

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Not Reportable

Case no: **A06/2025**

In the matter between:

DAVID COETZEE N.O.

First Applicant/Defendant

MARLENE COETZEE N.O.

Second Applicant/Defendant

[Acting in their representative capacities as joint
Trustees for the time being of Jason and Tamia
Family Trust IT No. 1[...]]

and

SALDANHA BAY MUNICIPALITY

Respondent/Plaintiff

Coram: DA SILVA SALIE, J

Heard: 17 September 2025

Delivered: 17 September 2025

Summary:

Appeal — Magistrates' Court — Summary judgment — Appeal against refusal of postponement and consequent grant of judgment by default — Whether appeal competent — Principle restated in *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA): a default judgment is rescindable, not appealable.

Appeal procedure — Uniform Rule 50(4)(a) and 50(1) — Failure to prosecute appeal within 60 days — Appeal lapsed — No application for condonation and reinstatement brought.

New evidence — Attempt to introduce on appeal — Principles governing admission of further evidence on appeal under s 19(b) of the Superior Courts Act 10 of 2013 — Stringent requirements not satisfied.

ORDER

- (i) *The appeal is struck from the roll.*
- (ii) *The appellants' application for condonation is refused.*
- (iii) *The respondent's counter-application is upheld.*
- (iv) *The appellants are ordered to pay the respondent's costs, including the costs consequent to the postponement of 17 June 2025 and the costs of the condonation application and counter-application, on a party-and-party scale (scale B).*

JUDGMENT

DA SILVA SALIE, J

Introduction

[1] This is an appeal against the judgment of the Regional Court for the Regional Division of the Western Cape held at Vredenburg on 25 August 2023, in terms of which summary judgment was granted in favour of the respondent, Saldanha Bay Municipality, against the Jason and Tamia Family Trust in the amount of R292 102. 34

[2] The appellants, the trustees of the Trust, seek to set aside the aforesaid judgment. The respondent opposes the appeal and has brought a counter-application for the appeal to be declared lapsed and struck, together with costs. The matter also involves a condonation application by the appellants and a dispute concerning the attempted introduction of new evidence on appeal.

Background:

[3] The respondent issued summons against the Trust on 24 April 2023 for arrear municipal charges in respect of Erf 1[...], Farm Eenzaamheid, Portion 18, Vredenburg.

[4] The appellants defended the action and filed a plea which essentially was a bare denial of the respondent's calculation of charges, without advancing any particularised defence. The relevant excerpts of the plea read as follows:

“Ad paragraph 8:

.... It is denied that these calculations are correct and Plaintiff is put to the proof thereof.

.... The Defendant admits demand, but denies being indebted to the Plaintiff.”

[5] On 28 July 2023 the respondent served its application for summary judgment, set down for hearing on 25 August 2023. On 23 August 2023 the appellants' attorneys of record withdrew. No new notice of appointment of attorneys was filed.

[6] On the hearing date, the respondent, the municipality, was represented whilst an unidentified attorney, who indicated that she was “standing in” for the erstwhile correspondent attorneys (“Brand Attorneys”) made an appearance confirming that a notice of withdrawal as attorneys had previously been served. In addition, thereto she requested a postponement for a period of two weeks. It is not altogether clear from the transcript on what basis she requested the two-week extension, who she obtained instructions from and in what capacity she had sought the request as she at this stage was no longer the attorney (or correspondent attorneys) of record. It follows logically that given her lack of instructions she could not tender wasted costs on behalf of the appellants. It is not in dispute that there was no substantive application for a postponement and there was no opposition to the application before the court for summary judgment.

[7] The magistrate granted summary judgment by default.

[8] The appellants thereafter instituted a rescission application, which was opposed. Before it was determined, the appellants withdrew that application and tendered wasted costs. They then proceeded with this appeal.

[9] The notice of appeal is dated 16 October 2024. The appeal was prosecuted only on 16 January 2025.

Grounds of appeal:

[10] The appellants’ grounds of appeal may be summarized as follows:

- (i) That the magistrate erred in refusing their request for a postponement and granting summary judgment in their absence.
- (ii) That the magistrate erred in treating the matter as unopposed when a plea had been filed and a representative was present.

(iii) That the magistrate failed to recognize that a *bona fide* defence had been disclosed. The municipality set out in its particulars of claim the municipal charges levied to the property and its calculations in respect of the amounts so due, which included, water consumption, rates and taxes. The appellants denied in the plea that the calculations were correct, putting municipality to the proof thereof and denied being indebted to the plaintiff.

Issues for determination:

[11] The following issues arise:

- (i) Whether the appeal was prosecuted within the time periods prescribed by Uniform Rule 50.
- (ii) Whether the failure to prosecute timeously results in the lapse of the appeal, and if so, whether condonation or reinstatement was sought.
- (iii) Whether the order of the magistrate is appealable at all, given its nature as a default judgment.
- (iv) Whether the appellants may introduce new evidence or raise a new defence on appeal.
- (v) The prospects of success in the appeal.

Condonation and Lapsing of the Appeal

[12] The notice of appeal was delivered on 16 October 2024. In terms of Rule 50(4)(a) the appellants were obliged to prosecute the appeal within 40 days, namely by 12 December 2024. The appellants argue that Rule 50(1) allows 60 days, which they calculate expired on 15 January 2025. The respondent contends that the appeal lapsed on

12 December 2024, being 40 days after the notice of appeal was filed on 16 October 2024, as contemplated in Rule 50(4)(a). The computation of 60-days in terms of Rule 50(1), expires on 15 January 2024, taking into account the *dies non* (non-court days) between 16 December and 15 January.

[13] It is common cause that the appeal was prosecuted only on 16 January 2025.

[14] On either 40- or 60-days calculation the appellants are out of time. On the computation of 40 days, the appeal was out of time on 12 December 2023. Even if the more generous 60-day period is applied, allowing for the exclusion of the recess from 16 December 2023 to 15 January 2024, the last day to prosecute was 15 January 2024. By acting only on 16 January 2024, the appellants were out of time, and the appeal had lapsed. Rule 50 is peremptory. An appeal not prosecuted in time is deemed to have lapsed. The only remedy is an application for condonation and reinstatement.

[15] The appellants however did not bring any substantive application to reinstate the appeal. The condonation application only deals with the late delivery of the notice of appeal, however, not its prosecution. It was argued on behalf of the appellants, relying on ***Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)***, that their delay was neither wilful nor *mala fide*. Furthermore, the appellants attributed the delay to changes of attorneys and difficulties in securing the record. Even if that explanation is accepted, condonation would however serve no purpose unless there are reasonable prospects of success in the appeal. It warrants me to turn to this issue.

Competence of the Appeal:

[16] Assuming the lapse of time could be cured, the judgment of the court a quo was however granted in the absence of the appellants. It accordingly constituted a summary judgment granted by default.

[17] The Supreme Court of Appeal in ***Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA)*** held that an order granted by default is not appealable until it becomes final, as it remains susceptible to rescission. The proper course is rescission, not appeal.

[18] Whilst the appellants had initially launched a rescission application, same was later withdrawn. The appellants submit that they relied on legal advice to the effect that their remedy lies in an appeal and not a rescission.

[19] The appellants filed a notice of intention to defend and a plea. However, once summary judgment was sought, they were required to deliver an opposing affidavit setting out facts constituting a *bona fide* defence. No such affidavit was filed. Although pleadings were on file, the matter proceeded in the absence of any opposition to the summary judgment.

[20] In my view, the appellants' election to pursue an appeal rather than rescission is misplaced. A change of attorneys or advice does not alter the character of the order granted on 25 August 2023.

[21] The appellant's principal ground of appeal is that the magistrate erred in refusing their application for a postponement. They submit that a postponement should have been granted to enable them to secure new representation after the withdrawal of their attorneys. This contention cannot succeed. The record reflects that no proper basis was laid for a postponement: no affidavit was filed, no tender of wasted costs was made, and no substantive explanation was offered. As set out above, the value of the request from the attorney who requested the postponement must also be seen through the lens that her mandate was terminated in light of the notice of withdrawal filed two days prior. In fact, no reasons were submitted from the bar as to why the postponement was sought. However, even if I were to accept that her request was in the form of adequate representation of the appellants, the request for a postponement lack the aforesaid cardinal features. I am of the view that the magistrate was entitled to refuse the application. In any event, even if

the refusal was open to challenge, the decisive factor is still the default nature of the order granted.

[22] The judgment a quo remains one granted by default in that the court a quo did not adjudicate a contested defence. The appellants' argument that amounts to "*we were not absent, as we filed a plea*" does not hold water. The key is not physical absence, but whether opposition to the summary judgment was before the court. No opposing affidavit was filed, and no substantive defence was advanced during the hearing for summary judgment. The merits of the defence were not placed before the court under oath in opposition of the application for summary judgment. The attorney who appeared for the appellants did not participate in the merits of the application. During argument, counsel for the appellants conceded, correctly so as I read the record, that the attorney was only briefed to request a postponement. On that basis the summary judgment was one by default within the meaning of ***Pitelli***. The order granting summary judgment was effect one granted by default within the meaning of ***Pitelli***. It follows that the remedy in such a case is rescission, not appeal.

New Evidence and prospects of success of appeal:

[23] The appellants have attempted to introduce a new defence on appeal, namely that no water meter was installed at the property and that they cannot be held liable for charges based on consumption. This defence was not pleaded in the court a quo, nor raised in the rescission application.

[24] Section 19(b) of the Superior Courts Act permits the admission of further evidence on appeal only where it is material, practically conclusive, and could not reasonably have been obtained earlier. The requirements are stringent, recognising the need for finality and the undesirability of piecemeal litigation. Seeking of this Court on appeal to deal with these issues, when the court whose judgment is appealed against had not had sight thereof would not only be procedurally incorrect but would render this Court on appeal as the Court of first instance in respect of those averments.

[25] I briefly deal with the new defence of alleged absence of a water meter (notably different to the plea which disputed the amounts but implied confirmed usage). This issue was never raised in the court a quo.

[26] The issue of the water meter absence is only raised before us. The replying affidavit deposed to by Ms Jade Frans-Jacobs (trustee of the trust) – filed in respect of the application to tender new evidence on appeal reads as follows:

“...there is no water meter installed on the property in dispute and in fact there is reason to believe the water meter is located on the opposite small holding across the R45 main road”

[27] The respondent placed rebutting material before this Court, including confirmatory affidavits establishing that a water meter was in place and operation over the relevant period. This clearly constitutes new matter on appeal.

[28] It is trite that new defences or evidence are not entertained for the first time on appeal unless stringent requirements of section 19(b) of the Superior Courts Act are satisfied. As I see it, those requirements are not met here. The “*no water meter*” defence, supported by the plumber’s report, is new matter, introduced before us on appeal.

[29] This contentiousness of this issue underscores why it is inappropriate to ventilate it for the first time on appeal. The presence or absence of a water meter is a factual dispute requiring evidence, credibility findings and proper ventilation in the court of first instance. That is precisely the function of rescission proceedings and not an appeal. The appeal court does not sit as a court of first instance to determine factual controversies that were never adjudicated in the court below.

[30] It would not be appropriate for this Court on appeal to determine the merits of such a new defence. To do so would blur the distinction between the limited role of an appeal

court and the proper function of rescission proceedings in the court a quo. Entertaining the disputed factual issue at this stage risks conflating procedural findings with factual adjudication and may prejudice the magistrates' court in the event the appellants follow with an application to rescind its previous order. I am satisfied that the determination must be brought in that forum. For these reasons, the attempt to introduce new evidence must fail.

Conclusion:

[31] In the result, the appeal cannot succeed. It had lapsed for want of prosecution within the time periods prescribed by Rule 50 and no application for reinstatement has been brought. In any event, the appeal is in my view incompetent, since the summary judgment order of the magistrate was granted by default and remains susceptible to rescission, and not by way of appeal. The appellants' reliance on belated new evidence does not alter this position. Those issues, if the appellants wish to pursue it, must be addressed in rescission proceedings. Condoning the late prosecution of the appeal, even if properly sought, would have been futile. No reinstatement of the appeal could overcome the lack of reasonable prospects of success.

[32] For these reasons the appeal must be struck from the roll.

Order:

[33] Wherefore I order as follows:

- (i) *The appeal is struck from the roll.*
- (ii) *The appellants' application for condonation is refused.*
- (iii) *The respondent's counter-application is upheld.*

- (iv) *The appellants are ordered to pay the respondent's costs, including the costs consequent to the postponement of 17 June 2025 and the costs of the condonation application and counter-application, on a party-and-party scale (scale B).*

G. DA SILVA SALIE
JUDGE OF THE HIGH COURT
WESTERN CAPE

I agree:

W. ROUX
ACTING JUDGE OF THE HIGH COURT
WESTERN CAPE

Then it is so ordered:

G. DA SILVA SALIE
JUDGE OF THE HIGH COURT
WESTERN CAPE

Appearances

For Applicants: Adv. S Bruinders
Instructed by: Jones Attorneys Inc.

For Respondent: Adv. C Bosman
Instructed by: Madelyn Attorneys Inc.