

Case summary : *Zamani Marketing and Management Consultants (Pty) Ltd and another v HCI Invest 15 Holdco (Pty) Ltd and others*

Rule 53 - whether of application to arbitration reviews – found to be of application – an arbitrators cannot be compelled to disclose arbitrators’ notes – arbitrators’ notes do not form part of the record under Rule 53

The Applicants brought proceedings to review an award made by an arbitration tribunal. The Applicants sought, in terms of Rule 53, the disclosure of the arbitrators’ notes made in manuscript on copies of the pleadings and documents in the arbitration. The arbitrators declined to disclose their notes. The arbitrators said that Rule 53 is not of application to arbitration reviews relying upon *Government of Republic of South Africa v Midkon (Pty) Ltd* 1984 (3) SA 522 (T); that arbitrators exercise a private judicial function that entails no obligation to disclose their notes;; and lastly that the notes did not form part of the record.

The Court held that Rule 53 is of application to arbitration reviews brought in terms of s33 of the Arbitration Act 42 of 1965. *Midcon* decides only that a failure to use Rule 53 is not an impediment to an arbitration review being entertained by the court. Both the wording of Rule 53 and its evident utility render the rule of application to arbitration reviews.

As to arbitrators exercising a private judicial function, this mistakes the proceedings to which Rule 53 has application. It is the court’s powers to review the exercise of private judicial powers in accordance with public norms that gives rise to the application of Rule 53 so as to discharge the court’s duty to be fair. The duty is not attenuated because the subject matter of the review concerns private adjudication.

The court found that the arbitrators’ notes do not form part of the record of proceedings in terms of Rule 53, and hence their disclosure cannot be compelled. The court considered the case of *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) in which the majority held that there is no general exclusion of the deliberations of the decision-maker from the Rule 53 record, either on the grounds of relevance or public policy. The court considered that the relationship between the arbitrators’ notes and their award differs from the relationship between the deliberations of the JSE and their decision. The arbitrators’ notes have a contingent relationship to the award. Further, for policy reasons arbitrators should be permitted to take notes under conditions of the greatest freedom, absent which, their adjudicative function would be compromised.

The application for disclosure of the arbitrators’ notes was dismissed.

