REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 32026/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between:

ZAMANI MARKETING AND MANAGEMENT

CONSULTANTS PROPRIETARY LIMITED 1st Applicant

ITHUBA HOLDINGS RF PROPRIETARY LIMITED	2nd Applicant
and	
HCI INVEST 15 HOLDCO PROPRIETARY LIMITED	1st Respondent
HCI TREASURY PROPRIETARY LIMITED	2nd Respondent
BOY ERICK MABUZA, CHARMAINE MABUZA and JOYLEEN DIPHOKWANA N.N.O. (in their capacities as the Trustees of the Charmaine Mabuza Trust)	3rd Respondent
BOY ERICK MABUZA, CHARMAINE MABUZA, MABEL MABUZA AND MUZIKAYISE SELBY MSIMANG N.N.O. (in their capacities as the Trustees of the Erick Mabuza Trust)	4th Respondent
ZAMANI GAMING PROPRIETARY LIMITED	5th Respondent
ZAMANI TREASURY PROPRIETARY LIMITED	6th Respondent

THE HON. RETIRED JUSTICE MEYER JOFFE N.O. 7th Respondent

THE HON. RETIRED JUSTICE LEX MPATI N.O. 8th Respondent

THE HON. RETIRED JUSTICE PHILLIP BORUCHOWITZ N.O. 9th Respondent

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J U D G M E N T

UNTERHALTER J

INTRODUCTION

1. The Applicants ("Zamani') have instituted proceedings in terms of s33 of the Arbitration Act 42 of 1965 ("the Act") to review and set aside an award made by three arbitrators, all retired judges, who are cited as the 7th, 8th and 9th Respondents in the proceedings before this Court. The arbitration concerned a dispute between Zamani and the 3rd,4th,5th and 6th Respondents, on the one hand, and the 1st and 2nd Respondents ("HCI").

2. Zamani brings an interlocutory application to compel two of the three arbitrators to dispatch to the registrar documents containing the manuscript notes that appear on their copies of the pleadings and the combined discovery bundle.

3. In their response to Zamani's notice in terms of rule 30A calling upon the arbitrators to comply with Rule 53(1)(b), the arbitrators state that a review under section 33 is *sui generis* and that the provisions of Rule 53 are not of application. The arbitrators, further, take the position that their manuscript notes do not form part of the record. The arbitrators indicate that certain of the pleadings and documents utilized in the arbitration contain manuscript notes (" the arbitrators' notes). The arbitrators say that they are not required to disclose the arbitrators' notes to Zamani. The arbitrators nevertheless abide the judgment of this court.

4. HCI have not opposed Zamani's interlocutory application. HCI made submissions, both written and oral, urging that the application be dismissed.

5. Three issues require consideration. First, is Rule 53 of application to the review of an award brought in terms of section 33 of the Act (" an arbitration review") ? Second, do the arbitrators' notes form part of the record ? Third, can Zamani compel the disclosure of the arbitrators' notes?

6. I proceed to consider these issues.

RULE 53

7. Zamani initially brought their review without recourse to Rule 53. At the prompting of HCI, Zamani invoked Rule 53 in order to secure the record from the arbitrators. Save for the arbitrators' notes, the record has been provided to Zamani. However, as indicated, the arbitrators have not produced the arbitrators' notes. They say that they should not be required to do so because Rule 53 is not of application to an arbitration review. The arbitrators cite *Midkon*[1] in support of this proposition.

8. In *Midkon,* the court dealt with an arbitration review. A preliminary issue arose. The applicant did not follow the provisions of Rule 53. Something was made of this in the affidavits, but not pressed in argument. *Preiss J* considered there to be merit in the submission that " *Rule 53 is inappropriate to the present proceedings* "[2] on the basis that the time periods in s32(2) of the Act and Rule 53 do not fit well together and a substantial record could not be produced in the time periods required by Rule 53.

9. Although *Midkon* is referenced with approval in the commentaries concerning arbitration review, closer scrutiny of the decision yields less certainty, both as to what the case decides and the weight of its reasoning.

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[1] *Government of the Republic of South Africa v Midkon (Pty) Ltd* 1984(3) SA 522 (T)
[2] at 558

10. First, the court in *Midkon* was concerned with what was appropriate, not with what was permitted. The issue was whether a failure to follow Rule 53 was a bar to the court entertaining the arbitration review. Correctly, the court found that it was not. It has long been the position of our courts that Rule 53 is available to an applicant (given its utility) but there is no obligation to follow Rule 53.[3] *Midkon* is entirely at one with this position in the context of arbitration review. Rule 53 may not be appropriate for use in a particular arbitration review. But it does not follow that *Midkon* decided the quite different issue as to whether an applicant in an arbitration review may not use Rule 53, even though it chooses to do so, because the rule is not of application. *Midkon* made no such determination.

11. Much of the reasoning set out in *Midkon* simply concerns the size of the record and whether a record was required to decide the case: both matters particular to that case and unavailing to decide the more general proposition as to whether Rule 53 is of application to arbitration review.

12. In order to decide this question, the analysis must begin by examining Rule 53. The rule commences by referencing proceedings to bring under review the decision or proceedings: *"of any inferior court and any tribunal, board or officer performing judicial, quasi- judicial or administrative functions."*

[3] *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A) at 662

13. The institutions, functionaries and functions referenced by Rule 53 are principally concerned with those who exercise public powers. But, in my view, there is no warrant to read the rule so as to confine its application to those who exercise such powers.

14. Our courts have frequently stated that an agreement to refer a dispute to arbitration is a choice made by the parties which must be respected.[4] The respect that is due to party autonomy has not prevented parliament from regulating arbitrations, and it has done so in the Act. The Act has given the courts the power, upon application by a party to a reference, to set aside an award on the grounds set out in section 33(1). It is a supervisory power that requires an arbitration tribunal to adhere to certain standards. A failure to do so permits a court to set aside the award that the arbitration tribunal has made. Put simply, the courts have been given the power to ensure adherence to public standards in respect of a referral to private adjudication.

15. Section 33 requires a court to determine whether an applicant has made out one or more of the grounds upon which an award may be set aside. That the parties to an arbitration agreement may agree upon procedures that deviate from the procedural rules customarily of application in a court of law is a permissible exercise of party autonomy. But it entails no attenuation of the duties a court must discharge to ensure that its own procedures suffice to ensure fair and effective adjudication of an application brought in terms of section 33.

[4] *Lefuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (6) BCLR 527 (CC) at para [219]

16. Four considerations support the proposition that Rule 53 is of application to an arbitration review.

17. First, the introductory language of Rule 53, set out above, references proceedings of the kind described in section 33 of the Act. Those proceedings bear all the hallmarks of a review. 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.

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 standard 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.

19. Second, this conclusion is fortified by the cases that have applied Rule 53 to arbitration reviews or have done so in analogous proceedings. In *Forbes,* the Appellate Division was concerned with the review of a domestic tribunal purporting to act under rights conferred by contract. This was not a case concerning the review of public powers or functions. Yet the appeal court found that Rule 53 was a procedure available to the applicant, though its use was not obligatory.

20. In *Telcordia*[5], the Supreme Court of Appeal assumed the application of Rule 53 in an arbitration review. So too, in *Lufuno*[6], Kroon AJ referenced the record procured in an arbitration review under Rule 53, without demur. High Courts have endorsed or assumed the use of Rule 53 in arbitration reviews.[7]

21. Third, *Midkon*, as I have endeavored to show , is not authority for the proposition that Rule 53 cannot be of application to arbitration reviews. Rather, as in *Forbes*, *Midkon* decides only that the failure to utilize Rule 53 is not an impediment to an arbitration review being entertained by a court because the rule, in a particular case, may be inappropriate. *Midcon* did consider Rule 53 to be a poor fit with the requirement in s33 (2) of the Act that an application for arbitration review must be made within six weeks after the publication of the award. However, there is little difficulty in aligning the provisions. s33 (2) specifies the time period within which the application shall be made. This means, in my view, when

[5] Telcordia Tecnologies Inc v Telkom SA LTD 2007 (3) SA 266 (SCA) at [32]
[6] See paragraphs [12], [38], [39] . Although forming part of the minority judgment, the majority also referenced the record procured under Rule 53: see paragraph [263]
[7] *Factaprops 164 (Pty) Ltd v Strydom Bouers CC and others* [2003] 2 All SA 509 (T); *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ); and

the application must be brought, not heard. The notice of motion will simply specify the time periods required under Rule 53. No conflict arises. Nor is the size of the record (also mentioned in *Midkon*) a reason not to use Rule 53 . Rule 53 may, for cause, simply be adapted as to time periods so as to meet the circumstances of a particular case – as occurs frequently in lengthy and complex cases of judicial review involving public law. *Midkon* neither decides that Rule 53 does not apply to arbitration review, nor does the case offer reasons that incline me to uphold that proposition.

22. Fourth, that Rule 53 is of application to the review of executive and administrative action, does not mean it is confined to these types of reviews. Rather, the application of Rule 53 is to be determined by reference to what the rule states as to its application and whether the procedures required by the rule have utility in an arbitration review.

23. As I have indicated, the language of Rule 53 does permit of its application to arbitration reviews. But so too are the procedures required by the rule of evident utility in an arbitration review, should an applicant seek to enjoy the benefit of the rule. Section 24 of the Act requires that an award shall be in writing. The parties to an arbitration will thus always have the award so as to consider whether an application in terms of section 33 is warranted.

24. The record of the proceedings constitutes the documentary foundation for many of challenges that may be brought on the grounds set out in section 33(1). The conduct of the arbitration proceedings is largely to be found in the record. Parties may well have

some or all of the record. It is nevertheless important that the arbitration tribunal should disclose the record. Such disclosure permits those whose conduct is subject to judicial scrutiny to provide an authoritative record. This, as the *Forbes* decision makes plain, allows an applicant to proceed with clarity as to the record and to supplement its grounds of review. It also permits the arbitration tribunal to place before the court the documentary record against which its conduct may be judged. The court hearing the review is also placed in a position to determine the matter, possessed of a full record. For these reasons, Rule 53 has been described as an invaluable tool.[8] Production of the record promotes transparency and fairness in the exercise by the courts of their power to hear and determine arbitration reviews. Rule 53 is a well understood procedure by recourse to which parties may bring reviews to the courts, and I do not consider Rule 53 to have any less utility when the rule is applied to arbitration review. Indeed, without Rule 53, courts would have to fashion procedures akin to the rule so as to secure fairness in arbitration reviews.

25. For these reasons I find that Rule 53 is of application to arbitration reviews. An applicant may use Rule 53, adapted as may be necessary to the circumstances of the case. However, if an applicant brings an arbitration review without recourse to Rule 53, nothing prevents a court from entertaining the review.

[8] *Turnbull -Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) at para [32]

THE RECORD

26. The arbitrators resist disclosure of the arbitrators' notes on two further grounds.

27. First, they say 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. This mistakes the proceeding to which Rule 53 has application. Rule 53 is of application to the court's proceedings of arbitration review. The rule has 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 because the subject matter of the review concerns private adjudication.

28. Second, the arbitrators say that the arbitrators' notes do not form part of the record of the proceedings that Rule 53 requires the arbitration tribunal to dispatch. I turn to consider this issue.

29. Historically, the courts have interpreted the record of proceedings under Rule 53 to have a wide meaning, but they have excluded from the record the deliberations of the decision-maker.[9] This position has changed. In *Helen Suzman Foundation*[10], the majority judgment of Constitutional Court held that there is no general exclusion of the

[9] *Johannesburg City Council v The Administrator Transvaal (1)* 1970 (2) SA 89 (T) at 91G – 92B
[10] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC)

deliberations of the decision-maker from the Rule 53 record, either on the grounds of relevance or public policy. [11]

30. The important passage from the judgment reads as follows :

> *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. [25] 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.*

31. The Constitutional Court found the deliberations of the decision-maker to be relevant and subject to disclosure because deliberations are "*the most immediate and accurate*

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[11] Para [22]

record of the process leading up to the decision"[12]. Absent disclosure of the deliberations, evidence of reviewable irregularities in the process of decision-making would remain hidden.

32. These *dicta* require consideration. First, the Constitutional Court distinguished the deliberations of a decision-maker and the notes made by a decision-maker. The notes may be used for the purpose of the deliberations, but they do not constitute the deliberations. This is so because the notes may record matters that are preliminary, subject to revision, or of no use for the ultimate consideration of the issues that require determination.

33. Second, the Constitutional Court left open the question as to whether notes contained in the equivalent of a judge's bench book fall to be excluded from the record.[13]

34. Third, at issue in the *Helen Suzman Foundation* case was whether the Judicial Service Commission's ("JSC's") deliberations, conducted in closed session, were subject to disclosure. Since the reasons for the JSC's decisions were distilled from their deliberations, the Constitutional Court found that the deliberations were relevant to the decisions and bore upon the lawfulness, rationality and procedural fairness of these decisions.[14]

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[12] Para [23]
[13] Paras [22] and [29]
[14] At para [24]

35. There are distinctions between the deliberations of the JSC and the arbitrators' notes. The JSC's practice was that the Chief Justice distilled the reasons for the decisions from the deliberations.[15] That practice is quite different to the making of an award in an arbitration. The Act requires that an award shall be in writing, signed by the members of the tribunal. An 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.

36. This marks 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.

37. What an arbitrator then does with these notes is entirely contingent. The salient consideration is this. The arbitrators are required to make an award. In doing so

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[15] Para [3]

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.

38. The relationship between the arbitrators' notes and their award thus differs from the relationship that exists between the deliberations of the JSE and their decision. The deliberations of the JSE bear a direct relationship to the reasons provided by the Chief Justice. The JSE's reasons are intended to capture the essence of the deliberations. The deliberations however provide the full account as to how the JSE came to its decisions. Since such decisions are reviewable, the deliberations are relevant, so the Constitutional Court has held, to permit a party to determine whether the JSC has met the standards required by legality review.

39. 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.

40. There is a further matter that I must weigh. The Constitutional Court recognized that there may be policy considerations that warrant exclusion in a particular case or in a particular type of case. Here we are concerned with the disclosure of the arbitrators' notes. When parties agree to appoint an arbitration tribunal, they repose adjudicative competences in the tribunal. Among these competences is the taking of notes. As I have observed, note taking may have diverse subject matter. But 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.

41. Without the freedom to take 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 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.

42. Those who would seek disclosure emphasize that an arbitrators' notes may contain evidence that truly demonstrates irregularity and that without disclosure an applicant may have to suffer an award that should be set aside. Further, the unmeritorious litigant should not be used as the standard against which the duty to disclose should be judged.

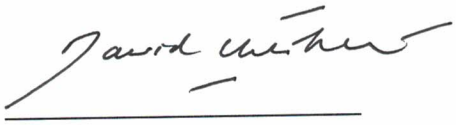
43. There is some force in these points. However, as a general matter, the arbitrators' notes are too remotely connected to the award and the systemic harm to the freedom with which arbitrators should be permitted to approach their task of adjudication is of greater importance than the outlying case where an arbitrator notes 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 a rule of disclosure.

44. For these reasons, I find that the arbitrators' notes do not form part of the record of proceedings and, as a result, Zamani cannot compel the disclosure of the arbitrators' notes in terms of Rule 53.

45. Neither the arbitrators nor HCI opposed the relief sought by Zamani, accordingly no costs are ordered.

In the result, the following order is made:

The application is dismissed.



Unterhalter J

Judge of the High Court

Gauteng Local Division: Johannesburg

Date of Hearing: 30 January 2020

Date of Judgement: 11 February 2020

Appearances:

Applicant : Advocates R Moultrie and N Deeplal briefed by Mkhabela Huntley Attorneys

Respondent: Advocate E Rudolph briefed by Werksmans Attorneys