



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

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Rose v National Prosecuting Authority N O and Others (668/2025) [2026] ZASCA 91 (26 June 2026)

Today the Supreme Court of Appeal (SCA) handed down judgment in which it dismissed the appellant's appeal with costs.

This appeal concerned a dispute over access to confidential representations made by an accused person to the National Prosecuting Authority (NPA). The appellant, Mr Christo Johan Rose (Mr Rose), sought disclosure of representations that had been submitted by Mr Elrico Esterhuizen (the accused) to a public prosecutor and which ultimately led to the withdrawal of criminal charges against him. The matter presented what this Court described as a novel legal question: whether a private prosecutor who has obtained a *nolle prosequi* certificate is entitled to access representations made by an accused to a public prosecutor on a without-prejudice basis. However, this Court ultimately did not determine that substantive issue because it found that the appeal faltered at the threshold on a point of non-joinder, which was dispositive of the matter.

The dispute arose after Mr Rose laid criminal charges of attempted murder against the accused, resulting in criminal proceedings being instituted in the Regional Court, Vryburg. Following his first court appearance, the accused made representations to the Senior Public Prosecutor. These representations persuaded the prosecution not to proceed with the case, and the Director of Public Prosecutions, Mahikeng, later confirmed the decision not to prosecute. Mr Rose subsequently requested both the *nolle prosequi* certificate and the representations that had been made by the accused. He also requested the Director of Public Prosecutions, Mahikeng, to reconsider the Senior Public Prosecutor's decision not to prosecute the accused and to provide reasons therefor. Since no response was forthcoming, Mr Rose instituted an urgent application

in the high court, requesting both the *nolle prosequi* certificate and the representations. Although the *nolle prosequi* certificate was eventually furnished, the NPA refused to disclose the representations. Dissatisfied with this refusal, Mr Rose launched a second urgent application in the high court seeking access to the documents. When the high court dismissed his application, finding that he was not entitled to the representations, he appealed to the SCA.

A crucial feature of the litigation was that Mr Rose never joined the accused person whose representations were sought, as a party to the proceedings. The respondents argued that this omission was fatal because the accused possessed a direct and substantial interest in the outcome of the case. Mr Rose, however, maintained that joinder was unnecessary. He argued that a private prosecutor effectively steps into the shoes of the public prosecutor and should therefore be entitled to all information available to the prosecution, including representations submitted by the accused. He further contended that the matter involved only a legal question between himself and the NPA and that the accused would suffer no prejudice if disclosure were ordered. The high court did not determine this issue. It, however, expressed that the accused has a substantial interest in the outcome of the application.

The respondents opposed Mr Rose's joinder argument on several grounds. Firstly, they contended that the accused was a necessary party and held a direct and substantial interest in the order sought by the appellant and that such an order could not be brought into effect without prejudicing the accused's rights. Secondly, they argued that the representations were confidential and had been submitted on a without-prejudice basis. They relied on clause 11.4 of the National Prosecuting Authority Manual, which expressly provides that representations made by an accused to the NPA are treated as without prejudice. In addition, they referred to section 41(6) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), which prohibits disclosure of information obtained in the performance of prosecutorial functions unless authorised or ordered by a court. And lastly, absent any waiver of legal privilege, the respondents are not permitted to disclose the representations.

In a unanimous judgment, Kooverjie AJA, focused exclusively on the issue of non-joinder. This Court reviewed a series of authorities dealing with the requirement that parties possessing a direct and substantial interest in litigation must be joined, and referred to cases such as *Gordon v Department of Health, KwaZulu-Natal*, *Johannesburg Society of Advocates v Nthai*, and *Lottostar v Ithuba Holdings*. In *Road Accident Fund v Hlatshwayo* this Court reiterated the established principle that a party must be joined whenever a court order may directly and prejudicially affect that party's rights or interests and cited with approval the Constitutional Court matter, *Snyders and Others v De Jager and Others* where the Constitutional Court emphasised the fundamental principle of *audi alteram partem*, which requires that no court may make an order against anyone without giving that person the opportunity to be heard.

Applying these principles, this Court concluded that the non-joinder point remained an insurmountable obstacle for the appellant and that it was fatal to the application from the onset. The accused plainly had a direct and substantial interest in the outcome of the application. He was the author of the representations and had submitted them on the understanding that they were confidential and protected from disclosure. Furthermore, the Court observed that the accused's participation was essential because he alone could decide whether to waive the

privilege attached to the representations. If he elected to waive that privilege, it would be the end of the matter. Because the respondents were themselves prohibited by section 41(6) of the NPA Act from disclosing the representations absent authorization by a court, the accused's involvement was indispensable. Consequently, this Court held that the non-joinder of the accused was fatal to the application.

The appellant contended that, if this Court upheld the non-joinder point, the matter should be struck from the roll rather than dismissed. This would have enabled him to join the accused and continue with the existing proceedings. The Court rejected this submission. It distinguished between striking a matter from the roll, which merely suspends proceedings, and dismissal, which disposes of the matter. The Court considered previous authorities where litigants had been afforded opportunities to rectify non-joinder defects, but found that the present case was distinguishable. Mr Rose had been aware throughout the litigation that the respondents regarded the accused as a necessary party and that the high court had expressed the view that he possessed a substantial interest. Despite these warnings, Mr Rose deliberately persisted with his stance that joinder was unnecessary. In those circumstances, the Court held that dismissal was the appropriate remedy, although it noted that Mr Rose remained free to institute fresh proceedings should he wish to pursue the matter further.

In conclusion, the SCA dismissed the appeal with costs.

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