



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: <i>YES</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>YES</i>
(3)	REVISED.
<i>11/8/22</i>	
DATE	SIGNATURE <i>[Signature]</i>

Case No: 31458/2020

In the matter between:

LABONTE 5 (PTY) LTD

Applicant

and

**THE MINISTER OF THE DEPARTMENT OF
MINERAL RESOURCES AND ENERGY**

First Respondent

**THE DIRECTOR-GENERAL: DEPARTMENT OF
MINERAL RESOURCES AND ENERGY**

Second Respondent

**THE DEPUTY DIRECTOR-GENERAL: DEPARTMENT
OF MINERAL RESOURCES AND ENERGY**

Third Respondent

**THE REGIONAL MANAGER: MINERAL REGULATION,
LIMPOPO REGION, DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

Fourth Respondent

SAND HAWKS (PTY) LTD

Fifth Respondent

SEACREST INVESTMENTS 129 (PTY) LTD

Sixth Respondent

JUDGMENT

D S FOURIE, J:

[1] This is a review application in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). On 22 April 2021 an order was granted by agreement in respect of Part A of the notice of motion. In terms of that order the first to fourth respondents are interdicted from processing the fifth and sixth respondents' mining permit applications to mine sand on the Farms Ehrenbreitstein and Wonderboomhoek in the Limpopo Province, pending the outcome of the relief sought in Part B of the notice of motion.

[2] On 25 May 2021 the applicant filed an amended notice of motion with regard to Part B. The relief sought therein is numerous, but the substance thereof is an application to review and set aside the decision of the second respondent (the "Director-General"), taken on 19 December 2019, in relation to an internal appeal lodged by the fifth and sixth respondents, in terms of s. 96 of the Mineral and Petroleum Resources Development Act, 28 of 2002 ("the Act"). The applicant also seeks, to the extent necessary, to review the Director-General's failure to decide and uphold its own internal appeal, and to obtain consequential relief. The application is opposed by only the fifth and sixth respondents.

BACKGROUND

[3] In July 2010, the applicant, Labonte applied for mining rights over several farms. In September 2010 the Regional Manager accepted Labonte's mining rights application under s. 22 of the Act. However, the Regional Manager excluded from Labonte's application two portions on the Farms Ehrenbreitstein

and Wonderboomhoek. The Regional Manager excluded the relevant properties from acceptance on the belief that a third party, namely Sungu Sungu Mining (Pty) Ltd held a prospecting right in respect of the same mineral on the same portions of the said properties.

[4] During August 2011 the fifth and sixth respondents (referred to collectively as “Sand Hawks”) applied for mining permits over the same portions of Ehrenbreitstein and Wonderboomhoek. At the beginning of 2013 the Regional Manager accepted Sand Hawks’ mining permits application.

[5] In April 2013 Labonte lodged an internal appeal under s. 96 of the Act to the Director-General. This internal appeal was against the Regional Manager’s limited acceptance of its mining rights application which excluded the said portions on Ehrenbreitstein and Wonderboomhoek as well as against the Regional Manager’s acceptance of Sand Hawks’ mining permits application, which included Ehrenbreitstein and Wonderboomhoek.

[6] At the beginning of May 2013 and while Labonte’s internal appeal was pending, the Regional Manager wrote a letter to Labonte in which he indicated that there was 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”*. Subsequent to this notification and in March 2017, the Deputy Director-General granted Labonte mining rights, including such rights over Ehrenbreitstein and Wonderboomhoek.

[7] In April 2018 Sand Hawks lodged an internal appeal to the Director-General against the Regional Manager’s subsequent decision to include

Ehrenbreitstein and Wonderboomhoek in Labonte's mining rights application as well as against the Deputy Director-General's decision to grant Labonte mining rights (and a related decision to approve Labonte's environmental management programme). In December 2019 the Director-General upheld Sand Hawks' internal appeal. When doing so, he did not deal with Labonte's internal appeal.

[8] This review application therefore concerns conflicting applications for mining rights by Labonte and mining permits by the Sand Hawks over the same portions of Ehrenbreitstein and Wonderboomhoek. Labonte now seeks, in the first instance, to review and set aside the decision of the Director-General in relation to the internal appeal lodged by the Sand Hawks and it also seeks, to the extent necessary, to review the Director-General's failure to decide and uphold its own internal appeal, and to obtain consequential relief.

THE APPLICATION PROCESS

[9] The application process for a mining right is dealt with by a handful of sections in the Act. I shall briefly set out the main sections (as they existed at the time) of the Act which are relevant to the present matter. It should be pointed out that the reference to "days" in these sections is, according to the definition of "*day*" in terms of s. 1, a calendar day.

[10] Section 9(1) provides for the order of processing of applications. It reads 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.”

[11] Section 22 deals with the application for a mining right. It provides as follows:

“(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.

(2) 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.*
- (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 fourteen days after receipt of the application and return the application to the applicant.*
- (4) *If the Regional Manager accepts the application, the Regional Manager must, within fourteen 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 interests and affected parties within 180 days from the date of the notice.*
- (5) *...”.*

[12] 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 subsection (3) the Minister must refuse to grant a mining right if the application does not meet all the requirements referred to in subsection (1).

[13] Section 27 provides for the application for and duration of a mining permit. Subsection (1) 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. Subsections (2), (3) and (4), are *mutatis mutandis* substantially the same as those subsections in s. 22 dealing with an application for a mining right.

[14] Finally, s. 96 regulates the internal appeal process and access to Courts.

It reads as follows:

- “(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.”*

THE INTERNAL APPEAL DECISION

[15] On 19 December 2019 the Director-General took a decision in respect of Sand Hawks' internal appeal. He did not decide the internal appeal of Labonte. His decision in respect of Sand Hawks' appeal reads as follows:

"The above-mentioned appeal dated the 12th 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."*

[16] In terms of the internal appeal decision by the Director-General that the decision by the Regional Manager to partially accept a mining right application by Labonte (to exclude Ehrenbreitstein and Wonderboomhoek) is confirmed. The subsequent decision by the Regional Manager to revoke his previous decision and to include the said properties in the application by Labonte, is set aside. These two decisions are interconnected and will be dealt with accordingly. Taking into account these two decisions of the Regional Manager and that of the Director-General (the internal appeal), I shall now deal with the issues as identified by the parties.

THE MAIN ISSUES

[17] The parties prepared a joint practice note for the benefit of the Court. They identified the following issues to be decided:

- (a) whether the Director-General's decision, taken on 19 December 2019 in relation to an internal appeal lodged by the Sand Hawks

should be declared unlawful and set aside. In this regard it is further in dispute:

- (i) whether the Regional Manager was *functus officio* once he had taken a decision to partially accept a mining right application by Labonte, but not to include the farms Ehrenbreitstein and Wonderboomhoek, or whether he was able to correct that decision himself thereafter;
 - (ii) whether the Director-General irrationally and unreasonably condoned the late filing of the Sand Hawks appeal; and
 - (iii) whether the Rule 53 record supports the appeal decision.
- (b) insofar as may be necessary to consider, whether the Director-General's failure to decide Labonte's internal appeal should be declared unlawful and substituted with a decision upholding the appeal and other consequential relief. In this regard it is further in dispute:
- (i) whether there was any peremption of Labonte's appeal, alternatively whether it was waived or abandoned;
 - (ii) whether the Director-General's refusal to grant condonation for the late filing of Labonte's appeal was

unreasonable and irrational, and falls to be reviewed and set aside;

- (iii) what exactly the scope of Labonte's appeal was, and whether this Court should itself decide the appeal, and if so, whether it had merit and should be upheld and what the appropriate order in relation to the appeal should be.

DISCUSSION

[18] In his reasons for the internal appeal decision, the Director-General concluded that the acceptance decision of the Regional Manager not to include Ehrenbreitstein and Wonderboomhoek constituted a final decision and the Regional Manager had no legal authority to revoke that decision as he was *functus officio*. I shall first consider this conclusion.

FUNCTUS OFFICIO

[19] Counsel for Labonte argued that the Regional Manager performs “a mechanical act when assessing a mining rights application under section 22”. According to this argument the *functus officio* doctrine does not apply because the exclusion by the Regional Manager of certain properties for which Labonte had applied was a mere clerical act, not entailing the exercise of a discretion, and that he could thus have corrected his own mistake. It was also submitted that the Regional Manager's decision should not be regarded as an “administrative” one and that would also then mean that there would not be a right of appeal against that decision under s. 96(1)(a) of the Act.

[20] Counsel for Sand Hawks supported the opposite view. She contended that the function of the Regional Manager under s. 16(2) or 22(2) should be regarded as “*evaluative*” and that it should be found that the Regional Manager’s decision has the required finality to render it an administrative decision under PAJA in which event the *functus officio* doctrine should apply. The Regional Manager performs an evaluative function, so it was contended, if one has regard to Regulations 2, 10 and 11 (application for a mining right). Therefore, according to this argument, the function which the Regional Manager performs in terms of s. 22 is not merely a clerical act as his duties may consist of a complicated exercise which would require an analysis of the application, the plans and a comparison with departmental records.

[21] The *functus officio* doctrine states, generally speaking, that once a decision-maker has rendered a final decision, he becomes *functus officio* and cannot reconsider the decision made (*Retail Motor Industry Organisation and Another v Minister of Water and Environmental Affairs and Another* 2014 (3) SA 251 (SCA) par 23). When does a decision become final? Professor Hoexter, *Administrative Law in South Africa*, 2nd Ed, p 278 gives the following explanation:

“In general, the functus officio doctrine applies only to final decisions, so that a decision is revokable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it.”

[22] This explanation by the learned author should not be taken out of context. In my view one should first distinguish between a preliminary decision and a final decision (*cf.* *Milnerton Lagoon Mouth Development (Pty) Ltd v The*

Municipality of George and Others 2004 JDR 0258 (C) par 12 where the Court also distinguished between a preliminary decision and a final decision). A final decision becomes effective when the decision is published, but a preliminary decision will not become final even if it has been published. To determine whether a decision is final or not, one should take into account, *inter alia*, the nature of the decision, the purpose it is intended to serve, the outcome or result of the decision and whether it forms part of a process in a broader context.

[23] The question now to be considered is whether the Regional Manager was *functus officio* once he had taken a decision to partially accept a mining right application by Labonte, but not to include the Farms Ehrenbreitstein and Wonderboomhoek? Put differently, was the decision to exclude Ehrenbreitstein and Wonderboomhoek a preliminary decision or a final decision?

[24] When considering the provisions of sections 22 and 23 it appears that a two-stage application process is envisaged. The first stage is set out in s. 22. It comprises the lodgement and verification of an application for a mining right, whereas the second stage (s. 23) consists of the granting or refusal of an application of a mining right. The first stage is performed by the Regional Manager, whereas the second stage is executed by the Minister. It is the Minister (or his delegate) who is empowered to grant or refuse a mining right and not the Regional Manager.

[25] Does the Regional Manager have a discretion in performing his duties in terms of s. 22? In terms of subsection (2) the Regional Manager "*must accept*" an application if the requirements contemplated in subsection (1) are met and no

other person holds a prospecting right, mineral right or mining permit for the “*same mineral and land*”. If the application does not comply with the requirements of this section, the Regional Manager “*must*” notify the applicant thereof and return the application to the applicant.

[26] Section 22(1) provides that an application must be lodged “*in the prescribed manner*”, i.e. as prescribed by regulation (the definition in s. 1). This is a reference to the regulations promulgated pursuant to s. 107(1) of the Mineral and Petroleum Resources Development Act, 28 of 2002 (GNR.527 of 23 April 2004) as amended. Regulation 2 prescribes the manner of lodging an application and the information which a plan must contain. The required information is listed in sub-regulation (2). It includes, *inter alia*, the north point and scale to which the plan has been drawn; the location, extent and boundaries of the land to which the application relates; and registered servitudes where applicable.

[27] Regulation 10 deals with an application for a mining right. It requires the completion of Form D contained in annexure “I”. The required information is listed in sub-regulation (1) and Form D. It includes, *inter alia*, full particulars of the applicant, the mineral or minerals for which the right is required, a mining work programme; and detailed documentary proof of the applicant’s technical ability or access thereto to conduct the mining activities.

[28] Regulation 11 deals with a mining work programme. It sets out what the work programme must contain, such as, for instance, details of the identified mineral deposit concerned; details of the market for and pricing in respect of the

mineral concerned; details with regard to the applicable timeframes and scheduling of the various implementation phases and a financing plan setting out the details and costing of the mining technique, mining technology and production rates applicable.

[29] When the duties of a Regional Manager in terms of s. 22 are compared with that of the Minister in s. 23, a clear distinction can be drawn. Section 23(1) sets out when a Minister must grant a mining right. It refers, *inter alia* to whether an applicant has the “*technical ability to conduct the proposed mining operation optimally*” and that the mining will not result in “*unacceptable pollution, ecological degradation or damage to the environment.*” On a proper interpretation of subsection (1) it appears that the Minister is also required to make an assessment whether the mineral can be mined “*optimally in accordance with the mining work programme*” and whether the “*financing plan is compatible with the intended mining operation*”.

[30] Having regard to the powers of the Minister it seems to me that the Minister (or his delegate) is required to consider the merits of the application. He has to decide, for instance, whether an applicant has the “*technical ability to conduct the proposed mining operation optimally*” and also whether the mining will not result in “*unacceptable pollution, ecological degradation or damage to the environment*”. Clearly, compliance with these conditions require at least some kind of a “*value judgment*” which may ultimately imply a measure of discretion or choice whether or not an applicant has complied with the conditions or requirements. No such powers implying a discretion or choice when verifying an

application are included in the list of duties to be performed by a Regional Manager.

[31] Before coming to a conclusion, I also have to consider the argument that the function of the Regional Manager under s. 22(2) should be regarded as “evaluative” and that the Regional Manager’s decision has the required finality in which event the *functus officio* doctrine should apply. I was referred to the case of Aquila Steel (S Africa) (Pty) Ltd v Minister of Mineral Resources and Others 2019 (3) SA 621 (CC) par 51 where the Constitutional Court held as follows in respect of the role of the Regional Manager in terms of s. 16 (which is similar to s 22):

“It is true that the Regional Manager did not have the power to grant or refuse ZIZA’s application, since only the Minister enjoys that power under section 17(1). ... Both Regulation 2 and Regulation explicitly ‘prescribed’ how an application for a prospecting right under section 16 must be made, and what it must contain. This suggests that the Regional Manager has an evaluative function when accepting an application. He or she must check that the application has been lodged ‘in the prescribed manner’, in terms of each applicable regulation. It also means that an application that fails to comply with either regulation ‘must’ be returned.” [My emphasis]

[32] It was submitted, by counsel for the Sand Hawks, that this Court should follow the Constitutional Court which described the function of the Regional Manager as “evaluative” and I should therefore find that the Regional Manager’s decision has the required finality to render it an administrative decision under PAJA to which the *functus officio* doctrine should apply.

[33] I do not think that this decision of the Constitutional Court supports the submission that the *functus officio* doctrine should apply. Moreover, this dictum appears to be qualified in footnote 43 of that judgment wherein it is stated that:

“If so, this renders debateable the suggestion by the Supreme Court of Appeal in Minister of Mineral Resources v Mawetse ... at para 8 that section 16 entails a purely ‘mechanical and bureaucratic procedure for the application’, and that the Regional Manager’s office though playing a crucial role in the process, ‘fulfils a very limited clearly circumscribed role’, but it is not necessary finally to determine this question.”

[34] It therefore seems to me that the issue about the nature of the Regional Manager’s decision has not been finally decided by the Constitutional Court. In any event, I agree with the suggestion that the Regional Manager has an evaluative function, if that description means no more than only to check that the application has been lodged in the prescribed manner and not also to exercise a value judgment or a discretion or to decide the merits of the application.

[35] There is no indication in either s. 22 or the applicable regulations that the Regional Manager is empowered to exercise a discretion or to make a value judgment when verifying an application. He is not empowered to consider the merits of the application. His duty is to check or verify whether the required information *is included in the application as prescribed*. Put differently, this can be described as a preparatory phase to ensure that the Minister will get a properly completed application in the prescribed manner. The Minister – not the Regional Manager – will then decide, *inter alia*, whether the applicant has indeed the technical ability to conduct the proposed mining operation and whether the financing plan is compatible with the intended mining operation.

[36] It therefore appears that the Regional Manager's function is a very limited one which is clearly circumscribed (*cf. Minister of Mineral Resources and Others v Mawetse* 2016 (1) SA 306 (SCA) par 8 where s. 16 of the Act (prospecting right) was considered, which is similar to s. 22). In *Norgold Investments (Pty) Ltd v Minister of Minerals and Energy*, [2011] 3 All SA 610 (SCA) the provisions of s. 16 of the Act were also considered. Navsa JA said the following with regard to the function of Regional Managers (par 40):

"In my view, the significance of the role of the Regional managers is exaggerated by Norgold in its heads of argument. 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 ...".

[37] Taking into account the relevant provisions of the Act and the regulations referred to above, as well as the abovementioned dictum, I am of the view that a Regional Manager does not have the statutory power to exercise a discretion in performing his or her duties or to decide the merits of the application, in terms of s. 22. It is true, those duties may be of a complex nature, or require a lot of work to be done, but that should not be confused with exercising a discretion. To me these duties appear to be "*mechanical powers*" which are to be exercised during a preliminary phase before the Minister comes into the picture (*cf. Norgold Investments (Pty) Ltd v Minister of Minerals and Energy, supra*, par 58 and more particularly the reference to *Baxter*). The learned author of *Administrative Law in South Africa, supra*, p 47 explains the difference as follows:

“Unlike discretionary powers, mechanical (sometimes ‘ministerial’) powers involve little or no choice on the part of their holder. In fact, ‘purely mechanical’ powers are more in the nature of duties.”

[38] Having regard to all the above considerations, I am of the view that the Regional Manager is performing only certain duties as prescribed by s. 22, which does not include the power to make a final decision. That is the prerogative of the Minister. Any decision taken by the Regional Manager should therefore be regarded as preliminary and not final. If the Regional Manager rejects an application, that is not the end of the road for an applicant. It can simply submit a corrected application. Nor is there any finality to the Regional Manager accepting an application. The application then moves onto the second phase when it is sent to the Minister to make a final decision.

[39] I therefore conclude that the Regional Manager was not *functus officio* when he had taken the decision to partially accept a mining right application by Labonte, but not to include the Farms Ehrenbreitstein and Wonderboomhoek. This means that the Director-General’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.

THE RIGHT TO APPEAL

[40] There is another issue which is not included in the joint practice note, but which was fully addressed by both parties in their heads of argument and debated thereafter. This issue relates to the question whether the Regional

Manager's decision to correct his previous decision (not to include the Farms Wonderboomhoek and Ehrenbreitstein) by later including the aforesaid two properties to form part of Labonte's mining right application, should be regarded as an administrative decision. Counsel for Labonte submitted that this is not an administrative decision as contemplated in s. 96(1)(a) of the Act as the decision concerned was not final. Therefore, so it was submitted, Sand Hawks had no right of appeal. Counsel for Sand Hawks contended that upon a proper interpretation of the Act, the said decision has certain legal consequences and has therefore a direct, external legal effect and the required finality to render it an administrative decision as defined in PAJA.

[41] I have already concluded that a decision taken by the Regional Manager in terms of s. 22 should be regarded as preliminary and not final. However, that does not necessarily mean that a preliminary decision should never be regarded as an administrative decision.

[42] In terms of s. 96(1)(a) any person who is aggrieved by any administrative decision in terms of the Act, may appeal to the Director-General *"if it is an administrative decision by a Regional Manager"*. In terms of s. 1 of PAJA,

'administrative action' means any decision taken, or any failure to take a decision, by –

(a) *an organ of state, when –*

(i) *exercising a power in terms of the Constitution or a provincial constitution; or*

- (ii) *exercising a public power or performing a public function in terms of any legislation; or*
- (b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect ...'*

[43] The Act then lists certain exclusions from the definition which are not relevant here. Taking into account the elements of this definition, I shall accept that there is no issue with regard to the fact that a decision was taken; by an organ of state or a natural person; exercising a public power or performing a public function; in terms of legislation or in terms of an empowering provision which does not fall under any of the listed exclusions. The real issue, as I understand it, relates to the question whether the decision of the Regional Manager adversely affects the rights of any person and which has a direct, external legal effect.

[44] In *Grey's Marine Hout Bay and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) par 23 Nugent considered the impact of these two requirements. He then concluded as follows:

"The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', 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."

[45] It has been pointed out in Administrative Law in South Africa, *supra*, p 231 that there is pre-PAJA support for the idea that administrative decisions should be final before they are reviewable. However, taking into account the jurisprudence in this regard it does not appear that finality is still a steadfast requirement. No doubt, even a preliminary decision can have serious consequences. In Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga 2008 (2) SA 570 (T) it was held that a decision of an investigative team to "*recommend suspension*" amounted to administrative action. The Court relied on the Grey's Marine dictum that administrative action is merely required to have the *capacity* to affect legal rights and also on the understanding that it is possible for a preliminary decision to have serious consequences, more particularly so where it lays the necessary foundation for a possible final decision (par 25). I associate myself with this approach.

[46] It is not in dispute that in September 2010 the Regional Manager excluded from Labonte's application the Farms Ehrenbreitstein and Wonderboomhoek. Sand Hawks lodged their application for mining permits in respect of the excluded properties in August 2011. At the beginning of 2013 the Regional Manager accepted Sand Hawks' mining permits application. At the beginning of May 2013 the Regional Manager decided to include Ehrenbreitstein and Wonderboomhoek in Labonte's application. During March 2017 a mining right was granted to Labonte, including such rights over Ehrenbreitstein and Wonderboomhoek.

[47] This timeline and the decisions taken by the Regional Manager indicate that conflicting applications for mining rights and mining permits over the same

properties had been accepted by the Regional Manager. When the Regional Manager decided in May 2013 to include Ehrenbreitstein and Wonderboomhoek in Labonte's mining rights application, the Sand Hawks application with regard to the same properties was already pending.

[48] It was pointed out in the replying affidavit (with reference to *inter alia* annexures "RT9.1" and "RT9.2" to the answering affidavit) that Sand Hawks (fifth and sixth respondents) were informed by the Regional Manager during January and February 2013 that their applications had been accepted in terms of s. 9(1)(b) of the Act "*which means there is an application received prior to yours and therefore your application will be processed after the decision on the first application has been made.*"

[49] This notification should not be taken out of context. It was specifically pointed out by Sand Hawks in the answering affidavit that at the time when they lodged their applications for mining permits "*there was no pending application by the applicant in respect of the mining permit areas*", i.e. Ehrenbreitstein and Wonderboomhoek. The issue therefore relates to the status of the applicant's application with regard to these properties after they had been excluded from acceptance of the applicant's application. The reason for excluding these properties, whether erroneously or otherwise, may ultimately be important. For reasons which will appear later, it is not necessary for me to decide this issue.

[50] However, it is important to point out that the decision to include the said properties at a later stage could have potential serious consequences for Sand Hawks. I am therefore of the view that the impugned decision of the Regional

Manager has the capacity (I say no more) to affect the legal rights of Sand Hawks and for this reason it should be regarded as an administrative decision as contemplated in s. 96(1)(a) of the Act. As I have indicated above, the Regional Manager's decision to exclude Ehrenbreitstein and Wonderboomhoek from the applicant's application and his decision later to include these properties are two interconnected decisions. Perhaps I should therefore add that, in my view, the Regional Manager's first decision to exclude these properties should also be regarded as an administrative decision as it could also have serious consequences for the applicant, notwithstanding my conclusion that these are preliminary decisions.

CONDONATION

[51] When considering the Sand Hawks internal appeal the Director-General decided to condone the late filing of the appeal as *"it will be in the interest of justice that the appeal be heard"*.

[52] Regulation 74(1) provided at the relevant time that an appeal must be submitted within 30 days after the appellant became aware or should reasonably have become aware of the administrative decision concerned. As indicated in paragraph 9 above, the reference to *"days"* is, according to the definition of *"day"* in terms of s. 1 of the Act, a calendar day.

[53] Sand Hawks' appeal was lodged on 12 April 2018. In their notice of appeal (confirmed in the answering affidavit) Sand Hawks explained that they became aware of the Regional Manager's decision to exclude Wonderboomhoek from the applicant's application and the decision thereafter to include this

property, on 5 March 2018. It is therefore contended that the appeal with regard to Wonderboomhoek was timeously lodged. There is a dispute in this regard, but as no application for condonation was made and no condonation was granted (with regard to Wonderboomhoek) I need not have to concern myself with this dispute and I make no finding in this regard.

[54] As far as Ehrenbreitstein is concerned, Sand Hawks admitted that they had already become aware of the decision to include Ehrenbreitstein in the applicant's mining right on 28 July 2017 upon receipt of their applications for access to information. The application for condonation therefore relates only to the relevant decision insofar as Ehrenbreitstein is concerned.

[55] A fairly detailed explanation is given in the notice of appeal as to why condonation should be granted. Reference was made, *inter alia*, to the legal requirements for condonation, i.e. the length of the delay; an explanation for the delay; and prejudice to the other party. For reasons which will appear later, it is not necessary for me to consider the merits of the condonation application. The question to be decided is whether the Director-General had applied his mind properly to the condonation application before deciding to grant the application.

[56] According to an internal memorandum dated 9 December 2019, prepared by the advisors of the Director-General, the issue of condonation was addressed. It was pointed out that in deciding whether sufficient cause had been shown, the basic principle is that the Court has a discretion, to be exercised judicially, upon a consideration of all the facts. Among the facts usually relevant,

so it was pointed out, are the degree of lateness, the explanation thereof, the prospects of success and importance of the case.

[57] However, notwithstanding this appreciation of what should be done, there is no indication of a consideration of all the relevant facts, more particularly the explanation why the appeal was late. It appears that the advisors were more concerned about the aspect of fairness by referring, *inter alia*, to the fact that Labonte's appeal was also filed late. It was then concluded that "*it 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*". Needless to say, Labonte's appeal was never considered.

[58] The relevance of this document is to be found in the recommendation that was made to the Director-General. It was recommended that the Director-General "*if in agreement with the contents herein*", should then make the decision as recommended. On 19 December 2019 it was signed by the Director-General. Taking into the account the record of proceedings, as well as this internal memorandum, it appears that this is the only document which was being adjudicated upon.

[59] I was referred to the decision in *Sunrise Energy v Ports Regulator* (Case No 8267/2015) ZAKZDHC 85 20 November 2015 (Lopes J) where the Court upheld the review of an appeal decision of an administrative body on the basis that the body misdirected itself in granting condonation to the appellant by, *inter alia*, failing to consider all the relevant facts regarding an application for condonation. In that case the Court came to the conclusion that the decision of

the administrative body on condonation is constructed upon an incorrect application of the law in that it *“has failed to take into account relevant factors such as the extensive delay in bringing the appeal without any adequate explanation therefore”* (par 66).

[60] In the present matter the Director-General also failed to take into account relevant factors such as a proper explanation for the lateness of approximately eight months. Instead, it was taken into account that Labonte’s appeal was also late and therefore it would be fair to the parties to grant Sand Hawks condonation as requested, notwithstanding the fact that Labonte’s appeal was not considered or decided. This is in my view a clear indication that the Director-General failed to apply his mind properly to all the relevant facts regarding condonation.

[61] It is true that reviews are concerned with material irregularities. However, in this case, I am of the view that the Director-General’s failure to apply his mind properly, is material. For this reason also the Director-General’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)(e)(iii). To avoid any misunderstanding, it should be pointed out that I have made no decision with regard to the question whether condonation should have been granted by the Director-General, or not. I did not concern myself with the merits of his decision, but only the manner in which he made the decision.

[62] In view of my conclusions above, it is no longer necessary to decide whether the Rule 53 record supports the appeal decision.

THE APPLICANT'S INTERNAL APPEAL

[63] It appears to be common cause that on 3 April 2013 Labonte lodged an internal appeal in terms of s. 96(1)(a) of the Act. The appeal was against the Regional Manager's partial acceptance (to exclude Ehrenbreitstein and Wonderboomhoek) of the applicant's mining right application and his decision of 4 August 2011 to accept the mining permit application by Sand Hawks in which Ehrenbreitstein and Wonderboomhoek are included.

[64] There also appears to be no dispute about the fact that Labonte's appeal was not considered and decided. The heading of the internal memorandum dated 9 December 2019 (which was signed by the Director-General on 19 December 2019) clearly indicates that the appellants are "*Sand Hawks (Pty) Ltd & Seacrest Investments 129 (Pty) Ltd*". In this document Labonte is referred to as "*the third party*". The ultimate decision upholding Sand Hawks' internal appeal does not deal with Labonte's internal appeal at all.

[65] However, it was pointed out by Sand Hawks in their answering affidavit that the validity of the revocation decision was directly challenged in their appeal and because the Director-General had decided to set aside this decision and to confirm the partial acceptance decision, the issue was therefore properly considered and decided by the Director-General in the Sand Hawks appeal. Reference was also made to the internal memorandum dated 9 December 2019 in which it was pointed out that the Regional Manager thereafter incorporated Ehrenbreitstein and Wonderboomhoek into the third party's mining right application, "*which rendered the third party's appeal mute (moot)*". It was

therefore contended that the Director-General, by signing the internal memorandum, also formed the view that the Labonte appeal *"had become moot as a result of the revocation decision"*.

[66] It has been pointed out in the replying affidavit that the Director-General was in any event required to give due consideration to whether the late filing of the Labonte appeal should be condoned. He never did so, despite granting Sand Hawks condonation for their appeal which was also out of time. Furthermore, so it was contended, the Labonte appeal might have been rendered moot *"after the partial acceptance decision was revised"* by the Regional Manager on 6 May 2013, but that was about to change when Sand Hawks' appeal was to be considered without also taking into account Labonte's appeal. Put differently, it must necessarily follow that, were the Regional Manager's revised decision to be reconsidered or set aside (as sought in the Sand Hawks appeal), the Labonte appeal would again become alive with regard to this issue and could therefore not continue to be ignored.

[67] I agree with this approach. The Director-General evidently failed to appreciate this difference. There is no merit, in my view, in the argument that because the Director-General had decided to set aside the revocation decision and to confirm the partial acceptance decision, the issue was therefore properly considered. Labonte was entitled, in terms of s. 96(1)(a), to have its appeal considered and the Director-General had a duty to do so. The Director-General failed to consider the Labonte appeal and therefore he did not comply with his statutory duty.

[68] It was also submitted that Labonte's remedy in respect of the Director-General's failure to decide its appeal, was an appeal to the Minister in terms of s. 96(1)(b) of the Act. This is an internal remedy, so it was argued, which Labonte failed to exhaust before approaching this Court for the review relief.

[69] Counsel for Labonte pointed out that in the founding affidavit it was submitted that s. 96(1)(b) did not contemplate a double appeal process (i.e., an appeal against a decision of the Director-General in an appeal from a decision of the Regional Manager) and merely envisaged there being an appeal to the Minister against a decision of the Director-General if the Director-General was making an administrative decision *at first instance*. It was contended, in the alternative, that should a double appeal in fact be permitted, then there are exceptional circumstances to justify the applicant being exempted from exhausting that internal remedy.

[70] Section 7(2)(a) of PAJA provides that no Court or tribunal shall review an administrative action unless any internal remedy provided for in any other law has first been exhausted. Subsection 2(c) provides for an exemption. It states that a Court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the Court or tribunal deems it in the interest of justice. There is indeed such an application in the amended notice of motion (par 3, 6.4 and 7.3).

[71] I shall assume, without deciding, that Labonte had a right to lodge a further appeal to the Minister in respect of the Director-General's failure to decide its own appeal, although that "*right*" appears to be doubtful. However, I

am of the view that there are exceptional circumstances why Labonte should be exempted from appealing further to the Minister. First, the two internal appeals are interrelated and to lodge a further appeal to the Minister in respect of the Director-General's failure to decide Labonte's appeal, without also hearing a further appeal against the decision in the Sand Hawks appeal, would be highly undesirable. Second, as was pointed out in the founding affidavit, a further appeal to the Minister may even take "*on average three years to be decided*". That would not be in the interest of either Labonte or Sand Hawks. Third, and perhaps more importantly, the issue of the *functus officio* doctrine is central in both the internal appeals. It raises an important and complex legal question. Courts are better suited to decide questions of this nature, more particularly so where these issues can be debated. For these reasons I am satisfied that it is in the interest of justice, as required by s. 7(2)(c) of PAJA, to exempt Labonte to exhaust any further internal remedy that may exist.

[72] It was also contended by counsel for Sand Hawks that Labonte's right to appeal the first decision of the Regional Manager had been preempted, alternatively it was waived or abandoned and on the merits, Labonte has no prospects of success. Counsel for Labonte supported the opposite view and submitted that Labonte's internal appeal should be successful. For reasons that will appear later, it will not be necessary or appropriate for me to decide any of these issues.

[73] I now return to the Director-General's failure to consider the Labonte appeal. In terms of the definition in s. 1 of PAJA "*decision*" means any decision of an administrative nature made, proposed to be made or *required to be made*

and a reference to a failure to take a decision must be construed accordingly. Section 6 of PAJA deals with judicial review of an administrative action. Subsection (2)(g) provides that a Court has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision. In this matter the Director-General failed to consider the appeal lodged by Labonte and he also failed to take a decision with regard to that appeal. This failure should therefore be declared unlawful and set aside in terms of s. 6(2)(g) of PAJA.

APPROPRIATE RELIEF

[74] Section 6(1) of PAJA provides that any person may institute proceedings in a Court or a tribunal for the judicial review of an administrative action. In terms of s. 8(1) of the same Act the Court or tribunal, in proceedings for judicial review in terms of s. 6(1), “*may grant any order that is just and equitable*”, including the orders listed therein. This means, *inter alia*, that this Court is not bound to only consider the relief sought in the amended notice of motion.

[75] I was invited by counsel for Labonte, if the Director-General’s failure to decide Labonte’s internal appeal were to be declared unlawful, not to remit the matter but to correct the failure and to take a decision by upholding the appeal and to grant the other consequential relief set out in the amended notice of motion. I have carefully considered this possibility. However, I have decided not to follow the correction or substitution route for the following reasons: first, it was pointed out in Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T) at 76D-E that the Court is “*slow to assume a discretion which has by*

statute been entrusted to another tribunal or functionary". Second, this approach has found its way into s. 8(1)(c)(ii)(aa) of PAJA which permits a Court to substitute or vary the administrative action, or to correct a defect only in "exceptional cases".

[76] Factors to be taken into account to decide what sort of cases might be exceptional, may include cases where it appears that the end result is a foregone conclusion, it would be a waste of time to remit the decision, a further delay would cause unjustifiable prejudice to the applicant and where the functionary has exhibited bias or incompetence (Johannesburg City Council v Administrator, Transvaal, *supra*, at 75H-77C). I do not think any of these factors are applicable in the present matter, save that a further delay might cause unjustifiable prejudice to the applicant. After careful consideration, I have decided that this prejudice can to a great extent be taken care of by making an order that the administrator should properly consider both internal appeals within a specified period of time.

[77] Section 8(1)(c)(i) provides that the Court or tribunal may grant an order setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions. In this regard the following should be pointed out and incorporated in the order that will ultimately be granted:

- (a) the two internal appeals are interrelated and should not be separated. They should be considered and decided together by the same administrator;

- (b) the issue with regard to the *functus officio* doctrine has already been decided by this Court, should be accepted by the administrator and may not be reconsidered in any of the two internal appeals by the administrator;
- (c) 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. Put differently, the merits of such an application has not been decided by this Court and may be considered by the administrator in both the internal appeals;
- (d) subject to sub-par (c), issues raised in the internal appeals which have not been finally decided by this Court, may and should be properly considered and decided by the administrator;
- (e) the administrator who will be assigned to the hearing of both the internal appeals, must hear and finalise these appeals by making known his decision(s) within 3 (three) months after this order has been served on the first, second, third and fourth respondents, or within such longer period as authorised by this Court.

[78] It should finally be pointed out that none of the respondents in the Department of Mineral Resources and Energy made any attempt to clarify any of the issues, or to give an explanation to assist the court, or to make submissions to consider and formulate the abovementioned directives. This is because they decided not to participate in these proceedings, which is a pity.

ORDER

In the result the following order is made:

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 par 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 decisions with regard to both the appeals, within 3 (three) 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.


D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 11/8/22

(05) Labanto 5 (Pty) Ltd v Min Dep Mineral Resources Energy Olt Judgment.doc

Application heard: 1 June 2022

Judgment delivered: 11 August 2022

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