



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 668/2025

In the matter between:

CHRISTO JOHAN ROSE

APPELLANT

And

**THE NATIONAL PROSECUTING
AUTHORITY NO**

FIRST RESPONDENT

**THE NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS NO**

SECOND RESPONDENT

ADV. S. M. MZINYATHI: ACTING DEPUTY

NATIONAL DIRECTOR HEAD–NPS

THIRD RESPONDENT

Neutral citation: *Rose v National Prosecuting Authority N O and Others*
(665/2025) [2026] ZASCA 91 (26 June 2026)

Coram: MATOJANE, GOOSEN and KOEN JJA and PHATSHOANE and
KOOVERJIE AJJA

Heard: 28 May 2026

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 date and time for the handing down of the judgment are deemed to be 11:00 on 26 June 2026.

Summary: Joinder – private prosecution – substantial and direct interest – private prosecutor seeking the without-prejudice representations made by the accused to the public prosecutor leading to the decision not to continue with the prosecution – non-joinder of the accused was fatal – appeal dismissed.

ORDER

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

The appeal is dismissed with costs.

JUDGMENT

Kooverjie AJA (Matojane, Goosen and Koen JJA and Phatshoane AJA concurring):

Introduction

[1] The appeal raises a novel question of law: whether a private prosecutor who has been furnished with a *nolle prosequi* certificate is entitled to obtain representations made on a without-prejudice basis by an accused person to the public prosecutor. That question does not fall to be determined. The appeal falters at the threshold on a point of non-joinder, which is dispositive of the matter.

[2] The appeal lies against the order of the Gauteng Division of the High Court, Pretoria (the high court), which dismissed the appellant's application on the merits. The high court found that the appellant was not entitled to the representations. This appeal is with the leave of the high court. The relevant facts are set out below.

Background

[3] The appellant, Mr Christo Johan Rose (Mr Rose), laid criminal charges against Mr Elrico Esterhuizen (the accused). This resulted in the institution of

criminal proceedings against the accused for attempted murder in the Regional Court, Vryburg.

[4] After his court appearance, the accused made certain representations to the Senior Public Prosecutor, which resulted in the withdrawal of the criminal charges against him. On 9 October 2024, the Director of Public Prosecutions in Mahikeng confirmed the Senior Public Prosecutor's decision not to prosecute the accused.

[5] The appellant initially sought such representations as well as the *nolle prosequi* certificate from the Senior Public Prosecutor, Vryburg. Later, the appellant requested the representations from the Director of Public Prosecutions, Mahikeng, as well. The appellant further 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.

[6] Since no response was forthcoming, on 11 February 2025, the appellant instituted an urgent application in the high court, requesting both the *nolle prosequi* certificate and the representations. The parties agreed that the *nolle prosequi* certificate would be furnished to the appellant. The Director of Public Prosecutions then furnished the *nolle prosequi* certificate. The representations were, however, withheld.

[7] On 22 April 2025, the appellant instituted a second urgent application, in which he persisted in obtaining the representations. The high court proceeded to determine the merits of the application and found that he was not entitled to the said representations. It is the order of the high court in this application that forms the subject matter of this appeal.

[8] It is common cause that the appellant did not join the accused as a party in the application before the high court. The respondents contended that the non-joinder was fatal to the application as the accused had a direct and substantial interest in the outcome.

[9] The appellant's stance before the high court was that it was unnecessary to do so. His view was that since a private prosecutor steps into the shoes of the public prosecutor, he is entitled to have access to the representations made by the accused.

[10] The high court did not determine this issue. However, it stated that the accused has a substantial interest in the outcome of the application.

Issues for determination

[11] Two issues arise for determination. The first is whether the failure to join the accused as a party renders the application fatally defective. The second, which arises only if the first issue is resolved in the appellant's favour, is whether a private prosecutor is entitled to without-prejudice representations made by an accused to a public prosecutor. For the reasons set out below, the first issue is resolved against the appellant, and the second does not arise.

Analysis

Non-joinder

[12] On appeal, the respondents persisted with the non-joinder point. The appellant maintained that the accused's participation in these proceedings was unnecessary, as the case turned on a question of law: whether a private prosecutor stands on the same footing as a public prosecutor. If this principal proposition is upheld, then there would be no reason why a private prosecutor should not be privy to the representations. In his replying affidavit before the high court, the

appellant contended that the dispute remains one between the respondents and himself. Consequently, the accused would not suffer any prejudice if the relief sought is granted. The appellant took no issue that the accused's representations were, in fact, made on a without-prejudice basis.

[13] The respondents, in their answering papers, inter alia, pleaded that: (a) the accused was a necessary party and held a direct and substantial interest in the order sought by the appellant. Such an order could not be brought into effect without prejudicing the accused's rights; (b) the representations were confidential and submitted on a without-prejudice basis; and (c) absent any waiver of legal privilege, the respondents are not permitted to disclose the representations.

[14] The respondents premised their case on Clause 11.4 of the National Prosecuting Authority Manual (the Manual),¹ which stipulates that representations made by the accused are to be treated as made without prejudice. Consequently, the disclosure thereof by the respondents would be impermissible in terms of s 41(6) of the National Prosecuting Authority Act 32 of 1998 (the NPA Act).²

[15] It is settled law that a party that has a direct and substantial interest in a matter should be joined. This Court in *Gordon v Department of Health, KwaZulu-*

¹ The National Prosecuting Authority Manual, compiled in terms of Section 14 of the Promotion of Access to Information Act 95 of 2000, Version 1.06. Clause 11.4 of the Manual reads:

'An accused may also make representations with the NPA. In such circumstances, the representations will be treated as having been made "without prejudice".'

² Section 41(6) of the NPA Act sets out that:

'Notwithstanding any other law, no person shall without the permission of the National Director or a person authorised in writing by the National Director disclose to any other person-

- (a) any information which came to his or her knowledge in the performance of his or her functions in terms of this Act or any other law;
- (b) the contents of any book or document or any other item in the possession of the prosecuting authority; or
- (c) the record of any evidence given at an investigation as contemplated in section 28 (1), except-
 - (i) for the purpose of performing his or her functions in terms of this Act or any other law; or
 - (ii) when required to do so by order of a court of law.'

Natal,³ held that if the order or judgment sought cannot be sustained or carried into effect without necessarily prejudicing the interest of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.

[16] In *Johannesburg Society of Advocates and Another v Nthai and Others*,⁴ this Court affirmed the approach in *Gordon* as well as the test to be applied in non-joinder disputes. It expressed:

‘. . . [J]oiner of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. This court has set out the test as follows:

“The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.”⁵

[17] A determination as to whether a party has to be joined does not depend on the subject matter of the litigation but rather on how, and to what extent, the court’s order may affect the interests of such party. Hence, the test is whether a party has a direct and substantial interest in the subject matter of the action that the court’s judgment may prejudice.

[18] This Court, in *Lottostar (Pty) Ltd and Others v Ithuba Holdings (Pty) Ltd and Others*,⁶ affirmed the aforesaid proposition and expressed:

‘As Fagan AJA pointed out in *Amalgamated Engineering Union v Minister of Labour 1949* (3) SA 637 (A) at 656:

³ *Gordon v Department of Health, Kwazulu-Natal* 2008 [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA); 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA) para 9 (*Gordon*).

⁴ *Johannesburg Society of Advocates and Another v Nthai and Others* [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2021] 2 All SA 37 (SCA).

⁵ *Ibid* para 31.

⁶ *Lottostar (Pty) Ltd and Others v Ithuba Holdings (Pty) Ltd and Others* [2023] ZASCA 119 para 13.

“The question of joinder should surely not depend on the nature of the subject-matter of the suit . . . , but . . . on the manner in which, and the extent to which, the Court’s order may affect the interests of third parties”.

Indeed, as observed by the full court (per Cilliers AJ (Goldstein and Joffe JJ concurring) in *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (WLD) para 37:

“There is a distinction between the case of a party whose rights are derived purely from ‘the right which is the subject-matter of the litigation’ and in which he has no legal interest, on the one hand, and the case where the third party has a right acquired *aliunde* the right which is the subject-matter of the litigation and which would be prejudicially affected if the judgment and order made in which he was not a party were carried into effect . . .”

[19] More recently, in *Road Accident Fund and Others v Hlatshwayo and Others*,⁷ this Court, seized with the issue of the non-joinder of the Board, stated that:

‘In dealing with the issue of personal costs against the CEO and the Board, it is perhaps convenient to start with the order against the Board. The order of the full court was assailed on the basis that there was a material non-joinder of the Board. It is trite that joinder of a party is required where such a party may have direct and substantial interest in the subject matter of the action.’

It further referred to *Snyders and Others v De Jager and Others*,⁸ where the Constitutional Court, in emphasising the importance of the *audi alteram partem* rule, expressed:

‘A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person’s rights or interest. In that case, the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.’⁹

⁷ *Road Accident Fund and Others v Hlatshwayo and Others* [2025] ZASCA 17; [2025] 2 All SA 333 (SCA) para 29.

⁸ *Snyders and Others v De Jager and Others* [2016] ZACC 54 2017 (5) BCLR 604 CC.

⁹ *Ibid* para 9.

[20] The non-joinder point remains an insurmountable obstacle for the appellant. It was fatal to the application from the onset. The accused has a direct and substantial interest in the outcome of the application. He is the author of the without-prejudice representations, and his response is material to the determination of the merits. He made the representations on the understanding that they were on a without prejudice basis and would be protected from disclosure.

[21] His interests would be prejudicially affected by the ultimate judgment that may result in this matter. He has a fundamental right to be heard and should have been joined in the proceedings. The non-joinder issue had to be disposed of before the substantive issue could be traversed.

[22] The underlying purpose of joining the accused in this matter was also to allow him to consider waiving his privilege against self-incrimination. The respondents are not permitted to disclose the representations made by the accused under s 41(6) of the NPA Act. The decision to disclose the representations lies with the accused. If he decides to waive privilege, it would be the end of the matter.

Appropriate relief

[23] In a belated attempt to ward off the consequences of the appeal's outcome, the appellant submitted that, in the event this Court upholds the non-joinder point, the appeal should not be dismissed. He reasoned that striking the matter off the roll would be appropriate as the order would enable him to join the accused and have the matter enrolled for the determination of the merits.

[24] The practical difference between striking a matter off the roll and dismissal is that in the case of dismissal, the matter is disposed of and can no longer be set down on the roll again. If the applicant wishes to proceed with the matter, he must initiate the proceedings *de novo*. On the other hand, striking a matter off the roll has nothing to do with the merits of the case. It is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for reinstatement.¹⁰

[25] The issue of non-joinder as a dispositive ground of appeal is not novel. This Court has recognised that the failure to join parties having a direct and substantial interest in the outcome of litigation may be fatal to the proceedings. In *Gold Dividend 339 (Pty) Ltd and Another v ABSA Bank Limited*¹¹, this Court found that the non-joinder of the creditors in the business rescue proceedings was fatal to the relief sought by the bank and accordingly upheld the appeal.¹²

[26] It is appreciated that the outcome of a matter depends on the specific facts of that matter. By way of example, in *Prinsloo v Majiedt NO and Another (Prinsloo)*,¹³ the non-joinder point was raised *mero motu* for the first time on appeal. This court upheld the appeal on this point raised, but directed that the matter be dealt with in the high court. This Court expressed that:

‘The proceedings on the separated issue before the high court suffered from the fatal non-joinder of Mrs Prinsloo. The parties should have realised, in committing to the agreement for the determination of the issue separated, that Mrs Prinsloo should be joined as a necessary party. The appeal therefore must be upheld.’¹⁴

¹⁰ See *J.M.M and Another v Cara Dorothy Masureik and Others* [2026] ZASCA 1; [2026] 1 All SA 259 (SCA) para 36, where this Court discussed the distinction between striking a matter off the roll and dismissal and cited with approval *Turner and Another v Ntintelo and Another* [2023] ZAWCHC 51 para 62.

¹¹ *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited* [2016] ZASCA 78 para 10.

¹² See also *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd* 2017 JDR 1577 (SCA) para 16.

¹³ *Prinsloo v Majiedt N.O and Another* 2025 JDR 2398 (SCA).

¹⁴ *Ibid* para 21.

[27] In *Amalgamated Engineering Union v Minister of Labour*,¹⁵ the non-joinder issue was raised and argued at the appeal stage. The debate centred on whether the Durban City Council should have been joined. Both parties held the view that the matter should proceed on the merits without the City Council's input. This Court was not convinced and directed that the City Council respond. It acknowledged that since the point was raised on appeal, it would be financially and practically expedient to stand the matter over to ascertain the City Council's view, particularly to either consent to the judgment being handed down or indicate otherwise.

[28] The facts in this matter are distinguishable from the circumstances illustrated in the aforesaid matters. In this instance, the application before the high court was defective since its inception. The appellant took a firm stance on the joinder of the accused and persisted in that view on appeal. The appellant was at all relevant times aware of the high court's view that the accused had a substantial interest in the matter, as well as the fact that the respondents had intended to persist with this issue on appeal. Despite these indications, the appellant maintained his stance throughout.

[29] In *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others*,¹⁶ this Court took into consideration the fact that non-joinder was raised in the previous hearing and expressed:

'It thus follows that the non-joinder of Corlink's other creditors was fatal to the amended relief sought by the applicant for non-joinder. Since the question of joinder had been raised at the previous hearing and since the applicant had taken a deliberate decision not to join other creditors, I do not think that the court a quo was required to afford the applicant a further opportunity to join the other creditors.'

¹⁵ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

¹⁶ *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others* [2017] ZASCA 131 para 16.

[30] In these circumstances, the appropriate order would be to dismiss the appeal. If the appellant wishes to persist with the matter, he is not barred from instituting a fresh application *de novo*.

Costs

[31] The appellant is unsuccessful on appeal and must bear the costs. The respondents have not demonstrated any basis for a costs order employing two counsel. The appeal was resolved on a procedural point. The issues, while not without complexity, did not require the engagement of both senior and junior counsel. No special circumstances have been placed before the Court that would justify a departure from the default position of one counsel.

Order

[32] In the premises, I make the following order:

The appeal is dismissed with costs.

H KOOVERJIE
ACTING JUDGE OF APPEAL

