IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2026-070920

In the matter between:

CARLA MELANIE SMITH Applicant

and

GREGORY JAMES PILLAY First Respondent

MIRANDA PILLAY Second Respondent

VAN DEVENTER AND VAN DE VENTER INC Third Respondent

CEIPROP CAPE (PTY) LTD T/A CHAS EVERITT

INTERNATIONAL PROPERTY GROUP Fourth Respondent

THE REGISTRAR OF DEEDS Fifth Respondent

Corum: Lekhuleni J

Summary: Application for interim interdict pending action for specific performance— Requirements of interim interdict not established – election to abide or cancel contract - conduct of the applicant abandoning claim for specific performance.

Heard: 2 April 2026

Delivered (electronically): 14 April 2026

JUDGMENT

LEKHULENI J:

Introduction

[1] This is an urgent application brought in terms of Rule 6(12) of the Uniform Rules of Court for an interim order interdicting the first and the second respondents ('the respondents') from transferring their property located at E[…] close, Parow to any person pending the finalisation of proceedings in this court in relation to a claim for specific performance for the transfer of the said property from the respondents to the applicant. The respondents sold the impugned property to the first purchasers, Mogamad and Reyana Nacerodien. The applicant is the second purchaser of the said property. The applicant's offer to purchase was subject to the successful cancellation of the first purchasers' offer to purchase, which was subject to suspensive conditions.

[2] The respondents opposed the applicant's application. They averred that when the applicant signed the offer to purchase, she was fully aware that her offer constituted a second offer and was expressly subject to the proper cancellation of the first offer to purchase. The respondents asserted that first purchasers secured a mortgage bond for the full purchase price of the property, thereby fulfilling the suspensive condition in the offer to purchase. Accordingly, the sale of the property to the first purchasers became unconditional and final, and the sale to the applicant lapsed by operation of law. The applicant contests this assertion and has launched this application to seek an interdict preventing the respondents from transferring the property to the first purchasers.

The parties

[3] The applicant is a South African citizen who works and resides in San Francisco, California, in the United States of America. The first and second respondents are married in community of property and reside in Parow, Western Cape. The respondents are currently the co-owners of the disputed property. The third respondent is Van de Venter and Van de Venter Inc, a company duly incorporated in accordance with the laws of South Africa and carrying on business as a firm of attorneys, with its principal place of business located at High Street, Rosenpark,

Tygervalley. The third respondent is cited in their capacity as the conveyancing attorneys appointed by the sellers and as the primary agent through whom the sellers would give effect to their intention to transfer ownership of the property. The third respondent did not oppose the applicant’s application but instead filed a notice to abide by the decision of this court.

[4] The fourth respondent is Ceiprop Cape (Pty) Ltd trading as Chas Everitt International Property, a company duly incorporated in terms of the company laws of South Africa and having its place of business located at […] T[…] Building, Tygervalley, Western Cape. The applicant seeks no relief against Chas Everitt. Chas Everitt is also cited due to the interest that they may have in these proceedings. The fifth respondent is the Registrar of Deeds, Cape Town, the person in charge of the Cape Town Deeds Registry and who is responsible for attesting, executing, and registering deeds of transfer, as contemplated in the Deeds Registry Act 47 of 1937. The applicant seeks no relief against the Registrar, who is cited herein due to the interest that they may have in these proceedings.

The applicant’s case

[5] In September 2025, the applicant and her family decided that she should relocate from the US to South Africa. Accordingly, the applicant began searching for a house in Cape Town in November 2025. The applicant’s sister contacted Henry White, an estate agent employed by Chas Everitt, in December 2025 to inquire about the property that is the subject of the dispute. The applicant was notified that the property was not available, as the respondents had entered into a purchase agreement with the first buyer. Despite this, in January 2026, the applicant noticed that the property was still listed on Property24, and her sister subsequently contacted Mr White again to ask whether the property was still available. In response, Mr White informed the applicant’s sister that the property was back on the market and conveyed the applicant’s interest in purchasing the property and further shared the applicant’s contact with Mr White.

[6] Mr White contacted the applicant on 7 January 2026. The parties discussed the purchase price and deposit amount, and Mr White undertook to prepare the offer to

purchase the property. The applicant was informed that the first purchasers had made an offer to purchase the same property. The applicant was also informed that the first purchasers in respect of the same property had until 31 January 2026 to obtain a bond, failing which their offer would be null and void. On 31 January 2026, the applicant signed an offer to purchase, which was subsequently accepted by the sellers, being the first and second respondents.

[7] The applicant offered to purchase the property for R4900 000. The offer was subject to the successful cancellation of the first sale, which was set to expire on 31 January 2026. The offer to purchase was further subject to the condition that the applicant pay a deposit of R1 000 000 and obtain a bond for the balance of the purchase price within 20 days of the seller's acceptance of the offer, which would have been 20 February 2026.

[8] On 02 February 2026, the third respondent, the respondents' conveyancers, addressed an email to the applicant with instructions regarding the payment of the deposit and the securing of the bond. In the same email, the third respondent restated that the sale of the property to the applicant was subject to the successful cancellation of the first sale. Subsequent thereto, the applicant paid a deposit of R1 000 000 into the third respondent's account on 10 February 2026. The applicant also secured a home loan from First National Bank on 11 February 2026 and accordingly notified the third respondent on 12 February 2026, that she has paid the deposit accordingly.

[9] Notwithstanding all the above, on 16 February 2026, the estate agent, Mr White, informed the applicant that the respondents are proceeding with the sale of the impugned property to the first purchasers. Following this, the applicant engaged the services of her attorney of record who addressed a letter dated 24 February 2026 to Chas Everitt as well as the sellers (first and second respondents) informing them that she intended to hold them in breach of the offer to purchase and gave them seven days to remedy the breach by giving written confirmation that they would in fact proceed with the sale of the property to her. The applicant's legal representative also indicated that they were instructed that the first offer was not extended on 31

January 2026 and accordingly lapsed on that date, whereupon the applicant's offer to purchase became final, binding and enforceable between the parties.

[10] In response, the third respondent addressed an email to the applicant's attorney disputing the alleged breach and the applicant's alleged right to seek specific performance in relation to the offer to purchase. The third respondent advised the applicant's attorney that the first offer did not expire on 31 January 2026. Instead, it was duly extended with the incorporation of a continued marketing clause. Furthermore, the third respondent stressed that the applicant's offer was subject to the lawful cancellation of the first offer, which the applicant was aware of. The third respondent further emphasised that the respondents were not in breach of the offer to purchase, and the applicant is not entitled to the legal remedies set out in the email. In addition, the third respondent confirmed to the applicant's legal representative that they are proceeding with the transfer of the property in respect of the first offer. Accordingly, the applicant instituted these urgent proceedings to stop the respondents from transferring the property to the first purchasers, as she seeks to enforce a claim for specific performance to have the property transferred to her.

The first and second respondents' case

[11] The first and second respondents are husband and wife, married in the community of property. The respondents sold the property that is the subject of the dispute in this matter to the first purchasers in terms of an offer to purchase ('the first offer') dated 17 December 2025, together with Addendum A thereto, for a purchase price of R4 800 000, subject to certain suspensive conditions. In terms of the Addendum, the first offer was subject to the sale of the first purchaser's property by 31 January 2025. On 30 January 2026, the respondents noted that the first purchasers' property had not been sold in time as provided. They then instructed the third respondent (the conveyancer) in writing to grant the first purchasers an extension of time of 28 days and to remove certain suspensive conditions in favour of the first purchasers.

[12] The respondents asserted that they accepted the applicant's offer to purchase not only because both the first offer to purchase and the second offer to purchase

contain a continued marketing clause in terms of clause 4 of the agreement which is a standard provision in the fourth respondent’s offer to purchase - but also because, given that both offers were subject to suspensive conditions, it was commercially prudent for the respondents to retain both offers if the suspensive condition attaching to the first offer to purchase were not fulfilled. The respondents asserted that there is nothing improper or irregular about this approach; it is a widely accepted and reasonable practice in property transactions to ensure that a sale may proceed should one offer fail due to non-fulfilment of its suspensive conditions.

[13] The respondent observed that the first purchasers secured a mortgage bond for the full purchase price, thereby eliminating the need to sell their own property. The sale to the first purchasers became unconditional and final, and the sale to the applicant lapsed by operation of law.

[14] The respondents further asserted that the applicant was not candid with the court in her application, particularly in her founding affidavit. The respondents note that on 6 March 2026, the applicant was informed that the transfer of the property to the first purchasers was proceeding. In response, the applicant stated that she would start looking for another property with immediate effect. In addition, the applicant demanded a refund of her deposit and stated that she had already found another house and planned to make an offer on the same day.

[15] The applicant was subsequently refunded her deposit, with interest thereon, to enable her to acquire another property as requested. The respondent averred that the applicant's conduct in requesting a refund of her deposit to acquire another property amounts to an election to abandon her claim for specific performance or, at the very least, undermines the credibility and bona fides of such a claim. The respondents also submitted that the matter is not urgent and implored the court to dismiss the applicant’s application with costs.

Discussion

[17] For the sake of convenience, I deem it proper to address the preliminary issues raised by the respondents before I can consider this matter on the merits. The first

preliminary point raised by the first and second respondents was that the matter was not urgent, alternatively that the urgency was self-created. The respondents contended that the applicant became aware as early as 16 February 2026 that the property would be transferred to the first purchasers yet delayed for more than a month before launching these proceedings. The respondents noted that the applicant’s actions, including her request for a refund of her deposit to purchase another property, are inconsistent with her claim for urgent interim relief and indicate a lack of urgency.

[18] On the other hand, the applicant asserted that the matter is urgent. In her founding affidavit, the applicant points out that while it has been a little over a month since Mr White first informed her that the respondents intended to proceed in transferring the property to the first purchasers, this is not an undue delay on her part. The applicant also explained that she initially wished to resolve the matter out of court; however, when the sellers expressly stated that they intended to transfer the property to the first purchasers, notwithstanding the points raised in the correspondence from her attorney, she was left with no option other than to seek the assistance of this court. Following this decision, her attorney needed more time to compile all relevant documentation and brief counsel on the matter, since she seeks an order that can only be granted by the High Court.

[19] It is trite that an applicant who approaches the court on an urgent basis essentially seeks an indulgence and to be afforded preference, to prevent the prejudice and harm that may materialise or persist, if the conduct complained of continues. See *Soobedar and another v Minister of International Relations and Cooperation and another* (2021) 42 ILJ 1762 (LC) para 19. Central to a determination of whether a matter is urgent is whether the applicant has, in the founding affidavit, set forth explicitly the circumstances which render the matter urgent, and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of an applicant to adequately set out in his founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary. *Radebe and Others v Aurum Institute* (2024) 45 ILJ 876 (LC) para 20.

[20] In the present matter, from the parties' email correspondences, it is common cause that the third respondent advised the applicant on 16 February 2026 that the respondents were proceeding with the sale of the property to the first purchasers. Subsequently, the applicant indicated her intention to seek another property. Moreover, on the said date, the applicant asked the third respondent when her deposit would be repaid, as she had already found another property and planned to make an offer on the same day. The applicant’s deposit with interest thereon was accordingly paid to her. It is further common cause that, pursuant to further correspondence between the parties, the applicant was again informed on 6 March 2026 that the respondents were proceeding with the first offer. Notwithstanding, the applicant waited for just over a month to institute these proceedings.

[21] In my view, the urgency alleged by the applicant is directly attributable to the applicant’s failure to act expeditiously since 16 February 2026. The applicant was timeously informed of the respondents’ decision to proceed with the first offer to purchase. Notwithstanding, the applicant did nothing. Instead, the applicant demanded a refund of her deposit because she had found another property and wanted to make an offer. As foreshadowed above, this application was instituted only after a month had passed since the estate agent first informed the applicant that the seller intended to proceed with transferring the property to the first purchaser.

[22] It is trite that urgent relief will not be granted in circumstances where it is apparent that the urgency claimed is self-created. The excuse raised by the applicant in her founding affidavit that she lives in America and that it would take a significant amount of time for her to courier the original signed affidavit is an afterthought and not borne out by the objective facts. The founding and the replying affidavit were commissioned virtually. In light of recent developments in South African law that authorise electronic commissioning, it is evident that the applicant's explanation for the delay lacks substance and is inadequate. In my view, the urgency pleaded is self-created.

[23] Self-created urgency is apparent when an applicant fails to submit the application at the earliest available opportunity. It is expected of litigants to react immediately to prevent harm and/or prejudice, rather than standing back and doing

nothing until it is too late. Evidently, the urgency in this matter is self-created. The applicant did not provide cogent reasons for delaying her application by a month. The courts have made it clear that self-created urgency is not to be entertained by an urgent Court. I am of the view that this matter is not urgent and must ordinarily be struck from the roll.

[24] The difficulty in the applicant's application does not end there. The applicant failed to join the first purchasers. In her founding affidavit, the applicant explained that, despite her reasonable request, both Chas Everitt and the third respondent failed to provide her attorneys of record with the details of the first purchasers. As a result, she was unable to properly cite them or serve this application on them. In the answering affidavit, the respondents disclosed the names of the first purchasers. Notwithstanding, the applicant failed to join them as parties in these proceedings when she filed her replying affidavit. In my view, this is a fatal defect to the applicant's case.

[25] I must emphasise that as a general rule, if a party has an interest of such a nature that it is likely to be prejudiced by a judgment given in the proceedings, such a party ought to be joined. See *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2010 (5) SA 479 at 482F. The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. See *Zingwazi Contractors CC v Eastern Cape Department of Human Settlements* 2021 (6) SA 557 (ECG) para 62. A 'direct and substantial interest' has been held to be an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. See *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 (4) SA 635 (O) at 644A-B.

[26] It cannot be disputed that the first purchasers have a direct and substantial interest in this matter. The remedy sought by the applicant would invariably materially affect their rights and interests. All parties who have a direct and substantial interest in the relief sought are required to be joined to the proceedings. In the absence of such joinder, the applicant's application is materially defective. The

applicant noted this defect in reply and, instead of simultaneously bringing an application to join the first purchasers, decided to cite them in her replying affidavit without an application or an order joining them to these proceedings. In my view, the applicant's application falls to be struck from the roll for the non-joinder of the first purchasers.

[27] Ordinarily, this finding should lead to the end of the dispute. However, for completeness, I will briefly consider the applicant's application on the merits. As articulated above, the applicant seeks an interdict restraining the respondents from transferring their property to the first purchaser or to any person pending the finalisation of the applicant's claim for specific performance for the transfer of the property from the respondents to her, which the applicant seeks to institute within 30 days of granting the interdict.

[28] The primary remedy of specific performance in relation to a contract, assuming that such a case is made out, holds true to this day. This principle was aptly articulated by Innes J in the case of *Farmers' Co-operative Society (Reg) v Berry* [1912] AD 343 at page 350, where he explained the concept in detail as follows:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract."

[29] A party cannot both cancel a contract and keep it in being. He has to make a choice. In technical language he has an election. The doctrine of election is based on the fact that enforcement and cancellation is inconsistent with each other or mutually exclusive. See *Ray v Ray and Others* [2022] JOL 55149 (WCC) para 24. Put differently, once a breach that justifies cancellation has occurred, the innocent party is faced with an election: either to affirm or to cancel the contract. An innocent party is, of course, never obliged to cancel, and he or she need not make an election immediately – the innocent party has a reasonable period of time in which to do so. *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785.

[30] An election, once made, is however final and irrevocable unless the other party consents to its reversal. See *Culverwell v Brown* 1990 (1) SA 7 (A) at 17. Thus, if the innocent party elects to uphold the contract, he or she cannot thereafter change his or her mind and cancel the contract, unless the other party commits a fresh breach justifying cancellation. *Tracetec (Pty) Ltd v Business Equipment Asset Finance (Pty) Ltd* (3449/2022) [2025] ZAWCHC 181 (29 April 2025) para 34. Enforcement and cancellation, being inconsistent with each other or mutually exclusive, the innocent party must make an election between them and cannot both appropriate and reprobate the contract. *Segal v Mazzur* 1920 CPD at 644 – 645.

[31] In the present matter, the applicant was informed that the respondents are proceeding with the sale in respect of the first offer to purchase. The applicant subsequently demanded the refund of her deposit. The applicant also looked for another property and informed the respondents that she had found a new house and was making a new offer. In my view, the applicant's conduct is inconsistent with her claim for specific performance as set out in her founding affidavit. As correctly pointed out by the respondents, the applicant’s conduct in requesting a refund to acquire another property amounts to an election to abandon her claim for specific performance, or, at the very least, undermines the credibility and bona fides of such a claim.

[32] It is also concerning that the applicant in her founding affidavit did not disclose the fact that she demanded the deposit, which was subsequently refunded. The applicant appears to have hidden this information to buttress her alleged claim for specific performance. Moreover, the applicant did not disclose in her founding affidavit that she had informed the respondents and the conveyancers that she had found a new property and was making an offer to buy it. A significant concern regarding the applicant's submission is that the applicant did not satisfy the requirements for an interim interdict. The applicant failed to establish a prima facie right to claim the transfer of the property, as the first offer to purchase became unconditional only upon the first purchasers securing full bond approval. All suspensive conditions were met, and the offer became unconditional.

[33] Furthermore, the applicant has failed to establish a well-founded apprehension of irreparable harm, as required for the grant of interim relief. The applicant has not demonstrated that she will suffer any harm that alternative remedies cannot adequately address. In fact, according to her own email correspondence, she has obtained an alternative house. Crucially, the applicant has alternative remedies, including a claim for damages. Accordingly, the applicant has failed to satisfy the requirement that no adequate alternative remedies are available to her.

[34] Importantly, the balance of convenience overwhelmingly favours the respondents, as any delay in the transfer of the property would prevent them from relocating to a retirement facility for the first respondent's urgent medical care, while the applicant, having already received a full refund of her deposit and indicated her intention to purchase an alternative property, will suffer no comparable prejudice. As correctly pointed out by the respondents' counsel, granting the interdict sought would cause irreparable harm to the respondents, particularly affecting the first respondent's health and his urgent need to relocate for medical care.

Order

[35] Given all these considerations, I am of the view that the applicant's application must fail. To this end, the following order is granted:

35.1 The applicant's application is hereby dismissed.
35.2 The applicant is hereby ordered to pay the first and second respondents' costs on a party and party scale, including the costs of counsel on scale B.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv McLean

Instructed by: Rossouw Attorneys

For the first and second respondents: Adv Moore

Instructed by: Van de Venter and Van de Venter Inc