



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

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

SIGNATURE

DATE: 17 April 2026

Case No. 12835/2018

In the matter between:

MONTLHA WELHEMINA NGOBENI AND 15 OTHERS

Applicants

and

NATIONAL HEALTH LABORATORY SERVICE

First Respondent

**NATIONAL INSTITUTE FOR COMMUNICABLE
DISEASES**

Second Respondent

MINISTER OF HEALTH

Third Respondent

TIGER BRANDS LIMITED

Fourth Respondent

ENTERPRISE FOODS (PTY) LTD

Fifth Respondent

TIGER CONSUMER BRANDS LIMITED

Sixth Respondent

A SPOT OF INNOVATION (PTY) LTD

Seventh Respondent

JUDGMENT

WILSON J:

- 1 This application involves the exercise of my statutory powers under section 14 (2) (b) of the National Health Act 61 of 2003. That provision permits a court to order the disclosure of confidential medical information concerning a “user” of healthcare services, as defined in section 1 of the Act, to any other person, on appropriate terms and conditions. Section 14 (2) (b) creates a power of judicial oversight. The court weighs the strong privacy interest a user of healthcare services has in keeping information about their health status and treatment confidential against any public or private interest that might favour disclosure. The provision plainly does more than create a framework for the resolution of disputes between healthcare users, or holders of confidential information about such users, and those who wish to access information about them. It places a broad public law duty on a court to weigh competing interests in the confidential information, and to order disclosure only when, and to the extent that, it is justified (*MEC for Health v Solomons* 2023 (6) SA 601 (GJ) (“*Solomons*”), para 42).
- 2 The applicants are representatives of a class of individuals who claim that they suffered compensable loss at the hands of the fourth to sixth respondents (“Tiger Brands”), when they consumed food products produced by Tiger Brands, which were contaminated with listeria. This court certified their class action on 12 December 2018, but the action has not yet gone to trial.
- 3 One of the steps the applicants say is necessary before the matter goes to trial is the disclosure of material relating to an investigation conducted by the

first and second respondents, the National Health Laboratory Services and the National Institute for Communicable Diseases (“the NHLS / NICD”), which traced the listeriosis outbreak back to a Tiger Brands food processing centre. The relevant material is necessary both because it will likely be evidence in the action itself, and because access to it will allow the applicants’ legal representatives to trace members of the class who have not yet been identified. The class action is an “opt-out” class action, and so it is necessary to trace the putative members of the class in order to afford them a meaningful opportunity to opt-out, and to ensure that, if they do not opt-out, they will receive any damages that may ultimately be due to them.

- 4 The applicants seek disclosure to their legal representatives of the relevant material on terms and conditions meant to preserve the confidentiality of the individuals who may be identifiable from it. The material sought is set out in a draft subpoena, and is likely to contain information about individuals tested for listeriosis as part of the NHLS / NICD investigation.
- 5 It seems to me that the privacy interests of the individuals who may be identifiable from the information the applicants seek are outweighed by the interest the applicants and other members of the class have in accessing the information for the purposes of the class action. Indeed, there is likely to be a substantial overlap between the individuals whose medical information may be disclosed and the members of the class. The disclosure is, accordingly, likely to benefit those whose privacy interests section 14 is meant to protect, at least insofar as it will enable them to exercise a meaningful choice about whether to opt-out of the class action. The disclosure of the confidential

information is, naturally, only justified to the extent necessary to allow the parties and their legal representatives to assess the conduct of the investigation, and to trace any members of the class who have not yet been contacted by the applicants' attorneys.

6 The applicants placed an application for an order directing NHLS / NICD to disclose the information identified in the draft subpoena on my unopposed roll for 12 March 2026. The order sought contained appropriate safeguards to ensure that the information would only be used by the parties' legal representatives for purposes connected with the class action, and that any person receiving the information for those purposes makes an undertaking to keep that information confidential. Tiger Brands supports the application. It briefed counsel to appear before me to confirm this. In January 2026, the NHLS / NICD filed a notice indicating that it would abide my decision.

7 In these circumstances, the order sought might have been granted without written reasons, had the NHLS / NICD not, late in the evening of 11 March 2026, filed a 44-page "explanatory affidavit", which included complex clinical information of an expert nature. The purpose of the explanatory affidavit was far from clear, but its gist was that the relief the applicants seek is overbroad and inappropriate. There was no cogent explanation of why, in light of the position adopted in the affidavit, the NHLS / NICD did not (and presently still does not) oppose the application. Nor was there any suggestion of how the difficulties raised with the applicants' relief should be resolved. No alternative relief was formulated. The affidavit was simply deposited into the court file a few hours before the hearing, for purposes that remain unclear to me.

- 8 Still, this obvious disregard of the rules of practice applicable in this court might not have mattered that much, had the NHLS / NICD sent counsel to court to explain the affidavit and the position the NHLS / NICD took in light of it. But when the matter was called on 12 March 2026, nobody placed themselves on record for the NHLS / NICD.
- 9 The conduct of the NHLS / NICD left me, and counsel briefed to appear for the applicants and Tiger Brands, in an invidious position. None of us could reasonably have been expected to digest material of the complexity contained in the explanatory affidavit overnight. I was at a loss to understand how the NHLS / NICD's legal representatives could have thought that it was appropriate to file such material, without briefing counsel to appear, knowing, as they must have, that this matter was but one of fifty-nine cases on my roll for 12 March 2026. Organs of state such as the NHLS / NICD are under a constitutional duty to assist and protect the courts, and to ensure their effectiveness (see section 165 (4) of the Constitution, 1996). The conduct of the NHLS / NICD and their legal representatives is, *prima facie*, a dereliction of that duty.
- 10 Nevertheless, the circumstances were what they were. Ms. Steinberg, who appeared for the applicants, submitted that the matter remained unopposed and should be treated as such. She asked that the order be granted as prayed for, there and then. In the circumstances I have set out, I fully appreciate why that submission was made. But I could not accept it. Orders under section 14 (2) (b) are not given for the asking. They involve the careful weighing of the considerations to which I have already referred. I was under a duty to come to

grips with the explanatory affidavit. The applicants and Tiger Brands had the right to deal with it. I reserved judgment on the basis that Tiger Brands and the applicants would be afforded until 27 March 2026 to file further submissions or affidavits dealing with the explanatory affidavit.

11 On 24 March 2026, the NHLS / NICD filed a further affidavit, seeking to supplement the explanatory affidavit of 11 March 2026. The affidavit was filed without my leave, and in apparent breach of the general rule that further material is not to be placed before the court after judgment is reserved without the consent of the parties or the permission of the court. I gave notice to the parties that the contents of the further affidavit would be disregarded without such consent or permission. To date, the NHLS / NICD has not taken issue with that position. Nor, as far as I can see, has any attempt been made to seek my permission or the consent of the parties to file further material. The contents of the further affidavit are, in any event, of no real materiality. They may safely be disregarded in the exercise of my powers under section 14 (2) (b).

12 The initial explanatory affidavit raised two broad objections to the order the applicants seek. In the first place, the NHLS / NICD object to being directed to provide information referred to in the draft subpoena that they say they do not currently possess. There is no substance in that objection. The purpose of my order is to establish that there is a right to the disclosure of the specified information, not to make a final factual determination on whether it is all actually in the possession of the NHLS / NICD. If the NHLS / NICD does not possess some of the material set out in the subpoena, they need only say so.

It is in the nature of a subpoena, or indeed in any order of court requiring the disclosure of information, that if the person ordered to disclose information turns out not to have it, the information need not be disclosed. The applicants pointed this out to the NHLS / NICD in January 2026, at around the same time the NHLS / NICD filed their notice to abide. There is no response to the applicants' stated position on record. In these circumstances, it is not clear to me why the same objection was raised again the night before the matter was due to be heard. In any event, the applicants have now amended their draft order to provide explicitly that the NHLS / NICD are not obliged to hand over information that they do not have.

- 13 The second substantial objection raised was that the applicants had not established the relevance of the information set out in the draft subpoena to the issues in the class action. To be clear: the objection was not that the information was in fact irrelevant. It was that relevance had not been established. I reject that submission. For the reasons I have already given, the information sought is plainly relevant to the issues in the class action. The NHLS / NICD's investigation appears to be the principal factual substrate on which Tiger Brand's liability is sought to be established. Both the applicants and Tiger Brands need access to the information about that investigation to pursue their competing cases at trial. Such information will also plainly be of interest and assistance to the court that hears the trial. It has accordingly been established that disclosure of the information sought is "genuinely necessary" for the exercise of the parties' fair trial rights (see *Solomons*, para 42.4). In any event, the information is also sought to trace members of the class. It seems to me that this is a proper purpose for which an order under section 14

(2) (b) should be made, and that access to the information is “genuinely necessary” to pursue that purpose.

14 There is nothing else in the explanatory affidavit that would militate against the relief the applicants seek. I am satisfied that the relief strikes the appropriate balance between the confidentiality interests section 14 is meant to protect, and the clear public interest in facilitating the ventilation of the class action.

15 As should be abundantly clear by now, the NHLS / NICD and their legal representatives have approached this application ineptly. They have indicated that they abide the relief sought, before filing an affidavit on the eve of the hearing, in which they appeared to take issue with the relief despite having failed to oppose it. They failed fully to explain their position to the court, leaving me to guess at what that might be. They have filed papers without my leave, and in breach of the rules of practice applicable in this court. They have failed to brief counsel to appear before me when they should have done so. They have refused to engage fully and frankly with the relief the applicants seek. They have sought to place additional material before me after judgment was reserved, without taking the steps required of a party seeking to adduce such material. In doing so, they have failed to assist me, and have delayed the finalisation of a class action, the hearing of which is already long overdue.

16 In these circumstances, it seems to me that the NHLS / NICD are under a duty to explain why they should not bear the costs of this application on the scale as between attorney and client. I will afford them an appropriate interval in which to do so.

- 17 The applicant's draft order provides for the variation of the relief in appropriate circumstances. In order to avoid the unfortunate delay and obfuscation that has marred this application to date, I have directed, in the order I intend to grant, that such a variation may be sought from me in chambers, or from any other Judge of this court in the event that I become unavailable.
- 18 For all these reasons –
- 18.1 The draft order in this matter, which I have signed, dated, marked "X" and caused to be uploaded to this court's electronic registry, is made an order of this court.
- 18.2 The first and second respondents are directed, by no later than 4 May 2026, to file such affidavits and written submissions necessary to show cause why they should not pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.
- 18.3 The applicants, and the fourth to sixth respondents, may respond to the first and second respondents' affidavits and submissions by no later than 18 May 2026.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson, with whom Judges Mia and Smit agree. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 17 April 2026.

HEARD ON: 12 March 2026

FURTHER SUBMISSIONS
ON: 27 March 2026

DECIDED ON: 17 April 2026

For the Applicants: C Steinberg SC
(Heads of argument drawn by C Steinberg SC, M
Bishop, M Mbikiwa, E Cohen)
Instructed by Richard Spoor Inc

For the First and
Second Respondents: Lawtons Africa

For the Fourth, Fifth
And Sixth Respondents: M Kriegler SC
Instructed by Clyde & Co. Inc