THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 2/2009

In the matter between:

GLEN DUNCAN	**APPELLANT**
and	
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	**FIRST RESPONDENT**
CHIEF DIRECTOR: RESEARCH ANTARCTICA AND ISLANDS OF THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM	**SECOND RESPONDENT**

Neutral citation: *Duncan v The Minister of Environmental Affairs and Tourism* (2/2009) [2009] ZASCA 168 (1 December 2009)

CORAM: **Streicher, Brand, Mlambo, Malan JJA *et* Leach AJA**

HEARD: **12 November 2009**

DELIVERED: … **1 December 2009**

SUMMARY: Review – refusal of fishing licence under s 18 of MLR Act 18 of 1998 – appellant seeking to enforce substantive legitimate expectation to acquire licence – question whether competent in our law left open because legitimacy of expectation held not to be established on the facts – further reliance on legitimate expectation to be heard prior to refusal – also dismissed on the facts.

ORDER

On appeal from: Cape High Court (Nagan AJ sitting as court of first instance).

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

BRAND JA (Streicher, Mlambo, Malan JJA *et* Leach AJA concurring):

[1] The appellant is a commercial fisherman. The first respondent is the Minister of Environmental Affairs and Tourism. The second respondent is the Chief Director in the same State department ('the Department') who is responsible, inter alia, for the marine and coastal management branch of the Department. For the sake of convenience I shall refer to the first respondent as the Minister, to the second respondent as the Chief Director and to both of them as the respondents. On 4 November 2005 the appellant applied for a licence to undertake commercial fishing for traditional line fish in terms of s 18 of the Marine Living Resources Act 18 of 1998. Acting under delegated authority of the Minister in terms of s 79, the Chief Director refused his application. His appeal to the Minister in terms of s 80 was also unsuccessful. In the event the appellant brought an application in the Cape High Court for these two decisions to be reviewed and set aside. In due course, the court a quo (Nagan AJ) dismissed this application with costs. The appeal against that judgment is with the leave of Traverso AJP in the court a quo.

[2] The licence that the appellant applied for was a long term licence for the eight year period from 1 January 2006 to 31 December 2013. As appears from the reasons given by the Minister and the Chief Director for their

decisions, they refused the appellant's application on one single ground: to wit, that he had failed to demonstrate access to a 'suitable line fish vessel'. At first sight this reason comes across as rather curious because the appellant was the owner/skipper of the MFV Endeavour which, from a commercial point of view, was by all accounts undoubtedly suitable for catching line fish. But it is common cause that the requirement of a 'suitable vessel' is to be understood in the light of a document entitled 'The Traditional Line Fish Policy' which was issued by the Department and published in the Government Gazette during June 2005 (the policy document).

[3] The policy document contained a full exposition of the departmental policies and objects in regard to the long term line fishing licences that were about to be issued at that time. It also informed prospective applicants for these licences of the requirements with which they would have to comply. One of these requirements was stated thus:

'All applicants need to demonstrate access to a suitable line fish vessel. A suitable vessel in the traditional line fishery is a vessel that:

- is either a ski-boat or traditional wooden deck boat of approximately 10 metres or less (this criterion should be flexibly applied by the delegated authority) that is currently operating in the fishery. The vessel must be certified by SAMSA as being safe for fishing; and
- is geared for hand line fishing.'

[4] The appellant's vessel, the Endeavour, is not a ski-boat or a traditional wooden deck boat, also known in the trade as a 'chukkie'. The Endeavour belongs to a class described as freezer boats. Its specifications are substantially different from those of ski-boats and chukkies. These differences are vividly illustrated by the following table originating from the respondents' answering papers:

DETAILS	ENDEAVOUR	TYPICAL SKI-BOATS	CHUKKIES
LENGTH	16,58m	5m-8,9m	6m-11m
GROSS TONNAGE	66,65	1,5-3	5-20
HOLD CAPACITY TONNES	± 30	1-3	3-5
CREW	25	5-11	5-16

[5] The appellant's licence application indicates his appreciation that the Endeavour did not comply with the description of a 'suitable vessel' in the policy document. Hence he proceeded to motivate why it should nonetheless be regarded as 'suitable' in the following way:

'I have been utilising this vessel [the Endeavour] for the past eight years, initially to land squid and later line fish . . .

In and during 2001, I submitted an application for a right of access in terms of s 18 of the Marine Living Resources Act within the traditional line fish sector. On this application being successful I have been using this vessel to target and harvest traditional line fish.

The vessel has been certified to carry 25 crewmen using the line fish method and have been doing so since the allocation was made . . ..

It is, however, noted with concern that the suitability of the vessel is determined by its length. The policy goes further and indicates that the length should not exceed 10 metres (which discretion should be flexibly applied). The policy, however, does not clarify or pronounce or offer any further details regarding the flexibility of the discretion . . ..

It is however submitted that the vessel, Endeavour, despite it being longer than the average vessel within the traditional line fish sector, is a suitable vessel for the targeting and landing line fish especially if one considers the economic sustainability of the traditional line fish business. As stated in previous annexures, the vessel is . . . [inter alia] fitted with a blast and holding freezer. This allows the rights holder to operate for longer periods at a time, deliver product of prime quality and negates the fluctuating and varying factors which perpetuate the line fish sector.'

[6] The appellant's thesis that he should have been granted a long term licence to continue his line fishing business by means of the Endeavour because he had been allowed to do so since 1995, was elaborated upon in his review application. Accordingly, the appellant explained in his founding affidavit that he had been involved in the fishing industry for most of his adult life. Since 1995, so he said, he had been actively involved in both the traditional line fish sector and the squid sector as skipper and later the skipper/owner of the Endeavour. In 2001, however, he was compelled to choose between line fish and squid as a result of a notice published by the then Minister in the Government Gazette under s 16 of the Act. In terms of the notice the Minister declared that an emergency had occurred in the line

fishing sector, excluding tuna and hake. In order to protect stocks of line fish species from being depleted and commercially oversubscribed, so the notice proceeded, the following restrictions were imposed until further notice:

'(1) The Total Applied Effort (TAE) [as defined in the Act] in respect of line fish shall be restricted to 450 vessels with a maximum of 3450 crew;

(2) A right in the line fish sector may not be granted to any person who holds a commercial fishing right in respect of any sector of the fishing industry.

(3) Hake and tuna will no longer form part of line fish, but will from the coming into operation of these restrictions, constitute two separate sectors within the fishing industry . . . '

[7] Because he was compelled to make an election in terms of paragraph (2) of the notice, so the appellant said, he made his calculations and decided that line fish would be more profitable than squid. When invitations for fishing licence applications were invited by the Department in 2001, he therefore applied for line fish only and not for squid. The licence that he applied for was for a medium term of four years between 2001 and 2005. The vessel he nominated in his application was the Endeavour. On that occasion his application was successful. The reasons why other applications did not succeed, were published at the time in a general statement by the Department. One of the reasons given was that these unsuccessful applicants had failed to meet with an essential requirement for a licence which was formulated thus:

- 'Ownership of or access to an appropriate vessel. An appropriate vessel is typically a small vessel between approximately 5m and 10m in length with two outboard motors, such a ski-boats. . . . '

[8] The conclusion he drew from all this, so the appellant said, is that, despite the fact that in 2001 a suitable vessel was also described as one of less than 10 metres in length, the Endeavour was then regarded as 'suitable' though it obviously exceeded that length. In 2005, so the appellant contended, nothing material had changed. The TAE was still determined by the Minister at 450 vessels and 3450 crewmen and there was no apparent reason why the Endeavour would suddenly become non-suitable for purposes of a long term licence. Moreover, the appellant continued, long term

licences were granted in 2005 for vessels which also exceeded 10 metres in length. In this regard he referred, by way of example, to a vessel, the Kowie, for which a licence was granted, despite the fact that it was 13,4 metres long. In this light, so the appellant's founding affidavit concluded, the refusal of his application on the sole basis that his vessel was 3 metres longer is, for that reason alone, manifestly unreasonable.

[9] In his answering affidavit, the Chief Director explained that his decision not to accept the Endeavour as a suitable vessel must be understood against the precarious state of our line fish stocks. More pertinently, he said, stock assessments performed since the 1980s showed that most commercially exploited species of line fish had been depleted to dangerously low levels. By December 2000 the situation had not improved. Consequently the then Minister declared the environmental emergency in the fishery to which the appellant referred. Pursuant to the declared emergency, the Minister determined, as we know, that the TAE in this fishery shall be restricted to 450 vessels with a maximum of 3450 crew. With regard to vessels, it had been considered for some years that smaller vessels of less than 10 metres in length should be given preference in the fishery. These smaller vessels are typically the ski-boats and wooden deck boats or chukkies. They are far less efficient than larger freezer vessels such as the Endeavour. Consequently they have a much smaller impact on an already compromised resource. Large vessels are less affected by adverse weather conditions. They can stay at sea for longer periods. While ski-boats and chukkies have to return at the end of each day, the Endeavour, for example, can stay out for two weeks. The operational range of freezer boats is up to 2 000 kilometres while the maximum range of traditional vessels is no more than 80 kilometres.

[10] Further studies completed in 2003 showed, so the Chief Director continued, that a substantial number of the species in the traditional line fish sector had collapsed. Others were in a state of collapse but were fished in large quantities as this was often the only way in which vessel operators could generate sufficient income. In these circumstances the limit placed on the type of vessel in 2005 was designed to reduce the fishing pressure

applied by larger freezer vessels, capable of trips of long duration and range, to stocks on the Agulhas offshore bank. The objective in this regard was to allow the Agulhas offshore bank to act as a refuge for these resources to recover. As they recover they should start to feed the inshore area which is the typical area fished by ski-boats and chukkies. The further problem with larger vessels such as the Endeavour, so the Chief Director explained, is that they have a history of targeting over-fished species, such as carpenter, because they are capable of reaching the distribution range of these species.

[11] With regard to the Kowie, a vessel that the appellant brought into comparison, it was pointed out by the Chief Director that the Kowie is a fairly large traditional wooden deck boat which was built more than 40 years ago. Though it is 13,4 metres in length (versus the 16,58 metres of the Endeavour) it has a gross tonnage of 17 (versus the 66,65 of the Endeavour) and a holding capacity of 4 tons (versus the 30 tons of the Endeavour) and a crew of 16 (versus the Endeavour's 25). Based on information supplied by the appellant and by the operators of the Kowie, so the Chief Director pointed out, the superior efficiency of the Endeavour is illustrated by the fact that it caught about twice as much fish in kilogram per crewmember per day as the Kowie. It is an appreciation of these issues, so the Chief Director concluded, that resulted in the decision reflected in the policy document to restrict 'suitable vessels' to ski boats and chukkies of approximately ten metres or less.

[12] On 6 March 2006 the appellant was informed by the Chief Director that his application for a long term licence had been refused because he did not 'demonstrate access to a suitable vessel'. In his refusal letter, the Chief Director also referred to a document entitled 'General reasons for decisions on the allocation of rights and effort in the traditional line fish sector' which was published at the same time. The appellant then launched his appeal to the Minister in terms of s 80. In his letter of appeal, which had been prepared by his attorney and covered 25 pages, he sought to persuade the Minister that the Chief Director had erred in refusing his application on the basis that the Endeavour was not a suitable vessel. But, as we now know, the argument

was unsuccessful in that the Minister confirmed both the Chief Director's decision and the reasons that he gave. Relying on the decision of this court in *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) 182 (SCA) para 35, the respondents contended at the outset that it is only the Minister's decision under s 80 that is reviewable, because it constituted a complete re-hearing and a fresh determination of the appellant's application on the merits. The appellant, on the other hand, disputed that this was so. I find this question unnecessary to decide for present purposes. For the sake of argument I will assume in the appellant's favour that the decision of the Chief Director is reviewable as well.

[13] The starting point of the appellant's argument as to why he should have been granted a long term licence, was his claim that he had a legitimate expectation of being awarded such a licence in respect of the Endeavour and that he was entitled to enforce that expectation. This argument immediately raised the question whether the substantive protection or enforcement of a legitimate expectation is competent in our law. In its original role the doctrine of legitimate expectation has been recognised as affording no more than the right to a fair hearing before an adverse decision is taken (see eg *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) at 758C-G). In English law, where the doctrine originated, its operation has, however, in recent years been extended so as to afford a claim to compel substantive compliance with the expectation (see eg *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 (CA); *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237 (CA); *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363). Other Commonwealth jurisdictions, on the other hand, which also inherited the doctrine of legitimate expectation from English Law, have refused to follow the English extension of substantive protection (see eg The High Court of Australia in *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 and the Supreme Court of Canada in *Reference Re Canada Assistance Plan* (BC) [1991] 2 SCR 525; *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281). Thus far our Constitutional Court has found it unnecessary to decide whether or not we should follow the

English example (see eg *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 36; *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 96). And in *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) paras 27 and 28, the question was pertinently left open by this court.

[14] Since *Meyer*, the results of extensive academic research and analysis have been published (see eg Cora Hoexter *Administrative Law in South Africa* (2007) 382 *et seq*; John Campbell 'Legitimate expectations: The potential and limits of substantive protection in South Africa (2003) 120 *SALJ* 292; Geo Quinot 'The developing doctrine of substantive protection of legitimate expectations in South African administrative law' (2004) 19 *SA Public Law* 543). These publications will undoubtedly be of valuable assistance when eventually the time comes in an appropriate case, as it presumably will, for our courts to cut the Gordian knot. But this is not that case. Even if substantive protection of legitimate expectations were to be recognised as part of our law, the appellant has in my view failed to lay the foundation for his claim of a legitimate expectation to acquire a long term licence in respect of the Endeavour.

[15] Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The requirements for the legitimacy of such expectation have been formulated thus:

(a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.

(b) The expectation must have been induced by the decision maker.

(c) The expectation must be reasonable.

(d) The representation must be one which is competent and lawful for the decision-maker to make.

(See eg *National Director of Public Prosecutions v Phillips* 2002 (4) SA 60 (W) para 28; *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 19; Woolf, J Jowell, A Le Sueur, *De Smith's Judicial Review* 6 ed (2006) paras 12-029 *et seq.*)

[16] The grounds on which the appellant relied for his substantive legitimate expectation of being awarded a long term licence in respect of the Endeavour were summarised by his counsel as follows:

- He had been an active participant in the traditional line fish sector since 1995 as skipper and later skipper/owner of the vessel.
- In 2001 he had to abandon a lucrative portion of his livelihood in applying for a medium term licence in the line fish sector in order to stay within the policy guidelines as formulated by the Department.
- The Endeavour had throughout been registered with the Department as a commercial fishing vessel and had been lodging catch returns with the Department in respect of her operation since 1995 and the appellant had complied with all obligations under the medium term licence.
- By granting a medium term licence the respondents had blessed appellant's vessel nomination in the past and implicitly considered it to be a suitable vessel.
- The policy document indicated that the suitable vessel requirement would be flexibly applied and a number of vessels the length of which exceeded 10 metres were awarded long term licences.

[17] As I see it, the appellant could not have expected to acquire a long term licence without any reservation and whatever the circumstances. This is particularly so because he knew that the concept of a medium term licence had been introduced as a precursor to long term licences and to provide the Department with a window of observation and research. Common sense therefore dictates that even in the appellant's own mind his subjective expectation must have been subject to some reservations and conditions in the light of what the uncertain future might bring. But what would these conditions and reservations entail? Would it be that fish stocks remain the same; or that the number of participants in the industry remains constant; and so forth? The applicant does not say. In consequence I do not believe that the representations he relied upon met the first requirement of certainty and unambiguity.

[18] As to the second of the stated requirements, it is clear that most of the factors relied upon by the appellant cannot be ascribed to the Chief Director or the Department. If the appellant, for example, believed that he would acquire a long term licence because he had been involved in the industry since 1995 or because he had complied with the terms of his medium term licence, that is not something that he had been told by the Department. Any expectation based on these factors could therefore only be inspired by the appellant's own beliefs. The same goes for his decision in 2001 to opt for line fish and not to apply for squid. The appellant did not allege that there was any intimation by the Department that if he gave up squid he could expect to acquire a right to catch line fish. Giving up squid was a precondition for his application in 2001, not a guarantee that the application would be granted. Hence the appellant gave up squid at his own risk and because he thought that line fish would be more profitable. As I see it, only two of the factors relied upon by the appellant could possibly be laid at the door of the Chief Director or the Department. These are (a) the fact that the appellant had been granted a medium term licence for the same vessel and, (b) the statement in the policy document that the suitable vessel requirement would be flexibly applied.

[19] As to the first of these two factors, it would not, in my view, be reasonable for the appellant to expect to acquire a long term licence simply because he was granted a medium term fishing right. He knew that his medium term licence was granted for a specific period only, from 1 January 2002 until 31 December 2005. Any expectation to the contrary would be in conflict with s 18(6) which, inter alia, provides that:

'All rights granted in terms of this section shall be valid for the period determined by the Minister . . . whereafter it shall automatically terminate and revert back to the State to be reallocated in terms of the provisions of this Act . . ..'

[20] As I see it, the same can be said for the other factor possibly attributable to the Chief Director or the Department, ie the statement in the policy document that the suitable vessel requirement would be flexibly applied. But again, any expectation based on that factor would simply not be reasonable. An application of the requirement flexible enough to allow the

Endeavour which did not qualify at all, would in effect render the requirements of a suitable vessel nugatory. In the end I do not believe that any of the factors relied upon by the appellant – whether attributable to the decision-maker or not – would, either singularly or collectively, provide a sufficient basis for characterising his alleged expectation as reasonable. They would all raise the rhetorical question as to why it would be reasonable for a person who realised that he did not meet one of the essential requirements for a licence to expect that he would nonetheless acquire that licence because he had been involved in the industry for ten years; or because he had been lodging the prescribed catch returns; or because of any of the other factors on which the appellant purported to rely. For these reasons I conclude that the appellant failed to establish the legitimacy of his alleged expectation to acquire a long term licence.

[21] That, however, is not the end of the matter. On the appellant's papers and even in the written heads of argument filed on his behalf in this court, his case turned on the substantive protection of his alleged legitimate expectation to acquire a long term licence in respect of the Endeavour. But in oral argument there was an unmistakable shift in focus. What his counsel then contended for relied on the conventional, procedural role of the legitimate expectation doctrine as formulated, eg in *Traub* (at 758E-G), to the effect that the person concerned may have a legitimate expectation to be heard before an adverse decision is taken. Departing from this premise appellant's counsel submitted that on the face of it the requirements for a suitable vessel imposed in 2005 were substantially the same as those pertaining to a medium term licence in 2001. Since the Endeavour had been regarded as suitable in 2001, so the argument went, the appellant had a legitimate expectation in 2005 to be given fair warning in advance that the goalposts had shifted; that the Endeavour may no longer be regarded as suitable; and to be given the opportunity of persuading the Chief Director that, although the Endeavour does not strictly comply with the requirements stated in the policy document, it should nonetheless be approved as a suitable vessel.

[22] As I see it, this argument rests on substantially firmer ground than the appellant's attempt at enforcement of a substantive legitimate expectation. Yet, for the reasons that follow, I do not believe it can succeed. The policy document contained sufficient detail to explain what type of vessel would be suitable. The appellant plainly understood that the Endeavour did not satisfy these criteria. He thus made specific separate representations in that regard. These representations have been fully set out earlier in this judgment (para [5] above). As appears from the quotation, the appellant inter alia reminded the Chief Director that the Endeavour had been utilised in the industry for eight years and that it had been granted a medium term licence in 2001. He then set out to motivate why, despite its excessive length, the Endeavour should be approved. In his answering affidavit the respondents said – and it is not disputed – that the appellant's motivation had been considered and that he was given a further opportunity to deal with the issue on appeal. In this light, I believe that any legitimate expectation of an opportunity to persuade the respondents that the Endeavour was a suitable vessel, had been satisfied.

[23] When met with these obstacles during argument, counsel for the appellant introduced a further change of tack. What he then contended for was in essence that the appellant could legitimately expect to be granted an opportunity to persuade the Chief Director that the requirements for a suitable vessel, as set out in the policy document, were not only unreasonable but in fact misconceived. Had the appellant been given this opportunity, so the argument went, he could explain to the Chief Director that it was wrong to think that freezer boats like the Endeavour would impose undue pressure on threatened species and that, in any event, there were other, more effective ways of protecting these species than by excluding freezer boats from the sector completely. To my way of thinking, a proper analysis of this argument shows that it effectively relies on a legitimate expectation to be consulted about the contents of the policy document. Thus understood, the argument founders on the undisputed fact that the content of the policy document was formulated after extensive consultations with a wide variety of interested

parties. This appears, inter alia, from the following statement by the Chief Director:

'The draft traditional line fish policy was published in isiXhosa, Afrikaans, isiZulu and English in the Government Gazette and on the Department's website and copies were distributed along the coastline. For purposes of public consultation, the notice and comment process set out in the Promotion of Administrative Justice Act 3 of 2000 and its regulations were adopted. As part of the notice and comment process, a series of public meetings were held in order to assist interested and affected parties who cannot read or write or who otherwise needed special assistance. In April 2005 consultations with communities took place in 15 venues along the coast regarding the draft traditional line fish policy. At each consultation, every comment was recorded and documented . . . At the end of the consultation process, more than 1700 fishers between Port Nolloth and Durban had been heard orally. Apart from the hundreds of oral comments which were recorded, the Department also received more than 330 written comments on the policy. Significant changes were made to the policy after the comments were considered. In May 2005, Cabinet approved the 19 "*sector specific policies*" and the "*General policy*".

[24] Finally it was contended on the appellant's behalf that the decisions by the respondents were reviewable under s 6(2) of the Promotion of Administrative Justice Act 3 of 2000. In support of this contention the appellant sought to rely on a contravention by the respondents of virtually every sub-section of s 6(2). Hence it was submitted, by way of illustration, that the respondents' decisions were taken for an ulterior purpose or because of the unauthorised or unwarranted dictates of another person (s 6(2)(e)(ii) and (iv)); that the decisions were not rationally connected to the purpose for which they were taken or to the information before the respondents or to the reasons given by them (s 6(2)(f)(ii)); and that the decisions were so unreasonable that they could not have been taken by a reasonable person (s 6(2)(h)). I do not think it is necessary to record and discuss the content of these submissions in any detail. Suffice it to say, in my view, that in the light of the background facts and the reasons given by the respondents for their decisions, I find the appellant's contentions based on s 6(2) of PAJA without any merit at all. This inevitably leads me to the order I propose.

[25] The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

.....
F D J BRAND
JUDGE OF APPEAL

Counsel for the Appellants:	S F Burger SC
	M Steenkamp
Instructed by:	Dawson Edwards & Associates
	Cape Town
Correspondents:	McIntyre & Van der Post
	Bloemfontein
Counsel for the Respondents:	W R E Duminy SC
	E A De Villiers-Jansen
Instructed by:	The State Attorney
	Cape Town
Correspondents:	The State Attorney
	Bloemfontein