THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 190/2023

In the matter between:

SAND HAWKS (PTY) LTD	**FIRST APPELLANT**
SEACREST INVESTMENTS 129 (PTY) LTD	**SECOND APPELLANT**

and

LABONTE 5 (PTY) LTD	**FIRST RESPONDENT**
THE MINISTER OF MINERAL RESOURCES AND ENERGY	**SECOND RESPONDENT**
THE DIRECTOR GENERAL: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**THIRD RESPONDENT**
THE DEPUTY DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**FOURTH RESPONDENT**
THE REGIONAL MANAGER: MINERAL REGULATION: LIMPOPO REGION, DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**FIFTH RESPONDENT**

Neutral citation: *Sand Hawks (Pty) Ltd and Another v Labonte 5 (Pty) Ltd and Others* (190/2023) [2024] ZASCA 122 (16 August 2024)

Coram: MOCUMIE, MEYER and GOOSEN JJA and KOEN and SEEGOBIN AJJA

Heard: 9 May 2024

Delivered: 16 August 2024

Summary: Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) – powers of a Regional Manager – whether *functus officio* when, due to error of Regional Manager, an application for a mining right in terms of s 22 read with s 23 and s 16 of the MPRDA was accepted partially.

Administrative law – review – principle of legality – whether the Director-General applied his mind to the granting of condonation for the late filing of an internal appeal in terms of s 96 of the MPRDA – whether the High Court was correct to review and set aside the Director-General's failure to decide appeal, and remit the appeal to the Director-General for determination.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie J, sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Mocumie JA (Meyer, Goosen JJA and Koen and Seegobin AJJA concurring):

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (Fourie J) with the leave of that court. The appeal is the culmination of a battle for prospecting and mining rights by the first and second appellants, Sand Hawks (Pty) Ltd and Seacrest Investments 129 (Pty) Ltd (jointly referred to as Sand Hawks), and the first respondent, Labonte 5 (Pty) Ltd (Labonte), over certain portions of the farms Ehrenbreitstein and Wonderboomhoek (the property), situated in the Limpopo Province. The high court granted an order reviewing and setting aside: a decision of the third respondent, the Director-General (the DG), Limpopo, Department of Mineral Resources and Energy (the Department); and the decision of the fifth respondent, the Regional Manager (the RM) of the same Department, who had granted Labonte mining rights over certain portions of the property.

[2] Sand Hawks engages, *inter alia*, in the exploration for, and the exploitation of mineral resources in South Africa. Labonte is in the same industry. On 23 July 2010 Labonte lodged an application (the Labonte application) in terms of s 22 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) for mining rights in respect of sand over various portions of a number of farms in the Limpopo region. On 20 September 2010, the Regional Manager (RM) accepted the Labonte application in part (the partial acceptance), but not in respect of the property although it had formed part of the Labonte application. The RM did not accept the application in respect of the property as he believed that a third party, Sungu Sungu Mining (Pty) Ltd, held rights in respect of the same mineral over the property. It was established subsequently that the RM's belief was erroneous.

[3] During August 2011, almost a year after the partial acceptance of Labonte's application, Sand Hawks lodged various mining permit applications in respect of sand in general over various properties, including the property as described above. On 4 August 2011, Labonte was notified that Sand Hawks' applications had been accepted. In November 2011, based on advice from the Department after having engaged with it over some time regarding addressing the RM's error/mistake, Labonte lodged a second application for mining rights in respect of the property.

[4] At the beginning of 2013, the RM accepted Sand Hawk's application for mining rights, including the property, in terms of s 9(1)*(d)* of the MPRDA. On 3 April 2013, Labonte lodged an internal appeal with the DG:
(a) against the partial acceptance decision of the RM, in terms of s 96 of the MPRDA read with reg 74 of the Regulations of the MPRDA, to set aside the decision of the RM which excluded the property and to replace the decision with one accepting Labonte's application including all the portions; and
(b) to set aside the RM's acceptance of Sand Hawk's mining rights application in respect of the property.

[5] On 6 May 2013, the RM wrote to Labonte accepting its second application 'after thorough investigation with the proof that you submitted that there is no conflict with the prospecting right of Sungu Sungu as they are prospecting a different commodity and on land wherein you will be mining in the river. Therefore, the above mentioned two properties will therefore form part of your mining right application of reference ….'

[6] On 14 March 2017, the Deputy Director-General (DDG), granted Labonte the mining rights over the property. More than a year later, on 12 April 2018, Sand Hawks lodged an internal appeal in terms of s 96 of the MPRDA against:
(a) the RM's subsequent decision to correct his error/mistake and include the property in Labonte's mining rights application, maintaining that the RM was *functus officio* after having originally not accepted the application in respect of the property*;* and
(b) the DDG's decision to grant Labonte's mining rights (and a related decision to approve Labonte' environmental management programme).

[7] On 19 December 2019, the DG upheld Sand Hawk's appeal and issued the

following decision:

'**APPEAL IN TERMS OF SECTION 96 OF THE MPRDA AGAINST**:

…

The above-mentioned appeal dated the 12 April 2018 has reference.

After careful consideration of the facts before me, I Adv. Thabo Mokoena, Director-General of Mineral Resources, hereby decides as follows:

- Condone the late filing of the appeal;
- Confirm the decision by the regional manager to partially accept a mining right application by Labonte 5 (Pty) Ltd to exclude the farms Wonderboomhoek 550 LQ and Ehrenbreitstein 525 LQ;
- Set aside a decision by the regional manager to revoke his decision retrospectively insofar as certain portions of the farm Wonderboomhoek 550 LQ and Ehrenbreitstein 525 LQ are concerned;
- Amend the mining right granted under LP187MR to exclude certain portions of the farms Wonderboomhoek 550 LQ and Ehrenbreitstein 525 LQ;
- Amend the Power of Attorney for the execution of the mining right LP187MR to exclude certain portions of the farms Wonderboomhoek 550 LQ and Ehrenbreitstein 525 LQ;
- Amend the approval of the environmental management programme under LP187MR to exclude certain portions of the Farms Wonderboomhoek 550 LQ and Ehrenbreitstein 525 LQ.

The following are the reasons for the decisions:

- It will be in the interest of justice that the appeal be heard;
- It is common practice for the regional manager to partially accept an application;
- The acceptance decision constituted a final decision by the regional manager and the latter had no legal authority to revoke it since he was *functus officio*.'

[8] Labonte sought to review the decision of the DG in terms of the provisions of the Promotion of Access to Justice Act 3 of 2000 (PAJA) in the high court on essentially four grounds:

(a) the DG erred in finding that the RM was *functus officio,* because his decision is preliminary in nature and not final and was mechanical and not discretionary and in any event because the RM made a clerical error or mere slip capable of revision;

(b) the DG failed to apply his mind to the issue of condonation as the Sand Hawks' application was lodged almost 13 months after the DDG had granted Labonte its mining rights and five years after the RM had advised Labonte he would accept its application in full;

(c) the Appeal decision was not justified by the documents in the Rule 53 record; and

(d) the DG failed to decide the Labonte appeal, which required determination in the event that he concluded that the RM was *functus officio*.

[9] In addition Labonte sought orders; (i) exempting it, to the extent necessary, from the obligation to exercise its right of appeal in terms of s 96(1)*(b)* of the MPRDA; (ii) upholding the decision to grant the mining right to it; (iii) directing the Department to take all the necessary steps required to execute the mining right; and (iv) to the extent necessary, reviewing and setting aside the DG's failure to take a decision in respect of its appeal.

[10] On 11 August 2022, the high court granted the following order:

'1. Declaring unlawful and setting aside the decision taken by the second respondent on 19 December 2019 to:

1.1. Grant condonation to the fifth and sixth respondents for the late filing of their appeal;

1.2. Confirm the decision by the Regional Manager (fourth respondent) to partially accept a mining right application by Labonte 5 (Pty) Ltd (applicant) to exclude the Farms Wonderboomhoek 550 L Q and Ehrenbreitstein 525 L Q;

1.3. Set aside a decision by the Regional Manager (fourth respondent) to revoke his decision retrospectively insofar as certain portions of the Farm Wonderboomhoek 550 L Q and Ehrenbreitstein 525 L Q are concerned;

1.4. Amend the mining right granted under LP187MR to exclude certain portions of the Farms Wonderboomhoek 550 L Q and Ehrenbreitstein 525 L Q;

1.5. Amend the power of attorney for the execution of the mining right LP187MR to exclude certain portions of the Farms Wonderboomhoek 550 L Q and Ehrenbreitstein 525 L Q;

1.6. Amend the approval of the Environmental Management Programme under LP187MR to exclude certain portions of the Farms Wonderboomhoek 550 L Q and Ehrenbreitstein 525 L Q;

2. Declaring unlawful and setting aside the second respondent's failure to consider and take a decision in respect of the applicant's internal appeal dated 3 April 2013 against the partial acceptance decision by the fourth respondent and any acceptance of the fifth and sixth respondents' mining permit application(s) as referred to in the appeal, by the fourth respondent in respect of the properties referred to above.

3. Insofar as may be necessary, exempting the applicant from any obligation to exhaust any internal remedy available to challenge any of the aforementioned decisions.

4. Remitting both the applicant's internal appeal and the internal appeal of the fifth and sixth respondents to the second respondent to properly consider and decide both the said internal appeals.

5. Ordering the second respondent (as the administrator) to comply with the following

directives:

5.1. The two internal appeals are interrelated and may not be separated. They should be considered and decided together by the same administrator;

5.2. The issue with regard to the *functus officio* doctrine has now been decided by this Court. This should be taken into account by the administrator and this issue may not be reconsidered and decided again in any of the two internal appeals;

5.3. As no decision was taken by this Court regarding the question whether or not condonation should be granted for the late filing of any of the two internal appeals, the merits of such an application have not been decided by this Court and it may and should be considered and decided by the administrator in both the internal appeals;

5.4. Subject to sub-paragraph 5.3 above, the remainder of the issues raised in both the internal appeals, which have not been finally decided by this Court, may and should be properly considered and decided by the administrator;

5.5. The administrator who will be hearing both the internal appeals must consider and finalise these appeals and make known his or her decision with regard to both the appeals, within three (3) months after this order has been served on the first, second, third and fourth respondents by the Sheriff, or within such longer period as authorised by this Court.

6. Costs of this application shall be paid by the fifth and sixth respondents, jointly and severally, including the costs of two counsel where so employed.'

[11] In granting the above order the high court held that the law regarding *functus officio* applies only to final decisions. When the RM made his decision to accept Labonte's application, his decision was not final but a preliminary step of what is envisaged in ss 22 and 23 of the MPRDA, which contemplate a two-stage application process. It held that under s 22 the RM does not exercise a discretion and does no more than perform a purely mechanical duty of checking that the application has been lodged in the prescribed manner. Any decision taken by the RM is preliminary and not final. Thus, the RM was not *functus officio* when the decision to partially accept the Labonte application, while excluding Ehrenbreitstein and Wonderboomhoek properties, was taken. The high court found that although the RM's decision was preliminary, it was an 'administrative decision' as contemplated under s 96(1)*(a)* of the MPRDA.

[12] On the question of condonation, the high court found that the DG did not hold an inquiry into the delay by Sand Hawks to prosecute its appeal close to two years late. He also did not consider all relevant facts, more particularly, any explanation as to why the appeal was late. This was a material irregularity and a further reason why the appeal decision had

to be reviewed and set aside. The high court also held that if the Sand Hawks appeal was upheld, then it was indeed necessary for the Labonte appeal to be determined. The DG had failed to consider the appeal and accordingly did not comply with his statutory duty. Even if Labonte did have a right to lodge a further appeal to the Minister as the DG held, there were exceptional circumstances warranting Labonte being exempted from such further appeal. To insist on an appeal in respect of the DG's failure to decide the Labonte appeal without also hearing the interrelated Sand Hawks 'appeal', would give rise to substantial delay. The high court concluded that the issue of *functus officio* is a complex legal question which courts are better placed to resolve.

[13] The issues for determination before this Court (as before the high court) are: (a) whether the DG's decision, taken on 19 December 2019 in relation to the internal appeal lodged by the appellant, should be declared unlawful and set aside; (b) whether the RM was *functus officio* once he had taken a decision to partially accept the mining right application by Labonte, but not to include the property, or whether he was able to correct that decision himself thereafter; and (c) whether the DG irrationally and unreasonably condoned the late filing of the Sand Hawks' appeal. Other issues which arose in the high court need not be considered for the purposes of this appeal.

[14] The relevant provisions governing the application process for a prospecting and mining rights under the MPRDA are set out below. Section 9 provides for the order of processing of applications as follows:

'(1) If a Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit, as the case may be, in respect of the same mineral and land, applications received on -

(a) the same day must be regarded as having been received at the same time and must be dealt with in accordance with subsection (2);

(b) different dates must be dealt with in order of receipt.

(2) When the Minister considers applications received on the same date, he or she must give preference to applications from historically disadvantaged persons.'

[15] Section 16 provides for applications for prospecting rights, as follows:

'(1) Any person who wishes to apply to the Minister for a prospecting right must lodge the application-

(a) at the office of the Regional Manager in whose region the land is situated;

(b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.

(2) The Regional Manager must accept an application for a prospecting right if-

(a) the requirements contemplated in subsection (1) are met; and

(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of receipt of the application and return the application to the applicant.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) to submit an environmental management plan; and

(b) to notify in writing and consult with the land owner or lawful occupier and any other affected party and submit the result of the consultation within 30 days from the date of the notice.

(5) Upon receipt of the information referred to in subsection (4)*(a)* and *(b)*, the Regional Manager must forward the application to the Minister for consideration.

(6) The Minister may by notice in the *Gazette* invite applications for prospecting rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted.'

[16] Section 22 deals with the application for a mining right. It provides that:

'(1) Any person who wishes to apply to the Minister for a mining right must lodge the application-

(a) at the office of the Regional Manager in whose region the land is situated;

(b) in the prescribed manner; and

(c) together with the prescribed non-refundable application fee.

The Regional Manager must accept an application for a mining right if-

(a) the requirements contemplated in subsection (1) are met; and

(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

(2) The Regional Manager must accept an application for a mining if-

(a) the requirements contemplated in subsection (1) are met; and

(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

(3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing of that fact within 14 days of the receipt of the application and return the application to the applicant.

(4) If the Regional Manager accepts the application, the Regional Manager must, within 14 days from the date of acceptance, notify the applicant in writing-

(a) to conduct an environmental impact assessment and submit an environmental management programme for approval in terms of section 39, and

(b) to notify and consult with interested and affected parties within 180 days from the date of the notice.

(5) The Minister may by notice in the *Gazette* invite applications for mining rights in respect of any land, and may specify in such notice the period within which any application may be lodged and the terms and conditions subject to which such rights may be granted.'

[17] Section 23 provides for the granting and duration of a mining right. Subsection (1) states that the Minister must grant a mining right if certain conditions have been complied with. Subsection (2) provides that the Minister may, having regard to the nature of the mineral in question, take into consideration the provisions of s 26. In terms of s 23(3) the Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in s 23(1).

[18] Section 27 provides for the issue and duration of mining permits. Subsection (1) thereof, provides that a mining permit may only be issued if the mineral in question can be mined optimally within a period of two years and the mining area in question does not exceed 1,5 hectares in extent. Section 27(2), (3) and (4) are *mutatis mutandis* substantially the same as the subsections in s 22 dealing with an application for a mining right.

[19] Last, s 96 regulates the internal appeal process and access to courts. It reads as follows:

'**Internal appeal process and access to courts**

(1) Any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of this Act may appeal in the prescribed manner to-

(a) the Director-General, if it is an administrative decision by a Regional Manager or an officer; or

(b) the Minister, if it is an administrative decision by the Director-General or the designated agency.

(2) An appeal in terms of subsection (1) does not suspend the administrative decision, unless it is suspended by the Director-General or the Minister, as the case may be.

(3) No person may apply to the court for the review of an administrative decision contemplated in subsection (1) until that person has exhausted his or her remedies in terms of that subsection.

(4) Sections 6, 7(1) and 8 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), apply to any court proceedings contemplated in this section.'

Ad condonation

[20] An important feature of this appeal which bears highlighting, is the issue of Sand Hawk's delay in pursuing its appeal. Although the appeal concerns the review of the decision of the DG, the DG has not participated in the proceedings in the high court and before this Court. He has not filed any affidavits, nor has he indicated that he abides by the decision of this Court. Ordinarily, a party may serve a notice to abide, and not file an affidavit. Such a party pre-empts and waives its right to appeal against the order to be made by the court. It is equally accepted that generally a party need not indicate that they will be participating in the proceedings. Their silence is taken as an indication that they are not. The reasons for the DG's decision are gleaned from *inter alia* the Memorandum of 19 December 2019, and what Labonte has labelled 'a chaotic and incomplete Rule 53 record containing mostly irrelevant documents', comprising of letters exchanged between the legal advisors in the office of the DG and the parties; particularly Labonte and the RM in trying to resolve a patent error on the RM's part without having to go to court. This (the Minister and his delegates' lack of participation in the proceedings) is relevant as it has a bearing on the issue of condonation, as will become apparent in what follows.

[21] Sand Hawks filed its appeal to the DG late, a year and some months after Labonte's mining right was granted. It did not file any application for condonation for the late filing of the appeal. The high court did not deal with this issue at all. As part of the relief provided in its order, it remitted the issue to the RM. The question before this Court is more nuanced; ie, whether the DG applied his mind properly to the question whether condonation should be granted. This Court in *Aurecon South Africa (Pty) Ltd v Cape Town City* (*Aurecon*),[1] stated that in determining whether condonation should be granted, the relevant factors that require consideration are the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice; the reasonableness of the explanation for the delay; the importance of the issues raised; and the prospects of success on review.

[22] Section 96(1) of the MPRDA prescribes a deadline for the lodging of an internal

[1] *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; [2016] 1 All SA 313 (SCA); 2016 (2) SA 199 (SCA) para 17. This was re-affirmed by the Constitutional Court in *Cape Town v Aurecon SA Pty Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 4 SA 223 (CC) para 18.

appeal, as 30 days from 'becoming aware of such administrative decision'. Similarly, reg 74(1) provided at the time (prior to its amendment in March 2020) that an appeal must be submitted within 30 days after an applicant became aware or should reasonably have been aware of the administrative decision concerned.[2]

[23] The RM initially accepted Labonte's mining rights application, excluding the property, in May 2013. The DG granted Labonte's mining right in March 2017. More than a year later, and five years after the RM's initial acceptance of Labonte's application, in April 2018, Sand Hawks lodged an internal appeal against both decisions in terms of s 96. In their answering affidavit, Sand Hawks acknowledged that they became aware of the decision to grant Labonte's mining right in July 2017, and that at that stage it knew that the mining right covered a portion of the property. It alleges that it only became aware of the decision on the other part of the property on 5 March 2018.

[24] As indicated earlier, the DG has not participated in the proceedings. The only reasons he provided in this regard is what is captured in the Memorandum of 19 December 2019, namely to '…condone the late filing of the appeal… in the interest of justice'. This is not sufficient for the following reasons. First, in what was produced as the Rule 53 record, there is no record where the DG during the proceedings enquired into this delay of five years (in respect of the RM's decision) and one year (in respect of the DDG's decision to grant Labonte's mining rights). In fact, the DG does not make any reference to the delay, or an application for condonation by Sand Hawks. In a letter signed by both the Chief Director and a Senior Legal Administrator in the DG's office, provided as a curt answer to a query from Labonte for reasons, they state simply:

'[I]t therefore stands to reason that to grant condonation in this matter will be a matter of fairness to both sides and it is thus recommended that the appeal be adjudicated accordingly.'

[25] In their letter, these functionaries did not indicate whether this was in fact the view of the DG after they consulted with him. Nor does the DG clarify the position in a confirmatory affidavit later. But besides this, this reasoning is flawed on two bases. First, the reasoning is unreasonable and irrational. It does not show that the DG considered all the relevant factors. It therefore follows that the DG failed to consider each application for condonation

[2] Regulation 74(1) of the MPRDA provides: 'Any person who appeals in terms of section 96 of the Act against an administrative decision, must within 30 days after he or she has become aware of the or should reasonably become aware of the administrative decision concerned, lodge a written notice of appeal with the Director-General or the Minister, as the case may be.'

on its own facts; taking into account factors such as the extent and cause of the delay, its effect, the reasonableness of the explanation, the importance of the issues raised, and the prospects of success.

[26] Second, the DG failed to apply the '*unfairness and travesty of justice*' notion which the legal division's functionaries suggested should be the basis for his consideration of Sand Hawks's late appeal. From a reading of the record, it is abundantly clear, considering all that was before the DG, that the DG did not consider Labonte's appeal and its application for condonation. More importantly, the DG did not consider any of the basic factors enumerated in *Aurecon* which are now trite considerations in an application for condonation, when he granted Sand Hawks's appeal. Sand Hawks did not file a substantive application for condonation in terms of s 96. Whatever Sand Hawks states (*post facto*), in their Heads of Argument and in their submissions before this Court, do not carry any weight as counsel correctly conceded. The DG did not participate in the proceedings from the onset. Nor did he file any affidavit. I therefore, conclude that the DG's decision, taken on 19 December 2019 in relation to the internal appeal lodged by Sand Hawks, should be declared unlawful and set aside in terms of s 6(2)*(d)* of PAJA as it was materially influenced by an error of law. That should be dispositive of the appeal. I however proceed to consider the merits hereafter.

Ad merits

Whether the RM was functus officio when he revisited his Labonte decision.

[27] In *Mncwabe v President of the Republic of South Africa*,[3] the Constitutional restated the doctrine of *functus officio* as follows:

'[T]his doctrine entails that once something is done, it cannot be undone, reversed or otherwise altered by the decision-maker. This is because the decision-maker would have exhausted her authority and relinquished her jurisdiction over the matter by taking a final decision. The finality of a decision is central to the doctrine's operation. The doctrine promotes certainty and stability and it ameliorates prejudice and injustice occasioned to those who would rely on otherwise wavering decisions. The doctrine's relationship to the *Oudekraal* rule is evident from this Court's judgment in *Kirland*.

In *Retail Motor Industry Organisation*, the Supreme Court of Appeal held with regard to the doctrine—

[3] *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others* [2023] ZACC 29; 2023 (11) BCLR 1342 (CC); 2024 (1) SACR 447 para 42.

"first, the principle applies only to final decisions; secondly, it usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested; thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions) …."'[4]

[28] A person who applies for a mining permit lodges same with the RM within the region where the mine is located. The RM's duties are circumscribed by s 22, amongst others, to verify whether the preconditions of the application have been met. He plays a 'clerical sorting' role under s 22.[5] The RM's decision under s 22 is akin to the kind of decision which Professor Hoexter describes as purely mechanical. With reference to *Nedbank Ltd v Mendelow and Another (Mendelow)*, she puts it as follows:

'Unlike discretionary powers, mechanical powers involve little or no choice on the part of their holder. In fact, "purely mechanical" powers are more in the nature of duties.'[6]

[29] This Court in *Norgold Investments Pty Ltd v The Minister of Minerals and Energy of the Republic of South Africa (Norgold)*, described the role of regional managers as follows:

'Regional managers can, of course, be of assistance in verifying if the preconditions have been met, but they are not the ultimate decision maker, nor do they exercise a discretion in that regard….'[7]

[30] Following this judgment and others subsequent to it,[8] if consideration is given to the process under s 22 juxtaposed to that in s 23, the following emerges. A two-stage process is involved: firstly there is the acceptance of the application pursuant to ss 16(2), 22(2) and 27(3); and thereafter, the application is referred to the Minister to make his decision whether to grant the mining right as provided in ss 17, 23 and 27(6), or not, based on a list of substantive requirements set out in s 23. There are no such substantive requirements in s 22. It is contextually clear from s 22 that the RM plays a clerical sorting role to ensure that an application ticks all the boxes in subsection (1) and if so, he must pass the application on to the higher official, in this instance, the Minister, who ultimately decides whether to grant,

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[4] Ibid fn 2 above para 43.
[5] *Rhino Oil and Gas Exploration South Africa Pty Ltd v Normadien Farms Pty Ltd* [2019] ZASCA 88; 2019 (6) SA 400 (SCA) paras 26 and 28, as confirmed in *Normadien Farms Pty Ltd v SA Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC).
[6] *Nedbank Ltd v Mendelow and Another NO* [2013] ZASCA 98; 2013 (6) SA 130 (SCA) paras 25 and 26.
[7] *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy, Republic of SA and others* [2011] ZASCA 49; [2011] 3 All SA 610 (SCA) para 40.
[8] *Mendelow* fn 5; *Minister of Mineral Resources and Others v Mawetse (SA) Mining Corporation (Pty)Ltd* [2015] ZASCA 82; [2015] 3 All SA 408 (SCA); 2016 (1) SA 306 SCA.

or not grant the mining right. The requirements in s 22(2) and the regulations in terms of the MPRDA are purely formal in nature and aimed at ensuring compliance with the limited requirements listed; a mechanical exercise involving no discretion.

[31] As the RM does not make any substantive decision under s 22, let alone a 'final decision', it follows that the RM was not *functus officio* when he made the decision requiring the re-submission of the Labonte application. This is so because, when the RM rejects an application for a mining right, that is not the end of the road for an applicant. An applicant can correct an application and re-submit it to the RM. This is particularly so where the application was from the onset compliant with the MPRDA (as in this case) but the RM (as he later explained) wrongly dealt with the application. The high court cannot be faulted for having reached this conclusion.

[32] That is however not the end of the enquiry. Section 9 (quoted above) is implicated. This calls for an interpretation thereof. This Court in *Capitec Bank Holdings Limited v Coral Lagoon Investments*,[9] expanding on the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*),[10] stated as follows:

'…It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, "[t]he inevitable point of departure is the language of the provision itself".'

[33] We must therefore proceed from analysing the words used in s 9 specifically that, '*different dates must be dealt with in order of receipt*'. These words in my view, postulates 'a queueing system'. When an applicant submits an application, it joins the queue in an order which translates to 'first come, first served'. If an application is received first, logically, it must have the exclusive right for the time being to have its application for that mineral in respect of the land identified considered first, ie, in the order of receipt. If it complies with s 16(2)[11]

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[9] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others [*2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para.

[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

[11] Section 16 provides: The Regional Manager must accept an application for a prospecting right if-

or 22(2) the application must be accepted.[12] Once accepted, it is processed further and considered as to whether it should be granted. Other applications remain unprocessed in the queue until the first one has either been granted or refused in terms of ss 17[13] or 23.

[34] Sand Hawks' contention is for a strict queueing system, ie, if the application is not accepted, it is rejected, and is terminated, whether partially or in totality, and the applicant is faced with a choice:

(a) It can accept the rejection, fix the application in its own time and submit it again, but such submission will be a new application in law and it must go to the back of the queue; or

(b) If the applicant is of the view that, as in this case, the RM made a mistake, it can appeal to the DG against the failure to accept within 30 days, or such longer period as may be condoned. If the DG sets the RM's decision aside on appeal, then the effect is that the application is re-instated as the first received application.

(a) the requirements contemplated in subsection (1) are met;
(b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and
(c) no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and which remains to be granted or refused.

[12] After a subsequent Amendment Act, only one application can be accepted at any one time (s 22(2)(c)).

[13] Section 17 provides:

(1) The Minister must within 30 days of receipt of the application from the Regional Manager, grant a prospecting right if-
(a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme;
(b) the estimated expenditure is compatible with the proposed prospecting operation and duration of the prospecting work programme;
(c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued;
(d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act, 1996 (Act 29 of 1996);
(e) the applicant is not in contravention of any relevant provision of this Act; and
(f) in respect of prescribed minerals the applicant has given effect to the objects referred to in section 2 (d).

(2) The Minister must, within 30 days of receipt of the application from the Regional Manager, refuse to grant a prospecting right if-
(a) the application does not meet all the requirements referred to in subsection (1);
(b) the granting of such right will result in the concentration of the mineral resources in question under the control of the applicant and their associated companies with the possible limitation of equitable access to mineral resources.

(3) If the Minister refuses to grant a prospecting right, the Minister must, within 30 days of the decision, in writing notify the applicant of the decision with reasons.

(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in section 2 (d).

(4A) If the application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.

(5) A prospecting right granted in terms of subsection (1) comes into effect on the effective date.

(6) A prospecting right is subject to this Act, any other relevant law and the terms and conditions stipulated in the right and is valid for the period specified in the right, which period may not exceed five years.

[35] They, therefore, contend that on a proper construction of the MPRDA a defective application, once rejected in terms of s 22(2), cannot remain at the front of the queue or pending for an undetermined period. They argue that there are no provisions in terms of which a rejected/terminated application may be resurrected and reinstated at the front queue with a corrected application. Such an interpretation would result in the potential sterilisation of the right to prospect or mine the land in question for indeterminate periods. This would be at odds with the clear objectives of the MPRDA.

[36] What Sand Hawks loses sight of is that Labonte's application was compliant with s 22 at all material times. It was the RM, as he acknowledged, who made a mistake, meaning the fault lay squarely with the RM. The RM worked on correcting the mistake, albeit after accepting Sand Hawks' application for prospecting rights over the same properties. The subsequent acceptance of Sand Hawks' application was clearly with a *caveat*, as provided in terms of s 9(1)*(b),* that is subject to prior rights of the Labonte application. Applying the same 'first come, first served' notion, and because Labonte's application which was compliant with the MPRDA came first and should have been accepted but for the erroneous belief of the RM, the ineluctable conclusion must be that Labonte cannot be expected to commence the process afresh and lose its place in the queue. It would be unbusiness-like to conclude thus. This is all the more so when Labonte and the Department were in continuous discussions regarding this error. It is not as if Labonte abandoned the queue totally, and then years later returned and demand to jump the queue. It co-operated with the RM and acted as directed by the RM to correct a glaring mistake by the RM.

[37] The application under s 22, read with s 23, is a composite one and has to be treated as such. Meaning, on these facts, that the RM's error in respect of one part of the application, which was indeed compliant with s 16, did not nullify the whole application. The application remained 'alive' and could be corrected. Labonte kept its position until the RM corrected his error and added the property which was omitted due to his error. Labonte's application thus remained an impediment to any subsequent application, such as that of Sand Hawks.[14]

[38] In sum, this means, the words in s 9(1)*(b)* in their ordinary meaning, mean that an application submitted under s 22, even if partially wrongly not accepted, but compliant with

[14] Section 22 does not expressly mention the word 'rejected' in its current form nor did it before the amendment of the MPRDA.

the MPRDA, does not fall away and cannot be ignored as of no legal effect. Labonte's application had not been rejected, and could be corrected by supplementation and variation, subject possibly only to such rights becoming prescribed. It can be supplemented in these circumstances. Any other interpretation will lead to an absurdity that the legislature did not contemplate. It certainly could not have contemplated that an applicant who satisfied all the requirements of the MPRDA would be excluded because of an error or oversight on the part of the RM, as part of the machinery of the MPDRA.

[39] The high court did not address the issue raised by Labonte that it should be exempted from the obligation to appeal in terms of s 96(1)*(b)* of the MPRDA. Labonte conceded that it did not seek to be exempted. Section 96 read with reg 74, provides for an internal appeal to an affected applicant who is aggrieved by an administrative decision in terms of the MPRDA. The application must be made within 30 days from 'becoming aware of such administrative decision.' Labonte did not follow this procedure after it became aware of the RM's approval of Sand Hawks' application. Nonetheless, the fact of the matter is that Labonte was entitled, even on the basis of the principle of legality, to be exempted considering that the delay emanated from the interaction between it and the RM in an attempt to solve the problem which existed then.[15] The problem was finally resolved in its favour by a decision which the RM was lawfully entitled to make.

Is the decision of the RM an administrative decision? Is PAJA applicable?

[40] The more pertinent question to answer is whether the decision of the RM is an administrative one. The high court held that it was. Labonte did not cross appeal, correctly so, because as a matter of principle what is appealed against is the order not the reasoning of the court. However, how a court reaches a particular conclusion and grants a particular order is influenced by its reasoning. It is understandable why the high court came to conclusion which it did. It concluded that the RM was not *functus officio*. It thus followed that the decision was not appealable except under s 96 which provides for an appeal and review under the MPRDA in respect of an administrative decision.

[41] Section 1 of PAJA defines administrative action as any decision taken by an organ of

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[15] *Minister of Education, Western Cape, and Others v Governing Body, Makro Primary School, and Another* [2005] ZASCA 66; [2005] 3 All SA 436 (SCA); 2006 (1) SA 1 (SCA); 2005 (10) BCLR 973 (SCA) para 25.

state when inter alia exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect. In *Grey Marine Hout Bay v Minister of Public Works*,[16] this Court held:
'At the core of the definition of administrative action is the idea of action (a decision) "of an administrative nature" taken by a public body or functionary. Some pointers to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity.'

While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely.[17] The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect",[18] was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'

[42] In *Aquilia Steel (South Africa) Ltd v Minister of Mineral Resources and Others*,[19] the Constitutional Court held that '…it is lack of compliance with the requirements of s 16 that *kiboshes* an application'… not whether the decision of the RM to accept the mining right application has the legal effect that once it has gone through the RM's s 22 process, it can only be granted by the Minister or his delegate but based on the RM's acceptance of the application. The Constitutional Court further held as follows on this:

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[16] *Grey's Marine Hout Bay and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) paras 22 and 23.
[17] Section 3(1) provides that 'administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'.
[18] As to the meaning of that phrase see I Currie and J Klaaren. *The Promotion of Administrative Justice Act Benchbook* (2001) para 2.33.
[19] *Aquilia Steel (South Africa) Ltd v Minister of Mineral Resources and Others* [2019] ZACC 5; 2019 (4) BCLR 429 (CC); 2019 (3) SA 621 (CC) para 87. See also *Pan African Mineral Development Co (Pty) Ltd and Others v Aquila Steel (SA) (Pty) Ltd* [2017] ZASCA 165; [2018] 1 All SA 414 (SCA); 2018 (5) SA 124 (SCA) where Willis JA writing for the minority held 'it is the lack of compliance with the requirements of s 16 that makes the application … not its deathblow.' para 50.

'As noted,[20] only the Minister has the power to grant or refuse an applicant a prospecting right.[21] But the statute gives the Minister that power *only once the Regional Manager accepts the application*. Aquila's decision to target the erroneous acceptance of ZiZa's application therefore put the crucial precondition to the Minister's eventual grant or refusal of the prospecting right in the crosshairs. And, since the MPRDA itself determines the conditions under which the Minister may grant or refuse a new-order right, it cannot assist the old-order applicant that item 8(3) provides that the old-order right "remains valid" until grant or refusal of the new-order right. Differently put, the continued existence of the old-order right until grant or refusal of the new-order right does not exempt the old-order rights-holder from compliance with the requirements of the MPRDA. Nor does it permit the *Regional Manager* to accept applications that do not comply with the statute.'[22] (Emphasis added.)

[43] Undoubtedly, the action of the RM has legal consequences. Once the RM's decision is negative (as with a rejection) in terms of s 22(3), and he informs the applicant of such rejection, the application is terminated. The MPRDA provides for a review under s 96. This means that if any party is aggrieved by the decision of the RM, they can take the decision on review. Thus, it constitutes an administrative action which is subject to review under PAJA. For that reason, the finding that the RM was *functus officio* has no bearing on the nature of the action. In other words, the fact that the high court found the RM's decision not to be final and that he was not *functus officio*, does not detract from the fact that the RM's decision is an administrative decision and action which is subject to review. The high court was correct. The appeal falls to be dismissed.

[44] In the light of the above conclusions, it is unnecessary to decide peripheral issues raised, including whether Labonte's appeal had been pre-empted or waived or abandoned.

[45] Last, the matter of costs. Sand Hawks and Labonte have had to resort to litigation, for a determination of their respective rights, thereby incurring costs, largely as result of the error of the RM. I am equally mindful that the Minister and his functionaries, the RM, DDG and DG, did not oppose the appeal. In the Notice of Motion Labonte sought costs only against the respondents who opposed the appeal. The second respondent did not oppose. Thereafter no party has ever given notice of intention to seek costs against the second respondent. The Ministry was not given notice that costs will be sought against it in the event

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[20] See also *Aquila Steel (SA) Ltd v Minister of Mineral Resources and Others* 2017 (3) SA 301 (GP) (22 November 2016) para 78.
[21] Section 17(1) of the MPRDA.
[22] *Aquilia* fn 19 above para 88.

that Labonte is successful in the appeal. Although I am of the view that the Ministry should have participated in these proceedings and shed light on this important matter, the trite principle is that they should be heard before they are mulcted with any cost order as has been suggested. In their absence before this Court, the general rule as to costs in respect of the litigants who participated in the appeal must apply.

[46] In the result, the following order issues:

The appeal is dismissed with costs, including the costs of two counsel where so employed.

B C MOCUMIE
JUDGE OF APPEAL

Appearances:

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