THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 86/10

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES **Appellant**

v

ROCHELLE MAHON **Respondent**

Neutral citation: *The Law Society of the Northern Provinces v Mahon* (86/2010) [2010] ZASCA 175 (2 December 2010).

Coram: Lewis, Cachalia, Leach, Tshiqi JJA and Ebrahim AJA

Heard: **23 November 2010**

Delivered: **2 December 2010**

Summary: Section 13(2) of the Attorneys Act 53 of 1979 permits a court to condone irregular service by a candidate attorney only if he or she has entered into a valid agreement of articles – constitutional law – interpretation – the concepts of 'fairness' and 'justice' are not freestanding requirements against which the constitutionality of a statute, its interpretation or its application to the particular facts of a case, may be tested – whether a high court is bound by this court's pre-constitutional interpretation of a statute.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bertelsmann and Rabie JJ sitting as court of first instance).

The following order is made:

1. The appeal is upheld.
2. The order of the court a quo admitting and enrolling the respondent as an attorney of the high court is set aside and the following order is substituted in its place:

   '2.1 The applicant's application for her admission and enrolment as an attorney of the high court is postponed sine die.

   2.2 Her application for condonation in terms of s 13(2) of the Attorneys Act 53 of 1979 for the period served from 3 January 2006 to 28 May 2006 before the conclusion of her articles of clerkship on 28 May 2006 is dismissed.

   2.3 Upon successful completion of her articles of clerkship for a further period of at least three (3) months, either with her former principal or any other attorney duly qualified to act as her principal, alternatively, upon successful completion of a period of at least three (3) months of community service as envisaged by s 2(1A)(b) of the Attorneys Act, the applicant may apply to court on the same papers, duly supplemented, for an order in terms of s 11(2) or, depending on the circumstances, any other applicable provision in terms of the Attorneys Act for her admission as an attorney of the high court.

2.4. The further period of three (3) months of articles of clerkship is to be served or community service to be performed within a period of twenty four (24) months from the date of this order.

2.5. The order granted by the court a quo condoning the applicant's period of absence of leave for 17 days in excess of the 30 days allowed during any year of her articles of clerkship is not affected by this order.

2.6. The applicant is ordered to surrender her certificate of enrolment as an attorney of the high court to the respondent forthwith.'

JUDGMENT

CACHALIA JA (Lewis, Leach, Tshiqi JJA and Ebrahim AJA concurring):

[1] This appeal, against a judgment of the North Gauteng High Court (Bertelsmann J, Rabie J concurring),[1] with its leave, concerns the proper interpretation of s 13(2) of the Attorneys Act 53 of 1979. The facts of the case are these.

[2] In September 2005 the respondent, Ms Rochelle Mahon, accepted an offer of employment from Attorneys D M Kisch Inc. Her contract was signed on 27 December. It described her position as that of a 'Candidate Trademark Attorney', and took effect as from 3 January 2006. I shall refer to this agreement as the 'first agreement'. In addition to the usual provisions relating to salary, working hours, leave, membership of a provident fund and medical aid, her agreement also provided, uncommonly, for a three-month probationary period and an undertaking by the employer to sign her articles of clerkship agreement

[1] The judgment is reported as *Ex Parte Mahon* 2010 (2) SA 511 (GNP).

(the clerkship agreement) only if she successfully completed her probation phase.[2] However, when the period ended her principal, Mr A K Van der Merwe, deferred the conclusion of the agreement until she had obtained an outstanding credit (Criminal Law) for her LLB degree so that they could enter into an agreement for a two-year period, which is provided for in s 2(1) of the Act.[3] She passed her Criminal Law examination in April 2006. The clerkship agreement was then signed on 28 May 2006, duly lodged with the Law Society of the Northern Provinces on 27 July 2006, and registered in good time as s 5 of the Act requires.

[3] On 4 February 2008, Ms Mahon accepted another employment offer as a legal adviser for a bank, where she began working on 5 March 2008. Her employment with D M Kisch came to an end on 28 February 2008, approximately two years and two months after she had started working there. The duration of her service under her clerkship agreement was, however, for three months less than the two year period that s 2(1)(a) of the Act requires for admission as an attorney. So, to overcome this problem, and acting on the premise that the period between 3 January 2006 to 28 May 2006 was 'irregular service' as a 'candidate attorney' as contemplated by s 13(2), she applied to the high court to condone this period of service as 'substantially equivalent to regular service' the effect of which would, if granted, exempt her from having to serve the full period of two years in terms of her clerkship agreement in order to qualify for admission as an attorney.

[4] The Law Society of the Northern Provinces, the appellant in these proceedings, opposed her application. It did so on the ground that the time spent before Ms Mahon entered into her clerkship agreement was 'not served regularly

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[2] The court below stated that the probationary period 'certainly did not reflect the applicant's wishes' (para 23(k)) and that she 'was given little choice . . . and could only accept her fate' (para 13). But no such averments were made in the papers.

[3] The court below described Mr Van Der Merwe's decision to delay signing the clerkship agreement until Ms Mahon had passed her Criminal Law exam as a refusal to do so (para 11). This is inaccurate.

as a candidate attorney' within the meaning of s 13(2), and therefore, was not capable of being condoned. The high court, however, granted Ms Mahon's application. The Law Society appeals against that order.

[5] On behalf of Ms Mahon it was contended that the first agreement was, in substance, one entered into in accordance with the Act and, therefore, that condonation was not required. Put another way, the argument was that there was 'substantial compliance' with the requirements of the Act. In the alternative, and if we were to hold that the first agreement was not one that the Act contemplates then, it was contended, her period of employment under it was nevertheless 'irregular service' that was capable of being condoned. Finally, if the first two submissions failed, it was submitted that the interpretation of s 13(2) raises a constitutional issue, which is that if the section is interpreted literally, the effect will be to violate Ms Mahon's constitutional right to choose and practise a profession of her choice under s 22 of the Constitution. The court below upheld this submission.

[6] I turn to consider the proper construction of s 13(2). There was no challenge to the constitutionality of the section, a point I will revert to later in this judgment. To interpret the section requires a consideration of its language in the light of its context and purpose. The section provides:

'If any person has not served regularly as a candidate attorney, the court, if satisfied that such irregular service was occasioned by sufficient cause, that such service is substantially equivalent to regular service, and that the society concerned has had due notice of the application, may permit such person, on such conditions as it may deem fit, to apply for admission as an attorney as if he had served regularly under articles or a contract of service.'

[7] I commence with the language. The words 'regular service' and 'irregular service' in the section both refer to service 'as a candidate attorney'. Section 1 defines a 'candidate attorney' as 'any person bound to serve under articles of

clerkship . . .'. And, 'articles of clerkship', also defined in s 1, means 'any contract in writing under which any person is bound to serve an attorney for a specified period in accordance with this Act'. Plainly, it is only the irregular service of a candidate attorney (as defined), which may be normalised – not irregular service generally. If there was the slightest doubt that this is so, it is dispelled by the signed Afrikaans text, which can hardly be clearer. It reads:

'Indien iemand nie gereeld diens as kandidaat-prokureur verrig het nie . . . dat daar gegronde rede vir die ongereelde diens was, dat daardie diens in hoofsaak gelykstaande met gereelde diens is . . . .'

[8] This construction of s 13(2) is buttressed by its statutory context. In this regard Chapter 1 of the Act, which creates the regulatory regime for candidate attorneys, is relevant. Section 2(1) prescribes the duration of service under articles of clerkship that must be served before a person is eligible for admission as an attorney. The period to be served depends on the qualification obtained. Where a person has satisfied the requirements for the *baccalaureus legum* (LLB) degree, the period prescribed is two years.[4] In the case of a person who does not have an LLB qualification, but does have another degree, the period is three years,[5] and for a person who has only passed the matriculation examination, as in Ms Mahon's case, five years.[6] In other instances, none of which bear on this matter, the period may be shortened to a year[7] or the person may be exempt from service under articles of clerkship.[8] The Act contains no other provision to accommodate a shorter period for a clerkship agreement. Before concluding a clerkship agreement an aspirant candidate attorney must submit proof of his or her qualifications to the Law Society.[9] And, once concluded, it must be lodged with the Law Society within two months to be registered.[10]

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[4] Section 2(1)(a) and s 2(1)(aA).
[5] Section 2(1)(c).
[6] Section 2(1)(e).
[7] Section 2(1A).
[8] Section 2A.
[9] Section 4(b).
[10] Section 5.

[9] The termination of a clerkship agreement is dealt with in s 11. It provides that if a clerkship agreement is cancelled or abandoned before completion, a court may add the period served under that agreement to any other period that the candidate attorney has served.[11] The purpose of the section is to ensure that the requirement that clerkship agreements comply with the period requirements in s 2(1) is made easy.

[10] Section 13(3) gives further contextual assistance for the choice of language employed in s 13(2). It provides that where a candidate attorney has satisfied the degree requirements in s 2(1), a period served by the candidate attorney under a clerkship agreement before achieving this shall for purposes of admission as an attorney be regarded as having been served after the qualification was obtained. The effect of this section is that a candidate attorney may be credited for a period of articles served before satisfying the degree requirements, and therefore suffers no prejudice, because his or her initial clerkship agreement was concluded for a longer period. I will revert to this point later in the judgment.

[11] The provisions of chapter 1, with reference to articles of clerkship, must be read with rule 58 of the rules of the Law Society, which requires an agreement to substantially comply with the form in the Second Schedule to the rules. The rule gives the Law Society the right to reject any agreement, submitted to it for registration, which does not comply with the Act, the rules or has other improper or objectionable provisions.

[12] What emerges from this analysis is that the legislature intended the terms of the clerkship agreement to be the bedrock of the regulatory regime governing candidate attorneys. But it recognized that the strict application of this regime may sometimes cause hardship. It thus gave the high court the authority to

[11] Section 11(2) and s 11(3).

condone, on sufficient grounds, the irregular service of a candidate attorney. What the legislature had in mind by 'irregular service' were 'breaks in service either through accident, as in the case of illness of the clerk, or through a *bona fide* mistake, or through other sufficient cause'.[12] But, it is plain that the high court's authority to excuse any irregular service is conditional upon the candidate attorney having concluded a clerkship agreement in accordance with the Act – in other words a valid contract of articles.

[13] Although the section has been amended over the years it has been interpreted for well over a century to convey the same idea: 'that no service could be taken into computation as qualifying for admission, except service subsequent to the date of a written contract'.[13] In addition, a string of cases from provincial divisions have said emphatically that service of articles can only be service of articles under a valid contract and that a court may only consider condoning any irregular service once the validity of the contract has been established.[14] In *Ex Parte Singer; Law Society, Transvaal, Intervening*,[15] this court gave its imprimatur to this interpretation.

[14] This brings me to Ms Mahon's first point – that the first agreement complied, or substantially complied, with the Act. As I have mentioned a contract of 'articles of clerkship' means 'any contract in writing under which a person is bound to serve an attorney for a specified period in accordance with the Act'. The agreement described her position as a 'Candidate Trademark Attorney'. But beyond that it bore no resemblance to an agreement that the Act envisages. It did not specify the duration of service as s 2 requires; nor did it conform in any material respect to the form in the Second Schedule to the rules. Most

[12] *Ex Parte Couzyn* 1929 TPD 238 at p 240. This case was decided under s 21 of Ordinance 1 (Private) of 1905.
[13] *In re Berrangé* 3 M 458. This case was decided under Rule of Court 149 in 1837.
[14] *Ex Parte Traverso* 1977 (1) SA 791 (C) p 793A-D. This case was decided under s 19(1) of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934. *Bosman v Prokureursorde van Transvaal* 1984 (2) SA 633 (T) p 636F-G; *Tshabalala v Natal Law Society* 1996 (4) SA 150 (N) p 152C-G.
[15] 1984 (2) SA 757(A).

significantly, it provided for a three-month probationary period and only then, after the 'successful completion of the probationary period', would the clerkship agreement be signed. So it is clear that the first agreement anticipated a proper agreement being signed later – and this is what happened. The parties did not intend the first agreement to be a clerkship agreement and it clearly was not. There is therefore no merit in the submission that the first agreement complied substantially or at all with the provisions of the Act.

[15] That ought to have been the end of the matter. However, counsel for Ms Mahon pressed the argument that s 13(2) is ambiguous, despite the fact that the interpretation of the section appears to have been settled. The ambiguity, he submitted, permitted an interpretation that would allow the period of articles served under the first agreement to be treated as irregular service which was capable of being condoned. For this submission he relied on *Ex Parte Edwards*,[16] a decision of the Cape Provincial Division (Farlam J, Van Niekerk J concurring). That court took the view that the words 'not served regularly as a candidate attorney' were ambiguous, the ambiguity, it said, arising from the fact that it was not clear whether the words governed by the word 'not' related only to the words 'served regularly' or included the words 'as a candidate attorney' so that only a candidate attorney who had entered into a valid contract could apply for relief under the section.[17]

[16] The court in *Edwards* found support for its view in the change of wording in s 13(2) from its predecessor, s 19(1) of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934. That section read as follows:

'Where *any person articled to an attorney* has not served under such articles strictly in accordance with the provisions of this Act, the Court, upon being satisfied that such irregular service was occasioned by sufficient cause, and that such service although irregular, is substantially equivalent to regular service, and that the law society

[16] 1995 (1) SA 451 (C).
[17] *Ibid* p 454B-D.

concerned has had due notice of the application, may, subject to the provisions of clause 6 of the First Schedule, permit such person, upon such conditions as it may deem fit, to present (if otherwise qualified) his petition for admission as an attorney in the same manner as if the service in question had been regular and in conformity with the provisions of this Act.' (Emphasis added by the court.)

[17] The court reasoned that the fact that s 19(1) of the previous Act used the words '(w)here any person articled to an attorney', and s 13(2) of the current Act did not, gave a 'strong indication' that Parliament did not intend s 13(2) to be limited in its operation to service of persons already articled.

[18] However, in a carefully reasoned judgment, the Natal Provincial Division (Howard JP, Levinsohn J concurring) in *Tshabalala v Natal Law Society*[18] firmly rejected this reasoning in *Edwards.* It accepted that the word 'not' governs the entire phrase, but considered that unless one ignored the words 'as a candidate attorney' the section could not be construed to cover irregular service by persons other than candidate attorneys, that is by persons who have not concluded valid clerkship agreements.[19] And, as I have explained earlier, because the clerkship agreement lies at the heart of the admission of persons as attorneys, it is not possible to construe the section to refer to irregular service generally. The reasoning in *Tshabalala* is in my view correct. For the same reason I do not think that the change of wording from the 1934 Act to the present one constitutes sufficient evidence of a change of intention on the legislature's part.[20]

[19] One more point must be made about *Edwards.* The court attempted to distinguish this court's decision in *Singer* by holding that there the irregular service was rendered pursuant to articles that were null and void because the applicant entered into them at a time when he was enrolled as an advocate,

[18] 1996 (4) SA 150 (N).
[19] *Ibid* p 153F-G.
[20] *Ibid* p 153G-H.

which disqualified him from doing so.[21] However, in *Edwards* the person who served articles was properly qualified to enter into a clerkship agreement but did not do so through no fault on her part. The distinction is one without a difference. In my view it matters not whether the person was qualified. The real question, as this court said in *Singer*, was whether the irregular service was capable of producing legal consequences or, put another way, was capable of being condoned. And it is only a valid contract of articles that can produce legal consequences. Had the court in *Edwards* approached the issue in this way, which I think it should have in the light of the ratio in *Singer*, it would have come to another conclusion. It follows that Ms Mahon's reliance on *Edwards* must founder.

[20] I now turn to consider the third ground that counsel for Ms Mahon relied upon: that if s 13(2) is interpreted in the manner that I have done here, and the courts have consistently done over many years, it would violate Ms Mahon's constitutional right to choose her profession freely – a right that s 22 of the Constitution now protects.[22] Counsel for Ms Mahon found support for his submission in the reasoning of the court below. For its part the court below, in turn relied on a decision of the Cape Provisional Division (Traverso DJP, Hlophe JP concurring) in *Ex Parte Ndabangaye*.[23] It is, therefore, necessary to examine *Ndabangaye* more closely.

[21] The *Ndabangaye* court was confronted with facts almost identical to those in *Singer*. The applicant for admission as an attorney had not removed her name from the roll of advocates at the time she registered her clerkship agreement with the Law Society of the Cape of Good Hope. She was thus precluded from

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[21] *Edwards* above p 455A-D.

[22] Section 22 of the Constitution provides: '**Freedom of trade, occupation and profession** Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

[23] 2004 (3) SA 415 (C).

registering her articles by s 12 of the Act.[24] When she discovered the problem, she successfully applied to court to have her name removed from the roll of advocates. She then applied to court to be admitted as an attorney, and asked the court to condone the fact that she was still enrolled as an advocate while doing her articles.

[22] The court found that there was 'sufficient cause', as s 13(2) contemplates, to condone the applicant's non-compliance with s 12 (in contrast to *Singer*, which decided that the clerkship agreement concluded contrary to s 12 was a nullity incapable of being condoned). It also held that it was no longer bound by *Singer* on two grounds: first, because s 13(2) had been amended since that case was decided and, secondly, for the reason that it predated the Constitution.[25]

[23] It is convenient to dispose of the first ground briefly. When *Singer* was decided, s 13(2) read:

'If any person has not served regularly as an articled clerk, the Court, if satisfied that such irregular service is substantially equivalent to regular service, and that the society concerned has had due notice of the application, may permit such person, on conditions as it may deem fit, to apply for admission as an attorney as if he had served regularly under articles.'

[24] For present purposes the only relevant difference between the wording then and now is that in the present Act the phrase 'was occasioned by sufficient cause' is added to the requirement that the court be 'satisfied'. I respectfully disagree that the additional words change the substance of the section's meaning. In both cases the section confers a broad discretion on the court to condone 'irregular service' – in the former case 'as an articled clerk' and in the

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[24] Section 12 provides: '**Registration of articles or contract of service entered into by advocate** Any person admitted to practice as an advocate shall not be allowed to register articles or a contract of service in terms of the provisions of this Act, unless his name has on his own application been removed from the roll of advocates.'

[25] *Ndabangaye* above n 23 para 11.

latter, 'as a candidate attorney'. This discretion can only be exercised if the prerequisite of a valid contract of clerkship exists[26] – a requirement in both the earlier and the amended section. There was therefore no proper basis to distinguish *Singer* on this ground.

[25] I turn to consider the second ground: that the court in *Ndabangaye* was not bound by this court's construction of s 13(2) in *Singer* because, to use its words, 'the . . . case preceded the Constitution'.[27] If the court intended to hold that *Singer* was not binding on it merely because it was decided before the advent of the Constitution, I must respectfully disagree with this proposition for two reasons: first, there was no direct challenge to the constitutionality of s 13(2), which means that the court had to accept that the section was constitutionally valid, and secondly, because the section is not ambiguous or otherwise reasonably capable of being given any other meaning, it logically could not have been read in a way which better 'promote[s] the spirit, purport and objects of [s 22 of] the Bill of Rights'. The *Ndabangaye* court thus ought to have considered itself bound by the decision in *Singer.*[28]

[26] But, as I have said, it did not. And, having thus freed itself of the binding force of this court's judgment it proceeded as follows; it accepted that the applicant had acted contrary to the provisions of s 12 when she registered her articles while still being on the roll of advocates[29] and, by implication, that her clerkship agreement was therefore invalid on an ordinary reading of s 13(2).

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[26] *Singer* above p 761H-762A.
[27] See *Ndabangaye* above n 23 para 11.
[28] There is some uncertainty whether in the light of the decisions in *Ex Parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) and *Afrox v Strydom* 2002 (6) SA 21 (SCA) high courts, when interpreting legislation in accordance with s 39(2) of the Constitution, are bound by pre-constitutional decisions of this court. (See Stuart Woolman and Danie Brand 'Is there a Constitution in this courtroom? Constitutional jurisdiction after *Afrox and Walters*' (2003) 18 *SAPR/PL* 49. It is not necessary to resolve this question in this case.
[29] *Ndabangaye* above n 23 para 12.

[27] But having acknowledged this to be the case, the court confusingly said that the two sections must be interpreted against the injunction in s 39(2) of the Constitution to promote the spirit, purport and objects of s 22 of the Bill of Rights;[30] and also that in interpreting ss 12 and 13(2) it must be borne in mind that they must serve a purpose envisaged by s 22 of the Constitution. In regard to s 12 it observed:

'(O)ne of the reasons why . . . an attorney wishing to become an advocate is obliged to sever all ties with the attorneys' branch of the profession may be to prevent him from using undue influence to channel work in his direction.'[31]

[28] The judge found, on the facts, that the applicant had attempted to have her name removed from the roll of advocates but, through no fault on her part, the attorneys who she had instructed had not done so. It also found that she was in no position to channel work in her direction. She would thus, said the judge, be denied her constitutional right to choose her profession freely by not being admitted to practise as an attorney if the question whether she had complied with the relevant sections were approached in a 'legalistic' manner.[32] Furthermore, said the judge, she could think of no 'rational reason why an interpretation should be afforded to s 13(2) of the Act which will result in such drastic consequences . . .'. The judge concluded that 'the interpretation adopted in the *Singer* case was so strictly legalistic that it must, in view of the . . . provisions of the Constitution and the Bill of Rights and the underlying aims of fairness and justice be departed from'.[33] Accordingly, she found 'sufficient cause' to condone the irregular service of the applicant's contract of articles of clerkship.

[29] The court below adopted the reasoning in *Ndabangaye.* It approached the question whether Ms Mahon's service should be regarded as service 'substantially equivalent to regular service' as contemplated by s 13(2) as one to

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[30] *Ibid* para 18.
[31] *Ibid* para 22, citing *In re Rome* 1991 (3) SA 291 (A) at 309C.
[32] *Ibid* paras 23 and 24.
[33] *Ibid* paras 28 and 29.

be determined against the factual background of the matter.[34] It then, as the court in *Ndabangaye* approached the issue, said that the stated purposes of the Act included the protection of the integrity of the profession, the safeguarding of the public from unqualified and unscrupulous individuals entering the profession and also to ensure that candidate attorneys received proper training from their employers and were not exploited by them.[35] And, that neither these purposes, nor any purpose sanctioned by s 22 of the Bill of Rights, would be served by adopting an 'unduly legalistic approach' to the interpretation of s 13(2).[36] Instead, said the judge, the matter had to be approached in a manner that ensures that 'substantive justice' is done.[37] It thus concluded, as did *Ndabangaye*, that it would be 'unfair' on the facts of this case not to recognize Ms Mahon's prior service because she had received 'appropriate instruction' during this period.[38]

[30] I have already indicated that in the absence of any direct constitutional challenge to s 13(2) under s 36 of the Constitution,[39] or a proper case that the section was reasonably capable of any other interpretation, the court in *Ndabangaye* and the court below were bound by *Singer.* It appears, however, that they both had s 36 in mind when they emphasised that a statutory provision – in this case s 13(2) – must serve a *purpose* that the Bill of Rights sanctions. But by doing so they conflated s 36 of the Constitution, which deals only with direct challenges to the constitutionality of a law (in this case a statute), with s 39(2),

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[34] *Ex parte Mahon* 2010 (2) SA 511 (GNP) para 23.
[35] *Ibid* paras 24 and 25.
[36] *Ibid* paras 24 and 26.
[37] *Ibid* para 27.
[38] *Ibid* para 28.
[39] '**Limitation of rights**
1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
a. the nature of the right;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation;
d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

which is concerned only with the interpretation of law in a manner that is consistent with the Constitution.[40] More fundamentally, they erred in considering that the subjective positions of the applicants for admission as attorneys had any bearing on how s 13(2) was to be interpreted.[41] This led both courts, with respect wrongly, to conclude that a 'legalistic interpretation'[42] of s 13(2) would, in these cases, be contrary to a purpose sanctioned by s 22 of the Constitution and thus unjustifiably infringe the applicants' rights. This brings me to the question of whether fairness and justice in and of themselves afford constitutional grounds to impugn legislation.

[31] The statement by the court in *Ndabangaye* that fairness and justice are underlying aims of our constitutional order is uncontroversial.[43] Most legal systems would subscribe to these values. Central to the idea of fairness, writes Amartya Sen, is:

'[A] demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality.'[44]

In a similar vein 'justice', according to Plato, requires us to treat equals equally and unequals unequally. There are, however, many theories and conceptions of justice and the search for any exact idea of justice has escaped philosophers as

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[40] Section 39(2) provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[41] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) para 26.
[42] The courts in *Ndabangaye* (para 24) and the court below (para 26) cited *Ex Parte Mothuloe (Law Society, Transvaal, Intervening* 1996 (4) SA 1131 (T)) to support this proposition. But *Ex Parte Mothuloe* did not deal with s 13(2); nor does it refer to the Constitution. The case merely confirms a trite principle of statutory interpretation, which predates the Constitution, that when considering whether a statutory provision has been complied with the answer is to be found by having regard to the intention of the legislature as ascertained not only from the language, but also from the scope and purpose of the enactment as a whole. The approach has been confirmed by a long line of authority. This 'trend in interpretation', said Van Dijkhorst J, is 'away from the strict(ly) legalistic to the substantive . . .'.
[43] Above n 23 para 29.
[44] Amartya Sen *The Idea of Justice* (2009) 54.

it has judges. It often boils down to what in the Afrikaans language would be one's 'regsgevoel' – one's personal sense of justice.

[32] But fairness and justice are inherently malleable concepts and cannot be freestanding requirements against which to test the constitutionality of a statute, its interpretation or its applicability to the facts of a particular case.[45] Because if they were, statutes would be declared unconstitutional or applied differently depending on an individual judge's perception of what is fair or just in a particular case, which is what happened in the two cases now under consideration. Obviously, when interpreting laws judges are assisted by the presumption that the legislature does not intend to enact laws that produce unfair, unjust or unreasonable results.[46] But laws have general application and their meaning cannot change to accommodate individuals. A statute, just like the Constitution, does not mean whatever we wish it to mean. Cases must be decided on a principled basis.[47] The statements in the judgments of *Ndabangaye* and of the court below that suggest the contrary should consequently not be followed.

[33] I return to the instant matter. I have held that Ms Mahon's first agreement was not a valid agreement as contemplated by the Act and for that reason the period that she served under it was not capable of being condoned. I should add that it is not as if the Act did not permit her to conclude a clerkship agreement that conformed to the Act. Before obtaining all her credits for her LLB degree she could have entered into a five-year contract in terms of s 2(e) and, once she had completed two years, applied to court under s 13(3)[48] to permit her to be

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[45] Cf *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) para 53.
[46] L C Steyn *Die Uitleg van Wette* (5 ed) 101.
[47] *Minister of Safety and Security v Sekhoto* (131/10) [2010] ZASCA 141 para 14.
[48] 'The court may, on the application of a candidate attorney who has satisfied all the requirements for a degree referred to in paragraph *(a)* or *(c)* of section 2(1), or for the degrees referred to in paragraph *(a*A*)* of that section, or for a degree or degrees referred to in paragraph *(a*B*)* or *(c*A*)* of that section in respect of which a certification in accordance with those respective paragraphs has been done, and subject to such conditions as the court may impose, order that the whole or any part of the period served by that candidate attorney under articles before he or she satisfied such requirements, shall, for the purpose of his or her admission and enrolment as

enrolled. The court below was understandably concerned that applying the law in its terms would result in some hardship to her. This is because she had already performed functions of a candidate attorney for a two-year period. Courts should be compassionate: but legal questions, as a judge said many years ago, must be resolved without regard to sentiment or sympathy.[49]

[34] Courts should bear in mind too that certain consequences flow from articles of clerkship and that these are professionally important. These include the Law Society's supervisory and regulatory function of the work of a candidate attorney and the fact that legal privilege is afforded to clients of an attorney and a candidate attorney. Service other than under valid articles of clerkship would undermine these features and could impact adversely on the public.

[35] There is, however, a matter arising from this case that requires the attention of the Law Society. I am not aware of any consistent practice where attorneys enter into clerkship agreements, which include a period of probation as in the instant case. Such contracts, as the court below correctly observed, must be discouraged as they are open to abuse.

[36] The Law Society has, at the request of the court, and in collaboration with Ms Mahon's legal representatives, very helpfully proposed a draft order. That order will be made an order of court. The Law Society has appropriately not asked for a costs order in the event that it is successful in the appeal. I accordingly make the following order.

1. The appeal is upheld.
2. The order of the court a quo admitting and enrolling the respondent as an attorney of the high court is set aside and the following order is substituted in its place:

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an attorney, be regarded as having been served after and under articles entered into after he or she satisfied such requirements.'

[49] *Ex parte Venter* 1954 (3) SA 567 (O) at 569D-F.

‘2.1 The applicant’s application for her admission and enrolment as an attorney of the high court is postponed sine die.

2.2 Her application for condonation in terms of s 13(2) of the Attorneys Act 53 of 1979 for the period served from 3 January 2006 to 28 May 2006 before the conclusion of her articles of clerkship on 28 May 2006 is dismissed.

2.3 Upon successful completion of her articles of clerkship for a further period of at least three (3) months, either with her former principal or any other attorney duly qualified to act as her principal, alternatively, upon successful completion of a period of at least three (3) months of community service as envisaged by s 2(1A)(b) of the Attorneys Act, the applicant may apply to court on the same papers, duly supplemented, for an order in terms of s 11(2) or, depending on the circumstances, any other applicable provision in terms of the Attorneys Act for her admission as an attorney of the high court.

2.4. The further period of three (3) months of articles of clerkship is to be served or community service to be performed within a period of twenty four (24) months from the date of this order.

2.5. The order granted by the court a quo condoning the applicant’s period of absence of leave for 17 days in excess of the 30 days allowed during any year of her articles of clerkship is not affected by this order.

2.6. The applicant is ordered to surrender her certificate of enrolment as an attorney of the high court to the respondent forthwith.’

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	A T Lamey (Attorney) Instructed by Rooth & Wessels Inc, Brooklyn Naudes, Bloemfontein
RESPONDENT:	J E Ferreira Instructed by Mothle Jooma Sabdia Inc, Pretoria Matsepes Inc, Bloemfontein