

SOUTH AFRICA / JUDGMENT

Rose v National Prosecuting Authority and Others (056281/2025)

[2025] ZAGPPHC 549 (15 May 2025)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

056281/2025

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FLYNOTES:

CRIMINAL – Private prosecution – Access to accused’s representations – Private prosecutor not entitled to accused’s representations – Representations were privileged – Disclosing them would undermine without-prejudice basis on which they were made – Applicant does not need representations to institute private prosecution – Access would give an unfair advantage in criminal proceedings – Application dismissed – Promotion of Access to Information Act 2 of 2000, s 14 – Criminal Procedure Act of 1977, ss 7-10.

IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 056281/2025

DATE:

09-05-2025
(1)
REPORTABLE: YES / NO.
(2)
OF INTEREST TO OTHER JUDGES: YES / NO.
(3)
REVISED.

DATE: 15 May 2025
SIGNATURE
In
the matter between
CHRISTO
JOHAN ROSE
Applicant
and
NATIONAL
PROSECUTING AUTHORITY
First Respondent
THE
NATIONAL DIRECTOR OF PUBLIC
Second Respondent
PROSECUTIONS
ADV.
S.M MZINYATHI:
Third Respondent
ACTING
DEPUTY NATIONAL DIRECTOR

HEAD: NATIONAL PROSECUTING
SERVICES

JUDGMENT

NEUKIRCHER, J: This is a judgment that emanates from an urgent application that I heard in this court which is going to be given ex tempore.

The facts in this matter are not in dispute or contentious. What is, is the relief sought by the applicant who asks of the respondents, (the NPA), to provide him with the representations made by one Esterhuizen (the accused) in Vryburg CAS102/06/2023 within 48 hours of date of this order.

It bears noting that the accused is neither cited as a party in this application nor has this application been served on him. The point of non-joinder has been taken by the NPA. The NPA also opposes the application on its merits and on the issue of urgency.

The applicant is the complainant in a criminal matter originating in the Regional Division held at Vryburg under CAS102/06/2023 in relation to a charge of attempted murder against the accused.

On 25 February 2025, Yende AJ, issued out the following order in this division, by agreement between the parties and that order, inter alia, states:

“...2. The second respondent (the NDPP) to within 21 days from the date of this order either issue a nolle prosequi certificate to the Applicant or instruct the Fourth Respondent (the senior Public Prosecutor sub-cluster Vryburg) to reinstitute the criminal proceedings forthwith ...”.

The nolle prosequi certificate received by the applicant on 12 March 2025 turned out to be incorrect (the reason is not relevant to the issue to hand).

The applicant states that the correct nolle prosequi was eventually received by him.

However, on 17 March 2025, the applicant's attorneys sent correspondence to the respondents in which it was pointed out that:

- (a) the docket received as incomplete;
- (b) the applicant was not provided with the representations of the accused that led to the issuing of the nolle prosequi certificate.

The NPA's response is dated 18 March 2025 and the relevant portions of that read as follows:

"12.4 I will request the DPP to assist you with your query in respect of the alleged incomplete case docket. Please note that the NPA is neither the owner nor the custodian of the case docket, as the docket is compiled by the South African Police Service (SAPS).

12.5 The representations on behalf of E Esterhuizen is legally privileged and cannot be disclosed to you, as the NPA is not the author thereof. A further consideration as to why you cannot be provided with a copy of the representations made on behalf of E Esterhuizen, is because you would expect the NPA not to disclose your representations to E Esterhuizen. See also in this regard the Democratic Alliance v The Acting National Director of Public Prosecutions (288/11) [2012] ZASCA 15 where the SCA declined to compel the NPA to provide the applicant with a copy of the representations made on behalf of the accused. The court order also does not provide for this to be furnished to you."

The applicant, however, was not satisfied with this and on 22 April 2025 he launched this urgent application giving the NPA until 24 April 2025 to file a notice to oppose and until 29 April 2025 to file an answering affidavit. The application was then set down for hearing in my urgent court on 6 May 2025 and heads of argument were also filed by both parties.

The applicant contends that:

- (a) he is a private prosecutor as contemplated in sections 7 to 10 of the Criminal Procedure Act of 1977 (CPA);
- (b) as such he stands on the same footing as the NDPP and its prosecuting arms (see Polovin v Director of Public Prosecutions 2025 (1) SACR 1 (SCA) paragraph 34);
- (c) however, by virtue of the provisions of section 9 of the CPA a private prosecutor is required to provide security for the private prosecution as set out in sections 9(i) and 9(ii) which is:
 - (i) R2 500 being the amount set by the minister in the Government Gazette; and
 - (ii) the amount a court may determine as security for the costs incurred in respect of the accused's defence to the charge (or any increased amount in terms of section 9(2));

- (d) this places an undue and onerous burden upon him and that he must “seriously apply his mind” to the case;
- (e) he cannot do so without the accused’s representations.

He argues that the application is urgent as he has a short window within which to initiate his private prosecution – this being three months – and therefore were he to wait his turn on the ordinary Opposed Motion Roll he would not obtain substantial redress in due course.

The applicant argues that as the accused’s representations have been instrumental in the decision to issue the nolle prosequi, it must be considered by the applicant as well in order to make an informed decision on whether or not to continue with the private prosecution and to refuse this, exposes him to substantial prejudice.

The NPA argues, over and above the points in limine, that the representations of an accused are legally privileged and that they are made on the understanding that they will not be

disclosed to any third party without his or her consent in light of the provisions of the NPA’s PAIA Manual. This has been the NPA’s consistent stance since the applicant’s first application that led to Yende AJ’s order of 25 February 2025.

The NPA argues that the accused “has a legitimate expectation that his representations will not be disclosed without him waiving the legal privilege”. According to the NPA, paragraph 11.4 of the PAIA Manual compiled in terms of section 14 of the Promotion of Access to Information Act 2 of 2000 provides:

“An accused person may also make representations to the NPA. In such circumstances, the representations will be treated as having been made without prejudice.”

Although I am of the view that the matter is not truly urgent, the issue being mooted since the first (incorrect) nolle prosequi being received in early March 2025, I decided to entertain this matter on its merits so that the toing and froing of the parties can be resolved at an early stage. Thus, I entertained this matter as one of at least some urgency.

The applicant has not sought to take issue with paragraph 11.4 of the NPA’s PAIA Manual as set out supra. It has not sought to review or set aside that provision if indeed it can do so. I make no comment or finding on this as it was not argued.

The highwater mark of the answer to the particular paragraph dealing with paragraph 11.4 of the PAIA Manual was the NPA’s argument is “misplaced” and loses sight of the applicant’s status as a private prosecutor and that he is permitted to take the steps necessary to institute private prosecution by virtue of the nolle prosequi certificate. But this argument loses sight of the issue raised by the NPA i.e. that the accused makes representations based on the assurance that he does so “without prejudice”. This means that the representations are per se privileged. In *ABSA Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA) (ABSA Bank) the Court stated that the general rule as regards negotiations between the parties is as follows:

“[13] It is true that, as a general rule, negotiations between parties which are undertaken with a view to a settlement of their disputes are privileged from disclosure. This is regardless of whether or not the negotiations have been stipulated to be without prejudice...”

In KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd 2017 (6) SA 55 (SCA) (KLD) at paragraph 32 the SCA reaffirmed the principle and confirmed that although there are exceptions to the privilege rule:

“[39] ...the exception itself is not absolute and will depend on the facts of each matter and there is nothing to prevent parties from expressly or impliedly ousting it in their discussions. What the exception allows for, as I see it, is the prevention of abuse of the without prejudice rule and the protection of a creditor.”

In both cases the abuse sought to be prevented was:

- (a) in ABSA Bank the debtor had admitted an act of insolvency during negotiations and this admission was allowed by the Court as an exception to the without prejudice rule;
- (b) in KLD an acknowledgment of indebtedness embodied in a letter written to settle litigation was permitted by the Court in order to interrupt prescription.

In my view, the exceptions considered, *supra*, by the SCA do not arise in *casu*.

There are also further considerations that prompt me to find that the applicant is not entitled to the accused's presentations.

The NPA must act as a disinterested third party to prosecute defences in the public interest and using public funds. The prosecutor is an “at arm's length” decision-maker based on the facts and evidence available to him or her at the time. A private prosecutor does not act in public interest – he or she has a vested interest in prosecution. This is because section 7(1)(a) of the CPA requires that:

“(a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence ...”

This difference cannot be understated.

In the unreported judgment of Mathunyane and Another v Mokoena (case number 5722/2024) Mpumalanga Division Middelburg, 18 November 2024, Bhengu AJ stated:

“[13] I consider that the applicants are not challenging the decision of the DPP in declining to prosecute or the validity of the nolle prosequi certificate of the DPP. The applicants are also not challenging the action of the clerk of the court in issuing the summons. I am of the view that the recording forming the basis of the NDPP's decision to issue a nolle prosequi is irrelevant in the absence of a challenge to the decision ...”

On the issue of whether such a record would include the accused's representations, the following must be said: where an accused raises no objection to the disclosure of the representations, he then waives privilege and those may then be provided. (See *Polovin v Director of Public Prosecution and Others supra*).

In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) (the DA decision) the DA brought an application to review, correct and set aside the decision to discontinue the prosecution of Mr Zuma and to declare the decision to be inconsistent with the Constitution. The DA required that the record of decision including the representations made by Mr Zuma be made available.

The NDPP refused to deliver the record on the basis that it contained the representation which had been made on a confidential and without prejudice basis. They, inter alia, pointed out that Mr Zuma had declined to waive the conditions under which he had submitted his representations. The DA then brought an application to deliver the record of proceedings on which the decision to discontinue the prosecution was based excluding these representations. The SCA stated:

"[33] There was a debate before us about what value would be to the reviewing court of a reduced record, namely, a record without Mr Zuma's representations. Concern was also expressed on behalf of Mr Zuma that there might be material in the record of the decision, which might adversely affect his rights and to which he might rightly object. That concern was met by an undertaking on behalf of the first respondent that, in the event of this Court altering the decision of the court below as to order the production of the record of the decision sought to be reviewed, the NDPP's office would inform Mr Zuma of its contents. Questions involving the extent of the record of the decision and its value to the court hearing the review application are speculative and premature. In the event of an order compelling production of the record, the office of the NDPP will be obliged to make available whatever was before Mr Mpshe when he made the decision to discontinue the prosecution. It will then fall to the reviewing court to assess its value in answering the questions posed in the review application. If the reduced record provides an incomplete picture it may well have the effect of the NDPP being at risk of not being able to justify the decision. This might be the result of Mr Zuma's decision not to waive the confidentiality of the representations made by him. On the other hand, a reduced record might redound to the benefit of the NDPP and Mr Zuma.

[37] In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescript. That much is clear from the Constitutional Court judgments set out above. It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed. The DA, in its application to compel

discovery, has merely asked for an order directing the office of the NDPP to despatch within such time as the court may prescribe the record of proceedings relating to the decision to discontinue the prosecution, excluding the written representations made on behalf of Mr Zuma to the office of the NDPP. Subject to the question of standing which is dealt with next I can see no bar to such an order being made.”

Whilst the applicant relies on the general statement set out at paragraph [37] of the judgment *supra* to underscore his position, the facts of the DA decision are vastly different to those in *casu*:

- (a) in that matter it appears that the DA abandoned its request that the record include the representations. This much is clear from paragraph [37] and paragraph 1.3 of that court order which states:

“1.3 ... the first respondent is directed to produce and lodge the registrar of this court a record of the decision. Such record shall exclude the written representations made on behalf of the third respondent (who was Mr Zuma) and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching to the representations (a reduced record) ...”.

- (b) the DA decision also involves the issue of a review of the exercise of a public power - there is no such consideration present here.

In fact, the applicant has disavowed pursuing a review in the application that is before me, and that is clear from his papers and

relief that he seeks.

In my view the applicant does not need the complainant’s representations to institute his private prosecution.

I am also of the view that it would give him an unfair advantage in the criminal proceedings as he will know at commencement what the version of the accused is and would be able to tailor his evidence to accommodate that. If the accused decides to give a plea explanation or make any admissions at the commencement of the criminal proceedings then so be it.

Given my view that the application must fail, I do not intend to deal with the point of non-joinder in any detail. However, I must state that had the outcome been different, I would have insisted on service of this application on the accused as in my view he has a substantial interest in the outcome of this application.

Costs

The NPA sought a cost order in the event it is successful. However, I must bear in mind that the applicant seeks information he alleges should be made available to him in order to put him in a position to exercise his rights under sections 7 to 10 of the CPA. These issues are complex and a novel I cannot find that he pursued a course knowing he would be unsuccessful or that he is vexatious in his suit. I also take into account that he will have to set security should he persist with his private prosecution.

This all being so, I am of the view that each party should pay his or its own costs.

ORDER

The application is dismissed.

NEUKIRCHER, J

JUDGE OF THE HIGH COURT

Judgement

handed down: 9 May 2025

Transcript revised: 15 May 2025

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