

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

Case No: 12835/2018

In the matter between:

MOTHLA WELHEMINA NGOBENI	First Plaintiff
CLINTON GREGORY CHINULA	Second Plaintiff
MAMORAKA NTJANA	Third Plaintiff
PHILIP GEORGE COETZEE	Fourth Plaintiff
PRESENDRIE GOVENDER	Fifth Plaintiff
ANNELIZE LE ROUX	Sixth Plaintiff
XOLILE BOSCH	Seventh Plaintiff
RAJESH KUMAR MISRA	Eighth Plaintiff
SEBASTIAN LAURENT STEPHEN SCHWAGELE-FAN MORITZ	Ninth Plaintiff
SHEREZE CURTIS	Tenth Plaintiff
ALANA JULIE	Eleventh Plaintiff
JOHN PIETER KEISER	Twelfth Plaintiff
THATO OSCAR MATHOLE	Thirteenth Plaintiff
CARLA VERLAAT	Fourteenth Plaintiff

And

TIGER BRANDS LIMITED	First Defendant
ENTERPRISE FOODS (PTY) LIMITED	Second Defendant
TIGER CONSUMER BRANDS LIMITED	Third Defendant

COMBINED SUMMONS IN CLASS ACTION

TO:

CLYDE & CO, ACTING ON BEHALF OF:

- 1. TIGER BRANDS LIMITED – 1st Defendant**
- 2. ENTERPRISE FOODS (PTY) LIMITED – 2nd Defendant**
- 3. TIGER CONSUMER BRANDS LIMITED – 3rd Defendant**

6th Floor, Katherine & West Building, 114 West Street, Sandton, Johannesburg
Attorneys on record for the First, Second and Third Defendants described above in
the present certified class action.

The 1st Defendant being **TIGER BRANDS LIMITED**, a public company duly registered
within the laws of the Republic of South Africa, with its principal place of business
being place of at 3010 William Nicol Drive, Bryanston.

The 2nd Defendant being **ENTERPRISE FOODS (PTY) LIMITED**, a private company
duly registered within the laws of the Republic of South Africa, with its principal place
of business being at 85 Bute Lane, Sandown, Sandton

The 3rd Defendant being **TIGER CONSUMER BRANDS LIMITED**, a public company
duly registered within the laws of the Republic of South Africa, with its principal place
of business being at 3010 William Nicol Drive, Bryanston.

PLEASE BE INFORMED THAT:

MOTHLA WELHEMINA NGOBENI, an adult female call centre operator residing at
16781 Paris Avenue, Mahlasedi Park, Polokwane.

CLINTON GREGORY CHINULA, an adult male bank official residing at 3 Florida
Avenue, Ext 7 Eldorado Park, Johannesburg.

MAMORAKA NTJANA, an adult female maintenance planner currently residing at 31
Terrace View, 15 Acacia Street, Sagewood, Midrand, Johannesburg

PHILIP GEORGE COETZEE, an unemployed adult male residing at 46 Hippocrates Avenue, Hospital Park, Bloemfontein.

PRESENDRIE GOVENDER, an adult female former business owner, currently residing at 78 Almond Road, Illovo Glen Kingsburgh, Amanzimtoti, Durban, Kwazulu-Natal.

ANNELIZE LE ROUX, an adult female farmer residing at Farm Langverwacht, Winburg, Free State..

XOLILE BOSCH an adult male industrial cleaner residing at 43 Falcon Court, Woodlands Estate, Bendor, Polokwane, Limpopo.

RAJESH KUMAR MISRA, an adult male gynaecologist practising at Empangeni Garden Clinic Hospital, in Empangeni, KwaZulu Natal.

SEBASTIAN LAURENT STEPHEN SCHWAGELE-FAN MORITZ, formerly known as Glenn Frederick Strutt, an adult male businessperson residing at 14 Lady Jane, Cavendish Avenue, Cambridge, England.

SHEREZE CURTIS, an unemployed adult female residing at 205 Section A, Giyani, Limpopo.

ALANA JULIE, an adult female receptionist residing at 7 Portulaca Street, Lentegeur, Cape Town, Western Cape.

JOHN PIETER KEISER, an unemployed adult male residing at 28 Minaar Street, Forest Hill, Johannesburg, Gauteng.

THATO OSCAR MATHOLE, an adult male mechanical fitter residing at Stand 02780/68, Amandasig, Magalies Country Estate 2, Pretoria, Gauteng.

CARLA VERLAAT, an adult female domestic worker residing at 20 Joyce Court, Manenberg, Cape Town, Western Cape.

HEREBY institute summons, in their personal capacity and as representatives of classes certified by this Honourable Court on 3 December 2018 under case number 12835/2018 against the First, Second and Third Defendants, in accordance with authority and permissions granted onto them by the said Court, in which action the Plaintiffs claim the relief, on a class basis, on the grounds set out in the Particulars of Claim annexed and marked Annexure "A".

BE INFORMED further that if the First, Second and Third Defendants dispute the claim and wished to defend the action, they shall: –

- i. Within ten (10) days of service upon the First, Second and Third Defendants, or its authorised agent, of this summons, file with the Registrar of this Court, located at the Corner of Kruis and Pritchard Street, Johannesburg, notice of their intention to defend and serve a copy thereof on the Plaintiff's Attorneys which notice shall give an address (not being a post office or poste restante) referred to in Rule 19(3) for the service upon the First, Second and Third Defendants of all notices and documents in this action.
- ii. Thereinafter and within Twenty (20) days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the Plaintiff a Plea, Exception, Notice to Strike out, with or without a Counterclaim.
- iii. Together with their notice of intention to defend, indicate in writing whether they are prepared to consent in terms of Rule 17(3)(e) to further service of all papers between the parties by way of electronic mail, and therein set out the email addresses elected.

BE INFORMED THAT if the First, Second and/or Third Defendants fail to file and serve the notice as aforesaid, Judgement, as claimed, may be given against the defaulting

Defendants without further notice to them, or if having filed and served such notice, the Defendant/s fail to plead, except, make application to strike out or counterclaim, Judgement may be given against it/them.

BE INFORMED THAT the party serving this process shall return to the above Honourable Court, through the Office of the Registrar, the original copy of this summons and its particulars of claim.

DATED AT JOHANNESBURG ON THIS 15th DAY OF APRIL 2019.

REGISTRAR OF THE HIGH COURT

(already authorised by Court Order dated 3 December 2018)

(copy of authorisation Court Order attached)



ATTORNEYS FOR PLAINTIFFS

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(authorised agent acting obo Defendants)

Received on _____ of April 2019

Person receiving: _____

Capacity: _____

AND TO: **REGISTRAR OF THE HIGH COURT**
GAUTENG LOCAL DIVISION
JOHANNESBURG
CIVIL SECTION

AND TO: **REGISTRAR IN THE OFFICE OF THE DJP**
HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG
Email: SecretaryDJP@judiciary.org.za

PARTICULARS OF CLAIM

Introduction

- 1 This action is instituted pursuant to an order of this Honourable Court, made on 3 December 2018, under case number 12835/2018, authorising these class action proceedings.

The Plaintiffs

- 2 The First Plaintiff is Montlha Welhemina Ngobeni, an adult female call centre operator residing at 16781 Paris Avenue, Mahlasedi Park, Polokwane.
- 3 The Second Plaintiff is Clinton Gregory Chinula, an adult male bank official residing at 3 Florida Avenue, Ext 7, Eldorado Park, Johannesburg.
- 4 The Third Plaintiff is Mamorake Tebogo Ntjana, an adult female maintenance planner currently residing at 31 Terrace View, 15 Acacia Street, Sagewood, Midrand, Johannesburg.
- 5 The Fourth Plaintiff is George Philippus Coetzee, an unemployed adult male residing at 46 Hippocrates Avenue, Hospital Park, Bloemfontein.
- 6 The Fifth Plaintiff is Presendrie Govender, an adult female former business owner, currently residing at 78 Almond Road, Illovo Glen Kingsburgh, Amanzimtoti, Durban, Kwazulu-Natal.

- 7 The Sixth Plaintiff is Annelize le Roux, an adult female farmer residing at Farm Langverwacht, Winburg, Free State.
- 8 The Seventh Plaintiff is Xolile Bosch, an adult male industrial cleaner residing at 43 Falcon Court, Woodlands Estate, Bendor, Polokwane, Limpopo.
- 9 The Eighth Plaintiff is Dr Rajesh Kumar Misra, an adult male gynaecologist practising at Empangeni Garden Clinic Hospital, in Empangeni, KwaZulu Natal.
- 10 The Ninth Plaintiff is Sebastian Laurent Stephen Schwagele-Fan Moriz, formerly known as Glenn Frederick Strutt, an adult male businessperson residing at 14 Lady Jane, Cavendish Avenue, Cambridge, England.
- 11 The Tenth Plaintiff is Shereze Curtis, an unemployed adult female residing at 205 Section A, Giyani, Limpopo.
- 12 The Eleventh Plaintiff is Alana Julie, an adult female receptionist residing at 7 Portulaca Street, Lenteguur, Cape Town, Western Cape.
- 13 The Twelfth Plaintiff is Johan Pieter Keiser, an unemployed adult male residing at 28 Minaar Street, Forest Hill, Johannesburg, Gauteng.
- 14 The Thirteenth Plaintiff is Thato Oscar Mathole, an adult male mechanical fitter residing at Stand 02780/68, Amandasig, Magalies Country Estate 2, Pretoria, Gauteng.

- 15 The Fourteenth Plaintiff is Carla Verlaat, an adult female domestic worker residing at 20 Joyce Court, Manenberg, Cape Town, Western Cape.

- 16 The Plaintiffs bring this action as representatives of the following four classes of persons:
 - 16.1 Individuals who contracted – but did not die as a consequence of – an infection of *L. monocytogenes* as a result of ingesting contaminated food products originating from, or having passed through, the Enterprise meat processing facility at Polokwane over the period 23 October 2016 to 3 September 2018 (“**the first class**”).

 - 16.2 Individuals who, while *in utero*, contracted — but did not die as a consequence of — an infection of *L. monocytogenes*, as a result of their mothers ingesting contaminated food products originating from, or having passed through, the Enterprise meat processing facility at Polokwane over the period 23 October 2016 to 3 September 2018, or who suffered adverse health consequences as a result of their mothers having contracted listeriosis in this manner (“**the second class**”).

 - 16.3 Individuals who were dependent upon another person who died as a consequence of contracting an infection of *L. monocytogenes* by ingesting contaminated food products originating from, or having passed through, the Enterprise meat processing facility at Polokwane over the period 23 October 2016 to 3 September 2018 (“**the third class**”).

16.4 Individuals who were and/or are in fact maintaining another person who contracted an infection of *L. monocytogenes*, whether or not the other person died as a consequence of the infection, by —

16.4.1 Ingesting contaminated food products originating from, or having passed through, the Enterprise meat processing facility at Polokwane over the period 23 October 2016 to 3 September 2018; or

16.4.2 Their mothers ingesting such contaminated food products whilst carrying the other person *in utero*.

(“the fourth class”).

17 The classes were certified for the purposes of this action by the Gauteng Local Division of the High Court of South Africa on **3 December 2018** (“the certification order”).

18 The Plaintiffs have been granted leave to act as representative plaintiffs for the classes in this action in terms of the certification order.

19 In terms of the certification order, the class action is pursued in two stages. The claim herein is for declaratory orders regarding the Defendants’ liability for damages that may be proven in the second stage to have been suffered by the members of the classes, with interest sought at the *mora* rate.

The Defendants

- 20 The First Defendant is Tiger Brands Limited, a public company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1944/017881/06 and with its principal place of business situated at 3010 William Nicol Drive, Bryanston, Sandton.
- 21 The Second Defendant is Tiger Consumer Brands Limited, a public company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1972/006590/06 and with its registered office at 3010 William Nicol Drive, Bryanston, Sandton.
- 22 The Third Defendant is Enterprise Foods (Pty) Ltd, a private company duly registered in terms of the company laws of the Republic of South Africa, with registration number 1993/003464/07 and with its registered office at 85 Bute Lane, Sandown, Sandton.
- 23 The Second and Third Defendant are wholly owned subsidiaries of the First Defendant.

The Relationship Between the Defendants

24 At all material times:

- 24.1 The First Defendant was a manufacturer and marketer of branded fast-moving consumer goods/products.

- 24.2 The First Defendant owned and controlled a number of subsidiary companies including the Second and Third Defendants.
- 24.3 The First Defendant and its subsidiaries operated as a vertically integrated group that functioned as a single economic entity, under the First Defendant's direction and control, as the Tiger Brands Group.
- 24.4 The annual financial reports of the First Defendant were prepared on a group basis.
- 24.5 The First Defendant was a publicly listed company and the largest consumer goods company in South Africa. The Defendants had direct and indirect interests in international food businesses in Chile, Zimbabwe, Mozambique, Nigeria, Kenya, Cameroon and the United Kingdom.
- 24.6 The Defendants employed over 20 000 persons and had annual revenues of over R30 billion.
- 24.7 The First Defendant's authority over its subsidiaries included the authority to appoint directors.
- 24.8 The First Defendant organised its business into several divisions, principally 'Exports and International', 'Home Personal Care and Baby', 'Grains', and 'Consumer Brands – Food'.
- 24.9 The Consumer Brands – Food division included the Second and Third Defendants.

- 24.10 The First Defendant delegated certain operational responsibilities for the 'Consumer Brands – Food' division to the Second Defendant. The plaintiffs have no knowledge of the nature or the extent of the powers and functions delegated by the First Defendant to the Second Defendant to be exercised over the Third Defendant.
- 24.11 Amongst other foods, the 'Consumer Brands – Food' division manufactured and marketed a category of products known as 'value added meat products', among them were ready-to-eat processed meat products, including vienna sausages, French polony and chicken polony packaged and marketed under the brand names 'Enterprise', 'Renown', 'Mieliekip' and 'Bokkie' ("**the branded products**").
- 24.12 The Third Defendant owned and operated a meat processing facility at 28 21st Street, Industria, Polokwane ("**the Polokwane Facility**") where the branded products were produced and packaged for distribution.
- 24.13 The branded products produced by the Third Defendant were marketed and distributed by the First and/or the Second and/or the Third Defendants to various wholesale and retail outlets for sale to the public.
- 24.14 The Third Defendant also sold the branded products directly to the public from two retail outlets or factory shops, one of which was located at the Polokwane Facility and another which was located at a meat processing facility that it owned and operated at Germiston ("**the Germiston Facility**").

- 24.15 The branded products were marketed and sold by the Defendants as “ready-to-eat” products which indicated and was meant to indicate that the branded products were safe to be eaten without further cooking, heating or processing.
- 24.16 The Third Defendant operated under the First and/or the Second Defendants’ authority, direction and control.
- 24.17 The authority enjoyed by the First and/or Second Defendants over the Third Defendant included authority to advise and/or instruct the Third Defendant on key appointments, organisational design, process design, training, quality control, health and safety management systems and food safety management systems at its Polokwane facility as well as in relation to the marketing and distribution of the branded products.

Listeria and listeriosis

- 25 Listeriosis is a bacterial infection caused by *Listeria. Monocytogenes* (“***L. monocytogenes***”).
- 26 Listeriosis is most commonly transmitted by the ingestion of food products contaminated with *L. monocytogenes*.
- 27 In non-susceptible persons listeriosis may cause mild, self-limiting gastroenteritis and fever (febrile gastroenteritis). Symptoms include fever, severe watery diarrhoea, nausea, headaches, and pain in joints and muscles. These symptoms can last for up to a few days, after which they naturally pass.

- 28 In susceptible persons, the bacterium may enter the blood stream (invasive listeriosis) and cause severe illness including sepsis, meningitis or encephalitis, sometimes resulting in lifelong harm and even death.
- 29 In susceptible groups of people, the overall mortality rate from listeriosis is 20-30%. The mortality rate can be as high as 70% in untreated cases involving an infection of the central nervous system.
- 30 Susceptible groups, being those at risk of severe illness, are the elderly, pregnant women and their unborn babies, infants and persons who have compromised immune systems.
- 31 In pregnant women, listeriosis may cause stillbirth or miscarriage and pre-term birth is common.
- 32 Perinatal listeriosis occurs when the infection is transmitted from the mother to her foetus *in utero* (maternal foetal listeriosis). Perinatal listeriosis can cause stillbirths, miscarriages, pneumonia, meningitis, encephalitis, and abscesses in the baby's liver and lungs.
- 33 Neonates (new-born babies less than 28 days old) can contract listeriosis from their infected mothers during birth (neonatal listeriosis).
- 34 Late diagnosis and treatment of listeriosis increases the risk of severe injury or death.

- 35 A firm diagnosis of listeriosis requires the isolation of the organism from the stools, blood and/or the cerebrospinal fluid.
- 36 Identifying the specific strain of *L. monocytogenes* requires complex gene sequencing techniques. Some strains of *L. monocytogenes* are more virulent than others.
- 37 Treatment includes prolonged administration of antibiotics, primarily ampicillin and gentamicin, to which the organism is usually susceptible.
- 38 Listeriosis has an incubation period of between 3 and 70 days.
- 39 Ready-to-eat processed meat products pose an increased hazard to consumers because:
- 39.1 the products are susceptible to contamination with *L. monocytogenes*;
 - 39.2 the bacterium can grow and multiply in that medium even when it is refrigerated;
 - 39.3 ready-to-eat processed meat products typically have a long shelf life during which time the bacterium can grow and multiply to dangerous levels;
 - 39.4 while *L. monocytogenes* is destroyed and rendered harmless by cooking or heating the contaminated product to a temperature of 75 degrees Celsius, ready-to-eat processed meat products are often not cooked or heated before they are consumed.

- 40 Contamination of ready-to-eat processed meat products can be prevented by cooking or heating the product during manufacture thereby destroying killing the bacterium. Thereafter, by appropriate food hygiene measures, recontamination can be prevented.
- 41 Appropriate food hygiene measures include:
- 41.1 maintaining a high standard of hygiene among personnel;
 - 41.2 regular, thorough and frequent cleaning of production equipment and facilities;
 - 41.3 regular sampling and laboratory testing of products to detect contamination of products by *L. monocytogenes*;
 - 41.4 regular and methodical environmental sampling (swabbing) of the production facilities and laboratory testing to detect contamination of the facilities with *L. monocytogenes*;
 - 41.5 taking prompt and effective measures to eliminate all sources of *L. monocytogenes* contamination.
- 42 At all relevant times the Defendants were aware, or should reasonably have been aware, of the matters set out at paragraphs 25 to 41 above.

The listeriosis outbreak

- 43 From January 2017 to May 2018, South Africa experienced an unprecedented listeriosis outbreak.

- 44 The outbreak was caused by the production, distribution and sale of branded products manufactured at the Polokwane Facility that were contaminated with *L. monocytogenes* (“**the contaminated products**”).
- 45 The course of the outbreak was monitored and documented by the National Institute for Communicable Diseases (“**NICD**”), which is a division of the National Health Laboratory Services.
- 46 The NICD issued monthly reports on the progress of the outbreak.
- 47 The factual averments made in the NICD reports, cited below, should be read as averments that are expressly pleaded by the Plaintiffs.
- 48 In September 2017, the NICD reported that:
- 48.1 there had been a marked increase in *L. monocytogenes* isolations across the country;
- 48.2 as of 31 August 2017, 190 cases of listeriosis had been confirmed across the country, in that year up until 31 August 2017 with the majority (122) being reported from Gauteng. Of those 122 cases, 78 were paediatric patients of whom 63 were neonates;
- 48.3 since September 2015, the Centre for Enteric Diseases (which conducts the genome sequencing tests) had received a limited number of *L. monocytogenes* isolates from across the country, on which they had conducted molecular typing. The findings showed that the majority of

isolates submitted to their laboratory were of a single strain type, which was suggestive of a common source;

48.4 an outbreak investigation to determine the source of the outbreak, with particular focus in Gauteng, was ongoing.

49 The First Defendant is a custodian member of the South African Association for Food Science and Technology (“**SAAFoST**”), a national association of food science and other technical professionals concerned with advancing the knowledge of food science and technology.

50 In September 2017, the NICD engaged with SAAFoST regarding the listeriosis outbreak and requested the help of the association’s members to identify the source of the outbreak.

51 In October 2017, and pursuant to the request from the NICD, SAAFoST sent a letter to its members informing members about the outbreak and requesting them to help locate its source by sharing information with the NICD regarding any *L. monocytogenes* isolates obtained from samples taken at their food processing facilities.

52 Many food producers responded to that request and intensified testing of their products and facilities for signs of *L. monocytogenes*.

53 In October 2017, the NICD reported that:

- 53.1 the incidence of listeriosis in South Africa had increased ten-fold since 2016, from fewer than 30 cases per year, to well over 350 in 2017;
- 53.2 as of 20 October 2017, 383 cases of listeriosis had been laboratory confirmed across the country with the majority (243) reported from Gauteng;
- 53.3 of the 243 Gauteng cases, 124 were adult cases and 88 were neonates. The balance were cases occurring in children and adolescents;
- 53.4 the NICD together with infectious diseases physicians had released a clinical advisory suggesting that ampicillin and gentamicin should be included in empiric treatment of adult meningitis in areas where listeriosis in adults is highly prevalent;
- 53.5 the Centre for Enteric Diseases had received a limited number of *L. monocytogenes* isolates from across the country, on which they conducted molecular typing including whole genome sequencing and that the majority of isolates submitted to their laboratory were of a single highly virulent epidemic-related strain type, which was suggestive of a common source;
- 53.6 enhanced surveillance had been initiated at a number of hospitals nationally to gather additional case information and that the main focus of the ongoing outbreak investigation was the collection of clinical data, outcome and food histories from as many cases as is possible so as to enable direct food testing and detection of the source;

- 53.7 all clinicians, infection control nurses and environmental health officers were encouraged to assist in improving case investigation form (“CIF”) completion and history taking;
- 53.8 clinicians were requested to support data collection through completion of CIFs and submission by email to the NICD.
- 54 In November 2017, the NICD reported that:
- 54.1 as of 22 November 2017, a total of 536 laboratory-confirmed listeriosis cases had been reported from all provinces since 1 January 2017;
- 54.2 most cases had been reported from Gauteng Province (348) followed by Western Cape (67) and KwaZulu-Natal (35);
- 54.3 in the majority of cases, diagnosis was based either from the isolation of *L. monocytogenes* in blood culture (371 out of 536) or from CSF (cerebral spinal fluid) (141 out of 536);
- 54.4 where age was reported, the ages of the infected ranged from birth to 93 years, and 37% were neonates;
- 54.5 as of 22 November 2017, 180 CIFs had been received. Apart from neonates and the elderly (older than 65 years), other risk factors reported in adults with listeriosis were pregnancy and HIV infection;
- 54.6 final outcome data was available for 65 cases, of which 34 had died;
- 54.7 whole genome sequencing had been performed on 189 *L. monocytogenes* isolates. Fifteen sequence types had been identified.

71% of isolates (134 out of 179) belonged to a single sequence type, namely sequence type 6 (“**ST6**”);

54.8 the isolates in the ST6 cluster were very closely related, showing less than 20 single nucleotide polymorphism differences. This suggested that most cases in the outbreak had been exposed to a widely available, common food type/source;

54.9 actions to assist with identification of the source included in-depth interviews of persons who had had been diagnosed with listeriosis and engagement with the food control industry to identify potential sources and ongoing data collection.

55 In December 2017, the NICD reported that:

55.1 as of 19 December 2017, a total of 647 laboratory-confirmed listeriosis cases had been reported to the NICD;

55.2 most cases had been reported from Gauteng (399) followed by Western Cape (84) and KwaZulu-Natal (45);

55.3 where age was reported (620), ages ranged from birth to 93 years (median 26 years) and 39% (241 out of 620) were neonates;

55.4 of neonatal cases, 232 out of 241 had early-onset disease (disease becoming apparent at 6 days or younger);

- 55.5 whole genome sequencing of available clinical isolates (including archived isolates from 2015 and 2016), and food and food production facility environmental isolates was ongoing;
- 55.6 of the 248 isolates sequenced by 19 December 2017, 201 were clinical isolates received since 1 January 2017. Of these 201 isolates, 85% (170/201) were ST6 and were very closely related, representing a single strain of *L. monocytogenes*. This finding supported the NICD's working hypothesis of a single source of food contamination causing the outbreak, i.e. a single widely consumed food product, or multiple food products produced at a single facility;
- 55.7 a multisectoral outbreak response team with representatives from the National Department of Health, the Department of Agriculture, Forestry and Fishery, the Department of Trade and Industry, the NICD and other relevant stake-holders had been tasked by the Minister of Health to coordinate the outbreak response activities. This included interviewing case-patients to obtain detailed food consumption histories, culture of available food items from affected patients' homes, trace-back to source/s of food item/s found to be contaminated, and screening of abattoirs and food processing facilities;
- 55.8 members of the public were advised to practice the WHO '5 keys to safer food' principles, which were available on the NICD website.

56 On 10 December 2017 the Consumer Goods Council of South Africa (“CGCSA”), of which the First Defendant is a member, issued a press release entitled ‘CGCSA Statement on the Outbreak of Listeriosis’ that included the following:

“RESPONSE BY CGCSA MEMBERS

We wish to confirm that Retailer and Manufacturer Members already adhere to the strictest hygienic and food safety standards, which are regularly monitored by the Department of Health. Our concern is always the health of consumers and our members will not compromise on this non-negotiable requirement.

CGCSA members have ongoing routine testing schedules in place to monitor all food products for pathogens and to take action if these organisms are detected. The members have, as a result of the latest outbreak, taken additional precautionary measures to ensure the safety of food products sold to consumers.”

57 On 20 December 2017, SAAFoST released a statement, circulated to its members that stated *inter alia*:

“This is undoubtedly one of the worst listeriosis cases in global history. A large percentage (74%) of all the clinical isolates belong to the same sequence type i.e. ST6 – this means that these isolates originate from a single source, most likely a food product on the market.

The outbreak is now across all provinces. Considering the rapid increase seen, this outbreak has not yet peaked. This is very disturbing as we shall most likely see more cases and, most unfortunately, more deaths in the next few weeks.

Come on South Africans, let's end this by working with the NICD to identify the source and remove it from the market!"

58 In January 2018, the NICD reported that:

58.1 as of 23 January 2018, 820 laboratory-confirmed listeriosis cases had been reported to NICD since 1 January 2017;

58.2 most cases had been reported from Gauteng (486) followed by Western Cape (105) and KwaZulu-Natal (59);

58.3 where age was reported (in 784 cases), ages range from birth to 93 years (median 18 years) and 42%, (329 out of 784) were neonates;

58.4 of neonatal cases, 96% (317 out of 329) had early-onset disease;

58.5 final outcome data was available for 238 cases, of which 34% (82) died;

58.6 whole genome sequencing of available clinical, food and food production facility environmental isolates was ongoing;

58.7 of the clinical isolates received since 1 January 2017, 400 had been sequenced by 23 January 2018;

58.8 although the isolates belonged to 20 sequence types (ST), 90% (358 out of 400) were ST6 and are very closely related, representing a single strain of *L. monocytogenes*. This ST6 strain continued to be identified in isolates from all nine provinces, which supported the hypothesis that a single contaminated food commodity, or multiple food commodities

produced at a single contaminated food production/processing/facility, were responsible for the outbreak;

58.9 a total of 111 food and 22 food production/processing environmental isolates had been sequenced. Whilst 24 sequence types had been identified amongst these food and food production/processing environment isolates, none of them had been ST6.

59 On 12 January 2018, nine children were admitted to the Chris Hani Baragwanath Hospital in Soweto with symptoms of febrile gastroenteritis. It was established that the children had consumed polony at the same crèche facility.

60 Environmental Health Practitioners visited the crèche and obtained samples of the polony served to the children, including polony manufactured by the Defendants at the Polokwane Facility.

61 The samples of polony, which were manufactured at the First Defendant's Polokwane Facility, subsequently tested positive for *L. monocytogenes*, and specifically for the ST6 strain of *L. monocytogenes*.

62 On or about 2 February 2018, several officials, including three technical advisers from the World Health Organisation, inspected the Polokwane Facility which produced the polony sample from the Soweto creche that tested positive for the ST6 *L. monocytogenes* outbreak strain.

63 Some 170 samples were taken from the Polokwane Facility which were subsequently tested for *L. monocytogenes*.

- 64 The testing took place at an accredited laboratory between 17 and 22 February 2018. Some 70 of the 170 samples tested positive for *L. monocytogenes*.
- 65 Subsequently, whole genome sequencing was carried out on the samples and 28 of the samples were confirmed to be the ST6 strain of *L. monocytogenes*.
- 66 On 15 February 2018, a range of ready-to-eat processed meat products were purchased by the Department of Health from the Factory shop located at the First Defendant's Germiston Facility. Some ten of 13 samples tested positive for *L. monocytogenes* and seven of those were ST6.
- 67 A number of the contaminated products were not manufactured at the Polokwane Facility and were likely cross contaminated when they came into contact with products contaminated with *L. monocytogenes* from the Polokwane Facility.
- 68 In February 2018, the NICD reported that:
- 68.1 as of 20 February 2018, 915 laboratory-confirmed listeriosis cases had been reported to NICD since 1 January 2017;
 - 68.2 most cases had been reported from Gauteng (541) followed by Western Cape (112) and KwaZulu-Natal (66);
 - 68.3 where age was reported ages range from birth to 93 years and 363 were neonates;
 - 68.4 of 363 neonatal cases, 350 had early-onset disease;

- 68.5 final outcome data was available for 624 cases, of which 27% or 172 had died;
- 68.6 a team of interviewers of the NICD had conducted over 90 interviews with listeriosis case patients to obtain detailed food consumption histories;
- 68.7 analysis of the data showed that ready-to-eat processed meat products (specifically polony) had been consumed in the previous month by more than 80% of those patients;
- 68.8 ready-to-eat processed meat products had been linked to numerous outbreaks of listeriosis worldwide;
- 68.9 such products included viennas, polonies, russians, ham, salami, peperoni, other cold meats, sausages, various corned meats, refrigerated meat spreads/pates and similar products found in the processed meat section of food retailers and butcheries;
- 68.10 such products can be contaminated when the contaminated raw product is inadequately cooked, or more commonly, contamination can occur post-processing (i.e. at any stage after the cooking /curing process – for example during packaging or slicing);
- 68.11 *L. monocytogenes* survives and grows at refrigeration temperature and since many ready-to-eat processed meat products have a long shelf-life, this provides an ideal environment for the proliferation of the bacteria;

- 68.12 such products are usually not cooked/heated before eating so the bacteria escape a final opportunity to be killed before consumption;
- 68.13 persons at risk for developing listeriosis were encouraged to avoid or to cook all ready-to-eat processed meat products while further investigations were underway.
- 69 On 4 March 2018, the Minister of Health announced that the NICD had determined that ready-to-eat meat products manufactured at the Polokwane Facility had been positively identified as the source of the listeriosis outbreak.
- 70 On 5 March 2018, the Defendants closed the Polokwane Facility and recalled their ready-to-eat processed meat products following a safety recall of the impugned products by the National Consumer Commission in terms of section 60(2) of the Consumer Protection Act No. 68 of 2008 (“**the CPA**”).
- 71 In March 2018, the NICD reported that:
- 71.1 the source of the *L. monocytogenes* outbreak had been identified as ready-to-eat processed meat products manufactured at the Polokwane Facility;
- 71.2 the recall of implicated food products was announced on 4 March 2018;
- 71.3 it was however expected that new outbreak-related cases would continue to be reported, for the following reasons:
- 71.3.1 the incubation period of listeriosis can be up to 70 days;

- 71.3.2 the implicated food products have a long refrigeration shelf life, and it is possible that despite the recall some products were not removed from retail or home settings, and consumption of contaminated food might yet occur; and
- 71.3.3 the possibility of cross contamination of other types of foods in the retail or home setting may result in additional cases;
- 71.4 as of 26 March 2018, a total of 982 laboratory confirmed listeriosis cases had been reported to NICD since 1 January 2017;
- 71.5 most cases had been reported from Gauteng (576) followed by Western Cape (121) and KwaZulu-Natal (71);
- 71.6 final outcome data was available for 687 out of 982 cases, of which 28% (189) had died.
- 72 On 26 April 2018, the First Defendant released a press statement, reporting that it had received independent laboratory test results confirming the presence of the ST6 strain of *L. monocytogenes* in samples of ready-to-eat meat products manufactured at the Polokwane Facility.
- 73 Following the recall of the Defendants' products, the number of listeriosis cases steadily decreased to a point where on 3 September 2018 the Minister of Health announced the end to the listeriosis outbreak.
- 74 In its final report on the listeriosis outbreak in September 2018, the NICD reported that:

- 74.1 South Africa had experienced the largest outbreak of listeriosis globally, between January 2017 and May 2018;
- 74.2 owing to the fact that the number of listeriosis cases detected within the country had gone back to baseline levels and no ST6 (the outbreak strain) had been detected from June 2018 to date, the outbreak was declared over by the Minister of Health Dr Aaron Motsoaledi on 3 September 2018, with 1065 confirmed cases and 218 recorded deaths;
- 74.3 *L. monocytogenes* ST6 was subsequently confirmed by the NICD to be the strain responsible for the outbreak.

The harm suffered by the class members

- 75 During the class period, the following categories of persons consumed the contaminated products ((or products cross contaminated by these products) and contracted listeriosis as a result:
- 75.1 members of the first class;
- 75.2 the mothers of members of the second class while those class members were *in utero*;
- 75.3 persons on whom members of the third class were dependent; and
- 75.4 persons maintained by members of the fourth class.

- 76 The class members suffered damages as a result of these persons consuming the contaminated products (or products cross contaminated by these products).
- 77 Members of the first class suffered harm when they consumed the contaminated products (or products cross contaminated by these products) and contracted listeriosis.
- 78 The damages suffered by members of the first class fall into the following categories:
- 78.1 permanent and/or temporary pain and suffering;
 - 78.2 permanent and/or temporary disability;
 - 78.3 permanent and/or temporary disfigurement;
 - 78.4 past and future medical expenses;
 - 78.5 past and future loss of income and/or earning capacity;
 - 78.6 psychological trauma;
 - 78.7 emotional shock; and
 - 78.8 loss of amenities of life.

- 79 Members of the second class suffered harm, after contracting perinatal listeriosis *in utero* or neonatal listeriosis during birth, as a result of their mothers having consumed the contaminated products (or products cross contaminated by these products) and becoming infected with *L. monocytogenes* themselves.
- 80 The damages suffered by members of the second class fall into the following categories:
- 80.1 permanent and/or temporary pain and suffering;
 - 80.2 permanent and/or temporary disability;
 - 80.3 permanent and/or temporary disfigurement;
 - 80.4 medical expenses incurred, or to be incurred, by them, or on their behalf;
 - 80.5 psychological trauma;
 - 80.6 loss of amenities of life; and/or
 - 80.7 future loss of income and/or earning capacity.
- 81 Members of the third class suffered harm when persons they were dependent on died from listeriosis, contracted as a result of their consumption of contaminated products (or products cross contaminated by these products).

82 The damages suffered by members of the third class fall into the following categories:

82.1 loss of support;

82.2 funeral and burial expenses;

82.3 psychological trauma and/or emotional shock; and

82.4 past and/or future medical costs incurred in relation to the treatment of the psychological trauma or emotional shock sustained by them.

83 Members of the fourth class suffered harm arising from their obligation to care for and/or maintain another person/s who:

83.1 contracted listeriosis after consuming contaminated products (or products cross contaminated by these products); or

83.2 contracted listeriosis *in utero* or during birth as a result of their mothers having consumed contaminated products (or products cross contaminated by these products) and becoming infected with *L. monocytogenes*.

84 The damages suffered by members of the fourth class fall into the following categories:

84.1 medical expenses incurred or to be incurred on the other person's behalf;

- 84.2 additional costs of care and/or maintenance incurred or to be incurred occasioned by the other person's illness and its sequelae;
- 84.3 past and/or future loss of income occasioned by the increased burden of care and/or maintenance caused by the other person's illness and its sequelae;
- 84.4 funeral expenses; and
- 84.5 emotional shock and/or psychological trauma and the medical costs associated with the treatment of same.

The Defendants' liability under the Consumer Protection Act

- 85 The CPA provides for strict liability of producers, distributors, retailers and/or suppliers of goods for the harm caused wholly or partly as a consequence of the supply of unsafe, defective or hazardous goods and inadequate instructions or warnings pertaining to any hazard arising from or associated with the use of any goods.
- 86 The First and/or the Second and/or the Third Defendants produced, distributed, retailed and/or supplied the contaminated products to consumers for consumption. The Defendants are producers and/or distributors and/or retailers as contemplated in section 61 of the CPA.

- 87 The First and/or the Second and/or the Third Defendants marketed the contaminated products under their brand names, and applied their business name, trademarks and/or visual representations on the packaging of those products.
- 88 The contaminated products are goods as contemplated in section 1 of the CPA.
- 89 The contaminated products were unsafe and/or defective and/or hazardous for human consumption in that they were contaminated with *L. monocytogenes*.
- 90 The Defendants marketed the contaminated products on the basis that they were safe and ready-to-eat without further heating or cooking.
- 91 The First and/or the Second and/or the Third Defendants did not provide any instructions or warnings, alternatively, any adequate instructions or warnings, to the consumers of the contaminated products pertaining to the hazard or risk associated with the consumption of food that may be contaminated with *L. monocytogenes* and the means by which they could guard against such hazard or risk.
- 92 As a consequence:
- 92.1 persons who consumed the contaminated products (or products cross contaminated by these products) contracted listeriosis and suffered harm; and

92.2 children who were born to mothers who had consumed the contaminated products (or products cross contaminated by these products) contracted listeriosis and suffered harm.

93 As a result of the infections of the persons who consumed the contaminated products (or products cross contaminated by these products), the members of the classes suffered the loss and harm of the nature set out in section 61(5) of the CPA, which includes the categories of loss or harm suffered by them as set out in paragraphs 78 to 84 above.

94 The class members' claims for damages are brought within the time periods contemplated in section 61(4)(d) of the CPA.

95 In the premises, the Defendants are liable for the damages suffered by the class members, arising from the consumption of the contaminated products (or products cross contaminated by these products).

The Defendants' delictual liability

96 The Defendants produced and distributed ready-to-eat processed meat products that they knew, or reasonably should have known, were inherently susceptible to contamination by *L. monocytogenes*.

97 The Defendants were in control of the production, packaging, and distribution of potentially dangerous ready-to-eat processed meat products.

98 The Defendants were in a position to prevent the class members from sustaining harm from those ready-to-eat processed meat products because —

98.1 the Defendants were aware, alternatively should reasonably have been aware, of methods to detect the presence of *L. monocytogenes* in their products; and

98.2 the Defendants were aware, alternatively should reasonably have been aware, of methods to prevent the contamination of their products with *L. monocytogenes*.

99 The Defendants were aware of the potential danger of producing, packaging, and distributing contaminated ready-to-eat processed meat products and the potentially harmful consequences of doing so.

100 The Defendants, as food producers, enjoyed a special relationship with the class members, as consumers of those food products.

101 This relationship required the Defendants to ensure that the products they produced, packaged, and distributed to those consumers were —

101.1 fit for human consumption;

101.2 not contaminated with *L. monocytogenes*; and

101.3 did not contain any hidden dangers of which the consumers were unaware and against which consumers were unable to guard themselves.

102 The Defendants further owed a duty to consumers and to the members of the classes to take all reasonable measures to ensure that the ready-to-eat processed meat products produced at the Polokwane facility were not contaminated with *L. monocytogenes*, such duty entailed the following:

102.1 To establish and maintain an effective food safety management system that should be science based and systematic and having as its purpose to identify specific hazards and the measures to be taken for their control to ensure the safety of food and which is widely accepted as best practice in the international and local food industry.

102.2 The HACCP food safety management system is such a system and any food safety management should incorporate the key features of that system which include:

102.2.1 Suitably trained and qualified personnel with appropriate product specific knowledge and expertise of the production process and of food safety management systems should be appointed to design, apply and maintain the system;

102.2.2 A comprehensive hazard analysis should be conducted to determine:

- (a) the likely occurrence of hazards and severity of their adverse health effects, taking into account the nature of the product its, use and the market at which it is aimed and the food labelling
- (b) the qualitative and/or quantitative evaluation of the presence of hazards including:
 - (a) the hazards associated with the survival or multiplication of microorganisms of concern;
 - (b) the hazards associated with the production or persistence in foods of toxins, chemicals or physical agents; and,
 - (c) conditions that may give rise to such hazards;

102.2.3 A consideration of what control measures exist which can be applied to eliminate or reduce each hazard identified;

102.2.4 The identification of critical points in the production process where the identified control measures, designed to eliminate or reduce the likely occurrence of a hazard to an acceptable level, can be introduced. (critical control points);

102.2.5 Critical limits/parameters should be established for each critical control point, such as levels of bacterial contamination

and temperature, they may also include sensory parameters such as appearance and texture;

- 102.2.6 Establish a monitoring system for each control point to ensure the limits are not exceeded and that they remain within acceptable parameters and that deviations and trends can be identified in good time before limits are exceeded;
- 102.2.7 Specific corrective actions must be determined for each critical control point in order to deal with any deviations when they occur. Deviation procedures, as well as disposal procedures for out of parameter products, should be documented;
- 102.2.8 Procedures should be established to verify that the food safety management system is working properly. Such procedures to include audits, random sampling and analysis, reviews of record keeping and of deviations.
- 102.2.9 Efficient and accurate record keeping systems should be established and maintained. Records to be retained include hazard analysis, critical control point determination, critical limit determination as should critical control point monitoring records, records of deviations and corrective actions taken as well as records of any changes to the food safety management system.

102.2.10 Staff should be trained to know and understand the operation of the food safety management system and its importance.

102.3 A duty to conduct regular and structured testing for the presence of *L. monocytogenes* in the products, in the facility and in particular those parts of the facility where the cooked products are brined or cooled or deskinning (in the instance of Vienna sausages) or packed or despatched and to take immediate and effective corrective measures to disinfect any place or area found to be contaminated.

102.4 A duty to use an independent laboratory to test samples and/or to test control samples for *L. monocytogenes* in order to ensure that the in-house testing for *L. monocytogenes* is reliable and accurate.

102.5 A duty to use a testing method to identify *L. monocytogenes* that is accurate and reliable.

102.6 A duty to establish and maintain effective measures to prevent cross contamination from those parts of the facility where raw meat products are processed and handled to those parts of the facility where the cooked products are cooled, and packed.

102.7 A duty to establish a protocol for the investigation, testing and the recall of products in circumstances where the Defendants are alerted to the possibility or likelihood that their products may be implicated in any outbreak of a food borne disease such as listeriosis.

102.8 A duty to actively follow developments in the field of food safety and public health that may alert the Defendants to an outbreak of disease potentially associated with contamination of their products.

102.9 A duty to comply with certain statutory duties including:

102.9.1 The provisions of section 2(b)(i) of the Foodstuffs Cosmetics and Disinfectants Act No. 54 of 1972 (**“the Foodstuffs Act”**) which prohibits the Defendants from manufacturing and selling any foodstuff *“... which is contaminated, impure or decayed or is in terms of any regulation deemed to be, harmful or injurious to human health...”*.

102.9.2 The *Regulations Governing General Hygiene Requirements for Food Premises and the Transport of Food* promulgated in terms of section 15(1)(n) read with section 15(7)(b) of the Foodstuffs, Act, (Government Notice R 962 of 23 November 2012) and in particular:

- (i) Regulation 5.2 which requires *“food premises to be of such a location, design, construction, and finish that (i) food can be manufactured without creating a health hazard, and (ii) food can be effectively protected from biological contamination”*;
- (ii) Regulation 5.3 which requires that *“all interior surfaces of walls, sides or ceilings, or of roofs without ceilings,*

and the surfaces of floors, or any other similar horizontal or vertical surfaces that form part of or enclose the food-handling area shall have no open joints or open seams and shall be made of smooth, rust-free, non-toxic, cleanable and non-absorbent material that is dust-proof and water-resistant’;

- (iii) Regulation 6 which requires *inter alia* that “any equipment, utensil or basin or any other surface which comes into direct contact with food shall be (a) cleaned and washed before food comes into direct contact with it for the first time during each work shift; and (b) cleaned and washed, as and when necessary, during and/or immediately after the handling of food, so that contamination of the food that comes into contact with any such surface or facility is prevented, and any such surface or facility shall, before food comes into direct contact therewith, contain no more than 100 viable micro-organisms per cm² upon analysis, conducted in accordance with acknowledged scientific microbiological methods of analysis, of a sample taken in accordance with the swab technique prescribed in the *Efficacy of Cleaning Plant, Equipment and Utensils*”;
- (iv) Regulation 10 which *inter alia* requires that “a person in charge of food premises shall ensure that (i) he or she

is suitably qualified or otherwise adequately trained in the principles and practices of food safety and hygiene, as appropriate: Provided that such training is accredited and conducted in accordance with the relevant SETA / SAQA requirements; (ii) any other person working on the food premises, is suitably qualified or adequately trained in the principles and practices of food safety and hygiene, as appropriate, by an inspector or any other suitable person; (iii) routine assessments are conducted to determine the impact of the training required under this regulation and arrange follow up training as applicable”;

- (v) Regulation 11.1 which requires that “*food, a facility or a container shall not be handled by any person - (a) whose fingernails, hands or clothes are not clean; (b) who has not washed his or her hands thoroughly with soap and water or cleaned them in another effective manner (i) immediately prior to the commencement of each work shift; (ii) at the beginning of the day’s work or after a rest period; (iii) after every visit to a latrine or urinal; (iv) every time he or she has blown his or her nose or after his or her hands have been in contact with perspiration or with his or her hair, nose or mouth; (v) after handling a handkerchief, money or a refuse container or refuse; (vi) after handling raw vegetables, fruit, eggs, meat or fish*

and before handling ready-to-use food; (vii) after he or she has smoked or used tobacco in any form or on return to the food premises; or (viii) after his or her hands have become soiled or contaminated for any other reason.”

102.9.3 The Regulations relating to the Application of the Hazard Analysis and Critical Control Point System (“**HACCP System**”) [GNR. 908 of 27 June 2003], which require —

- (i) the creation of, maintenance of and adherence to an appropriate food safety monitoring system; and
- (ii) Compliance with standards set out in the *Codex Alimentarius*.

102.10 A duty to apply internationally recognised standards, codes of practice, guidelines and recommendations relating to foods, food production and food safety, determined by the World Health Organisation and the Food and Agriculture Organisation of the United Nations including:

102.10.1 *The Guidelines on the Application of the General Principles of Food Hygiene to the Control of L. monocytogenes in Food* (CAC/GL 61-2007), which provide *inter alia* that:

- (a) *“Equipment and facilities should be designed, constructed and laid out to ensure cleanability and to minimise the potential for L. monocytogenes*

harbourage sites, cross-contamination and recontamination.” (Section IV)

- (b) *“Well structured cleaning and disinfection procedures should be targeted against L. monocytogenes in food processing areas where ready-to-eat foods are exposed to reduce [i] the likelihood that the product will be contaminated after processing, [and] [ii] the level of contamination in the finished product.” (Section VI)*
- (c) *“To prevent workers from transferring L. monocytogenes from contaminated surfaces to food or food contact surfaces.” (Section VII)*
- (d) *“Measures should be taken where necessary to: [i] protect food from potential sources of contamination including harbourage sites for L. monocytogenes in transportation equipment and to prevent the co-mingling of raw and ready-to-eat product; [and (ii)] provide an adequately refrigerated environment (so that product temperature should not exceed 6°C, preferably 2°C - 4°C).” (Section VIII)*

102.10.2 Hazard Analysis and Critical Control Point (“**HACCP**”) System and Guidelines for its application, Annex to CAC/RCP 1-1969 (Rev. 4 - 2003).

103 The object of the abovementioned statutory obligations and international standards of best practice was to prevent harm to consumers of inter alia ready-to-eat processed meat.

104 In the premises these statutory obligations were enacted for the benefit of, inter alia, the classes.

105 A reasonable manufacturer with the resources, skills and knowledge of the Defendants would have:

105.1 foreseen the risk and potential for harm arising from manufacturing and distributing contaminated ready-to-eat processed meat products; and

105.2 taken appropriate steps to avoid such harm from occurring, including the measures described above.

106 The First and/or the Second and/or the Third Defendants wrongfully and negligently breached the duties of care that they owed consumers and the class members in all or any of following respects:

106.1 Failed to take reasonable measures to ensure that the products produced at and distributed from the Polokwane Facility were not contaminated with *L. monocytogenes*.

106.2 Failed to take reasonable steps to implement the HACCP food safety management system or any other food safety management system which was science-based and systematic and which could be used to

identify specific hazards and measures for their control, in accordance with best practice in the international and local food industry:

- 106.2.1 Failed to take reasonable steps to ensure that suitably trained and qualified personnel with appropriate product specific knowledge and expertise of the production process and of food safety management systems were appointed to design, apply and maintain the food safety management system for the Polokwane Facility.
- 106.2.2 Failed to take reasonable steps to ensure that a proper hazard analysis was done sufficient to assess the likely occurrence of a listeriosis outbreak and its potential scale and severity.
- 106.2.3 Failed to take reasonable steps to ensure that a proper or adequate assessment was done of the control measures which could be put in place to eliminate or reduce the risk of a listeriosis outbreak caused by the contamination of food products with *L. monocytogenes*.
- 106.2.4 Failed to take reasonable steps to ensure that adequate control measures were introduced at the cooking, deskinning and packing and despatch stages of the production process to eliminate or reduce the contamination hazard to an acceptable level.
- 106.2.5 Failed to take reasonable steps to establish an effective monitoring system at the polony cooker/heater to ensure that

the polony was heated to a temperature higher than 75 degrees Celsius in order to kill and render harmless *L. monocytogenes*.

- 106.2.6 Failed to take reasonable steps to establish an effective monitoring system at the deskinning stage (sausages) and at the packing and despatch stages of the production process in order to ensure that products that were contaminated with *L. monocytogenes* were detected and removed before they were distributed.
- 106.2.7 Failed to take reasonable steps to stipulate the appropriate corrective actions to be taken when *L. monocytogenes* was detected at any critical control point to ensure that the source of the contamination was identified and dealt with.
- 106.2.8 Failed to take reasonable steps to ensure that deviations and remedial measures taken were documented.
- 106.2.9 Failed to take reasonable steps to put in place effective measures to verify that the food safety management system was working properly, including audits, random sampling and analysis, periodic reviews of record keeping and of deviations.
- 106.2.10 Failed to take reasonable steps to ensure that efficient and accurate records of hazard analysis, critical control point determination, critical limit determination, critical control point monitoring, records of deviations and corrective actions taken

as well as records of changes to the food safety management system were maintained.

106.2.11 Failed to take reasonable steps to ensure that food handling staff were trained to know and understand the operation of the food safety management system and its importance.

106.3 Failed to take reasonable steps to ensure that regular and structured testing was conducted for the presence of *L. monocytogenes* in the facility and in particular those parts of the facility where the cooked products are processed and packaged and then to ensure that immediate and effective measures to disinfect any place or area found to be contaminated were taken.

106.4 Failed to take reasonable steps to ensure that the internal laboratory testing done by the Defendants to test for *L. monocytogenes* was accurate and reliable.

106.5 Failed to take reasonable steps to test the accuracy and reliability of its own in-house testing against tests performed by an independent laboratory using the same and different testing protocols.

106.6 Unreasonably failed to establish effective measures to prevent cross contamination of *L. monocytogenes* from those parts of the facility where raw meat products are processed and handled to those parts of the facility where the cooked products are processed and packaged.

106.7 Failed to take reasonable measures to establish a protocol for the investigation, testing and the recall of products in circumstances where

the Defendants were alerted to the possibility or likelihood that contaminated products may be implicated in a listeriosis outbreak prompt and effective action was taken either to confirm or eliminate the Defendants' products as the source of the outbreak.

- 106.8 Failed to take reasonable measures to stay abreast of local developments and the local context in the field of food safety and public health that would have alerted the Defendants to the listeriosis outbreak and its possible association with their products and its possible consequences.
- 106.9 Failed to take reasonable measures to ensure that their ready-to-eat meat products were packaged, transported, stored, handled, cleaned and packaged in a manner that would prevent the cross contamination of uncontaminated products by contaminated products.
- 106.10 The Defendants failed to take reasonable measures to ensure good hygiene at the Polokwane Facility and in particular failed to take effective measures to control or eliminate *L. monocytogenes* contamination in the facility through regular and effective cleaning of the facility, equipment and drains.
- 106.11 The Defendants failed to take reasonable measures to establish an effective environmental sampling program in the facility that would detect contamination by *L. monocytogenes* in the facility and an effective correction action plan if it was detected.

- 106.12 The Defendants failed to take reasonable measures to ensure that the laboratory testing that was carried out on product samples and swabs to test for the presence of *L. monocytogenes* was accurate and reliable.
- 106.13 The Defendants unreasonably failed to make use of independent laboratories to test samples and environmental swabs for contamination with *L. monocytogenes*.
- 106.14 Post-September or October 2017, the Defendants unreasonably failed to conduct Whole Gene Sequencing (WGS) or Multilocus Sequence Typing (MLST) on product samples or swabs that tested positive for *L. monocytogenes* to identify the sequence type.
- 106.15 Failed to take reasonable measures to ensure that adequate or sufficient accessible handwashing facilities were provided for employees.
- 106.16 Failed to take reasonable steps to comply with the provisions of section 2(b)(i) of the Foodstuffs Act and applicable regulations by manufacturing and selling contaminated foodstuffs that were harmful or injurious to human health.
- 106.16.1 Failed to take reasonable steps to ensure that all interior surfaces of walls, sides or ceilings, or of roofs without ceilings, and the surfaces of floors, or any other similar horizontal or vertical surfaces that form part of or enclose the food-handling area at the Polokwane Facility had no open joints or open seams and were made of smooth, rust-free, non-toxic,

cleanable and non-absorbent material that was dust-proof and water-resistant.

106.16.2 Failed to take reasonable steps to ensure that all equipment, utensils or basins or any other surfaces which came into direct contact with food were cleaned and washed before food come into direct contact with such equipment or utensils or basins or services, for the first time during each work shift; and was cleaned and washed, as and when necessary, during and/or immediately after the handling of food as is required to ensure that, before food comes into direct contact with it should contain no more than 100 viable micro-organisms per cm² upon analysis, conducted in accordance with the prescribed method.

106.16.3 Failed to take reasonable steps to ensure that the persons in charge of the food processing facilities at the Polokwane Facility were suitably qualified or otherwise adequately trained in the principles and practices of food safety and hygiene, and accredited.

106.16.4 Failed to take reasonable steps to ensure that persons working on the food premises, were suitably qualified or adequately trained in the principles and practices of food safety and hygiene.

106.16.5 Failed to take reasonable steps to ensure that routine assessments are conducted of staff to determine the impact

of the training provided and to require retraining where it fell short.

106.16.6 Failed to take reasonable steps to ensure that that food and equipment was not handled by any person (a) whose hands or clothes are not clean; (b) whose fingernails are not trimmed and clean; (c) who has not washed his or her hands thoroughly with soap and water or cleaned them in another effective manner (i) immediately prior to the commencement of each work shift; (ii) at the beginning of the day's work or after a rest period; (iii) after every visit to a latrine or urinal; (iv) every time he or she has blown his or her nose or after his or her hands have been in contact with perspiration or with his or her hair, nose or mouth; (v) after handling a handkerchief, money or a refuse container or refuse; (vi) after handling raw vegetables, fruit, eggs, meat or fish and before handling ready-to-use food; (vii) after he or she has smoked or used tobacco in any form or on return to the food premises; or (viii) after his or her hands have become soiled or contaminated for any other reason.

106.17 Failed to take reasonable steps to ensure that equipment and facilities at the Polokwane Facility were designed, constructed and laid out to ensure in a manner that facilitated easy and effective cleaning to minimise the potential for *L. monocytogenes* harbourage sites, cross contamination and recontamination.

- 106.18 Failed to take reasonable measures to ensure that equipment and facilities were designed, constructed and laid out to ensure cleanability and to minimise the potential for *L. monocytogenes* harbourage sites, cross contamination and recontamination.
- 106.19 Failed to take reasonable measures to ensure that well-structured cleaning and disinfection procedures were targeted against *L. monocytogenes* in food processing areas where ready-to-eat foods were exposed to reduce the likelihood that the product may will be contaminated after processing.
- 106.20 Failed to take reasonable measures to prevent workers from transferring *L. monocytogenes* from contaminated surfaces to food or food contact surfaces.
- 106.21 Failed to take reasonable measures to follow the guidelines for the application of a HACCP food safety management system as set out in the FAO publication “Hazard Analysis and Critical Control Point (“**HACCP**”) System and Guidelines for its application”, Annex to CAC/RCP 1-1969 (Rev. 4 - 2003).
- 107 As a result of the First and/or the Second and/or the Third Defendants’ wrongful, and unlawful conduct as set out above:
- 107.1 The Defendants’ produced, distributed and sold ready-to-eat processed meat products that were contaminated with *L. monocytogenes*;

- 107.2 The Defendants' food safety management system failed to prevent or to detect the manufacture, distribution and sale of contaminated products, from the Polokwane Facility;
- 107.3 The contaminated products produced and distributed by the Defendants cross contaminated other products that they came in contact with at the Germiston Facility and likely elsewhere;
- 107.4 The contaminated products were consumed by consumers and many became infected and developed listeriosis ("**the Outbreak**");
- 107.5 Over the course of the Outbreak no less than 1068 people were diagnosed with listeriosis and 218 persons died in what was the biggest listeriosis outbreak in recorded history;
- 107.6 As a result of the Defendants' failure to take reasonable measures to confirm or to eliminate the Polokwane Facility as a possible source of the Outbreak, after they became aware or should reasonable have become aware of that possibility in September or October 2017, many more persons became sick and many more died than would have been the case if the Defendants had taken such measures.
- 108 The Defendants' wrongful and negligent breach of their legal duties is the factual and legal cause of the damages suffered by the members of the classes.
- 109 There are no factors which militate against the Defendants legally being held liable for the damages suffered by the classes.

110 In the second phase of these proceedings, the individual class members shall establish that each of them suffered damages as a result of the Outbreak and the nature and quantum of such damages.

111 In the premises, the Defendants are liable to compensate the individual class members for the damages that they prove.

Constitutional / Exemplary / Punitive Damages

112 The First Defendant is Africa's largest consumer products company, with revenues of some R30 billion in the financial year ending May 2016. Sales of food products account for the greatest proportion of that revenue.

113 The Defendants ready-to-eat meat products were consumed by tens of thousands of South African consumers every day.

114 The listeriosis outbreak was the biggest outbreak of listeriosis in recorded history. The outbreak was caused by the consumption of contaminated products produced and/or manufactured and/or distributed by the Defendants.

115 Approximately 1068 people were diagnosed with listeria during the outbreak, 218 persons died, and a large number of pregnant women suffered miscarriages or stillbirths.

116 The scale of this catastrophe has to do with the fact that for a period of more than 14 months, from January 2017 to 4 March 2018, the Defendants produced and/or

manufacture and/or distributed large quantities of ready-to-eat processed meat products that were contaminated with a potentially lethal pathogen, *L. monocytogenes*.

117 At no time during this period did the Defendants recognise that they were producing and distributing contaminated products, alternatively and to the extent that they did recognise this, the Defendants took no effective action to stop the production, distribution and sale of the contaminated products.

118 Even after the Defendants became aware of the outbreak and it's appalling human toll and learned of the likelihood that it was associated with a widely consumed and widely distributed foodstuff from a single source, such as those manufactured at its facilities, the Defendants failed to take appropriate measures to eliminate their ready-to-eat processed meat products as a possible source of the outbreak.

119 The failure by the Defendants to detect the contamination of their products with *L. monocytogenes* or to take effective measures to stop the production and distribution of contaminated products over a 14 month period demonstrates the complete and total failure of the Defendants to establish and maintain an effective food safety management system.

120 The Defendants failure to detect the contamination of its products at the Polokwane facility with *L. monocytogenes* is all the more inexcusable when regard is had to the scale and extent of the contamination confirmed by Inspectors of the Department of Health who:

- 120.1 Took 170 samples/swabs from the facility of 2 February 2018, of which no fewer than 70 tested positive for *L. monocytogenes*.
- 120.2 Purchased a range of ready-to-eat processed meat products were from the factory shop located at the First Defendant's Germiston Facility on 15 February 2018 of which ten of the 13 samples tested positive for *L. monocytogenes* contamination.
- 121 The duty to establish and maintain an effective food safety management system is the most fundamental duty owed by producers and distributors of food products, such as the Defendants, to their consumers.
- 122 Throughout the 14-month period when the Defendants were producing and distributing contaminated products, the Defendants failed to conduct any accurate or reliable sampling and/or testing to confirm the presence or absence of *L. monocytogenes* in the Polokwane Facility.
- 123 From approximately September or October 2018, when the Defendants became aware that *L. monocytogenes* ST6 was implicated in the outbreak, until 4 March 2018, when the Polokwane Facility was closed, the Defendants failed to conduct any Whole Genome Sequencing (WGS) or Multilocus Sequence Typing (MLST) to determine the sequence type of any *L. monocytogenes* isolates, detected at their facilities or in their products.
- 124 When regard is had to the nature of the hazard posed by the contaminated products and the consequences of a failure to detect such contamination over

an extended period, the Defendants' failure to do so amounts to the most egregious wrongdoing and demonstrates a reckless disregard for the lives and safety of consumers.

125 In the course of the Outbreak:

125.1 approximately 443 neonates, being children 28 days of age or younger, contracted listeriosis, and 93 of them died as a result;

125.2 approximately 69 children between the ages of 1 month to 14 years, contracted listeriosis, and 9 of them died as a result; and

125.3 a large number of women miscarried, or their babies were stillborn.

125.4 Of the neonates who survived, a number have been left permanently disabled and disfigured.

126 The outbreak caused immeasurable pain and grief to the parents who lost their children or miscarried.

127 The Defendants' aforesaid conduct violated the Constitutional rights of class members, which the Defendants were under a Constitutional duty to respect and observe.

128 These rights include:

128.1 the right to dignity, which includes the right to family life as set out in s 10 of the Constitution;

- 128.2 the right to life as set out in s 11 of the Constitution;
- 128.3 the right to bodily and psychological integrity as set out in s 12(2) of the Constitution, including their reproductive choice rights, as guaranteed in s 12(2)(a) of the Constitution; and
- 128.4 the right to an environment that is not harmful to their health or well-being as set out in s 24(a) of the Constitution.
- 129 The overwhelming majority of the dead are either unborn children, infants infected *in utero* or during birth and elderly people above the age of 65.
- 130 The common law does not attach much value to the lives of unborn children, infants, the elderly and the indigent, this as opposed to breadwinners who are earning significant sums of money.
- 131 Absent any psychiatric injury suffered by a parent or spouse, the common law limits claims for damages in respect of such deaths to medical costs incurred and funeral expenses.
- 132 In the particular circumstances of this matter, where the victims are overwhelmingly poor and dependent on the public health system, the medical costs are also small and the funeral costs are modest.
- 133 By virtue of the Defendants' violation of the class members' Constitutional rights, the egregious nature of the Defendants' conduct and their wilful, alternatively, reckless breach of the special duty of care that they owed the class members,

as well as the inadequacy of the common law to otherwise provide a sufficient remedy, an award of exemplary or punitive or Constitutional damages to the members of the class is justified.

134 An award of exemplary alternatively punitive alternatively constitutional damages would act as an effective deterrent to the Defendants and other large corporates who increasingly monopolise food production in South Africa and the world and would provide such corporations with the financial incentive they need to implement the often times costly measures required to guarantee consumers safety.

135 The quantum of such exemplary or punitive or Constitutional damages is a matter to be determined in the second stage of the trial.

WHEREFORE the Plaintiffs seek judgment on behalf of the classes in the following terms:

- 1 Declaring that during the period 23 October 2016 to 4 March 2018, the Defendants produced, marketed and manufactured ready-to-eat processed meat products contaminated with *L. monocytogenes*.
- 2 Declaring that the Defendants are strictly liable to the class members for harm resulting from their production and distribution of contaminated ready-to-eat meat products in terms of section 61 of CPA.

- 3 Alternatively to paragraph 2 above, declaring that the Defendants are liable to the class members for harm resulting from their production and distribution of contaminated ready-to-eat meat products.

- 4 Declaring that the Defendants are jointly and severally liable to each of the class members for provable harm suffered as a result of the consumption of contaminated processed meat products produced, manufactured, and/or packaged by the Defendants by —
 - 4.1 members of the first class;
 - 4.2 the mothers of members of the second class;
 - 4.3 persons on whom members of the third class were dependent; and
 - 4.4 persons maintained by members of fourth class.

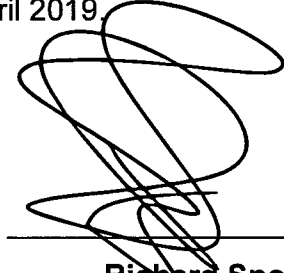
- 5 Declaring that the Defendants are jointly and severally liable to the class members to pay exemplary or punitive or Constitutional damages to the class members, the quantum of which is to be determined in the second stage of the trial.

- 6 Interest on the damages amounts at the prescribed rate of 10.25% per annum *a tempore morae*.

- 7 Directing the Defendants to pay the costs of this action on an attorney and own client scale, including the costs of three counsel, where three counsel were used.

8 Further and/or alternative relief.

Signed and dated at JOHANNESBURG on this 15th day of April 2019.

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Richard Spoor

(Attorney with right of appearance)

A handwritten signature in black ink, similar in style to the one above, positioned above a horizontal line.

RICHARD SPOOR INC.

LHL ATTORNEYS INC.

Plaintiffs' Attorneys