

SOUTH AFRICA / JUDGMENT

African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others [2023] ZAGPPHC 520; 27524/2017 (27 June 2023)

[2023] ZAGPPHC 520

COURT

North Gauteng High Court, Pretoria

BEFORE

R.G Tolmay

CASE / FILE NUMBER

27524/2017

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE NO: 27524/2017
In

the matter between:

AFRICAN
CENTRE FOR BIODIVERSITY NPC
(NPO
Registration no: 2004/025137/08)
Applicant
And
MINISTER
OF AGRICULTURE, FORESTY AND FISHERIES
First
Respondent

DIRECTOR-GENERAL: DEPARTMENT OF
AGRICULTURE,
FORESTRY AND FISHERIES
Second
Respondent
APPEAL
BOARD: GENETICALLY MODIFIED ORGANISMS
Third
Respondent
EXECUTIVE
COUNCIL FOR GENETICALLY MODIFIED ORGANISMS
Fourth
Respondent
MONSANTO
SOUTH AFRICA (PTY) LTD
(Registration
no: 1968/001485/08)
Fifth
Respondent

JUDGMENT

Tolmay J

Introduction

1. This is an application to review and set aside the approval of the general release of MON 87460, a genetically modified variety of

maize. The applicant (ACB) brings this application for the review and setting aside of three decisions (the impugned decisions),

namely the approval by the fourth respondent (EC) given during June 2015 for the general release of MON 87460 (the EC decision) , the dismissal of the third respondent (the Appeal Board) on 1 September 2016 of ACB's appeal against the EC decision (the Appeal Board decision) and the first respondent's (The Minister) confirmation of the Appeal Board decision dated 2 December 2016 (The Minister's decision).

2. ACB seeks an order referring the fifth respondent's (Monsanto) application for approval for the general release of MON 87460 back to the EC for reconsideration. After the launch of this application, Bayer (Pty) Ltd (Bayer) acquired full ownership of Monsanto and was joined as a party to the proceedings. The crux of ACB's case is that the respective decision makers accepted the data included in Monsanto's application at face value and without ensuring that the necessary health and safety risks associated with MON 87460 had been properly and independently assessed.

3. ACB did not launch the application under rule 53 and did not call for a record. Monsanto however called for such a record and ACB

failed to file a supplementary founding affidavit after the filing of the record.

Background

4. The permit for the general release of MON 87460 was issued in terms of the Genetically Modified Organisms Act 15 of 1997 (GMO Act) by the EC, which is a body created by the GMO Act to determine whether such permits should be granted.[1] The decision was taken in consultation with the Advisory Committee (AC) which is a specialist body comprised of experts [2]. Both the EC and the AC found MON 87460 to be safe for animals, humans, and the environment. ACB brought the review application under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
5. On the 14th of July 2014, Monsanto applied for a permit for the general release of MON 87460, a genetically modified maize variety. On the 15th of June 2015, the EC granted the permit. ACB made no submissions to the EC, as it was unaware of the application. ACB had been engaging the respondents in various applications relating to MON 87460 since 2007. ACB, due to a lack of resources did not see the notices that were published in three newspapers as is required by the GMO regulations, and only became aware of the EC decision by way of an email dated 18 June 2015. ACB requested reasons and this was provided. On 7 August 2015 it lodged and appeal, de novo. On 1 September 2016 ACB was informed that the appeal was dismissed and on 2 December 2016 it was informed that the Minister had upheld the Appeal Board's decision.
6. Monsanto claims that MON 87460 suffers less yield loss in water limited conditions, than conventional maize, it is referred to as a drought tolerant variety of maize. It has been approved for use in food, animal feed and environmental release in 17 countries,

including the United States, the European Union, Korea, and Japan. Certain field trials were also concluded in South Africa, although

the results of these trials were confidential, ACB's legal representatives and experts were granted access to this information

by way of a court order.

Issues to be decided

7. The court has to decide whether the impugned decisions should be reviewed and set aside in terms of PAJA and in particular whether;
 - a) the EC decision complied with section 5(1)(a) of the GMO Act.
 - b) the EC decision was procedurally fair.

- c) the EC provided adequate reasons for its decision.
- d) the EC failed to apply its mind to the information provided.
- e) the EC's decision was supported by the evidence before it.
- f) the Appeal Board adequately addressed the appeal grounds raised by the applicant.
- g) the Minister failed to give reasons for her decision or failed to engage with the issues before the EC and Appeal Board.
- h) the application for the general release of MON87460 ought to be referred to the EC for reconsideration.

Review proceedings

8. It is trite that in review proceedings that the question is not whether the relevant decision is correct, it is whether the decision maker exercised its powers properly. The focus thus is on the process and the way in which the decision maker came to the decision.[3] It is common cause that the decisions made in this matter are administrative actions and that ACB must establish grounds of review

under PAJA as the decisions were taken “by an organ of State in the performance of a public function”[4]. In review applications, the doctrine of separation of powers requires a court, when reviewing administrative actions, to treat

administrative decisions with appropriate deference and respect and is required to “give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.”[5]

9. In this case, the court is confronted with disputes of fact as the experts of ACB have conflicting views with the experts of the Advisory Committee (AC), who advised the EC, and those experts consulted by Monsanto. ACB accepted that there are disputes between the relevant experts relied on by the parties, ACB however invited the court to follow the approach set out in *Michael v Linksfeld Park Clinic (Pty) Ltd*[6], in that instance however, the claim was for damages and the hearing was conducted by way of a trial. It follows that disputes of fact were resolved by, inter alia, assessing the credibility and inherent probabilities of the evidence led. The witnesses were

subjected to cross-examination and the court had the opportunity to properly consider and evaluate the evidence led. This matter is to be distinguished from the *Linksfeld* matter, as no evidence was led, and the Court was confronted with conflicting opinions of experts. The evidence is of a highly technical and scientific nature.

10. There was no attempt to refer this matter to oral evidence. In motion proceedings the principle established in *Plascon-Evans Paints Ltd V Van Riebeeck Paints (Pty) Ltd* [7], must be applied. This well-known principle holds that in motion proceedings an applicant can only succeed if its case can be established based on the facts alleged by the respondent, read

together with the facts alleged by the applicant, and admitted by the respondent. With the exception that if the respondent's denial is far-fetched or untenable the court may reject it on the papers, or if the respondent's denial does not raise a bona fide dispute of fact. The rule in Plascon-Evans was confirmed by the Constitutional

Court.[8]

11. In this instance, the expert's opinions are highly technical and based on scientific analysis. To test the veracity of the different viewpoints evidential scrutiny is required. The Court is ill-suited to, without evidence, determine the disputes between

different expert opinions and is therefore obliged to follow the so-called Plascon-Evans rule. To deviate from the Plascon-Evans rule would, as counsel for Monsanto argued, amount to a substantial intrusion on the separation of powers. The starting point in

considering this review, must therefore be to apply the Plascon-Evans rule and the Court must therefore accept the expert evidence provided by the State Respondents and Monsanto.

Compliance with section 5(1)(a) of the GMO Act and application of the precautionary principle

12. Section 5 (1)(a) provides that the Council shall, when an applicant applies for a permit, determine whether the applicant must in addition, submit an assessment in accordance with the provisions of the National Environmental Management Act 107 of 1998 (NEMA), of the impact on the environment and an assessment of the socio-economic consideration of such activities. ACB is of the view that the decision not to call for an independent assessment was procedurally unfair, and that the precautionary principle was not applied.
13. ACB, in the founding affidavit, stated that the EC ought to have called on Monsanto to submit risk assessment and environmental impact studies. The record shows that Monsanto provided a risk assessment, but ACB insists that an independent risk assessment should have been provided. Monsanto's argument is that the EC did not fail to take a decision as envisaged in section 5(1)(a) but took a decision not to request an independent assessment based on the evidence before it.
14. The State Respondents pointed out, in their answering affidavit that Monsanto was not required to submit an environmental impact assessment (EIA) in accordance with NEMA, because section 24 of NEMA only requires EIA's to be conducted for listed activities, as published in section 24 (d) of NEMA. Monsanto was not required to submit an environmental assessment, because the South African trials did not show that the GMO may pose a threat to any indigenous species, or the environment.
15. The failure to call for an EIA is linked to the precautionary principle. ACB argued that the precautionary principle should be applied. This principle is included in chapter 2 of NEMA. Section 2(4)(a)(vii) of NEMA provides that a risk adverse and cautionary approach should be followed. This implies that the limits of current knowledge about the consequences of decisions and actions should be considered when decisions are taken. The precautionary

rule has been incorporated in the GMO Regulations. Regulation 4(6) reads: "lack of scientific knowledge or scientific consensus shall not be interpreted as indicating a particular level of risk, an acceptable risk, or an absence of risk." In *Fuel Retailers*[9] it was confirmed that the principle will apply, where due to unavailable scientific knowledge "there is uncertainty as to the future impact of the proposed development" and emphasised that NEMA requires a "risk averse and cautious" approach. In *WWF South Africa v Minister of Agriculture, Forestry and Fisheries*[10] the court referred with approval to the Australian decision of *Telstra Corporation v Hornsby Shire Council* [11] two conclusions were made, firstly that there must be a threat of serious or irreversible environmental damage and secondly that there must be scientific uncertainty as regards the environmental damage, for the precautionary principle to find application. It was held that the risk must be adequately sustained by scientific evidence and should not be based on unsupported speculation.[12] The second criterium requires considerable scientific uncertainty, which will be established when "empirical data (as opposed to simply hypothesis, speculation or intuition) make it reasonable to envisage a scenario, even if it does not enjoy unanimous support" [13]. It was also pointed out that the precautionary principle does not seek to avoid all risk.

16. Once the two conditions referred to above are met, the precautionary principle is activated and the evidentiary burden shifts[14]. In this case, as was argued on behalf of Monsanto, it means that once the threat is established the evidentiary burden will shift to Monsanto to demonstrate that the release of MON 87460 does not pose a risk, or the risk is negligible.
17. The precautionary principle is, as was argued on behalf of Monsanto, not directly applicable in review proceedings. Review proceedings are not concerned with the merits, but rather with whether a decision was taken in a lawful, reasonable, and procedurally fair manner. The application of the precautionary principle will require of this court to venture into the merits, which is not appropriate in review proceedings. The applicant, in this case, ACB, bears the onus to establish the grounds of review relied on. Based on the *Plascon-Evans* principle, the court is obliged to rely on the respondents' experts' evidence, unless it is clearly untenable. In the absence of oral evidence, the Court is not able to evaluate the experts' conflicting views and must accept the respondents' expert evidence and their evidence proclaims the safety of MON 87460.
18. ACB referred to *Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and others* [15] to support the argument that the precautionary principle should be applied. The facts were different as it dealt with an exploration

right to use seismic survey to seek out oil and gas reserves off the Eastern Cape coast. The decision related to a listed activity and as a result an EIA was prescribed by NEMA. It was common cause that no environmental authorisation was secured to undertake the impugned survey and exploration. The court also found that there was no proper notification and consultation with affected parties and the process was accordingly procedurally unfair. In this instance there was compliance with the statutory framework regarding notification as is

explained later on, and apart from that an appeal process had been followed, where ACB had the full opportunity to partake in the proceedings and to place submissions and evidence before the Appeal Board.

19. The EC and later the Appeal Board relied on the expert opinions of the AC and the expert evidence provided by Monsanto to determine the environmental risks. It can accordingly not be said that the impugned decisions were unlawful, unreasonable, or procedurally unfair. Furthermore, an EIA was not called for under the circumstances of this application. The result is that there was compliance with section 5(1)(a) of the GMO Act and this point must fail.

Procedural Fairness with reference to public participation

20. ACB argued that there was no proper public participation as it did not have the opportunity to place its submissions before the EC.

Section 3(5) of PAJA provides that when an administrator is empowered by any empowering provision to follow a provision which is fair, but different from the provisions of section 3 (2) of PAJA, the administrator may act in accordance with that different procedure. In this instance Regulation 9 of the GMO regulations prescribes the process for public participation of the proposed release of a GMO and for interested parties to make submissions. It follows that the procedure set out in the regulation could have been followed.

21. ACB's complaint with the process is, that it was not given direct notice of the application. It had been engaging with the

respondents since 2007 about MON8746 and says that, because of this, it should have been notified specifically. Regulation 9 of the GMO Regulations prescribes the process for public participation for the general release of a GMO. The process is the following:

21.1 The proposed release must be advertised in three national newspapers;[16]

21.2 Certain particulars must be included in the notice;[17]

21.3 The notice must indicate that any interested party may submit comments or objections within a period of not less than 30 days;[18]

21.4 Any comments or objections received must be referred to the EC.[19]

22. It was alleged that it has not been established that the application was advertised in three national newspapers. However public notices were published in the Beeld on the 25th of March 2014, Business Day on the 26th of March 2014 and Rapport of 3 April 2014. In the replying affidavit, ACB explained that it did not become aware of the notices due to the constraints it operates under. There was no attempt, during argument, to deny that the publications referred to, are national publications, or that the notification itself suffered from any defects. Even if one is of the view, that in the light of the longstanding opposition of ACB to the release of MON87460, direct notice should ideally have been given to it, ACB

failed to establish that Regulation 9 is unfair, nor did it establish any statutory basis on which it was entitled to direct notice of the application.

23. In any event, despite not having had the opportunity to submit submissions to the EC, this was eventually done when ACB submitted their opposition and submissions to the Appeal Board. The appeal is an appeal in the wide sense, which entails a full rehearing of the objection.[20] ACB, accordingly had the opportunity to fully ventilate its opposition to the granting of the permit during the appeal. This then

raises the question whether the relief claimed, which is a referral back to the EC, is at all appropriate. The opportunity of being heard was fully granted during the appeal process and a referral back to the EC would be pointless, due to the very nature of a wide appeal.

Adequacy of the

reasons

24. ACB argues that the reasons provided by the EC were insufficient as it did not indicate whether the EC was properly constituted and did not record whether Monsanto submitted all the necessary information, including the risk assessment and risk management measures. ACB also complained that the EC's reasons did not suggest that the information provided by Monsanto was evaluated critically and were nothing but an overview of Monsanto's application. It was also alleged that the reasons did not contain any explanation as to what, if any, other evidence, apart from those provided by Monsanto, were considered, and did not explain why Monsanto's claims were accepted.
25. The EC's decision records that MON 87460 is substantially equivalent to conventional maize and has a low environmental risk. The decision makes it clear that the EC was satisfied that there was adequate scientific support to indicate that MON87460 is safe and nutritionally adequate for human and animal consumption, and is expected to be beneficial to the environment due to the protection of yield loss under drought conditions. The reasons record that the conclusions referred to above were drawn from certain findings of fact. The facts on which the conclusions were based were set out.
26. The EC's decision furthermore sets out the conclusion based on its factual findings and concluded that MON 87460 is equivalent to conventional maize, does not pose a threat to the environment and does not pose a threat to human or animal safety. It explains the factual findings which underlie the conclusion.
27. To determine whether there is merit in ACB's criticism of the reasons provided, one should consider what the requirements for adequate reasons are. In *Koyabe v Minister of Home Affairs*[21] it was held that, although the reasons must be sufficient, they need not be set out in minute detail and ordinarily, reasons will be adequate if a complainant can make out a reasonable substantial case.[22]

28. In Phambili Fisheries [23] the following was said:

What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of Ansett Transport Industries (Operations) Pty Ltd and another v Wraith and others

[1983] FCA 179; (1983) 48 ALR 500 at 507 (23–41), as follows:

“The passages from judgments which are conveniently brought together in Re Palmer and Minister for the Capital Territory (1978) 23 ALR 196 at 206–7; 1 ALD 183 at 193–4, serve to confirm my view that s 13(1) of the Judicial Review Act requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: ‘Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.’

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him

to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.”

To the same effect, but more brief, is Hoexter The New Constitutional and Administrative Law Vol 2 244:

“[I]t is apparent that reasons are not really reasons unless they are properly informative. They must explain why action was taken or not taken; otherwise they are better described as findings or other information.” [24]

29. For the reasons to be adequate the decision maker, as was argued on behalf of Monsanto, must set out his understanding of the law, the findings of fact and the reasons that led to the conclusions arrived at. In this instance no finding of law was required The EC decision sets out the findings of fact and the conclusions arrived at. As a result, the EC decision met the requirements set out in Phambili and the other authorities referred to. ACB was placed in a position to decide whether the decision involved “an unwarranted finding”, which should be appealed or reviewed. The complainant was provided with the decision maker’s actual reasons to enable it to formulate its objections thereto, the adequacy of reasons does not include a consideration of the cogency or rationality of the reasons.[25] As a result, the conclusion is that the reasons provided were adequate and this objection must fail.

Did the EC apply its mind to the information provided to it by Monsanto and was the decision supported by the evidence before it

30. The record shows that no submissions by third parties were placed before the EC. However, it was assisted by the AC in coming to

the decision. The EC consisted of five members, who represented the Department of Agriculture, Forestry and Fisheries, the Department of Environmental Affairs, the Department of Science and Technology, the Department of Trade and Industry and Professor Bouwer, the Chairperson of the AC. Two meetings were held on 21 January 2015 and 26 June 2015 where Monsanto's application was considered. The minutes were kept and form part of the record.

31. ACB argues that the EC did not attend to a rigorous scientific assessment in relation to the safety and efficacy of MON 87460 and

uncritically accepted the evidence contained in Monsanto's application. ACB argued that the EC should have called for an

independent risk assessment. This aspect was already dealt with earlier in the judgment. It is also clear from the record that there was a proper consideration of all the aspects relevant to the application. ACB failed to file a supplementary affidavit, after the filing of the record and forfeited an opportunity to address any aspects pertaining to the recommendations and the minutes of the meetings held when the application was considered.

32. A golden thread throughout the application is ACB's failure to specifically identify the grounds of review relied on in terms of PAJA clearly. This resulted in the Court attempting to establish the exact grounds relied on. There was also not always coherence between the founding affidavit and heads of argument in this regard. It seems that ACB inter alia relied on section 6 (2)(a) (ii) and (iii), section (2)(e)(vi) and section 6 (2)(h) of PAJA, which provides that a decision is subject to review where the decision maker acted under an unauthorised delegation of power, was biased or reasonably suspected of bias, where the decision maker acted arbitrarily or capriciously, and where a decision maker exercises its power in such a manner that no reasonable person could have exercised the power in such a manner. This inference is drawn because ACB relied inter alia on *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* [26], where it was held that a functionary must exercise her power herself in the absence of a delegation and should not rubber stamp the application before her. However, considering the opinion of the AC and the meetings held, there is no indication of either an unlawful delegation of power or a mere rubber stamp of the application of Monsanto.

33. Reliance was also placed by ACB on *Tantoush v Refugee Appeal Board* [27], in support of the argument of bias in that instance however, there was evidence of probable external influence. There is no evidence of external influence in this instance. ACB's argument that where a decision is influenced by pressure from an external source, that decision will be reviewable is correct, but the evidence does not support its application in this case. There is no evidence that the EC did not exercise its own decision-making power. The record shows that the views of the AC was provided and there are minutes of the meetings held when the application was considered. The highwater mark in this instance of ACB's criticism is that

Monsanto's application was uncritically accepted, but the record indicates otherwise.

34. The record and the EC's decision make it clear that the EC did consider the risk assessment provided by Monsanto, in

the absence of submissions by third parties, and concluded that MON 87460 was safe for humans, animals and the environment. It was already pointed out that neither NEMA, nor the GMO Act and Regulations requires an EIA in the circumstances that prevailed in this matter. The fact of the matter is that procedures required by legislation were followed. In any event any procedural unfairness was cured by the appeal that followed. I must therefore conclude that the EC did apply its mind and considered the evidence before it.

Did the Appeal Board adequately address the appeal grounds raised by the Respondents.

35. ACB did not indicate in either the founding affidavit, or the heads of argument on which provisions of PAJA it based its review against the Appeal decision. ACB alleges in its heads of argument that the Appeal Board decision did not engage with the appeal

grounds, because it did not address the lack of adequate notice, Professor Heinemann's evidence, the absence of a determination

in terms of Section 5 (1) (a) of the GMO Act, the inadequacy of Monsanto's risk assessment; the claim of drought resistance and the South African field trials and the withholding of relevant information which made it impossible to evaluate experimental

conditions and methods.

36. The founding affidavit, however, only deals with procedural irregularities. It was pointed out that the Appeal Board decision was not dated or signed and did not identify its members. This point was not persisted with in the heads of argument. The failure to address the expert opinions of Dr Hillbeck and Professor Heinemann in the Appeal Board decision was raised. The point relating to Dr Hillbeck's evidence was not persisted with in the heads of argument and correctly so, as Dr Hillbeck assisted ACB in the preparation of ACB's appeal and cannot be regarded as an independent expert. [28]

37. The other concerns were that certain of the Appeal Board's findings were set out in vague and generalised terms. ACB concluded that the Appeal Board failed in taking a rational decision, failed to apply its mind to ACB's grounds of appeal,

acted unreasonably, failed to take an independent and an unbiased decision and did not provide reasons for its decision.

38. The issue of notice was already dealt with, as notice was given as required by legislation. As far as compliance with section 5(1)

- (a) of the GMO Act is concerned, this was dealt with above. Procedurally, there was no failure in this regard for the reasons set

out above.

39. As far as the alleged inadequacy of the reasons provided are concerned, the test for adequacy of reasons was already dealt

with above and the Appeal Board's reasons must be tested with reference to those requirements and for the same reasons as set out with reference to the EC decision there is no merit in this argument.

40. ACB is especially concerned with the safety of MON 87460 and dealt with the various arguments pertaining to its safety. Yet again,

it is not for this Court to determine the safety of MON 87460 and all this Court can legally do is to examine the procedure followed. The Appeal Decision dealt with the safety of MON 87460 and concluded that "all required scientific rigour has been applied, including review process from the Advisory Committee members, with relevant scientific expertise to determine the safety of the GM event in respect of human, animal and environmental safety," after being presented with the opinions of all the stakeholders. The Appeal Decision deals with MON 87460's traits and draws comparisons with conventional maize. It deals with unintended gene flow and concludes that the risk is minimal and in the rare event that it occurs, it concludes that it does not necessarily present a risk. The Appeal Decision refers to the history of safe use and concludes that the extent of the proposed yield loss reduction is low, but statistically significant.

41. The Appeal Decision sets out its conclusions, the facts, and the underlying reasoning for the conclusion. ACB, when considering the Appeal Board's decision should at least have been appraised of the Appeal Decision, as to understand why the appeal was rejected. There is accordingly no merit in the assertion that the reasons were inadequate.

42. ACB raised concern that Dr Heinemann's opinion was not addressed by the Appeal Decision. Dr Heinemann's opinion related to the safety of MON 87460. In concluding that MON 87460 is safe, the Appeal Board did consider the safety and in concluding that

it was safe for use, rejected by implication Dr Heinemann's opinion. Dr Barthotomaeus, a toxicologist provided evidence that Dr Heinemann's risk assessment had no basis. Dr Peters addressed the issue of yield loss. Contradictory expert opinions flow through this application and ultimately as already stated, it is not for this court to decide on either the merits or the safety of MON87460, but to determine whether the requirements for a review have been met.

43. The Appeal Board relied on the evidence before it and concluded, right or wrong, that MON87460 is safe. On the evidence before this court, it cannot be concluded that the decision was either irrational or unreasonable. As far as the question of the alleged drought resistance is concerned, the Appeal Board considered this issue and that should suffice for purposes of a review.

44. ACB also relied on Section 68 of the Promotion to Access to Information Act 2 of 2000 (PAIA), namely the refusal of access to information. This relates to the confidential information relating to the field trials by Monsanto in South Africa. However, once the review was launched, redacted information was made available to ACB's legal representatives and experts. The conclusion therefore that ACB failed in proving its grounds of review relating to the Appeal Board decision.

The Minister's failure to give reasons or to engage with the issues before the EC and Appeal Board

45. The Minister accepted the Appeal Board's findings and recommendations.
46. The power to adjudicate an appeal lies with the Appeal Board. Section 19 (4) of the GMO Act gives the power to the Appeal Board to

confirm, set aside or substitute the decision of the EC. Section 19

- (6) of the GMO Act then provides that "the full decision of the Appeal Board must be put in writing and furnished to the Minister, the registrar and all the parties directly involved". The Section goes further to state that the Minister "may take such further action as he or she may consider necessary". No obligation is put on the Minister to provide reasons or take any further steps. As a result, there is no merit in this ground for review.

Conclusion

47. There is no indication that either the EC or the Appeal Board failed to comply with the rationality test envisaged in Section 6 (2)(f)(ii) of PAJA. Although one might not agree with the decisions, the test is ultimately whether there is a rational objective basis between the material made available and the conclusion arrived at.[29] As far as reasonableness, as envisaged in Section 6(2)(h) of PAJA is concerned, the EC relied on the AC, who consisted of experts who considered Monsanto's application and who recommended that the application be approved. A recommendation report was prepared and formed part of the record. The EC took its decision in consultation with the AC. The information before the EC included a report from a statutory body whose specific function is to consider applications for GMO permits. As a result, the EC's decision can neither be irrational nor unreasonable.
48. The Appeal Board considered everything that was before the EC and had available the submissions of ACB, including the reports of

their experts. The Appeal Board considered all of this and concluded that the permit could be granted. There is no evidence that the decision was either irrational or unreasonable. Nor was there any credible evidence that either the EC or the Appeal Board did not apply their minds to the information before them. Despite the allegations of bias and/or influence by third parties, no objective evidence was provided to prove that, or any unlawful delegation of power.

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49. A perusal of the papers reveals that ACB's real concern is the safety of the release of MON 87460, which maybe a legitimate

concern, but it is something this Court is not able to determine within the confines of a PAJA review and in the light of the conflicting expert opinions, without the benefit of oral evidence. As a result, the application stands to be dismissed.

Costs

50. Considering the nature of the litigation, it is appropriate that no order as to costs is made following the Biowatch principle.^[30]

The following order is made:

1. The application is dismissed.

R.G Tolmay

Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances:

Counsel for Applicant : Adv K Pillay SC; Adv N Steyn Attorney for Applicant : Legal-Aid South Africa
Counsel for First to Fourth Respondents : Adv M Jozana Attorney for First to Fourth Respondents : State Attorney Pretoria
Counsel for Fifth Respondent : Adv P Lazarus SC; Adv I Learmonth Attorney for Fifth Respondent : Webber Wentzel
Date of Hearing : 8 February 2023
Date of Judgment : 27 June 2023

[1] GMO Act section 5(1) (c).

[2] GMO Regulations 9 (1), 9 (5)(c) and (9)(6).

[3] Rustenburg Platinum Mines (Ltd) (Rustenburg Section) v CCMA 2007 (1) SA 576 (SCA) at para 31-32; South Durban Community Environmental Alliance v MEC for Economic Development Tourism and Environmental Affairs,

Kwazulu-Natal Provincial Government 2020 (4) SA 453 (SCA) at para 12.

[4] Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation

and Environment, Mpumalanga Province 2007 (6) SA 4 at para 38 (Fuel Retailers).

[5] Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism

[2004] ZACC 15; 2004 (4) SA 490 (CC) at para 48; Somali Association of South Africa v The Refugee Appeal Board 2021 JDR 2182 (SCA) at para 93.

[6] 2001

(3) SA 1188 (SCA).

[7]

[1984] ZASCA 51; 1984

(3) SA 623 (A) 634 D-I, see also *Mbethhe v United Maganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA) at para 23.

[8] *Walele v City of Cape Town* [2008] ZACC 11; 2008 (6) SA 129 CC at paras 17 & 33, *Pilane v Pilane* 2013 (4) BCLR 431 (CC) at paras 47 & 48.

[9] *Fuel Retailers* at para 98.

[10] 2019(2) SA 403 (WCC) at para 104.

[11]

[2006] NSWLEC 199.

[12] *Telstra* at para 134-135.

[13] *Telstra* at para 147-148.

[14] *Telstra* at para 150.

[15] 2022(6) SA 589 ECM.

[16] GMO Regulation 9 (2).

[17] GMO Regulation 9 (5).

[18] GMO Regulation 9 (5)(1).

[19] GMO Regulation 9 (6).

[20] GMO Regulation 11, *Wings Park Port Elizabeth (Pty) Ltd v MEC for Environmental Affairs, Eastern* 2019 (2) SA 606 (ECG) at para 29.

[21] 2010

(4) SA 327 at para 63.

[22] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minster of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) 407 (SCA). (Phambili Fisheries)

[23] *Ibid* a para 40, See also *Commissioner of Revenue Services v Sprigg Investment* 117 CC t/a *Global Investment* 2011 (4) SA (SCA) at para 11-14(Sprigg Investments)

[24] GMO Regulation 9 (5)(1).

[25] *Sprigg Investments* at para 14.

[26]

[2005] ZASCA 11; 2005

(6) SA 182 (Scenematic) at para 20.

[27] 2008

(1) SA 232 (T).

[28] Price Waterhouse Coopers Inc. v National Potato Co-Operative.Ltd.2015 JDR 0371 (SCA) at para 113.

[29] Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 at paras 20-21.

[30] Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC).

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Prepared on 14 October 2026 · Esheria