

MINING & RESOURCES

Sand Hawks (Pty) Ltd and Another v Labonte 5 (Pty) Ltd and Others [2024] ZASCA 122 (16 August 2024)

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In this decision the Supreme Court of Appeal (“**SCA**”) was required to determine whether the Regional Manager (“**RM**”) of the Department of Mineral Resources and Energy, Limpopo (“**the Department**”), having made a decision in terms of section 22 of the Mineral and Petroleum Resources Development Act, 2022, was *functus officio*. The SCA was also required to consider issues relating to condonation for the late filing of an internal appeal in terms of section 96 of the MPRDA. However in this note we deal only with the *functus officio* issue.

Background

In July 2010, Labonte 5 (Pty) Ltd (“**Labonte**”) lodged an application in terms of section 22 of the MPRDA for mining rights in respect of sand over various portions of a number of farms in the Limpopo region. In September 2010 the RM partially accepted the application. The RM did not accept the application in respect of a portion of the property (“**excluded portion**”) because he erroneously believed that a third party already held rights in respect of sand over the excluded portion.

In 2011, Sand Hawks (Pty) Ltd and Seacrest Investments 129 (Pty) Ltd (“**Sand Hawks**”), lodged various mining permit applications, in respect of sand over various properties including the excluded portion. Also in 2011 and based on advice received from the Department, Labonte lodged a second application in respect of the excluded portion.

At the beginning of 2013, the RM accepted the applications lodged by Sand Hawks including the application relating to the excluded portion.

In April 2013, Labonte lodged an internal appeal with the Director General of the Department in terms of which it sought a decision setting aside the RM’s acceptance of the Sand Hawks application over the excluded portion.

In May 2013, the RM accepted Labonte’s second application.

In April 2018, Sand Hawks lodged an internal appeal in terms of section 96 of the MPRDA. The appeal was lodged a year late. Sand Hawks did not apply for condonation for the late filing of its appeal. In its appeal Sand Hawks alleged that the RM was *functus officio* after having originally rejected Labonte’s application in respect of the excluded portion.

On 19 December 2019 the DG upheld Sand Hawks appeal and found that the RM could not revisit its original decision in terms of which he rejected Labonte’s application in respect of the excluded portion because he was *functus officio*.

Labonte thereafter approached the High Court to review and set aside the decisions of the DG in terms of the provisions of the Promotion of Access to Justice Act 3 of 2000 (“**PAJA**”).

Labonte alleged that the DG erred in finding that the RM was *functus officio* and could not revisit its original decision.

The High Court agreed with Labonte that the RM was not *functus officio*. The High Court found that any decision taken by the RM is preliminary and not final and that hence the RM is not *functus officio*.

The decision of the High Court was appealed to the SCA.

SCA Appeal

In considering the issue, the SCA considered section 22 of the MPRDA.

The RM's duties are circumscribed by section 22 of the MPRDA and include whether the preconditions of the application have been met. The SCA found that the RM plays a clerical, mechanical role under section 22 of the MPRDA. The RM's role is to ensure that an application ticks all the boxes in section 22(1) of the MPRDA. If the application ticks all the boxes, then he must pass the application to the Minister who ultimately decides whether to grant or reject the application.

The SCA found that because the RM does not make a substantive decision, let alone a final decision, it follows that his decision can never be *functus officio*.

The SCA referred to the decision of the Constitutional Court in *Mncwabe v President of the Republic of South Africa*^[1] in which it was held that:

"[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 SCA also considered whether the decision of RM is an administrative decision subject to review under PAJA. In considering the issue, the SCA considered the decision of the Constitutional Court in *Aquilla Steel (South Africa) Ltd v Minister of Mineral Resources and Others*^[2]. The SCA concluded that whilst the RM is not *functus officio*, his decision nevertheless constitutes administrative action which is reviewable in terms of PAJA.

This judgment is instructive in that the decision of the RM to accept or reject an application is not a final decision and can be revisited by the RM. The RM's decision nevertheless constitutes an administrative decision which is subject to review in terms of PAJA.

^[1] [2023] ZACC 29

^[2] [2019] ZACC 5



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