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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG**

CASE NO: A2025-146025

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES
DATE 12/05/2026
SIGNATURE

In the matter between:

JUAN-PIERRE DIQUE

FIRST APPELLANT

JOHANNA MARIA DIQUE

SECOND APPELLANT

And

GEORGE DE JAGER

FIRST RESPONDENT

KAREN DE JAGER

SECOND RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be on 12 May 2026

JUDGMENT

Phahlamohlaka J et Mphahlele JP

Phahlamohlaka J

Introduction

[1] This is an appeal against the judgment and order of Magistrate H P Mkhabela of the Magistrates' Court for the District of Nkangala, Middelburg ("the court *a quo*"), dismissing the appellants' application with costs.

[2] The appellants are the owners of a property at 1[...] D[...] P[...] Street, Dennesig, Middelburg. The respondents are the appellants' neighbours. The appellants filed an interdictory application in the court *a quo* against the respondents, alleging that the respondents' dogs caused a noise nuisance by barking constantly, day and night, infringing on their peaceful enjoyment of their property. The appellants alleged that the respondents' dogs barked incessantly, causing a noise nuisance that deprived them of sleep, affected their work, and disrupted their peaceful enjoyment of their property.

[3] The respondents opposed the application, arguing that the appellants failed to prove the requirements for an interdict, including the absence of alternative remedies. They contended that the appellants could have approached the SPCA or other authorities to address the issue. The respondents also disputed the sufficiency of the evidence provided by the appellants, including the affidavits and CCTV footage. The respondents denied the allegations, claiming that the dogs were not constantly barking and argued that the appellants had not exhausted other remedies before approaching the court.

Point *in limine*

[4] The respondents raised a point *in limine*, that the appeal has lapsed because the appellants failed to apply to the Registrar for the date of hearing of the appeal within 40 days in terms of Rule 50(4)(a) of the Uniform Rules of Court.

[5] The parties are *ad idem* that the appellants had applied to the Registrar on day 47, but the appellants submitted that the appeal had not lapsed because it was prosecuted within 60 days in terms of Rule 50(1).

[6] Rule 50(1) of the Uniform Rules of Court provides as follows:

"An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after noting such appeal, and unless so prosecuted it shall be deemed to have lapsed."

[7] Rule 50(4)(a) provides that within 40 days of noting the appeal, the applicant shall apply to the Registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal. (my emphasis)

[8] It is common cause between the parties that the application for the assignment of a date was made after the 40 days prescribed by the Rules. The court is therefore basically called upon to determine if the 40-day period prescribed in Rule 50(1)(a) is of any consequence. In other words, the question is whether the 40-day period within which an appellant must apply to the Registrar can be cured by Rule 50(1) which provides that the appeal shall be prosecuted within 60 days and unless so prosecuted it shall lapse.

[9] Counsel for the Respondents referred us to two judgments which dealt with a similar issue, and in both cases the courts found that the appeal had lapsed.

[10] In *Pilato v Fakude*¹, a judgment of this Division, the court noted as follows:

"(47)Clearly, there is no indication in the index and paginated bundles that the appellant had applied for assignment of a date for the hearing of the appeal within the period provided for in the Uniform Rules of Court 50(4) or at all." The court in *Pilato* also found that because the appellant had failed to comply with the

¹ *Pilato v Fakude* 2021 JDR 3042 (MN)

Rules and did not apply for condonation the point *in limine* must succeed. The facts in *Plato* resonate with the facts *in casu*. However, in *Pilato* the court proceeded to deal with the merits of the appeal. The basis thereof is not clear.

[11] I therefore agree with the conclusion that if a litigant has not complied with the Rules the remedy available to cure the noncompliance is to apply for condonation. In this case the appellants have not applied for condonation for the late application of a date to the Registrar.

[13] Similarly in *Taute v Borman*² the appellant had not prosecuted the appeal within the prescribed 40-day period in terms of Rule 50(4)(a) and there was no substantive application for condonation. However, Hendricks JP found that the appeal had not lapsed but he removed the appeal from the roll with a question to be determined later whether the appeal that is deemed to have lapsed has indeed lapsed. I must hasten to say this judgment is of no assistance to this court.

[14] Counsel for the appellant referred us to another Northwest judgment of *Spamer v Olivier*³ to advance their submission that the appeal has not lapsed. In *Spamer*⁴ the court found that the deeming provision in Rule 50(1) was not triggered as the period of 60 days had not lapsed when the appellant prosecuted the appeal and therefore the appeal had not lapsed. However, the appellant's application for condonation was dismissed. The court on *Spamer* has not dealt with the interpretation of Rule 50(4)(a) in the circumstances where an appellant failed to apply for an assignment of a date within 40 days.

² *Taute v Borman* 2024 JDR 1021 (NWM)

³ (CIV APP MAG 34/2023) [2024] ZANWHC 236 (11 September 2024)

⁴ *Spamer v Olivier supra* Para 32

[15] Rule 50 is peremptory. Subrule 1 provides that the appeal shall be prosecuted within 60 days, and unless so prosecuted it shall be deemed to have lapsed. Subrule 4(a) provides that “The appellant or such appellant’s legal representatives shall, within 40 days of noting the appeal, apply to the Registrar in writing for the assignment of a date for the hearing of the appeal. The two subsections are peremptory, and they give the appellant no choice.

[16] However, the appellant who fails to comply with Rule 50 or any other Rule is not remediless. A condonation application procedure is available to a party who has not complied with the Rules.

[17] In *Coetzee NO and another v Saldanha Bay Municipality*⁵ the Western Cape High Court held that the appeal has lapsed for want of prosecution within the time periods prescribed by Rule 50 and no application for reinstatement has been brought.

[18] In my view, this appeal has lapsed because the appellant failed to apply for a date of hearing in writing to the Registrar within the time periods prescribed by Rule 50(4)(a). However, the appeal can be brought back to life through a proper and comprehensive application for condonation. The appellant chose not to file such an application for condonation and therefore this court is not competent to condone the noncompliance *mero motu*.

[19] In *Sungay v Schliemann*⁶ Lekhuleni J correctly held that an appeal or cross-appeal from the magistrates’ court that has lapsed may be reinstated in terms of Rule 27(1) of the Uniform Rules Once the court is satisfied that could cause has been shown for non-compliance with the rules.

⁵ [2025] JOL 69740 (WCC) para 31

⁶ (A58/2023) [2023] ZAWCHC 134 (9 June 2023)

[19] For the aforesaid reasons it is my considered view that this appeal has lapsed. There is no application for condonation, and therefore the court cannot resuscitate the appeal without an application for condonation for failing to comply with Rule 50(4)(a).

[20] It is now a settled principle of our law that an award of costs is within the discretion of the court. However, a successful party in litigation must be awarded costs.

[21] In the result I propose the following order:

- (a) The appeal is struck off the roll.
- (b) The appellant is ordered to pay costs including costs of counsel to be taxed on scale B.

K F PHAHLAMOHHLAKA

JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MIDDELBURG

I agree. It is so ordered.

S S MPHAHLELE

JUDGE PRESIDENT OF THE HIGH COURT
MPUMALANGA DIVISION

Appearances

For the Appellants: H J Lombard

Instructed by: Wynand Prinsloo & Van Eeden Attorneys

For the Respondents: Adv Sias Nel

Instructed by: De Jager Hattingh Attorneys

Date reserved: 14 November 2025

Date delivered: 12 May 2026.