THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others (934/2023) [2024] ZASCA 143 (22 October 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal by the *African Centre for Biodiversity NPC* (ACB) with costs, including those of two counsel, to be paid by the respondents jointly and severally, the one paying the other to be absolved.

The use of genetically modified organisms (GMOs) in South Africa is regulated by the Genetically Modified Organisms Act 15 of 1997 (the Act) and the Regulations framed thereunder, the Genetically Modified Organisms Regulations (the Regulations). The Act establishes an Executive Council for Genetically Modified Organisms and an Advisory Committee. A permit is required for the release of GMOs. Whether or not a permit is granted is determined by the Executive Council in consultation with the Advisory Committee. The process envisaged is a fact and science-based investigation into whether there are any risks posed by the release of a particular GMO into the environment and whether these risks can be effectively managed. The Advisory Committee evaluates the scientific components of applications for permits and reports to the Executive Council, which ultimately decides whether to approve the application, and issue a permit.

On 14 July 2014, the fifth respondent, Monsanto South Africa (Pty) Ltd (Monsanto), applied to the Executive Council for a permit for the general release of a genetically modified variety of maize, described as MON87460. MON87460, according to Monsanto, has been genetically modified to reduce yield loss in water limited conditions. Monsanto submitted confidential and non-confidential versions of the application, which included an assessment of the risks relating to human and animal health, toxicology, allergenicity and nutrition. It was advertised in the Rapport, Business Day and Beeld newspapers during March and April 2014. Interested and affected parties were invited to comment or object. No comments or objections were received in response to the advertisements. The Advisory Committee, having considered the application, issued a recommendation on 17 December 2014 that the application be approved. On 12 June 2015, the Executive Council granted a permit to Monsanto for the general release of MON87460.

On 7 August 2015, ACB, a non-governmental advocacy organisation with a focus on biosafety and agricultural biodiversity, appealed in terms of s 19 of the Act against the approval granted by the Executive Council to Monsanto for the general release of MON87460. Monsanto submitted a response to ACB's

appeal on 13 July 2016. The Appeal Board, by a majority, dismissed the appeal on 1 September 2016, and the Minister of Agriculture, Forestry and Fisheries (the Minister) confirmed the Appeal Board's decision on 2 December 2016.

In April 2017, ACB applied to the Gauteng Division of the High Court, Pretoria (the high court), to review and set aside the following decisions: (a) the Executive's Council's decision to approve the general release of MON87460; (b) the Appeal Board's decision dismissing the appeal; and (c) the Minister's decision confirming the dismissal of the appeal. They also requested the high court to refer the application for the general release of MON87460 back to the Executive Council for reconsideration. The high court (per Tolmay J) dismissed the application on 27 June 2023, but granted leave to ACB to appeal to this Court.

The thrust of ACB's case was that the State respondents accepted, at face value, the claims made by Monsanto and failed to independently and critically evaluate Monsanto's application to satisfy themselves that the health and safety risks associated with the general release of MON87460 had been properly addressed. ACB contended that the expert evidence that served before the State respondents, ought to have triggered the application of the precautionary principle enshrined in s 2 of the National Environmental Management Act 107 of 1998 (NEMA). This is so because: first, there was a lack of scientific data from which conclusions about the safety of MON87460 could be drawn; and second, the data that had been made available supported concerns about health risks arising from the use of MON87460. Accordingly, so the contention proceeded: (a) the Executive Council accepted the data submitted by Monsanto without any consideration of the veracity, accuracy and completeness thereof; (b) the Appeal Board did not engage with the grounds of appeal and the expert evidence, but simply rubber-stamped the decision made by the Executive Council; and, (c) the Minister further rubber-stamped the Appeal Board's decision by way of a confirmation letter that furnished no reasons at all.

According to the SCA, the high court's rejection of the appellant's reliance on the precautionary principle was based on its finding that the precautionary principle does not find direct application in review proceedings. However, such an approach, so reasoned the SCA, disregards the fundamental role that the precautionary principle plays in directing decision-makers in the exercise of their discretion. The current state of knowledge and uncertainty, the potential for serious or irreversible harm and the adoption of a cautious approach is clearly consistent with the subject-matter, scope and purpose of the Act.

That aside, a further complaint by ACB, that the State respondents had failed to comply with s 5(1)*(a)* of the Act, appeared to have gone unanswered. This provision, which is framed in peremptory terms, placed an obligation on the Executive Council to make a determination as to whether or not an applicant must submit an assessment in accordance with NEMA. The record contained no express evidence of any determination by the Executive Council as contemplated by s 5(1)*(a)*. The argument advanced before the SCA was that it would be safe to infer that the Executive Council had indeed determined that Monsanto did not have to submit such an assessment. However, such evidence, as there is, so stated the SCA, pointed in the opposite direction. That evidence strongly suggested that, at the time that the Executive Council assessed the application for a permit for the general release of MON87460, it failed to consider or determine whether an environmental impact study in terms of NEMA was necessary.

The high court conflated the obligation arising from section 5(1)*(a)* of the Act with the applicability of the precautionary principle, finding that an environmental impact study would only be required in the event of the precautionary principle being triggered. The SCA held that first, the precautionary principle was triggered and ought to have been applied; and, second, whether the Executive Council, as a matter of fact, complied with section 5(1)*(a)* by considering the necessity of an environmental impact study to ascertain the impact on the environment of the proposed general release of MON87460, was a separate and distinct inquiry from whether the precautionary principle was triggered and should have been applied. The SCA took the view that it ought to have been a relatively simple and straightforward matter for the State respondents to have adduced evidence that a determination, one way or the other, had been made.

They did not. The ineluctable conclusion therefore was that the Executive Council failed to comply with a mandatory statutory prescript. This means that the Executive Council's decision could not stand. Nor, for that matter, it had to follow, could the decisions by the Appeal Board or the Minister. In the result, the SCA upheld the appeal.

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