

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 1368/2016

**DELETE WHICHEVER IS NOT APPLICABLE**

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

29 JANUARY 2016  
DATE

*CRivendall*  
.....  
SIGNATURE

In the matter between:

**GARETH CLIFF**

**Applicant**

and

**ELECTRONIC MEDIA NETWORK (PTY) LTD**  
**[SIC] ENTERTAINMENT (PTY) LTD**

**1<sup>st</sup> Respondent**  
**2<sup>nd</sup> Respondent**

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**JUDGMENT**

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**NICHOLLS J:**

[1] This matter concerns Gareth Cliff's ("Cliff") position as a judge in the television programme SA Idols, flighted by M-Net. This application has been brought on an urgent basis as a result of M-Net severing their relationship with Cliff for the 2016 Idols season as a consequence of a tweet he posted on social media, which was

construed as racist, or in support of racism. The first and second respondents, Electronic Media Network (Pty) Ltd and [Sic] Entertainment (Pty) Ltd, respectively, are the broadcaster and producer of Idols and will be referred to generically as M-Net.

[2] The application is divided into Part A and Part B. This hearing only deals with Part A, wherein Cliff primarily seeks the urgent reinstatement of what he alleges is his contractual relationship with M-Net. This is sought on an interim basis pending the outcome of an action in Part B to be heard at a later stage. In Part B Cliff seeks permanent re-instatement of his 2016 contractual relationship with M-Net as well as future renewals; to declare his purported termination unconstitutional; payment of damages and the retraction of M-Net's harmful remarks.

[3] At the outset it should be emphasized that at this juncture what is before court are not issues relating to freedom of speech or freedom of speech versus hate speech, or indeed whether Cliff is a racist or supports racists. These issues, which recently have been the subject of much public debate, are not the subject matter of this urgent court. At present the crux of dispute is the contractual relationship between the parties and whether it should be restored to its position as of 6 January 2016.

[4] A court has a wide discretion in deciding whether to grant interim relief. In order for the applicant to be successful in an application for interim relief, pending the determination of the main issues in dispute, he must meet the following requirements<sup>1</sup>:

- 4.1 a prima facie right, albeit open to some doubt;
- 4.2 a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and the applicant ultimately succeeds in establishing his right;
- 4.3 the absence of a satisfactory alternative remedy; and
- 4.4 the balance of convenience should favour the applicant.

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<sup>1</sup> *Webster v Mitchell* 1948 (1) SA 1186 (W); *Gool v Minister of Justice* 1955 (2) SA 682 (C); *Beecham Group Ltd v B.M. Group (Pty) Ltd* 1977 (1) SA 50 (T);

[5] These requirements will be examined more fully as the basis of my decision, but first it is important to understand the background leading up to the dispute.

### Background

[6] Idols SA is a popular television programme based on the British show Pop Idols, whose format was adapted in many countries worldwide. It is essentially a singing competition to discover the best solo unsigned recording artist from members of the public. It has millions of viewers and the ultimate winner is determined by electronic voters. The season commences with the audition of several hundred hopefuls at major centres throughout the country, conducted by four judges. Public voting then commences and those selected compete for places in the group stages. Some competitors are eliminated while others get through to the following rounds until a winner is finally chosen.

[7] The South African version of Idols started in March 2002 and will be entering its twelfth season in 2016. It is not necessarily aired each successive year. Cliff has been one of the three, and later four, judges of Idols since its second season in 2003. The 2016 auditions are scheduled to start on 29 January 2016 in Durban.

[8] The genesis of the breakdown in relations between Cliff and M-Net was a racist and derogatory statement by one Penny Sparrow on her Facebook page, in which she referred to black people as monkeys.<sup>2</sup> This was met with widespread anger and outrage and immediately sparked a public outcry, particularly on social media. After she posted her statement on 2 January 2016, Penny Sparrow became a household name. Racism became a burning topic of debate.

[9] On 4 January 2016 Cliff posted a tweet: *"People really don't understand free speech at all"*. This, too, was met with outrage and a barrage of criticism on social media, with some members of the public equating this statement not as support for

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<sup>2</sup> "These monkeys that are allowed to be released on New years Eve And new years day on to public beaches towns etc obviously have no education what so ever so to allow them loose is inviting huge dirt and troubles and discomfort to others. I'm sorry to say I was amongst the revelers and all I saw were black on black skins what a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try. But think they can voice opinions about statute and get their way oh dear. from now I. Shall address the blacks of south Africa as monkeys as I see the cute little wild monkeys do the same pick drop and litter." (sic)

freedom of speech, but as support for Sparrow's views. This led to accusations of Cliff himself being racist. It is this tweet that M-Net allege was detrimental to their brand and necessitated the termination of Cliff's role as brand ambassador in his capacity as an Idols judge.

[10] Cliff states in his replying affidavit that the tweet was not a direct response to the Sparrow tweet but rather in response to a website known as South African Daily Poll, in which topical issues are raised for debate on twitter. On that particular day the topic was whether or not hate speech should be criminalised. It was in response to this poll that Cliff says he posted the offending tweet. Nonetheless, whether directly or indirectly, it is common cause that the tweet was a response to Sparrow's racist statement.

[11] On 5 January 2016 Cliff apologized and made it clear that he was not supporting Sparrow's statement and that his education on hate speech and free speech continues. On 6 January M-Net issued a statement that Cliff was not currently contracted to the company and that it would be reviewing his future employment. On 8 January 2016 representatives of M-Net met with Cliff and his manager, where they told him that the public backlash from his tweet had the effect of detracting from the M-Net brand. He was informed that he would not be included as a judge in the upcoming season and was offered the opportunity to issue a joint statement with M-Net. This he declined.

[12] The same night M-Net issued a media statement that Cliff would not be an Idols judge for the 2016 season. The following day they issued a media statement in which they stated that they did not believe that Cliff was a racist but he showed a lack of empathy for the country's history. They stressed the importance of differentiating between hate speech and freedom of speech. They further referred to having implemented a policy of zero tolerance for social media posts after two other Idols judges had placed unfortunate comments on social media.

[13] Cliff consulted his present attorneys of record two days later on 11 January 2016. He had various legal consultations, culminating in this application being

launched on 18 January 2016. There was no undue delay in bringing the application and it is self-evidently urgent as auditions begin on 29 January 2016. In any event lack of urgency was not an issue raised before me.

[14] I turn to consider whether Cliff satisfies the requirements for interim relief.

### Prima Facie Right

[15] The establishment of a prima facie right is the first and most important hurdle an applicant claiming interim interdictory relief must overcome. A prima facie right may be shown even where the facts set out by the respondents show contradictions and inconsistencies in the applicant's version. A temporary interdict can be granted even if the right is open to some doubt. It is only if there is serious doubt cast on the facts alleged by the applicant that a court must refuse the interim relief.<sup>3</sup>

[16] In support of his contention that a contract with M-Net was in existence, Cliff states that he concluded successive written agreements over the years with the first and second respondents as broadcaster and producer respectively. Generally, the signing of the agreement would take place well after the season had started. In the interim the relationship would be based on an oral agreement, tacitly modelled on the previous season's written agreement in all material aspects. So, too, with the 2016 agreement. There was email correspondence from M-Net informing Cliff of the logistical arrangements and dates for the auditions to be held in early 2016. Cliff's image appeared on advertisements flighted for the 2016 season.

[17] M-Net denies the existence of an agreement with Cliff in the absence of any written contract signed by the parties. Cliff's assertion that as a matter of course the season would start without a written contract having been concluded, is not disputed. M-Net merely responds that often parties begin with the implementation of a proposed agreement not yet concluded, on the assumption that it will be concluded. However, they submit that unless and until it is concluded, this does not result in the contract coming into existence.

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<sup>3</sup> *Webster v Mitchell* 1948 (1) SA 1186 (W)

[18] If one has regard to the emails exchanged between Cliff's agent and M-Net it is apparent that there had been previous discussions regarding the 2016 season and Cliff's participation therein. The emails raise three issues – the first being his fee; the others termed by the M-Net representative as 'challenges'. The first challenge was that Cliff would be unavailable for a 10-day period in March when he would be overseas. The other challenge was Cliff's request that three crew members for his daily radio show be provided with a studio when Idols was being filmed at the Wild Coast venue.

[19] M-Net contends that to the extent that Cliff alleges an oral agreement, the requirements for an oral agreement have not been met and that the final fee had not yet been agreed upon. The 'challenges' are said to be a further indication that no final agreement had been reached between the parties. M-Net concedes that once these issues had been ironed out, the intention was to enter into a written agreement with Cliff. However, before the agreement could be concluded, their relationship with Cliff broke down. Significantly, in the media statement of 22 January 2016 M-Net states that it had "decided to review its decision to include Cliff as a judge in the upcoming Idols season in order to protect its brand" and "had taken the decision to no longer include him as a judge..." (my underlining)

[20] Implicit in the above statements is a recognition by M-Net that a decision had been taken and an agreement reached regarding Cliff's inclusion as an Idols judge. It is disingenuous of M-Net to now refute the existence of an agreement between the parties. On their own version they were informed by previous practice and Cliff would have been provided with the written contract "*once it was in hand*". M-Net states that "*but for his reaction to the Sparrow post and the subsequent public fallout*" an agreement would have been concluded. It is therefore incorrect that a contract would have been concluded in the future when M-Net's statement makes it clear that they decided to review their decision, already taken, to include him. In any event it is highly improbable that Cliff's image would appear on all of M-Net's advertisements for the 2016 season if M-Net was of the view that no binding agreement had been reached between the parties.

[21] It is not correct that there was no consensus on the fee to be paid. In response to a request from Cliff's agent that he "*get confirmation of the money-side*", the M-Net representative specifically stated on 4 December 2015 that Cliff's fee would amount to R377 530.00 for the season. He accepted this figure, if not explicitly then at least tacitly, as there was no further engagement on the fee up to the time the relationship was terminated. The two other issues relating to a period of 10 days when he would be out of the country and for 3 members of his crew to be accommodated at the Wild Coast venue were peripheral issues which were not contentious and had been accommodated in previous years. The unavailability of judges for certain short periods during the season had not been an insurmountable obstacle in past years.

[22] If not an oral agreement, then there was a tacit agreement that Cliff would be an Idols judge. The conduct of both parties is evidence of this. This is so whether one adopts the approach that a contract can be established by inferring the most plausible conclusion from the proven facts<sup>4</sup> or whether on a preponderance of probabilities the facts allow for no other reasonable interpretation<sup>5</sup>. The conduct of both parties was clear and unequivocal.

[23] The facts in this matter are indicative of a contractual agreement between the parties having been reached. Although no agreement had yet been signed, both parties conducted themselves as though Cliff's position as an Idols judge was a foregone conclusion. Even if the respondents' version were to cast some doubt on the applicant's assertion of an existing contractual relationship, for the purposes of interim relief, a prima facie right, albeit open to some doubt, is sufficient. In my view the existence of a 'Judges Agreement' between Cliff and M-Net has been prima facie established. It is not contended that this agreement was cancelled in any manner whatsoever, either with or without written notice. In conclusion I am satisfied that Cliff has shown a prima facie right that he had a contract with M-Net which was terminated without due process.

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<sup>4</sup> *Joel Melamed and Hurwitz v Cleveland Estates(pty) Ltd* 1984 (3) SA 155 at 164

<sup>5</sup> *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 292

[24] What remains is to determine whether Cliff has satisfied the other requirements for interim interdictory relief. It should be noted that the stronger the prospects of success, the less important the other factors become. The weaker the ultimate prospects of success, the greater is the need for the balance of convenience to favour the applicant.<sup>6</sup>

Irreparable harm, the absence of an alternative remedy and balance of convenience

[25] The irreparable harm contended for by Cliff is that of being branded a racist which in South Africa today is, according to his counsel, tantamount to a death sentence. M-Net's axing of him has resulted in vitriolic attacks by prominent members of society. From the date of these statements, it is apparent the attacks appeared after the M-Net decision to axe him. Cliff submits that this is evidence that the public associated his dismissal from M-Net with the baseless allegations that he was dismissed for racism. It is submitted that interim reinstatement would go a long way in addressing these perceptions. Like M-Net, Cliff too, as a member of the entertainment industry, depends on his brand which he has built up over many years. Being axed for being labelled a racist does untold reputational and financial harm to him.

[26] Mr Trengove conceded that M-Net did not consider Cliff to be a racist. Nor was the view encompassed in his tweet – namely, the school of thought that freedom of speech encompassed the right to express even the most abhorrent views – in itself problematic. The real difficulty was the public reaction this tweet invoked which, in the words of Mr Trengove, made him the “the poster boy of racism”.

[27] There is merit in Cliff's submissions that he has a reasonable apprehension of suffering irreparable harm. A defamation action in due course or even a declaration of the unconstitutionality of M-Net's termination of Cliff's contract will not address the reputational damage that Cliff is suffering at present. The interim relief sought is the only satisfactory remedy that would go some way in addressing this issue.

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<sup>6</sup> *Olympic Passenger Services (Pty) Ltd v Ramalagan* 1957 (2) SA 382 (D); *Eriksen Motors (Welkom) v Protea Motors, Warrenton* 1973 (3) SA 685 (A)



[28] To see where the balance of convenience lies, a court must weigh the prejudice suffered by Cliff if the relief is refused as against the prejudice M-Net will suffer if the relief is granted. It is not an answer to say that he is the author of his own misfortune. The prejudice that Cliff will suffer has been dealt with. Essentially his brand is jeopardized and tainted. The view that his tweet was racist, either rightly or wrongly, will gain traction. The fact that another court may pronounce on this in due course does not address the immediate damage which is suffered without due process having been followed in his dismissal.

[29] On the other hand there is no factual basis that the Idols brand would suffer if Cliff were to be reinstated on a temporary basis. It cannot be ignored that Cliff's value as an Idols judge has been his tendency to shock and provoke, an image that M-Net has apparently supported, or certainly overlooked, until now.

#### Relief

[30] Mr Trengove argued that the interim relief sought by Cliff would compel M-Net to keep him on as an Idols judge for years to come. The contract contended for by Cliff is similar in all material aspects to the 2015 contract. A material term of this agreement is Clause 9.3 which provides:

*"9.3 The Producer and/or Broadcaster shall also be entitled at any time in its discretion without specifying any reason by giving the judge such of written notice of notice as is specified in the Special Conditions to terminate the Judge's engagement under this Agreement. In the event of termination under this provision, the Producer and/or Broadcaster shall remain liable to pay to the judge the remuneration due under this Agreement up to the expiry of such notice period but the Producer and/or Broadcaster will be under no further liability except under Clause 9.4.1 below."*

[31] The Special Conditions referred to above are found at clause 5.1.2 of the 2015 contract and stipulate a one week notice period.

[32] M-Net does not contend that it cancelled the agreement in writing on one week's notice, or at all. However, Mr Trengove argued that in light of M-Net's right to

terminate on such short notice, to grant the interim reinstatement of Cliff pending the outcome of an action in Part B, which could take months if not years, would be legally untenable. It would be tantamount to forcing M-Net to keep Cliff on for a period much longer than that envisaged in the contract which he contends for.

[33] Mr Mpofu pointed out the relief sought in part A is “*the interim reinstatement of the contractual relationship between the parties to what it was on or about 6 January 2016”* (my underlining). Cliff’s reinstatement would therefore mean that he would be restored to the contractual position of the other Idols’ judges, “warts and all”, including being vulnerable to termination on one week’s notice in terms of clause 9.3.

[34] The constitutional validity of such termination was raised. However, it is not for this court to determine and no finding is made in this regard. For present purposes it is sufficient that the relief sought would not amount to any infringement of M-Net’s contractual right to terminate the agreement on one week’s notice without specifying any reason therefor.

[35] Insofar as it is argued that temporary reinstatement of Cliff as an Idols judge would be an unsuitable remedy where the relationship between the parties has soured, our courts now recognize that, in principle, specific performance may be ordered in contractual disputes.<sup>7</sup> This is so, even in instances where the services are of personal nature and it means compelling an unwilling employer to reinstate his or her erstwhile employee.<sup>8</sup>

### Conclusion

[36] Cliff has satisfied the requirements for interim relief. He has made out a prima facie case for the contractual relief he contends for. Temporary reinstatement is a competent prayer in the circumstances of this case.

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<sup>7</sup> Haynes v King William’s Town Municipality 1951 (2) SA 371 (A); Benson v S A Mutual Life Assurance Society 1986 (1) SA 776 (A).

<sup>8</sup> National Union of Textile Workers v Stag Packings (Pty) Ltd 1982 (4) SA (T); Santos Professional Football Club(Pty) Ltd v Igesund and Another 2003 (5) SA 73 (C)

[37] Regarding costs, it was argued that the pattern of behaviour and the general conduct of M-Net justifies a punitive costs order. I am not satisfied that such an order is warranted.

In the result I make the following order:

1. Pending the finalization of Part B of the Notice of Motion, the contractual relationship between the parties is reinstated to what it was on or about 6 January 2016.
2. The respondents are to pay the costs of the application on a party and party scale, including the costs attendant upon the employment of two counsel.



**C. H. NICHOLLS**  
**JUDGE OF THE HIGH COURT OF**  
**SOUTH AFRICA**  
**GAUTENG LOCAL DIVISION**  
**JOHANNESBURG**

**Appearances**

Counsel for the applicant	:	Adv. D Mpofu SC Adv. T Ngcukaitobi Adv. F Hobden
Instructing Attorneys	:	Mabuza Attorneys
Counsel for the 1 <sup>st</sup> & 2 <sup>nd</sup> respondents	:	Adv. W Trengove SC Adv. L Harris SC Adv. M Lekoane
Instructing Attorneys	:	Webber Wentzel Attorneys
Date of hearing	:	26 January 2016
Date of judgment	:	29 January 2016