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DISPUTE RESOLUTION ALERT

IN THIS ISSUE

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What Rule 53 means in the context of a review of arbitral awards

There are various mechanisms to challenge the outcome of an arbitration, such as the remittal for consideration and the setting aside of an award, even though the grounds are severely limited. Our courts have therefore had to grapple with a litany of matters where dissatisfied parties challenge awards.

Arbitration, as a means to resolve commercial disputes, has in recent years surpassed other alternative dispute resolution methods and is now entrenched in the South African market. Its advantages are also well documented, namely: party autonomy, in that an arbitration stems from an agreement to refer a dispute to arbitration and is a choice made by the parties which must be respected; efficiency and flexibility, in that it can lead to a quicker resolution; simplicity, in that it offers simplified rules of evidence and procedure as opposed to the more complicated rules of court; privacy and confidentiality, in that it leads to a private resolution, so the information and documents disclosed during the proceedings are kept confidential; and, most importantly, finality, in that the arbitrator's decision is final and there is no appeal against it, unless the arbitration agreement specifically makes provisions for an appeal to an appeal tribunal. These features, and in particular "*finality*", make arbitrations appealing to users.

The reality however is that an award is not always "*final*".

There are various mechanisms to challenge the outcome of an arbitration, such as the remittal for consideration and the setting aside of an award, even though the grounds are severely limited. Our courts have therefore had to grapple with a litany of matters where dissatisfied parties challenge awards. It is therefore unsurprising that the law reports are replete with such cases. One example is *Zamani Marketing and Management Consultants Proprietary Limited and Another v HCI Invest 15 Holdco Proprietary Limited and Others* [2021] (5) SA 315 (GJ). In this matter, two issues arose for determination, first, whether Rule 53 of the Uniform Rules of Court is applicable to the review of an award brought in terms of section 33 of the Arbitration Act 42 of 1965 and second, whether the notes of the arbitrator form part of the record of decision and must be disclosed.

Applicability to arbitration reviews

Rule 53 triggers a duty on the decision maker to deliver a record of proceedings sought to be corrected or set aside. The Rule 53 record has been interpreted broadly by South African courts to include the documents, evidence, arguments and other information before the tribunal relating to the matter under review, at the time of the making of the decision in question and is filed to bolster an applicant's right of access to the courts by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision maker.

On the first issue, the court in *Zamani* held that Rule 53 is applicable to arbitration reviews even though an application for the review of an arbitration award without recourse to Rule 53 is itself not fatal and nothing prevents a court from entertaining such a review. The court advanced four reasons for this. First, it found that the introductory language of Rule 53 references proceedings of the kind described in section 33 of the Arbitration Act and those proceedings bear all of the hallmarks of a review. Second, the conclusion was fortified by the cases that have applied Rule 53 to arbitration reviews or have done so in analogous proceedings and held that Rule 53 was a procedure available to the applicant,

What Rule 53 means in the context of a review of arbitral awards...*continued*

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though its use was not obligatory. Third, Rule 53 may be adapted as to time periods to meet the circumstances of a particular case – as occurs frequently in lengthy and complex cases of judicial review involving public law. Fourth, the fact that Rule 53 is applicable 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 the question of whether the procedures required by the rule have utility in an arbitration review for 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) of the Arbitration Act. The conduct of the arbitration proceedings is also largely to be found in the record of decision.

On the second issue, the court in *Zamani* held that the notes of the arbitrator do not form part of the record of decision and, as a result, cannot be disclosed in terms of Rule 53. First, the court observed that the notes of the arbitrator may record matters that are preliminary, subject to revision, or of no use for the ultimate consideration of the issues that require determination. Second, the Arbitration Act requires that an award be in writing and signed by the arbitrator. The award must therefore set out the arbitrator's reasons and provide a dispositive and authoritative reason on which the arbitrator reached the decision. The notes on the other hand may contain a distillation of (perhaps) disparate views expressed during argument. The notes of an arbitrator do not bear any relationship to the award. They 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 dry cleaning and so forth. 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. Third, what an arbitrator then does with these notes is entirely contingent. The salient consideration is this: he/she is required to publish an award and in so doing provide the reasons for the decision. It is the reasons for the 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 grounds of review as set out in the Arbitration Act.

The decision in *Zamani* is a welcome development for the ever-growing arbitration community. First, it lays out a legal framework for the review of awards under Rule 53 and dispels the perception that Rule 53 is only appropriate in judicial reviews involving public law as opposed to reviews of awards under the Arbitration Act. Second, it preserves the arbitrator's freedom to take notes without having to justify (at a later stage) why a note was made, how it might have influenced the ultimate decision, or why it was discarded. Without the freedom to take notes, the adjudicative function of an arbitrator may well be compromised as the prospect of an unsuccessful party dissecting an arbitrator's notes for some fragment to support a claim of irregularity would encourage arbitrators to either not take notes at all or take them in such a way that stultifies the freedom of thought and enquiry that should be encouraged to secure sound adjudication.

Vincent Manko and Palesa Serumula

A time old tale of minority protection and majority pushback

Section 164 of the Companies Act concerns the exercising of appraisal rights, which is afforded to dissenting shareholders in certain circumstances. Essentially, it allows shareholders who disagree with certain transactions by a company, to request that the company buy back such shareholders' shares in the company at fair value.

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This is a quote by Yeats et al. in their Commentary on the Companies Act referred to by the court in *First National Nominees (Pty) Limited and Two Others v Capital Appreciation Limited and One Other* heard in the Gauteng High Court, Johannesburg.

The court had to consider the regulation of repurchases of shares by a company under the Companies Act 71 of 2008 (Companies Act). Specifically, the court was called upon to decide whether the repurchase by a company for more than 5% of its issued shares triggered appraisal rights. Section 164 of the Companies Act concerns the exercising of appraisal rights, which is afforded to dissenting shareholders in certain circumstances. Essentially, it allows shareholders who disagree with certain transactions by a company, to request that the company buy back such shareholders' shares in the company at fair value. The requirements for this remedy are threefold – firstly, the dissenting shareholder has to object in writing to the adoption of the resolution regarding such transaction before the meeting to vote on such resolution, secondly, the dissenting shareholder has to attend said meeting, and thirdly, they have to vote against the adoption of such resolution. In the event that the resolution is still adopted, the dissenting shareholder may demand that its shares be repurchased by the company at fair value. Only then will the company be obliged to make the dissenting shareholder an offer in writing, which the dissenting shareholder may then accept or reject. If rejected, the dissenting shareholder may approach the court for an appropriate order.

The facts before the court were that First National Nominees (Nominees), the applicant in this matter, duly followed the steps set out above, but hit a snag when Capital Appreciation Limited (Capprec), the respondent, made them an offer which they deemed to be unacceptable. Capprec had announced an intention to buy back 5% of its own shares, which would be voted on at a special shareholders meeting. In its announcement, Capprec advised shareholders that the buy-back was subject to sections 48, 114 and 164 of the Companies Act. Nominees duly gave written notice of their intention to object, subsequently voted against the adoption of the resolution and thereafter demanded the fair value of their shares. Capprec offered Nominees R0.80 per share, which they deemed to be unfair.

When is section 164 triggered?

After the application was launched, Capprec adopted a new position, namely that section 164 of the Companies Act had not been triggered and that the announcement made to shareholders advising otherwise, had been made in error. Capprec's simplified reasoning was the following:

- Section 164 is only triggered under the very specific circumstances set out in section 164(2)(b).
- In terms of section 164(2)(b), appraisal rights are triggered if a transaction in section 112, 113 or 114 is intended to be entered into.

A time old tale of minority protection and majority pushback...*continued*

The argument hinged on the contention that a re-acquisition of shares in terms of section 114 is different from that in terms of section 48, as the latter involves a voluntary seller.

- The buy-back of shares contained in section 48(2)(a) of the Companies Act does not trigger any of these sections, and any references in section 48(8)(b) to section 114 and 115 of the Companies Act merely refer to the procedural requirements set out therein.

Section 48(8)(b) of the Companies Act states that:

> *"A decision by the board of a company contemplated in subsection (2)(a) ... is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares."* [emphasis added]

It is common cause that the contemplated corporate action fell within the scope of section 48(2), which would necessarily mean that the action is subject to sections 114 and 115 of the Companies Act. However, Capprec's argument was that the reference to section 114 only referred to repurchase transactions set out in that section itself, and not to those contemplated in section 48. The argument hinged on the contention that a re-acquisition of shares in terms of section 114 is different from that in terms of section 48, as the latter involves a voluntary seller. Thus, although section 48 refers to section 114 and 115, it does so only to the extent that the procedural requirements of section 114 and 115 must be followed.

Crossing the 5% threshold

Nominees argued that the requirements of section 114 are made applicable precisely because the transaction crosses the 5% threshold (as contemplated in section 48(8)(b)) and not because it constitutes a scheme of arrangement (as contemplated in section 114).

The court agreed with Nominees and found that while section 48(2) allows a company to buy back its own shares without triggering the requirements

A time old tale of minority protection and majority pushback...*continued*

The judgment further reaffirms the fact that our courts and the legislature are particularly concerned with the protection of minority shareholders' rights and the prevention of abuse of corporate power by the majority shareholders in a company.

of section 114, it is specifically when this buy-back crosses the 5% threshold in section 48(8)(b), that section 114 is triggered. This is because section 48(8)(b) deals with a situation that would not ordinarily be subject to section 114 requirements, but due to the potential prejudice to minority shareholders, the legislature deemed it reasonable to include additional protection in these circumstances. It is only when a transaction involves a considerable repurchase that the requirements in section 114 are triggered and the subsequent appraisal rights in section 164 become available. The court further held that the reference to section 114 and 115 as a whole meant that both the procedural requirements and the substantive rights in these sections became applicable precisely because the legislature wanted to afford proper protection to minority shareholders and empower them to obtain the fair value for their shares.

As a result, the court ordered that an appraiser be nominated to determine the fair value of the shares. The court's order was quite extensive in that it set out the method whereby the appraiser should be nominated, the information to be provided by Capprec to assist the appraiser, the extent of the appraiser's discretion and the time limits for the parties to file papers following the receipt of the appraiser's report.

This is an extremely useful judgment in the sense that it clarifies the interaction between, and interpretation of, sections 48, 114, 115 and 164 of the Companies Act. The judgment further reaffirms the fact that our courts and the legislature are particularly concerned with the protection of minority shareholders' rights and the prevention of abuse of corporate power by the majority shareholders in a company.

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