



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

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

SIGNATURE

DATE: 27 May 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

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**JUDGMENT**

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**WILSON J:**

- 1 On 17 April 2026, I gave judgment directing the first and second respondents, the NHLS / NICD, to release a range of defined confidential medical information to the applicants, subject to terms and conditions meant to govern its use and preserve its confidentiality (see *Ngobeni v National Health Laboratory Service* [2026] ZAGPJHC 370 (17 April 2026)). The information had to be released because the applicants needed it to pursue their class action against the fourth to sixth respondents, Tiger Brands. The class action arose from what the applicants say was Tiger Brands' negligent failure to ensure that its food products were supplied free of contamination by listeria. That class action, though certified in 2018, is yet to go to trial. The information I ordered be released is material to the parties' attempts to settle the matter, or, in the event that the matter cannot be settled, to prove their case at trial.
  
- 2 The NHLS / NICD, as the holders of the information, formally abided the application to procure its release. However, on the evening before the matter was to be heard on an unopposed basis before me, the NHLS / NICD filed a lengthy affidavit that took issue with material parts of the relief the applicants sought. In other words, the NHLS / NICD changed its position from one of indifference to the relief sought to one of active opposition to it, at least in the form that it was sought. It turned out that the bases of the NHLS / NICD's opposition either had no merit at all, or could easily be catered for by minor amendments to the applicants' draft order. I granted very slightly amended relief once the nature of the NHLS / NICD's belated objections became clear to me.

- 3 Still, the manner in which NHLS / NICD had placed its misgivings before me left a great deal to be desired. Having formally abided my decision, they waited until just hours before the matter was to be heard before changing their position in a lengthy affidavit that they must have known I would have no real chance to absorb before the hearing. That was compounded by their failure to send counsel to court to explain the affidavit and motivate for the minimal changes to the applicants' draft order that turned out to have been justified.
- 4 This conduct had real consequences. For the reasons I gave in my judgment of 17 April 2026, I could not simply treat the application as unopposed. I was statutorily obliged to consider and come to grips with the tardy affidavit. The application could not be decided on the day for which it was set down (being but one of 59 cases on my roll that day), and further submissions were made necessary. These submissions were compiled and delivered, no doubt at significant cost to the applicants and to Tiger Brands.
- 5 Bearing in mind the inconvenience caused to the court, the additional costs caused to the applicants and Tiger Brands, and the fact that the applicants had, in their notice of motion, only waived their claim for costs on condition that the application would remain unopposed, I directed that the NHLS / NICD should explain why they ought not to pay the costs of the application on the scale as between attorney and client. I gave the NHLS / NICD an opportunity to file the material necessary for me to consider that question. That material was filed on 14 May 2026, and answered by both the applicants and Tiger Brands on 18 May 2026.

- 6 Having considered the relevant material, I am convinced that an attorney and client costs order should be made. Much of the material the NHLS / NICD placed before me sought to retread old ground. I was told a great deal about the Supreme Court of Appeal's decision in *Deltamune (Pty) Ltd v Tiger Brands Limited* 2022 (3) SA 339 (SCA), which dealt with an earlier dispute between the parties about the apparent overbreadth of a subpoena. I was also given a precis of some of the parties' earlier communications. That material was plainly irrelevant to my decision.
- 7 What was required in, but absent from, the NHLS / NICD's costs affidavit was a full explanation of why their affidavit in the main case was only filed at the last minute, why the NHLS / NICD changed their attitude toward the application in that affidavit, and why nobody was sent to court to explain the contents of the affidavit and the change of stance that it embodied. While the costs affidavit does accept that the NHLS / NICD's conduct resulted in "unintended consequences", for which an apology was tendered (*NHLS / NICD Costs Affidavit*, paragraph 59.2), the costs affidavit does not disclose an understanding of the extent of the additional cost and inconvenience the NHLS / NICD's manner of proceeding had caused.
- 8 The best that can be said for the NHLS / NICD is that, as counsel emphasised in their written submissions, the NHLS / NICD did not conduct themselves in bad faith, and that they did not intend to cause the additional costs, inconvenience and confusion that they did. I accept all of that, but I point out that far more was expected of the NHLS / NICD than the absence of bad faith. As organs of state, they are under a constitutional obligation to assist and

protect the courts and ensure our effectiveness (see section 165 (4) of the Constitution, 1996). They are also under a duty of fair and transparent dealing toward the applicants and Tiger Brands. An affidavit of the length filed must have been days or weeks in preparation. Neither I nor the applicants, nor Tiger Brands were given any indication that it was coming, much less that it would be filed late in the evening before the hearing. The failure to warn the parties or the court that the affidavit was on its way was, to put it mildly, neither fair nor transparent.

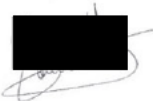
9 Accordingly, it seems to me that good-natured ineptitude is insufficient to escape a costs order in this case. As organs of state, the NHLS / NICD are under a duty to act professionally, fairly and appropriately as litigants, to make their position clear, and to afford the court the assistance necessary to appreciate fully what that position is. An organ of state is not “an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly” (*MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC), paragraph 82). Failing that, the least that could be expected of the NHLS / NICD is that they display a full appreciation of how their conduct has fallen short of the applicable standard.

10 The NHLS / NICD’s conduct to date possesses none of these attributes. I see no reason why the applicants and Tiger Brands ought to bear the costs of their ineptitude. This is precisely the sort of case where an attorney and client costs order is necessary both to signal that higher standards are required of litigants

such as the NHLS / NICD and to indemnify the applicants and Tiger Brands fully against the consequences of the failure to meet those standards.

11 It was finally contended that the NHLS / NICD should not be ordered to pay costs because they are organs of state and “the public purse is under extreme strain” (*NHLS / NICD Costs Affidavit*, paragraph 62). I do not accept that the NHLS / NICD cannot satisfy an attorney and clients costs order, not least because no evidence of that has been placed before me. In any event, the objective inability to satisfy a costs order has never been a defence to a claim for costs. If it were, I would make far fewer costs orders. I see no reason why the NHLS / NICD should be granted an indemnity so frequently denied to much less empowered litigants who, for example, find themselves sued for unpaid debts or other obligations that they have found themselves genuinely unable to fulfil. Here, the NHLS / NICD’s obligations to the court, to the applicants and to Tiger Brands were, or ought to have been, clear. Those obligations would have been easy to carry out, but were left unfulfilled without explanation and without any clear indication that NHLS / NICD genuinely appreciate how and why their conduct was inappropriate.

12 For all those reasons, the first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the applicants’ and the fourth to sixth respondents’ costs in this application, on the scale as between attorney and client.



**S D J WILSON**  
Judge of the High Court

This judgment was prepared by Judge Wilson. 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 27 May 2026.

SUBMISSIONS ON: 4 and 18 May 2026

DECIDED ON: 27 May 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: P Seleka SC  
F Karachi  
Instructed by Lawtons Africa

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