THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 847/2020

In the matter between:

DELTAMUNE (PTY) LTD	**FIRST APPELLANT**
RED MEAT INDUSTRY FORUM	**SECOND APPELLANT**
THE ASSOCIATION OF MEAT IMPORTERS & EXPORTERS	**THIRD APPELLANT**
FEDERATED MEATS (PTY) LTD	**FOURTH APPELLANT**
CURLY WEE BOERDERY (PTY) LTD	**FIFTH APPELLANT**
IBIS PIGGERY (PTY) LTD	**SIXTH APPELLANT**
KOO KOO ROO CHICKENS CC t/a MARIOS MEAT	**SEVENTH APPELLANT**
MOLARE INVESTMENTS (PTY) LTD	**EIGHTH APPELLANT**
NEW STYLE PORK (PTY) LTD t/a LYNCA MEATS	**NINTH APPELLANT**
WINELANDS PORK (PTY) LTD	**TENTH APPELLANT**
FAMOUS BRANDS MANAGEMENT COMPANY (PTY) LTD	**ELEVENTH APPELLANT**
NATIONAL HEALTH LABORATORY SERVICE	**TWELFTH APPELLANT**
JASOMAY PILLAY	**THIRTEENTH APPELLANT**
ASPIRATA AUDITING TESTING & CERTIFICATION (PTY) LTD	**FOURTEENTH APPELLANT**

and

TIGER BRANDS LIMITED	**FIRST RESPONDENT**
ENTERPRISE FOODS (PTY) LIMITED	**SECOND RESPONDENT**
TIGER CONSUMER BRANDS LIMITED	**THIRD RESPONDENT**

Neutral citation: *Deltamune (Pty) Ltd and Others v Tiger Brands Limited and Others* (Case no 847/2020) [2022] ZASCA 15 (4 February 2022)

Coram: ZONDI, MAKGOKA, MOKGOHLOA and GORVEN JJA and MEYER AJA

Heard: 4 NOVEMBER 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 10h00 on the 4th day of February 2022.

Summary: Subpoenas *duces tecum* – whether the subpoenas issued against third parties relevant to underlying class action – whether ambit of subpoenas too wide.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Lamont J sitting as court of first instance):

In the Deltamune and Aspirata appeal

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'1 Each of the applications by the first, second and third applicants against the second respondent and the fourth respondent respectively, is dismissed.

2 The counter-application by the fourth respondent against the first, second and third applicants to set aside the subpoena served on it on 13 May 2019 succeeds.

3 The subpoenas served on the second and fourth respondents on 13 May 2019 and 15 May 2019, respectively, are set aside.

4 The first, second and third applicants are ordered to pay the costs in respect of the main application and the counter-application, including the costs of two counsel where so employed.

In the Federated Meats appeal

1 The appeal is upheld with costs, including the costs of two counsel, save to the extent set out in paragraph 2 below.

2 The order of the high court is altered to read as follows:

'1 The application succeeds save to the extent set out in paragraph 2 below.

2 The subpoenas served on each of the first to sixth applicants are set aside, except the portion which requires the first to sixth applicants to furnish:

"(a) All records of protocols applicable during the period 1 January 2016 to 3 September 2018 regarding any aspect of the control or testing methodology for the presence, enumeration and/or sequence type of microbial hazards including Listeria monocytogenes involving but not limited to your:

(i) Hazard Analysis and Critical Control Points (HACCP);

(ii) Method descriptions; and

(iii) Sample handling processes",

which documents shall be furnished within one month of the service of the subpoenas on the first to sixth applicants.

3 The first, second and third respondents are ordered to pay the costs, including the costs of two counsel.'

In the National Institute for Communicable Diseases appeal

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'1 The application succeeds.

2 The subpoena issued by the first, second and third respondents dated 23 May 2019 against the applicant is set aside.

3 The first, second and third respondents are ordered to pay the costs, including the costs of two counsel.'

JUDGMENT

Makgoka JA (Zondi, Mokgohloa and Gorven JJA and Meyer AJA concurring):

[1] The appellants appeal against an order of the Gauteng Division of the High Court, Johannesburg (the high court), upholding the validity and enforceability of subpoenas to produce documents issued by the respondents, Tiger Brands Limited and its two operating subsidiaries, Enterprise Foods (Pty) Limited and Tiger Consumer Brands Limited (collectively 'Tiger Brands'). The appeal is with the leave of the high court.

[2] Tiger Brands faces a class action in the high court as a result of the outbreak of listeriosis in South Africa between January 2017 and 3 September 2018. A number of people across the country contracted an infection of the bacterium *Listeria monocytogenes* (L. *mono*)[1] as a result of consuming contaminated ready-to-eat meat products produced by Tiger Brands. The subpoenas were issued pursuant to that class action. None of the appellants are party to the class action.

[3] The factual background is this. Tiger Brands produces and markets ready-to-eat processed meat products including vienna sausages and polonies. It owned and operated a meat processing facility in Polokwane (the Polokwane facility) where it produced and packaged its products for distribution. The products were marketed and distributed to various wholesale and retail outlets for sale to the public. In respect of the listeriosis outbreak, the National Institute for Communicable Diseases (the NICD)[2] determined that the ready-to-eat meat

[1] Listeria monocytogenes is the species of pathogenic bacteria that causes the infection listeriosis.
[2] The National Institute for Communicable Diseases (the NICD) is a national public health institute, providing reference to microbiology, virology, epidemiology, surveillance and public health research to support the government's response to communicable disease threats.

products processed at the Polokwane facility were the source of the contamination, and the outbreak.

[4] On 3 December 2018 the high court authorised a class action by 18 individuals against Tiger Brands for damages allegedly suffered as a result of the L. *mono* infection. In its order, the high court certified four classes of plaintiffs. The first class consists of those who contracted listeriosis as a result of eating the contaminated food products. The second class comprises those who contracted listeriosis while *in utero*, as a result of their mothers eating the contaminated food. The third class comprises the dependents of those who died from contracting listeriosis as a result of eating the contaminated food products. The fourth class is made up of those who maintained other persons who contracted listeriosis, as a result of eating contaminated food products; or his or her mother eating such products while carrying that person *in utero*.

[5] Common to all four classes is the alleged link between a person contracting listeriosis as a result of eating (or somebody else having eaten) contaminated food that originated from, or passed through, the Polokwane facility during the relevant time period being between 23 October 2016 and 3 September 2018, and who sustained damages as a result.

[6] Pursuant to the certification order, the class action representative plaintiffs instituted action against Tiger Brands, seeking declaratory orders that: (a) during the period 23 October 2016 to 4 March 2018 Tiger Brands supplied *L. mono* contaminated ready-to-eat processed meat products; and (b) Tiger Brands, as producer, distributor or retailer, is strictly liable in terms of s 61 of the Consumer Protection Act 68 of 2008 to the class action members for harm resulting from its production of the contaminated products. Tiger Brands

defended the action and delivered a plea, denying liability on any of the bases alleged by the class action plaintiffs.

[7] Tiger Brands subsequently issued the impugned subpoenas, which required the recipients thereof to produce swathes of documents, items and things, mainly in respect of test results conducted for the L. *mono*. The subpoenas were issued against the following parties: the first appellant, Deltamune (Pty) Ltd (Deltamune); the fourth appellant, Federated Meats (Pty) Ltd and fifth to tenth appellants (the Federated Meats appellants); the twelfth appellant, the National Health Laboratory Services (the NHLS),[3] as well as against the fourteenth appellant, Aspirata (Pty) Ltd (Aspirata).[4] The subpoenas were issued in terms of s 35(1) of the Superior Courts Act 10 of 2013,[5] read with rule 38 of the Uniform Rules of Court (the Uniform Rules) which regulates the procedure for the procurement of evidence by subpoena.[6]

[8] No subpoenas were issued against the second appellant, the Red Meat Industry Forum (the Meat Forum), the third appellant, the Association of Meat Importers and Exporters (the Meat Association) and eleventh appellant, Famous Brands Management Company (Pty) Ltd (Famous Brands). Their involvement in the matter is purely to the extent their interests could be affected by the subpoenas.

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[3]The NHLS is a juristic person established as such in terms of s 3 of the National Health Laboratory Service Act 37 of 2000. One of its statutory functions is to promote co-operation between South Africa and other countries with regard to the epidemiological surveillance and management of diseases through the monitoring of laboratory test results.

[4] The thirteenth appellant is the laboratory manager of Aspirata and the subpoena against Aspirata was served on her in her capacity as such.

[5] Section 35(1) of the Superior Courts Act 10 of 2013 provides that:

'A party to proceedings before any Superior Court in which the attendance of witnesses or the production of any document or thing is required, may procure the attendance of any witness or the production of any document or thing in the manner provided for in the rules of that court.'

[6] Rule 38(1)*(b)*(ii) of the Uniform Rules of Court reads:

'Within 10 days of receipt of a subpoena requiring the production of any document, any person who has been required to produce a document at the trial shall lodge it with the registrar, unless such a person claims privilege.'

[9] It is necessary to briefly describe the recipients of the subpoenas. Deltamune and Aspirata are commercial pathology laboratories (the laboratories). They are accredited by the South African National Accreditation System (SANAS) and their laboratories are accredited in terms of a national standard which sets requirements for the competence of testing and calibration laboratories. They test, among others, for the presence and/or amount of any species of the bacterium Listeria, including *L. mono*.

[10] Federated Meats, as well as the fifth to tenth appellants, all supply meat products to Tiger Brands. Except for the ninth appellant, which supplies and distributes processed meats to Tiger Brands, the rest of the suppliers only supply raw meat products to Tiger. The twelfth appellant, the NHLS is a statutory body established in terms of s 3 of the National Health Laboratory Service Act 37 of 2000. One of its statutory functions is to promote the epidemiological surveillance and management of diseases through the monitoring of laboratory test results.

[11] The service of the subpoenas triggered the launching of four applications in the high court, to which this appeal is a sequel. In no particular order, one was brought by Tiger Brands against the laboratories to compel compliance with the subpoenas it had issued against them (the compel application). The other three applications were aimed at setting aside the subpoenas, brought respectively by Deltamune; the Federated Meats appellants; and the NHLS (the set aside applications). In both Tiger Brands' application to compel, and Deltamune's application to set aside, the Meat Forum and the Meat Association were cited as respondents, they being interested meat industry entities. They filed an answering affidavit in each application, supporting the laboratories' objection to producing the documents.

[12] Famous Brands was granted leave to intervene in Tiger Brands' application to compel against the laboratories, and in Deltamune's application to set aside the subpoenas. It, and its related companies, are clients of both laboratories. Its interest in the matter is that the subpoenas served on the laboratories include within their scope documents relating to it concerning testing for *L. mono*. Famous Brands supported the laboratories' objection to produce the documents.

[13] Broadly, the objections to the subpoenas were premised on the grounds that: (a) the documents are not relevant to the issues arising in the class action; (b) the breadth of the requests constituted an abuse of the court process; (c) the subpoenas amounted to a 'fishing expedition'; (d) the information in the requested documents was confidential and private.

[14] The four applications were consolidated, and came before the high court (Lamont J), during which Tiger Brands conceded that its subpoenas had been too widely framed and that it had sought more than it was entitled to obtain. Pursuant to that concession, Tiger Brands amended the subpoenas by reducing the ambit of documents requested. This notwithstanding, the appellants persisted with their objections and sought to set aside the subpoenas in their entirety.

[15] The high court did not specifically consider any of the bases of objections referred to earlier. Instead, it considered that given the wide-ranging factual allegations made by the class action plaintiffs in the particulars of claim, every conceivably relevant document should be produced, upon which issues of relevance would be determined. The amended subpoenas found favour with the high court. It observed that the facts pleaded by the class action plaintiffs depended on evidence from different sources as well as opinions obtained from different persons, both in the formulation of the claim and in the evidence which would be led at the trial. The court reasoned as follows:

'. . . There is evidence before me which expresses the opinion that all the documents sought by Tiger are relevant to establish what the facts were; which facts are correct, and which facts are relevant to form an opinion. The opinion that all the documents are required may, in due course, be found to be mistaken once all the facts are known. At present, it cannot with precision be determined to what extent the documents are required. It will only be possible to establish what the extent of the enquiry should have been once the documents have been considered. On the face of it, the evidence sought is germane to establish facts, to found an opinion; to controvert the rationality of the opinion expressed in the particulars of claim; and to cross examine witnesses and so on. From a factual point of view, the documents are relevant.'

[16] The high court further remarked that s 35 of the Superior Courts Act deals with the right to obtain production of the document as opposed to the right to view the contents of the document. In terms of that section, continued the high court, documents can be obtained for production in court. The fact that the document is produced does not entitle anyone to access its contents. The court emphasised that the right to see the contents will be determined once the documents have been produced. It further said that the purpose of s 35 was to permit the Registrar to hold the documents pending future rulings to be made by a court in respect of claims of privilege, privacy and the terms of disclosure before the date of the trial. The question of what controls and restrictions should be imposed on the access of the contents of the documents was left for future determination either by the Registrar or by a different court prior to the hearing.

[17] Pursuant to that approach, the high court: (a) granted Tiger Brands' application to compel against the laboratories and (b) dismissed the respective set aside applications by Deltamune; the Federated Meats appellants; and NHLS. However, in line with Tiger Brands' concession referred to in para 15 above, the court reduced the ambit of the subpoenas in terms of the number of documents. In each of the applications the high court ordered the recipients of the subpoenas to deliver the requested documents to the Registrar within one month of the service of the order on them, but held that the production of the documents did

not automatically entitle Tiger Brands to access their contents. The order, in each case, was subject to, among others, the following conditions:

'7. At the time of delivery of the documents to the Registrar, [the recipients of the subpoenas]:

7.1 shall identify those documents in respect of which privilege is claimed and stating the nature and extent of the privilege and;

7.2 those documents in respect of which there is an objection to any person having access to the contents including the reasons for the objection;

7.3 those documents in respect of which there is no objection to the production and inspection.

8. The registrar shall comply with the obligations imposed upon him by the Rules and shall make such rulings as he may deem appropriate.

9. The registrar's powers shall include the right to refer any issue upon which he is called to make a ruling to Court…'

[18] The high court effectively entrusted and deferred the determination of whether there should be disclosure to the Registrar or another court. Its approach would lead to piece-meal litigation, against which courts have repeatedly cautioned.[7] The result would be additional costs and possible delays in the finalisation of the disputes concerning the subpoenas. Inevitably, this would have a delaying effect on the finalisation of the class action. This certainly would not be in the interests of justice. The high court should have considered the merits of the various applications and determined what could or should not be disclosed, and the terms, if any, upon which that disclosure had to take place.

[19] It now falls on this Court to embark on that exercise. On appeal, the appellants contend that the subpoenas should have been set aside in their entirety. They contend that, despite their amended form, the subpoenas are not relevant to

[7] See for example, *South African Transport and Allied Workers Union v Garvis and Others* [2011] ZASCA 152 2011 (6) SA 382 (SCA) para 46; *De Lange v Presiding Bishop of the Methodist Church Southern Africa for the time being and Another* [2015] ZACC 35; 2016 (1) BCLR 1 (CC);2016 (2) SA 1 (CC) para 58.

the class action, remain too wide in their ambit, and lack specificity. I propose to consider the issue of relevance first.

[20] In *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) para 26, relevance was considered in the context of rule 53 of the Uniform Rules, which provides for furnishing the record. The court contrasted the process in that rule to that in rule 35, which provides for discovery of documents. It pointed out that '. . . [u]nder rule 35 documents are discoverable if relevant, and relevance is determined with reference to the pleadings'. It remarked that, '. . . under the rule 35 discovery process, asking for information not relevant to the pleaded case would be a fishing expedition'.

[21] I see no reason why, in principle, this should not apply in the context of a subpoena *duces tecum*, although a different threshold might apply. In terms of rule 35(3) of the Uniform Rules, discovery may be requested in respect of documents 'which may be relevant', whereas in terms of s 36(5)(*a*) of the Superior Courts Act, documents may be subpoenaed which 'would be relevant' which suggests a higher bar than that envisaged in s 35(3).

[22] There are compelling reasons why a higher threshold would apply in respect of subpoenas, including the fact that whereas the discovery process is applicable only between the parties to the litigation, the process of subpoena provided for in s 36(5) of the Superior Courts Act read with rule 38 of the Uniform Rules of Court, third parties may be subpoenaed to attend court and produce documents. Third parties ought not to be required to do so unless it is absolutely necessary and there is some certainty that such documents are relevant to the issues in the underlying action. Viewed in this light, a higher watermark for relevance in respect of a subpoena *duces tecum* is not only necessary, but appropriate.

[23] It is with that in mind that I consider the issue of relevance with reference to the pleadings in the present matter. The particulars of claim are not a model of the clarity and brevity envisaged by rule 18(4) of the Uniform Rules of Court, which reads:

'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.'

[24] The class action plaintiffs' particulars of claim, contrary to the dictates of this rule, contain a substantial body of what would constitute evidence at the trial, and a lot of verbiage. The high court correctly described the particulars of claim as containing 'wide-ranging sets of facts and allegations'. It went on to consider the effect of those as follows:

'. . . [I]t seems clear that the trial will traverse those matters and that the documents contained in the lists of documents are germane to Tiger's preparation for the trial and the evidence which will be led at it. All of those who received subpoenas are involved in the industry and are persons who could and who probably did furnish information, opinion and factual data to the NICD. The nature and extent of the information furnished, the nature and extent of information not furnished and the accuracy of the information are relevant to test whether or not the allegations made by the claimants are sustainable and necessary to run the trial. Hence, the wide-ranging set of information sought in the subpoenas is relevant to the action.'

[25] It is important to consider rule 18(4) in a proper perspective. The particularity required in that rule relates only to the material facts of the party's case. Thus, the pleader is only required to set out the material facts – with due regard to the distinction that should be maintained between the facts which must be proved in order to disclose the cause of action (*facta probanda*) and the facts or evidence which prove the facta probanda (*facta probantia*). The latter should not be pleaded at all, whereas the former must be pleaded together with the necessary particularity.

[26] It is not necessary for a pleader to plead every piece of evidence which is necessary to prove each fact. As was explained in *McKenzie v Farmer's Cooperative Meat Industries Ltd* 1922 AD 16 at 23, a cause of action is constituted by '… every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'.

[27] In the context of a class action, there is an added consideration: the certification order sets the parameters within which the issues in the pleadings should be considered. What this suggests is that even where *facta probantia* are pleaded, as is the case here, a court is enjoined to distill the real issues between the parties, within the confines of the certification order. This it can only do if it ignores the unnecessarily pleaded pieces of evidence and focuses on the *facta probanda* of the case before it.

[28] In the present matter, the class action plaintiffs assert three substantive causes of action. The first is based upon strict liability in terms of the Consumer Protection Act, which in s 61, provides for strict liability of producers, distributors and retailers of unsafe, defective or hazardous goods. The plaintiffs allege that Tiger Brands is a producer, distributor and retailer as contemplated in s 61; that the products were contaminated as contemplated in s 1 of the Consumer Protection Act; and that the members of the classes suffered loss of the nature contemplated in s 61(5) of the Consumer Protection Act. The products in question are alleged to have been produced, marketed and manufactured by Tiger Brands between 23 October 2016 and 4 March 2018, at the Polokwane facility.

[29] The second cause of action is delictual. The plaintiffs allege that the individuals who contracted *L. mono* did so as a result of consuming contaminated

food products originating from or having passed through the Polokwane facility; that Tiger Brands could and should reasonably have known that its products were inherently susceptible to contamination by listeriosis; that it was in control of production, packaging and distribution of dangerous ready-to-eat meat products; that Tiger Brands was aware or should reasonably have been aware of methods to detect the presence of listeriosis in their products; and that it enjoyed a special relationship with class action members as consumers of its products; hence had a duty to take all reasonable measures to ensure that its products were safe.

[30] The third cause of action is a claim for constitutional (exemplary) damages, it being alleged that Tiger Brands' conduct violated the constitutional rights of the class action members. The class action members alleged that this remedy was justified because: Tiger Brands' conduct was gross, and amounted to wilful or reckless breach of the special 'duty of care' that they owed the class members, and that common law remedies were inadequate.

[31] In its defence to the strict liability claim, Tiger Brands denied the allegation that products from its Polokwane facility caused the alleged harm, as contemplated by s 61(5) of the Consumer Protection Act. It relied upon the qualifications in ss 61(1)(*a*), (*b*) and (*c*), to deny that the alleged harm was as a consequence of: 'supplying any unsafe goods', 'a product failure, defect or hazard in any goods', or 'inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods'. Tiger Brands furthermore, relied upon the exception to strict liability recognised in s 61(4)(*b*)(ii), which deals with a person's 'compliance . . . with instructions provided by the person who supplied the goods to that person'.

[32] The defence to the delictual claim is that the 'production, packaging, distribution and sale of the ready-to-eat meat products were in compliance with

the [relevant] rules and standards', and in particular that 'all reasonable steps [were taken] to ensure that the ready-to-eat meat products at the Polokwane facility were acceptable in accordance with [the prescribed standards]. With regard to the claim for constitutional damages, Tiger Brands pleads that '[t]his is not an appropriate case for the development of the common law to provide for an award of exemplary or punitive or constitutional damages'. It lists several reasons why, in the circumstances, there is no basis to award such damages.

[33] Central to Tiger Brands' case on relevance is its assertion that the class action will focus on establishing whether Tiger Brands was the sole cause of the listeriosis outbreak. It bases this on two paragraphs in the particulars of claim in the class action. In paragraph 67, the class action plaintiffs alluded to a likelihood of cross-contamination of some products that were not manufactured at the Polokwane facility when they came into contact with the products contaminated with *L. mono* from that facility. In paragraph 107 it is alleged that Tiger Brands had failed to take reasonable steps to minimise the potential for cross contamination.

[34] Tiger Brands' submissions in this regard are as follows. Because the class plaintiffs alleged that Tiger Brands was a source of the listeriosis outbreak through its Polokwane facility, this necessitates an enquiry whether it was the sole source of the outbreak. If it was the sole source of the outbreak, then it was responsible for the harm suffered by all the victims of the outbreak. The individual class members would merely have to prove that they were victims of the outbreak to prove that Tiger Brands was responsible for the harm they suffered. This is best encapsulated in Tiger Brands' compelling application against the laboratories:

'[Tiger Brands is] now attempting under subpoena from the relevant laboratories (among several other entities) to collate and examine a reasonably comprehensive body of epidemiological evidence that was or may have been available to the NICD's finding. That

evidence is at least potentially relevant to the outbreak investigation as a whole, of which the test results (and related data) for listeria monocytogenes, including test results to determine the presence (or absence), enumeration, lineage, or sequence type and the relatedness of the sequence type of listeria monocytogenes are manifestly relevant and possibly even decisive in one or more questions(s) in the class action.'

[35] To consider Tiger Brands' submissions, the terms of the certification order must be borne in mind. In terms thereof, the class action would proceed in two stages. The first stage only concerns declaratory relief in respect of Tiger Brands' liability to the four certified classes. During that stage, members of the classes who do not wish to be bound by the outcome of the first stage are required to opt out of the class action in a prescribed manner. The second stage applies only to those classes in respect of which Tiger Brands' liability would have been established in the first stage.

[36] Therefore, the key question to be answered in the first stage is whether Tiger Brands should be held liable to the classes for any provable damages arising as a result of the consumption of contaminated food products that originated from, or passed through, the Polokwane facility during the relevant time period. So, if any class was not successful in the first stage of the class action, then all members of the unsuccessful class who did not opt out in accordance with the procedure would be bound by the judgment given at the conclusion of the first stage.

[37] If any class was successful in the first stage, then the class action in respect of all such successful classes would proceed to the second stage. During that stage, individual class members would pursue their claims against Tiger Brands by proving the causal link between their damages and the eating of contaminated food products linked to the Polokwane facility. The proof of damages actually suffered by each individual class member is thus to be established in the second stage of the class action.

[38] The defining and common feature of the certification order in respect of all the four classes is therefore, that the cause of harm must have been the consumption of contaminated food products 'originating from, having passed through, [Tiger Brands'] meat processing facility at Polokwane…'. To show that he or she is a member of any of the four classes as defined in the certification order, an individual claimant will have to establish the causal link between a listeriosis infection on the one hand, and the consumption of Tiger Brands' contaminated food products from its Polokwane facility, on the other. If this link cannot be proved, an individual claimant would have no case against Tiger Brands, irrespective of what would have been established regarding Tiger Brands' liability to the class, in the first stage. In that event, the quantum of the claimant's damages would become irrelevant. In this way, the certification order ensured that Tiger Brands' liability is suitably limited.

[39] The focus of the class action is therefore only on those whose damages result from consuming those products. It is therefore irrelevant for purposes of the class action, whether other persons may have been harmed by the consumption of products manufactured by anyone other than Tiger Brands through its Polokwane facility.

[40] Once this is appreciated, and if one has regard to the essence of the class action plaintiffs' pleaded case and the terms of the certification order, it is clear that the reference to possible cross-contamination in the particulars of claim, is extraneous to the certified class action. It does not expand the ambit of the class action against Tiger Brands, the parameters of which are clearly delineated in the certification order. The classes of plaintiffs are those whose harm can be linked to the ingestion of the contaminated food connected to the Polokwane facility. Such persons do not have to allege or prove that Tiger Brands was the only source of the listeriosis outbreak.

[41] Accordingly, Tiger Brands would not have to refute that allegation to successfully defend the class action. It would only be required to refute the allegation that any particular person, potentially falling within one of the four categories of plaintiffs, was infected by the consumption of a contaminated product produced or having passed through the Polokwane facility.

[42] I therefore conclude that Tiger Brands' 'sole source' argument has no relevance in the class action. Its demand for production of documents in this regard is entirely speculative. It seems to hope that in the midst of all the test results it requires, it would find a basis on which to pin co-liability on another party. This is not the purpose of a subpoena *duces tecum*.

[43] Viewed in this light, the high court's analysis of the pleadings was flawed, given the class action plaintiffs' pleaded case, and the parameters of the certification order. It failed to distinguish between *facta probanda* necessary to sustain the class action plaintiffs' cause of action, and the 'wide-ranging sets of facts and opinions', that ought to be considered in determining the factual and legal relevance of the documents sought in the subpoenas. It erroneously elevated the 'sole cause issue' to some cause of action which the class action plaintiffs needed to establish. As I have endeavoured to point out, that issue, to the extent it has been pleaded, has no bearing on any of the issues for determination in the class action. For the purpose of determining relevance on the pleadings, those allegations should have been ignored as mere surplusage.

[44] The high court also erred in its view that '… it seems reasonable that … the entire industry was the subject of investigation'. According to the experts in this matter, 'listeria' is a genus of bacteria of which there are 18 recognised species, only two of which are human pathogens. Of those is L. *Mono*, which is the only species that causes listeriosis. L. *Mono* may in turn be grouped into one

of various ‘strains’. The ST6 strain was determined by the NICD to be responsible for the listeriosis outbreak. That is the only material about which there is relevance in the class action. The other species contain bacteria which is common in fresh vegetables, water, milk and the fruits on supermarket shelves, which is harmless.

[45] While the NICD’s initial investigation was indeed broad, it was ultimately narrowed to the ST6 strain, following the finding that DNA ‘fingerprints’ lifted in clinical tests matched precisely those found at the Polokwane facility. This led to a determination by the NICD on 4 March 2018 that the Polokwane facility was the source of the outbreak. Shortly thereafter, Tiger Brands closed the facility and recalled its processed meat products from the market. Towards the end of April 2018 Tiger Brands announced that it had received independent laboratory tests which confirmed the presence of ST6 strain in samples of ready-to-eat meat products from its Polokwane facility. This fact was subsequently admitted by Tiger Brands in its plea. This means that further ‘extensive epidemiological investigation’ envisaged by Tiger Brands is unnecessary.

[46] Below I briefly discuss the contents of the amended subpoenas against their respective recipients.

[47] In respect of the laboratories, the amended subpoenas required each of them to provide copies of documents, referred to as ‘all requests received from any person or entity’; and ‘all data obtained and test results produced for detection testing and for enumeration testing, for any *L. mono* for the period 1 July 2017 to the date of the subpoena. In addition, the laboratories were required to provide copies of ‘[a]ny and all reports, memoranda, notes, analyses or correspondence. . . prepared or compiled in relation to any of the requests for testing’ referred to above. Finally, the laboratories were required to produce:

'Any and all correspondence, and other written communication (including emails, SMS texts and memoranda) exchanged during the period 1 July 2016 to the present concerning the 2017/2018 Listeriosis Outbreak or Listeria during the period 1 July 2016 to the present, with any person, entity or authority…'

[48] Evidently, Tiger Brands' subpoenas against the laboratories call for communication concerning listeria in general ie material relating to these bacterial species falling under the broadly inclusive genus of listeria, almost all of which are not known to cause any illness in humans. Therefore, the disclosure of material relating to these species is irrelevant to the class action.

[49] I also discuss briefly the position of Famous Brands. Although no subpoena was served upon it, Famous Brands is directly affected by the subpoenas served on the laboratories. In its answering affidavit in the Tiger Brands' application to compel against the laboratories, Famous Brands sought to explain why its test results (which are in possession of the laboratories) are irrelevant for the purposes of the class action. It explained the steps it takes to ensure that the meat it serves does not contain L. *Mono*, as follows: collectively, the restaurants in its stable, which include Wimpy, Steers and Debonairs Pizza, sell two types of menu items that may contain meat, menu items such as open sandwiches which contain uncooked ready-to-eat meat products and menu items such as hamburgers containing cooked meat.

[50] Those restaurants in the Famous Brands stable that serve meals containing cooked ready-to eat products rely on external suppliers who manufacture such products. The only test results that Famous Brands obtains from the laboratories concerns samples of raw meat that is served in the restaurants in the Famous Brands stable. Such meat is cooked at such high temperatures and for such extended periods of time before being eaten by consumers, that any L. *Mono*

that might be present in the meat before the cooking is destroyed during the cooking process.

[51] Accordingly, contends Famous Brands, the test results of raw meat cooked before serving are wholly irrelevant for purposes of the class action. The meals that contain cooked ready-to-meat products served in some of the restaurants in its stable, are produced by an external supplier. Famous Brands and its related companies do not submit samples of cooked ready-to-eat meat products for testing by the laboratories. Also, Famous Brands averred that neither it nor any of the restaurants in its stable buy or use any of Tiger Brands' ready-to-eat meat products.

[52] Tiger Brands did not dispute Famous Brands' averments. Despite this, the high court did not consider the undisputed evidence put up by Famous Brands. It erred in this regard, as these averments are pertinent to the relevance of the subpoenas issued against the laboratories, and by extension, to Famous Brands. As already mentioned, the focus of the class action is the liability resulting from the consumption of Tiger Brands' ready-to-eat meat products that were contaminated with *L. mono*, and produced in, or passed through, the Polokwane facility. In the light of Famous Brands' undisputed averments, any information pertaining to it held by the laboratories would not be relevant to any issue in the class action.

[53] In respect of Federated Meats appellants, the recipients of the amended subpoenas were ordered to provide:

'1. All test results for the presence of Listeria *monocytogenes* including but not limited to detection, testing, enumeration testing, or phenotypic testing on each environmental, food and product sample or swab collected at each of your facilities during the period 1 January 2016 to 3 September 2018.

2. All records of protocols applicable during the period 1 January 2016 to 3 September 2018 regarding any aspect of the control or testing methodology for the presence, enumeration and/or sequence type of microbial hazards including Listeria *monocytogenes* involving but not limited to your:
   (i) Hazard Analysis and Critical Control Points (HACCP);
   (ii) Method descriptions; and
   (iii) Sample handling processes;
3. All records of riboprinting, serotyping and whole genome sequencing undertaken by you or on your behalf of Listeria *monocytogenes* samples (environmental or food) collected from each of your facilities before, during and after the Listeriosis outbreak between 2016 and 2018; and
4. Any correspondence or other written communication, notice, instruction or demand concerning Listeriosis that was exchanged with, received from or sent to any person or entity during the period 1 January 2016 to the present including but not limited to the following entities:

(i) The Department of Health (DoH);
(ii) The Environmental Health and Port Health Services of the DoH;
(iii) The National Institute for Communicable Diseases (NICD);
(iv) The Core Sequencing Unit of the NICD (CSU);
(v) The Centre for Enteric Diseases of the NICD (CED);
(vi) The National Health Laboratory Services (NHLS);
(vii) The Department of Trade and Industry (DTI);
(viii) The Department of Agriculture, Forests and Fisheries (DAFF); and
(ix) The World Health Organisation (WHO).'

[54] Before us, counsel for the Federated Meat appellants conceded that the documents listed in paragraph 2 of the amended subpoena, referred to above, could well be relevant to the issue of negligence, as the documents relate to industry safety norms. Save for this, the Federated Meats appellants persisted in their quest to set aside the amended subpoena served on it.

[55] Tiger Brands' stance in this regard seems to be that the Federated Meats appellants' test results may be relevant by proving that it had received contaminated meat from them. The difficulty for Tiger Brands is the common cause fact that heating raw meat products to a temperature of 75 degrees Celsius destroys any listeriosis risk. The Federated Meats appellants largely supply raw meat products, which are not consumed without being cooked or heated. This must be considered together with the fact that Tiger Brands specifically denies in its plea that it failed to ensure that the meat was heated as described above. This negates the hypotheses that L. *Mono* contamination of Tiger Brands' products was 'passed through' from infected meat products sourced from its suppliers, including the Federated Meat appellants. The test results of these suppliers are plainly irrelevant to the issues in the class action.

[56] All of the above considerations apply equally in respect of the amended subpoena against the NICD. Only the following needs further mention in respect of the NICD. The high court held that the documents sought by Tiger Brands are germane to test, among other things, the rationality of the NICD's determination that the ST6 strain detected in processed meat products from the Polokwane facility was the source of the outbreak. Tiger Brands has never sought to challenge NICD's determination. What is more, its own expert, Professor den Bakker confirmed that the methods used by the NICD in the investigation and reporting of the outbreak are consistent with the widely accepted outbreak investigation methods. In the circumstances, the NICD's report should be accepted until reviewed and set aside by a competent court. It is instructive that Tiger Brands has not sought to set it aside.

[57] In addition to the issue of relevance, the NICD also impugns the amended subpoena on the ground that it lacks specificity envisaged in rule 38(1)(*a*)(iii).

That rule, in peremptory terms, requires a subpoena *duces tecum* to specify the document or thing which a witness is required to produce. It reads:

'If any witness is in possession or control of any deed, document, book, writing, tape recording or electronic recording (hereinafter referred to as "document") or thing which the party requiring the attendance of such witness desires to be produced in evidence, the subpoena shall specify such document or thing and require such witness to produce it to the court at the trial.'

The rule must be read together with s 36(4) of the Superior Courts Act, which specifically provides that '[n]o person is bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he or she has it in court'.

[58] The amended subpoena on NHLS spans four pages with 24 paragraphs demanding non-specific, generic information. It would serve no purpose to set out all of the paragraphs. The first four and the last one would suffice. They read as follows:

'1. All data collected or test results for the period 1 July 2016 to the present for detection testing of Listeria monocytogenes in samples taken or obtained from any of [Tiger Brands'] manufacturing plants situated at:

. . .

1.2 28 21st Street, Industria, Polokwane;

1.3 553 Linton Jones Street, South Germiston, Germiston and

. . .

2. Any and all reports (including microbiological or epidemiological reports), memoranda, notes, analyses or correspondence (including internal emails or other internal correspondence) prepared, compiled or exchanged in relation to any of the data collected or test results referred to in paragraph 1 above.

3. All data collected or test results for the period 1 July 2016 to the present, for the enumeration testing of Listeria monocytogenes detected in samples taken or obtained from any of the plants referred to in paragraphs 1.1 and 1.3 above.

4. Any and all reports (including microbiological or epidemiological reports), memoranda, notes, analyses or correspondence (including internal emails or other internal correspondence)

… prepared, compiled or exchanged in relation to any of the data collected or test results referred to in paragraph 3.

. . .

24. All written or electronic records relating to any person (including deceased persons) who suffered or were suspected to have suffered from Listeriosis during the period 1 September 2015 to the present including but not limited to records of any investigations conducted, tests performed and correspondence (including internal correspondence) exchanged.'

[59] Commenting on a similarly worded subpoena in *Beinash v Wixley* 1997 (3) SA 721 (SCA), this Court said the following at 735C-F:

'[T]he language used is of the widest possible amplitude, including within its sweep every conceivable document of whatever kind, however remote or tenuous be its connection to any of the issues which require determination in the main proceedings. The possible permutations are multiplied with undisciplined abandon by a liberal and prolific recourse to the phrase "and/or". Its potential reach is arbitrarily expanded by the demand that the documentation must be produced whether it be "directly or indirectly" of any relevance to a large category of open-ended "matters". Not the slightest basis is suggested to support the belief that any of these documents exist at all or that, if they do, they can be of any assistance in the determination of any relevant issue which might impact on the relief sought in the main proceedings. No attempt is made to have regard to the specific requirement of Rule 38(1) of the Uniform Rules, which expressly requires that a subpoena *duces tecum* shall "specify" the document or thing which the witness concerned is required to produce. The demand in the impugned subpoena includes the production of documentation which is said to arise from or "in relation to the conduct or the activities" of the first and second defendant "in or about the affairs or winding up" of conglomerates of companies. . . '

In *Re Excel Finance Corporation (Receiver and Manager Appointed); Worthley v Australian Securities Commission* [1993] FCA 108; (1993) 41 FCR 346; (1993) 113 ALR 543; (1993) 10 ACSR 255; (1993) 11 ACLC 330, a subpoena was critisised on the basis that the breadth of its language 'unreasonably requires the persons to whom they are directed to form judgments about the documents that are covered by the subpoenas' (at para 49).

[60] I am of the view that the remarks expressed in both *Beinash* and *Re Excel Finance* apply with equal force to the amended subpoena against the NICD. The language used is overly vague and generalised, and in some respects, manifestly uncertain. To borrow from *Re Excel Finance*, the language used leaves it up to the NICD to make its own judgment as to what document should be produced and whether or not they are relevant to a generic description of documents required in relation to listeriosis. Tiger Brands has not sought to lay a basis as to (a) the relevance of the documents to the issues in the class action, or (b) whether the NICD has in its possession or control the requested documents. I therefore conclude that the amended subpoena against the NICD lacks the necessary specificity.

[61] In sum, there is no merit in Tiger Brands' assertion that there is a need to obtain evidence to establish whether there are alternative sources of contamination. As pointed out in *Meyers v Marcus and Another* 2004 (5) SA 315 (C) para 67, 'the search for the truth … must, in the context of litigation and in the interests of justice, be confined to evidence that is relevant to the issues in any particular case'. Therefore, test results from a number of alternate sources in the country are irrelevant to the issues in the class action.

[62] Section 36(5)(*a*) of the Superior Courts Act provides for the cancellation of a subpoena if its recipient '. . . is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such proceedings. In *Sher and Others v Sadowitz* 1970 (1) SA 193 (C) at 195D-E it was held that '... in the exercise of its general [inherent] power, [a court may] set aside a subpoena where it is satisfied as a matter of certainty that the witness who has been subpoenaed will be totally unable to be of any assistance to the Court in the determination of the issues raised at the trial…'.

[63] In the present case, for all the reasons stated above, the third parties against whom subpoenas were issued, will be unable to be of any assistance to the court in the determination of the issues raised in the class action. Subject to the concession in respect of the Federated Meats appeal, the appeals should succeed, and the subpoenas in all the circumstances ought to be set aside. Costs should follow the event in each instance. All parties employed more than one counsel, which is warranted given the importance of the issues raised in the appeal.

[64] The following order is made:

In the Deltamune and Aspirata appeal

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

‘1 Each of the applications by the first, second and third applicants against the second respondent and the fourth respondent respectively, is dismissed.

2 The counter-application by the fourth respondent against the first, second and third applicants to set aside the subpoena served on it on 13 May 2019 succeeds.

3 The subpoenas served on the second and fourth respondents on 13 May 2019 and 15 May 2019, respectively, are set aside.

4 The first, second and third applicants are ordered to pay the costs in respect of the main application and the counter-application, including the costs of two counsel where so employed.’

In the Federated Meats appeal

1 The appeal is upheld with costs, including the costs of two counsel, save to the extent set out in paragraph 2 below.

2 The order of the high court is altered to read as follows:

‘1 The application succeeds save to the extent set out in paragraph 2 below.

2 The subpoenas served on each of the first to sixth applicants are set aside, except the portion which requires the first to sixth applicants to furnish:

"(a) All records of protocols applicable during the period 1 January 2016 to 3 September 2018 regarding any aspect of the control or testing methodology for the presence, enumeration and/or sequence type of microbial hazards including Listeria monocytogenes involving but not limited to your:

(i) Hazard Analysis and Critical Control Points (HACCP);

(ii) Method descriptions; and

(iii) Sample handling processes",

which documents shall be furnished within one month of the service of the subpoenas on the first to sixth applicants.

3 The first, second and third respondents are ordered to pay the costs, including the costs of two counsel.'

In the National Institute for Communicable Diseases appeal

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following order:

'1 The application succeeds.

2 The subpoena issued by the first, second and third respondents dated 23 May 2019 against the applicant is set aside.

3 The first, second and third respondents are ordered to pay the costs, including the costs of two counsel.'

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T Makgoka

Judge of Appeal

APPEARANCES:

For first, thirteenth and fourteenth appellants:	A R G Mundell SC (with him S van Aswegen)
Instructed by:	VDMA Attorneys, Johannesburg Symington De Kok, Bloemfontein
For second to tenth appellants:	H Epstein SC (with him M Osborne)
Instructed by:	Fairbridges Wertheim Becker Attorneys, Johannesburg Phatshoane Henny Attorneys, Bloemfontein.
For eleventh appellant:	D Berger SC (with him J Berger)
Instructed by:	RHK Attorneys, Johannesburg Symington De Kok, Bloemfontein.
For twelfth appellant:	P G Seleka SC (with him F Karachi) (Heads of Argument having been prepared by P G Seleka SC, F Karachi and S Mabunda)
Instructed by:	Lawtons Africa Inc., Johannesburg Symington De Kok, Bloemfontein.
For respondents:	W Trengove SC (with him M Kriegler SC; K Hofmeyr SC; R Ismail)
Instructed by:	Clyde and Co. Attorneys, Johannesburg McIntyre Van der Post Inc., Bloemfontein.