocutory application to compel disclosure of the arbitrators' notes in terms of rule 53.

**Eric Dunn, SC**
16 April 2020

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[32] Para [43], p. 18.

[33] The expression '*notes*' here obviously being used to denote the activity of an arbitrator's manuscript '*recordal*' of some or other item that supposedly would serve to illustrate some or other bias that is harboured by him or her.