

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00205

In the matter between:

**RED SOIL ENERGY AND MINERAL
EXPLORATION (PTY) LTD**

APPLICANT

and

**THE MINISTER OF MINES AND ENERGY
(IN HIS OFFICIAL CAPACITY)**

1st RESPONDENT

**NATIONAL PETROLEUM CORPORATION
OF NAMIBIA (NAMCOR)**

2nd RESPONDENT

INDIGENOUS ENERGY (PTY) LTD

3rd RESPONDENT

Neutral citation *Red Soil Energy and Mineral Exploration v The Minister of Mines and Energy (HC-MD-CIV-MOT-REV-2021/00205) [2023] NAHCMD 512 (18 August 2023)*

Coram: Schimming-Chase J

Heard: 22 February 2023

Delivered: 18 August 2023

Flynote: Legislation – Petroleum (Exploration and Production) Act 2 of 1991 – Section 32 – Applications for petroleum exploration licences – Ministerial guidelines state that audited financial statements must accompany the application and that an applicant must provide proof of technical capability with respect to oil and gas. In the case where an applicant does not possess these capabilities, a technical partner with those abilities must be provided.

Audi alteram partem- procedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important- the context of fairness is not static but must be tailored to the particular circumstances of each case -Functionary applied his mind to the application.

Summary: On 6 October 2020, the applicant applied to the first respondent for the grant of an offshore petroleum exploration licence in terms of the Petroleum (Exploration and Production) Act 2 of 1991. On 25 January 2021 and 9 March 2021, the first respondent refused the application, and the applicant instituted review proceedings against the first respondent's refusal.

The applicant submitted the first respondent did not properly apply his mind to the application, and further that he failed to follow a fair and reasonable administrative process by making the decision without the input of the Ministerial Committee, by failing to ensure a quorum was reached during the meetings when the decision was made, and further that the first respondent was biased in consideration of the application. The applicant further submitted the office of the first respondent strongly encouraged it to withdraw its application as the blocks forming part of the application were reserved for politically connected people. The applicant submits the conduct of the first respondent constituted gratification of politically connected people which is an element of corruption.

The first respondent argued that he has the authority to consider the application alone in terms of the applicable legislation, and that the application was refused for non-compliance with the Act and Ministerial Guidelines, after granting the applicant an additional opportunity to supplement its initial application. The first respondent denies it ever informed the applicant the blocks under question were for politically connected people.

Held that, when an application that is legislatively prescribed is made, it is incumbent at the outset for the applicant to comply with and submit the information expressly required in order for the application to be considered, and that the right to be treated fairly and reasonably in the consideration of the application, presupposes that the applicant must at the very least submit a complete or substantially complete application

Held that, by the admission of the applicant, the applicant failed to submit to the first respondent its Work Plan Budget. This indicates a lackadaisical approach to the application.

Held that, the Ministerial Guidelines state that audited financial statements must accompany the application and that an applicant must provide proof of technical capability with respect to oil and gas operations in the following areas namely seismic data acquisition, seismic data processing, seismic data interpretation, exploration and production well drilling and field development and operation. Further, and in the case where an applicant does not possess these capabilities, a technical partner with those abilities must be provided.

Held that, the nature of the exploration license is capital-intensive and requires a serious and material investment, both financially and technically; and despite the knowledge of the applicant in the field of oil and gas, the applicant failed to provide to the first respondent a complete application. In the result, the court finds the first respondent has demonstrably applied his mind to the application of the applicant, and the review relief must fail.

ORDER

1. The application for review is dismissed.
 2. The applicant is ordered to pay the costs of the application.
 3. The matter is removed from the roll and regarded as finalised.
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JUDGMENT

SCHIMMING-CHASE J:

[1] In this review application, an order is sought by the applicant, Red Soil Energy and Mineral Exploration (Pty) Ltd ¹ ('Red Soil'), reviewing and setting aside the decision of the Minister of Mines and Energy² ('the Minister') to decline Red Soil's application for an exploration licence made in terms of the Petroleum (Exploration and Production) Act 2 of 1991 ('the Act'). The decision to refuse Red Soil's application was taken on 25 January 2021 and 9 March 2021.

[2] The second respondent is the National Petroleum Corporation of Namibia, duly incorporated in terms of the Companies Act 28 of 2004. The third respondent is Indigenous Energy Ltd, a private limited company duly incorporated as such in accordance with the applicable company laws of Namibia. They are cited for any interest they may have in the outcome of

¹ Red Soil is a duly registered Namibian company with limited liability, with place of business at 11 Schlettwein Street, Windhoek. Although the entity is not properly described in the founding papers, the annexures contain a proper description.

² The first respondent, duly appointed as such in terms of Article 32(3)(*dd*) of the Namibian Constitution and responsible Minister in terms of the Petroleum (Exploration and Production) Act 2 of 1991.

the matter.

[3] The basis for the review is that the Minister did not properly apply his mind to Red Soil's application, and further that he failed to follow a fair and reasonable administrative process. In particular, Red Soil's complaint is that the Minister considered the application and made a decision alone without the input of the Ministerial Committee, as there was an absence of a quorum, and that he was biased in his decision making. Red Soil also laments that there was no record evidencing a rational decision-making process.

[4] The Minister opposes the application for review and firmly stands by his decision to refuse Red Soil's application for a petroleum licence. His grounds of opposition are that he has the power to make the decision alone in consideration of such an application in terms of s32 of the Act. In addition, the Minister contends that Red Soil's application was not in compliance with the requirements contained in the Act read with the relevant Ministerial Guidelines hence the refusal by him of the application. In addition, the Minister submits that the fact that one member was absent and did not sign the ministerial recommendation, all other members signed it and were *ad idem* that Red Soil had not provided the required documentation. He further submits that sufficient reasons for his decision have been given.

[5] The salient background facts can be summarised as follows. On 6 October 2020, Red Soil applied for an offshore petroleum exploration license over Blocks 2512A, 2513A, 2513B and part of Block 2612A. This was after Red Soil's managing director and deponent to the founding papers, Mr Kaura Kaura, enquired whether the aforementioned oil blocks were available for inspection. The enquiry was made through the Office of the Petroleum Inspector at the Ministry of Mines and Energy, Mr Jonas Amukende.

[6] After being informed that the aforementioned blocks were available, the application for the exploration licence was made. Mr Kaura makes it clear at the outset that he was well acquainted with the Licences Rights and

Permits Application Guidelines and Assessment Procedures published by the Minister ('the Guidelines'), due to his own qualifications and experience in the industry, and previous employment with a company that previously held an exploration license over the same blocks applied for by Red Soil. This company did not participate in the application that forms the subject matter of this application.

[7] The Guidelines (attached to their papers by both parties) contains the particular information required by the Minister for purposes of evaluating an exploration application - relating to details of operations, technical capacity, geological evaluation, work program, partners to be brought on board to provide technical support in technical operations such as seismic data acquisition, seismic data processing, seismic data interpretation, exploration and production, well drilling and field development operations.

[8] The Guidelines further provide, with regard to the proposed expenditure for the exploration venture, that audited financial statements should be submitted to assess an applicant's financial capacity and financial liability to commit the expenditure proposed. These documents included company's audited financial statements, balance sheet, income statement and cash flow statement.

[9] Mr Kaura states that at the time the application was submitted, he was aware that a detailed Work Programme Budget ('WPB') was outstanding. Consequently, and on 22 October 2020, he transmitted an email to Mr Amukende accompanying Red Soil's application, and advised that the detailed WPB would be included in Red Soil's 'MPA'³ for purposes of the application and instead just highlighted a few of the aspects that would constitute part of Red Soil's complete work programme. A request was made to advise whether same was in order, or whether there was different advice.

[10] Mr Amukende responded to this email as follows:

³ Not defined in the founding papers.

'Kindly please find the attached Guidelines for Petroleum Exploration Licence Application. Hopefully the attached will provide you with clarity on what constitutes a Petroleum Exploration Application. However if you have any further enquiry, do not hesitate to contact our office.'

[11] On 4 November 2020, Mr Kaura had a telephonic discussion with Mr Amukende concerning Red Soil's outstanding documents on its application. On the same date, Mr Kaura submitted Red Soil's additional documents. The additional documents submitted for purposes of the application was accompanied by a letter under the subject heading 'Re: Application for Offshore Petroleum Exploration Licence over Blocks 2512A, 2513A, 2513B and part of Block 2612A – Addendum'.

[12] In the letter Red Soil *inter alia* confirmed that the additional documents submitted complied with the Ministry's Guidelines. It further stated that it was believed that Red Soil's application met the requirements of the Act and that Red Soil was open '... to engage the Ministry where there might be an omission on our submission. We look forward to further engaging the Ministry in negotiations on the Model Petroleum Agreement – and would furnish more detailed explanation and evidence of our strategy for the requested tenement'.

[13] The additional documents submitted were the following: Red Soil's company profile, its company registration documents, and its detailed work programme and budget incorporating a technical summary.

[14] A week after submitting the above additional documents, Mr Kaura visited the Minister's offices to enquire whether there were any outstanding documents and if not, when Red Soil would be invited for negotiations. During this visit the Petroleum Commissioner (Ms Maggy Shino) in the employ of the Ministry invited Mr Kaura to her office and informed him that Red Soil's application was compliant with all requirements of the first respondent. However, the blocks are reserved for politically connected people, therefore, Red Soil must withdraw its application and apply for any of

the blocks west to those applied for. Naturally, Mr Kaura refused the suggestion and found it improper.

[15] On Monday, 23 November 2020, Ms Shino called Mr Kaura via WhatsApp and repeated her suggestion that Red Soil's application will not be granted unless it was withdrawn. On 1 February 2021, Mr Kaura received a letter dated 25 January 2021 from the Minister, advising that after the evaluation of Red Soil's application, same was 'unsuccessful due to failure on meeting the requirements'.

[16] On 2 February 2021, Mr Kaura in writing requested the evaluation report of Red Soil's application in order to file an appeal. Mr Kaura also complained about the unprocedural manner in which Red Soil's application was dealt with contrary to established precedent of the Minister. No response was received to this letter.

[17] After consulting with its legal practitioners, a formal letter was addressed to the Minister requesting detailed reasons why Red Soil's application was deemed unsuccessful and to indicate any other party who might have any substantial interest in the outcome of Red Soil's envisaged review application.

[18] The Minister formally responded to this correspondence and indicated that Red Soil's application was unsuccessful due to its failure to demonstrate technical and financial capability to carry out exploration operations. With reference to any other party with a substantial interest in this matter, the Minister declined to disclose such information, citing the provisions of s 5 of the Act.

[19] According to Mr Kaura, and shortly after receipt of the Minister's letter, he started receiving 'emissaries' purportedly sent by the Minister and Ms Shino, requesting that Red Soil should not proceed with the threatened review proceedings, and rather attend to the Ministry's office to try and settle the matter. Mr Kaura received legal advice to telephonically contact Ms

Shino and to record the conversation, which he did. In this regard, Mr Kaura submits that Ms Shino actively discouraged Red Soil from applying for a review of the Minister's decision. I point out at this stage that these allegations are denied by Ms Shino, which I deal with in more detail below.

[20] In light of the foregoing, Red Soil's grounds for review as set out in the founding papers are that the Minister acted unreasonably, unfairly and irrationally in declining the application. In this regard, it was submitted that there is no rule or policy or guideline of the Minister that demands that an otherwise compliant application must be withdrawn because politically connected people deserve the blocks for which Red Soil applied. Such conduct, according to Red Soil, constituted '... gratification of politically connected people which is an element of corruption'.

[21] In addition, it was submitted that the Minister's reliance on financial and technical capability for declining Red Soil's application was a ruse. Had the Minister acted fairly, reasonably and rationally he would have noticed that Red Soil is a Namibian-registered company, whose shareholders are indigenous. He would have also realised that in declining Red Soil's application he introduced new criteria into the assessment and acted contrary to the established precedent. For example, Red Soil alleges that the Minister awarded blocks 1811A, 2712A and 2812A to other applicants without any technical or financial capacity but simply on the promise by those applicants to find technical and financial partners. (Emphasis supplied)

[22] Furthermore, Red Soil submits that on the facts advanced above the Minister's decision was therefore *ultra vires* and unlawful, and that his conduct as an administrative official, to refuse to provide the details of any party with substantial interest in this matter was unreasonable and capricious. 'The refusal itself constitutes a ground of review coupled with the initial vague reasons advanced and thereafter opportunistically amplified'.

[23] The basis of the Minister's opposition to the application is that Red Soil did not meet the requirements of the Act and the published Guidelines

(which Mr Kaura is *au fait* with, on his own version) and in that regard, that Red Soil did not submit a properly compliant application for consideration, despite being provided a second opportunity to do so by Mr Amukende, and that is why additional information was not requested from Red Soil before he took his final decision.

[24] In addition, the Minister submitted that there is no 'consultation' required in terms of the Act, that the decision to refuse Red Soil's application lay solely with him, and that he properly applied his mind when he refused the application.

[25] As regards the absence of a quorum of the Ministerial Committee, the Minister submits that he had indeed appointed a committee of staff members to meet with and advise him on whether or not Red Soil's application met the requirements of s 32 of the Act and the Guidelines. That Ministerial Committee did not meet a quorum due to the absence of one member. The Minister submits that the absence of one member of the Ministerial Committee did not invalidate his final decision because he is not required by the Act to rely on the recommendations of a 'properly quorate' committee before he takes a decision whether to grant or refuse an application. Further, he was not required in terms of the Act to appoint a Ministerial Committee. In any event, all those who were present held the same view.

[26] The Minister explained his statutory powers and the exercise of it with reference to the applicable legislation. They are set out below, as they will inform the relevant legislative framework.

[27] The Government of the Republic of Namibia allows oil companies to submit applications to the Ministry for a petroleum exploration licence in terms of s 32 of the Act.

[28] The Act⁴ makes it clear that applications for an exploration licence are determined by the Minister. Section 32 deals with applications for exploration

⁴ Section 11(2).

licences.

[29] Section 32(c) of the Act provides as follows:

'32. An application for an exploration licence-

(a) ...

(c) shall contain particulars of-

(i) the minimum exploration operations and expenditure proposed to be carried out or expended in respect of the block or blocks to which the application relates;

(ii) the programme of such exploration operations, the expenditure in respect thereof, the period within which such operations will be carried out and such expenditure will be made; and

(iii) an estimate of the effect which the proposed exploration operations may have on the environment;

(d) shall state the period for which the licence is required;

(e) may contain any other matter which in the opinion of the person concerned is relevant to the application.' (Emphasis supplied)

[30] The Act clearly requires every applicant, applying for an exploration licence, to satisfy the Minister that the particulars of its planned operations as well as the particulars of the expenditure proposed in its application meet the requirements of the Act.

[31] The Ministry published Guidelines for members of the public to help them understand what the Ministry deems important when applications for exploration licenses are weighed against the requirements under the Act.

[32] The Ministry has indicated in its guidelines that it requires particulars relating to the technical details of such operations to be submitted. This includes details relating to the technical capacity, geological evaluation, and work program as well as details of any partners that may have been brought on board to provide support in technical operations such as seismic data acquisition, seismic data processing, seismic data interpretation, exploration and production well drilling, and field development and operations.

[33] With regard to the expenditure proposed, the guidelines provide that various audited financial statements should be submitted to enable him to assess Red Soil's financial capacity and financial viability to commit the expenditure proposed. These documents include the company's audited financial statements, balance sheet, income statement and cash flow statement.

[34] The Minister accepts that in terms of the Act, and before he takes a final decision to grant or refuse the application, he may in terms of s 12(1) of the Act require an applicant to furnish him with additional information as he may deem necessary for purposes of considering such application.

[35] Once he has considered the application he then exercises his statutory power in terms of s 11(2) of the Act to either grant or refuse the application.

[36] As regards the events leading to and consideration of Red Soil's application, there is no dispute that Red Soil's representative, Mr Kaura, contacted the office of the Chief Petroleum Inspector enquiring whether oil blocks 2512A, 2513A, 2513B and part of Block 2612A were available for application.

[37] Mr Kaura was correctly informed by Mr Amukende (who was the acting Chief Petroleum Inspector for the Ministry at the time) that the blocks were available for application.

[38] On 6 October 2020, Red Soil submitted an application to the Ministry for a petroleum exploration licence over blocks 2512A, 2513A, 2513B and part of Block 2612A.

[39] The Minister points out that when Red Soil's application was received by the Ministerial Committee, he was ready to consider the application as submitted. However, after Red Soil's initial submission which was wholly incomplete, Red Soil was afforded a second opportunity to submit additional documents. Reference was made to the email of Mr Amukende dated 22 October 2020 attaching the Guidelines. After being provided with a second opportunity, Red Soil submitted an amended application which was attached to the answering papers.

[40] On 18 November 2020, Red Soil's application was among the applications evaluated by the Ministerial evaluation team. The members of the committee comprised of Ms Maggy Shino, Mr Carlo Mcleod, Ms Aune Amutenya, Ms Hendrina Simon, and Mr Jonas Amukende.

[41] After the committee evaluated Red Soil's application it came up with an internal report. The report which is signed by the members in attendance was attached. The report recommended that Red Soil's application be unsuccessful as it failed to provide and demonstrate its technical as well as financial capability to carry out its operations.

[42] Having received Red Soil's application, as well as the recommendations by the committee for his consideration, he applied his mind to the documents submitted before he exercised his discretion.

[43] After considering the fact that Red Soil did not submit the required financial and technical documents despite being granted the opportunity to resubmit further documents, the Minister deemed it unnecessary to request any further information from Red Soil as the application was incomplete, and not in compliance with the Act and the Guidelines. The Minister submits that

this was because the requirements relating to the financial and technical information are clearly set out in the Guidelines which were sent via email to Mr Kaura, but Red Soil failed to comply with those requirements and was therefore effectively not eligible for consideration.

[44] The Minister submits that in the result, his decision not to grant Red Soil a third opportunity to submit the required documents was fair and reasonable, considering that Red Soil was already granted a second opportunity to submit further documents relating to technical and financial capability on 4 November 2020.

[45] He then made his final decision to refuse Red Soil's application on the ground that Red Soil failed to satisfy him on the technical and financial aspects under s 32 of the Act. The Minister submits that his decision was valid, fair and reasonable for the following reasons.

[46] Firstly, and with regards to the technical considerations under s 32 of the Act, his decision was valid as Red Soil's application did not indicate that it has technical staff or that it has a partner or a consultant that will execute the proposed work programme. Red Soil's failure to submit this crucial technical information meant that it did not demonstrate that it had the technical capability to carry out the exploration operations. The Minister was therefore entitled to refuse the application on the basis that Red Soil failed to satisfy him that it has the technical capacity to carry out the proposed operations.

[47] With regard to the financial aspects under s 32 of the Act, the Minister submits that his decision to refuse Red Soil's application on this ground was also valid and fair. Red Soil's application did not contain the required financial and audited financial statements to show that it has the financial capacity to carry out the operations on the blocks. The Minister pointed out that oil and gas exploration is a very capital-intensive undertaking, and Red Soil failed to provide particulars to substantiate its ability to fund its proposed expenditure.

[48] On 25 January 2021, the Ministry by letter informed Red Soil of the outcome of its application. In this letter, Red Soil was informed that the application was unsuccessful due to failure to meet the requirements.

[49] On 2 February 2021, the Ministry received a letter from Red Soil requesting a copy of the evaluation report for the purposes of filing an appeal in respect of the outcome of the application.

[50] The Ministry took longer than it planned to respond to the 2 February 2021 letter. On 26 February 2021, the Ministry received a letter from Red Soil's legal practitioners requesting the Ministry to inform them of any other party that might have any substantial interest in the outcome of Red Soil's review application, and to provide them with detailed reasons why its application was deemed unsuccessful.

[51] On 9 March 2021, the Minister informed Red Soil's legal practitioners that he deemed the application unsuccessful due to Red Soil's failure to demonstrate technical and financial requirements which were well known to Mr Kaura of Red Soil. He declined to provide the names of other interested parties because disclosure of the names of other applications would be a breach of confidentiality which is prohibited under s 5 of the Act.⁵

⁵ Preservation of secrecy:

5. (1) The Commissioner, the Chief Inspector and any other officer employed in the Ministry of Mines and Energy, whether or not involved in carrying out the provisions of this Act shall preserve and aid in preserving secrecy in relation to all matters that may come to his or her knowledge in the exercise of his or her powers or the performance of his or her duties and functions in connection with those provisions, and shall not communicate any such matter to any other person or permit any person to have access to any documents in his or her possession or custody, except in so far as any such communication is required by or may be made in terms of this Act or any other law or by order of a competent court.

(2) Any person who contravenes or fails to comply with the provisions of subsection (1) shall be guilty of an offence and on conviction liable to a fine not exceeding R8 000 or to

[52] According to Ms Shino, who delivered a confirmatory affidavit, she never informed Mr Kaura that Red Soil's application is compliant. According to Ms Shino, she never at any point in time or on any communication platform informed Mr Kaura that the blocks are for politically connected people and that he must withdraw Red Soil's application and apply for any of the blocks west of those applied for. In any event, it is common cause in terms of the Act that the task of granting or refusing applications is vested in the Minister and not the Petroleum Commissioner.

[53] According to Ms Shino, she has known Mr Kaura for many years and has had numerous conversations with him ever since he has been working in the Namibian petroleum sector. There have been many call exchanges over these years even before and after Red Soil launched an application over these blocks.

[54] Ms Shino confirms having a conversation with Mr Kaura after Red Soil's application was rejected. Mr Kaura was the one who called Ms Shino enquiring what he can do since his application was deemed unsuccessful. Through this conversation, she encouraged him not to give up on his interest to explore for oil and gas in Namibia, but to rather concentrate on improving on his shortcomings and apply again for the same blocks as they are still available or consider any other blocks that are open as the Ministry continuously seek investments in the oil and gas exploration and production sector.

[55] The Minister also denies sending emissaries to Mr Kaura to discourage him from approaching the Honourable Court but to 'attend to our office to settle the matter as previously discussed'.

[56] The Minister denies that Red Soil was treated unfairly in the consideration and determination of its application. In this regard, he imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

submitted that the criteria of financial and technical capability are not new. The criteria have always been there and they have been applied fairly and consistently in all applications dealt with by the Ministry.

[57] As regards the other applications, the Minister denies that he awarded blocks 1811A, 2712A and 2812A to the successful applicants without any technical or financial capacity but simply on the promise by those applicants to find technical or financial partners. According to the Minister, these blocks were awarded after the applicants met both requirements of financial and technical capability. The additional information that was requested was after the Minister had been satisfied that the applicant had displayed financial and technical capability, which Red Soil did not.

[58] The Minister also denies that he acted on the recommendation of the committee without further investigation of the application. He reiterated that he deemed it unnecessary to request further information as Red Soil had utilised two opportunities to submit audited financial and technical documents in compliance with the essential requirements in the Act as well as the Guidelines, but it failed to do so.

[59] In this regard, the Minister made it clear that the Act does not oblige him to first request additional information from Red Soil before he can make his decision. Although his predecessor had deemed it necessary to request further documents from other entities that had applied, such as Conselect and Serica before making his final decision, the facts peculiar to that application motivated the erstwhile Minister to exercise his discretion to ask for more documents before he could reach a final decision. The Serica and Conselect applications had their own merits, and therefore in assessing Red Soil's application, he was entitled to exercise his discretion independent from his predecessor's decisions.

[60] The Minister states that he did not know why Conselect and Serica's applications were handled the way they were handled, but he is required to

exercise his discretion by applying his mind to the facts of the application before him in line with the relevant requirements in the Act as well as the Guidelines.

[61] With regards to the applications of Namibia Civil and Mining Consultant (Pty) Ltd and Otjiere Mining (Pty) Ltd, who were requested to provide financial backup to carry out their proposed exploration program, the Minister submitted that he exercised his discretion and deemed it necessary to grant Namibia Civil and Mining Consultant (Pty) Ltd and Otjiere Mining (Pty) Ltd an opportunity to provide their financial backup because they had submitted all the basic documents required in the guidelines such as audited financial statements and a full and proper technical picture. Had they not done so, especially after being provided with a second opportunity to do so, he would have exercised his discretion to refuse their applications as he did with Red Soil.

[62] Also the Ministerial Committee's findings were mere recommendations to the Minister and they did not declare Red Soil's application unsuccessful as alleged. The Minister exercised his discretion in terms of the Act to refuse the application after considering the application together with the fact that Red Soil had been granted a second opportunity by the Ministry to 'beef up' its application.

[63] As regards the absence of a quorum, the Minister avers that in any event and during the application of his mind to the documents before him, he noted that although there was no quorum as per the terms of reference, Red Soil's application itself confirmed that it did not contain the required financial and technical information.

[64] The Minister also denied that the circumstances of this case justified a need to request further audited financial statements as well as information relating to technical partners from Red Soil. As Red Soil was already granted that opportunity by the Ministry when it was allowed a second opportunity to amplify its application in line with the Guidelines, there could be no legitimate

expectation for Red Soil to be requested by him again to submit further documents.

[65] As regards the principle of *audi alteram partem*, in *Nelumbu and Others v Hikumwah and Others*,⁶ the Supreme Court held that the context of each case is important when determining whether or not sufficient *audi* was granted. The court, recognising that the concept of *audi alteram partem* must not be applied rigidly, found as follows:

[52] As has correctly been stated by Hoexter in *Administrative Law in South Africa* (2012) 2 ed at p 362:

“... Procedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness.” (Emphasis supplied)

[66] In *Nelumbu and Others v Hikumwah and Others* the following was held:

[53] Gauntlett JA (as he then was) stated the following in the Lesotho case of *Matebesi v Director of Immigration & others* LAC (1995-1999) 616 at 621J-662:

“Whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in her liberty or property or existing rights, unless the statute expressly or by implication indicates the contrary, that person is entitled to the application of the *audi alteram partem* principle.”

[54] His Honour went on to add (at 625J) that:

⁶ *Nelumbu and Others v Hikumwah and Others* 2017 (2) NR 433 (SC) para 52.

“The right to audi is, however, infinitely flexible. It may be expressly or impliedly ousted by statute, or greatly reduced in its operation.”

[67] The court went on to state:

[55] Matebesi is also authority for the proposition that although audi may be a statutory requirement, the particular circumstances of the case may oust audi or significantly attenuate its operation. Each case must be considered on its facts. That much is recognised in both South African and English jurisprudence.

South Africa

[56] In *President of the RSA v SA Rugby Football Union 2000 (1) SA 1 (CC)* para 219, the Constitutional Court observed that:

“The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. Du Preez’s case is no authority for such a proposition, nor is it authority for the proposition that, whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case.”

England

[57] In *R v Secretary of State for the Home Department, Ex parte Dood* [1993] 3 ALL ER 92 (HL) at 106d-e, Lord Mustill put it thus:

“The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (Cited with approval by

Corbett CJ in *Du Preez v TRC* 1997 (3) SA 204 (A) at 231I-234D).”
(Emphasis supplied)

[68] I hold the view that when an application that is legislatively prescribed such as this one, is made, it is incumbent at the outset for the applicant to comply with and submit the information expressly required in order to be considered. Needless to say, there are some application procedures, by way of analogy, public tenders, that are automatically disqualified for failure to submit a compliant application.

[69] Mr Kaura at the outset set out his qualifications and knowledge of the procedure contained in the Act and the Guidelines when the application was made. He even admitted that when Red Soil first applied for the exploration licence, a detailed Work Programme Budget (which was required in terms of the Guidelines) was not included. He specifically stated in correspondence to Mr Amukende that the detailed Work Programme Budget would be included elsewhere and that ‘... for the purposes of our application, we have just highlighted a few aspects that could constitute part of our complete work programme’. I think, reasonably considered, this already pointed to a somewhat lackadaisical approach to the application by Red Soil.

[70] A request was then made to consider whether this was in order or whether different advice was forthcoming.

[71] In the response of Mr Amukende, the Guidelines were attached to provide clarity on what constituted a petroleum enquiry. The Guidelines provide that the application will be evaluated by an inter-Ministerial Evaluation Committee in the event that the application is successful. They also pertinently state that audited financial statements must accompany the application and that an applicant must provide proof of technical capability with respect to oil and gas operations in the following areas namely seismic data acquisition, seismic data processing, seismic data interpretation, exploration and production well drilling and field development and operation. Further, and in the case where an applicant does not possess these

capabilities, a technical partner with those abilities must be provided.

[72] An amended application was submitted and addressed to the Minister by Red Soil. In the cover letter to the Minister, Red Soil confirmed that its application was in compliance with the relevant guidelines. Yet no financial statements whatsoever appear to have been provided. It is not clear how financial capability could be evaluated in the absence of this important documentation.

[73] Red Soil further stated that it had assembled a technical and commercial team with extensive experience in natural resource development, particularly in Namibia and Southern Africa and has ‘... made arrangements with investors to finance its work programme’.

[74] It stands to reason that the right to be treated fairly and reasonably in the consideration of the aforesaid application, presupposes that the applicant must at the very least submit a complete or substantially complete application. This was simply not done because the documents prescribed in the guidelines were not included in the application. The compliance obligation is reciprocal, as it were.

[75] In light of the foregoing, Red Soil cannot complain about not being considered if it did not comply with the requirements for consideration of the application. In fact, Red Soil was given a second chance together with the Guidelines that Mr Kaura was professionally familiar with and still, failed to submit important documentation that would enable an informed consideration of the application.

[76] Insofar as the evidence of Ms Shino is concerned, I find that, applying the *Plascon Evans* test, Red Soil has not established the facts alleged relating to corruption as averred in its papers on a balance of probability. Ms Shino denied the interpretation of the conversation. It was not a bare or untenable denial. The context she gave to the conversation is one that can be inferred from the transcription itself. Red Soil says nothing further than

“politically connected people” in this regard. Red Soil does not say that any of the companies that succeeded in the application were politically connected or how they were politically connected, therefore, apart from the vague assertion, the version of Ms Shino is to be accepted on this score.

[77] I agree with the Minister that the nature of the exploration license is capital-intensive and requires a serious and material investment, both financially and technically. Yet those two aspects were not provided. Even if I may have viewed or evaluated the application differently, I cannot say that on the papers, the Minister did not apply his mind in the particular circumstances of this case.

[78] Therefore, I hold the view that the Minister was not unreasonable to refuse the application in the circumstances. He applied his mind and made the basis for the refusal clear. He also clarified that the other applicants for the license provided substantially compliant information, whereas the application of Red Soil was the opposite.

[79] As regards the inquorate committee, only one member was absent and it is clear from the minutes and the evaluation that but for Red Soil, all other applicants submitted annual financial statements. Therefore to my mind, this issue does not vitiate the Minister’s decision.

[80] In light of the foregoing, I find that Red Soil has not succeeded in its application and I make the following order:

1. The application for review is dismissed.
 2. The applicant is ordered to pay the costs of the application.
 3. The matter is removed from the roll and regarded as finalised.
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EM SCHIMMING-CHASE

Judge

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