

Substantive Legitimate Expectations in South African and European Administrative Law

By Geo Quinot*

A. Introduction

The doctrine of legitimate expectation was authoritatively accepted as part of South African administrative law in the landmark case of *Administrator, Transvaal v Traub*¹ in 1989.² In that case Chief Justice Corbett extended the scope of application of the rules of natural justice, specifically the *audi* principle,³ beyond the traditional “liberty, property and existing rights” formula to cases where something less than an existing right, a legitimate expectation, required a fair procedure to be followed.⁴ This acceptance followed the trend in other Commonwealth jurisdictions to extend the application of the rules of natural justice and hence afford greater procedural protection to individuals affected by administrative decisions.⁵ Although Chief Justice Corbett expressly stated that the content of the expectation may be substantive or procedural in nature,⁶ the protection of that expectation, if found to be legitimate, was exclusively procedural.⁷ Since the *Traub* decision, the doctrine of

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¹ *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

² For a discussion of this development see CORA HOEXTER, *THE NEW CONSTITUTIONAL ADMINISTRATIVE LAW VOLUME 2*, 209 (2002); G E DEVENISH ET AL., *ADMINISTRATIVE LAW AND JUSTICE IN SOUTH AFRICA*, 307 (2001); John Hlophe, *Legitimate Expectation and Natural Justice: English, Australian, and South African Law*, 104 SALJ 165 (1987).

³ The *audi alteram partem* principle, which in its most basic form requires the administrator to afford affected parties the right to be heard before taking a decision which would adversely affect them.

⁴ *Traub*, *supra* note 1, at 761 D-G.

⁵ *Id.* 754G – 761D where Corbett CJ examines the development of the doctrine in English law and also refers to the acceptance of the doctrine in Australia and New Zealand.

⁶ *Id.* 758D: The expectation may be that the individual will acquire some substantive benefit, such as a license, that is a substantive expectation, or simply that the individual will be heard before a decision is taken, that is a procedural expectation. Corbett CJ also notes that the two forms of expectation may even merge, *id.* 758E.

⁷ *Id.* 761E, 764A.

legitimate expectation has been deeply entrenched in South African administrative law to extend the scope of procedural rights afforded individuals affected by administrative action.⁸ It is now an established principle of South African administrative law that a person, who has a legitimate expectation, flowing from an express promise by an administrator or a regular administrative practice, has a right to be heard before administrative action affecting that expectation is taken.⁹ The doctrine, has however, by and large, remained one that provides procedural protection in South Africa. In a number of recent decisions by South African courts, ranging from the High Court to the Supreme Court of Appeal and the Constitutional Court, there have been increasing calls for the application of legitimate expectations beyond procedural claims.¹⁰

In other Commonwealth jurisdictions the doctrine of legitimate expectation has been developing beyond the procedural context for a number of years. The question that has been asked in these jurisdictions is whether the existence of a legitimate expectation can give rise to a substantive remedy. In other words, can a court compel an administrator to grant a substantive benefit to an individual based on that individual's legitimate expectation of receiving such benefit? This application of the legitimate expectation doctrine is referred to as substantive legitimate expectation, as opposed to the traditional procedural legitimate expectation.¹¹ The doctrine of substantive legitimate expectation has, however, not been universally accepted in Commonwealth jurisdictions.¹² In England, where it has received the most attention and acceptance, the position seems to be unclear in the absence of an authoritative opinion from the House of Lords.¹³

⁸ See Daniel Malan Pretorius, *Ten Years After Traub: The Doctrine of Legitimate Expectation in South African Administrative Law*, 117 SALJ 520 (2000); HOEXTER, *supra* note 2, at 209.

⁹ HOEXTER, *supra* note 2, at 210.

¹⁰ See paragraphs 0 to 0 below.

¹¹ P.P. CRAIG, *ADMINISTRATIVE LAW*, 611 (1999). The labels substantive and procedural in this context refers to the relief that the legitimate expectation entitles the individual to as opposed to the content of the expectation, which, at least in procedural legitimate expectation instances may be either substantive or procedural in nature, see note 6.

¹² In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* (2001) 2 SCR 281 at paragraph 35 the minority judgement rejected substantive protection of legitimate expectations in Canadian law. The majority decided the case on different grounds. See also *Reference re Canada Assistance Plan (BC)* (1991) 83 DLR (4th) 297 (SCC). In *Attorney General, New South Wales v Quin* (1990) 93 ALR 1 (HC) the doctrine was rejected in Australian law, see also Cameron Stewart, *Substantive Unfairness: A New Species of Abuse of Power?*, 28 FED. L. REV. 617 (2000) at 634.

¹³ In 1997 the Court of Appeal described the doctrine as "heresy" in *R v Secretary of State for the Home Department, Ex parte Hargreaves and Others* (1997) 1 WLR 906 (CA) at 921. However, in *R v North and*

In as well the administrative law of the European Union ("EU") and many of its member states, the protection of legitimate expectations is widely accepted.¹⁴ The scope of such protection extends significantly beyond that afforded in Commonwealth jurisdictions and includes substantive protection. The European Court of Justice has at least since the *Civil Service Salaries* case¹⁵ of 1973 applied the principle that administrators should be held to their representations. The jurisprudence of the European Union in this context is therefore much more developed than its Commonwealth counterparts.

This note examines the recent developments in South African administrative law regarding the doctrine of substantive legitimate expectation against the backdrop of the well developed doctrine in European administrative law. The analysis of South African law shows that substantive legitimate expectation is still in an early stage of development. The note continues to argue that the more developed jurisprudence of the European Union holds some important lessons for South African courts in developing this doctrine. A number of considerations are set out in comparison and contrast to the European position, which must be kept in mind in the future development of the doctrine of substantive legitimate expectation in South African administrative law. In closing, the important point is made that South African courts will be well-served in not restricting comparative analyses when evaluating substantive legitimate expectation claims to English law or the Commonwealth in general, from which South African administrative law developed, but to heed the lessons from the EU.

B. European Administrative Law

Legitimate expectations has long been judicially protected by means of review in the European Union. The development of the doctrine in EU law was strongly influenced by German law, where expectations created by administrators are given strong judicial protection.¹⁶ In German law the concept of *Vertrauensschutz* has long

East Devon Health Authority, *ex parte* Coughlan (1999) LGR 703 the Court of Appeal seems to accept the doctrine as part of English law.

¹⁴ See paragraphs 0 to 0 below.

¹⁵ Case 81/72, *Re Civil Service Salaries*: E.C. Commission v E.C. Council, 1973 E.C.R. 575.

¹⁶ SØREN SCHØNBERG, *LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW* 118 (2003); *C.f.* Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 *CAMB. L. J.* 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, *ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES* 285 (Rene Seerden & Frits Stroink eds., 2002).

been recognized as requiring administrators to honor their representations.¹⁷ The scope of the principle in German law also extends far beyond similar protection in Commonwealth jurisdictions to also apply to informal representations and mere expectations as opposed to only vested rights.¹⁸ As early as 1956 the *Oberverwaltungsgericht* in Berlin applied this principle to hold an administrator to a representation regarding the payment of a welfare grant.¹⁹ As Forsyth²⁰ indicates this decision is remarkable in the sense that the court acknowledged that the administrator's representation was clearly unlawful, but still upheld the applicant's expectation on the grounds of her legitimate reliance on the representation.

In EU law the protection of legitimate expectations is, however, not restricted to procedural relief, but extend to substantive relief as well. The general principle is that EU institutions will be held to their representations irrespective of whether those are procedural or substantive in nature,²¹ provided that the requirements for applying the doctrine are met. This principle is so well established in EU law that legitimate expectations are not classified as either procedural or substantive.²² If an expectation is created and that expectation is found to be legitimate the European Court of Justice ("ECJ") will protect that expectation by holding the relevant administrator to the representation that gave rise to the expectation.

The type of representations creating expectations that has come to be protected by the doctrine of legitimate expectation in South African law²³ has been protected as such in EU law at least since the *Châtillon* case of 1966.²⁴

¹⁷ Forsyth, *supra* note 16, at 242, Seerden & Stroink, *supra* note 16, at 119, SCHØNBERG, *supra* note 16, at 71-72, *see also* Joined Cases 7/56 and 3-7/57, *Algera v Common Assembly*, 1957 E.C.R. 39 and Cases 205 to 215/82, *Deutsche Milchkontor GmbH et al. v Germany*, 1983 E.C.R. 2633.

¹⁸ Forsyth, *supra* note 16, at 242.

¹⁹ Quoted and discussed by Forsyth, *supra* note 16, at 243.

²⁰ *Id.*

²¹ SCHØNBERG, *supra* note 16, at 117.

²² P.P. Craig, *Substantive Legitimate Expectations in Domestic and Community Law*, 55 CAMB. L. J. 289 (1996) at 306.

²³ That is informal representations made by administrators such as promises or long-standing practices, for example based on an existing policy.

²⁴ Case 54/65, *Châtillon v High Authority*, 1966 E.C.R. 185. It is interesting to note that this case predates the English law case of *Schmidt v Secretary of State for the Home Affairs* [1969] 2 Ch. 149, which is generally viewed as the case in which Lord Denning created the English law concept of legitimate expectations.

The *locus classicus* in EU law regarding legitimate expectations is, however, the 1973 case of *Re Civil Service Salaries: E.C. Commission v E.C. Council*.²⁵ In that case the Council departed from an existing published guideline regarding Community staff salaries. Upon review the ECJ ruled that the Council could not depart from its earlier statements without “circumstances sufficient to justify the abandonment.”²⁶ The court stated the reason for its decision as “the rule of protection of the legitimate confidence which citizens may have in the respect by the authorities of undertakings of this sort.”²⁷ Consequently the court held the Council to its representation, that is afforded substantive relief.

In adjudicating legitimate expectation claims the ECJ follows a two step approach. Firstly it asks whether the administrator’s actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation.

The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The test to determine this reasonableness is what the *bonus paterfamilias* would expect.²⁸ The representation itself must be precise and specific²⁹ and importantly, lawful.³⁰ The reasonable person would not form a specific expectation on a vague representation or rely on unlawful representations. One important aspect of the objective dimension of this inquiry in EU law, is the foreseeability of potential retractions of the representation.³¹ EU law is quite strict in requiring individuals to demonstrate a high degree of diligence in foreseeing that specific representations may be retracted or may be subject to constant change and should therefore not be

²⁵ Case 81/72, 1973 E.C.R. 575. Forsyth, *supra* note 16, at 242; SCHØNBERG, *supra* note 16, at 118.

²⁶ Case 81/72 at 584-5.

²⁷ *Id.* at 584.

²⁸ Case 78/77, Lührs v Hauptzollamt Hamburg-Jonas, 1978 E.C.R. 169; Case 265/85, Van den Bergh en Jurgens v Commission, 1987 E.C.R. 1155; SCHØNBERG, *supra* note 16, at 119; E. Sharpston, *Legitimate Expectations and Economic Reality*, 1990 ELR 103 at 156.

²⁹ Case T-123/89, Chomel v Commission, 1990 E.C.R. II-131.

³⁰ Case 112/77, Töpfer v Commission, 1978 E.C.R. 1019; Case 188/82, Thyssen v Commission, 1983 E.C.R. 3721, Case 15/85, Consorzio Doopertaive d’Abruzzo v Commission, 1987 E.C.R. 1005, SEERDEN & STROINK, *supra* note 16, at 284.

³¹ Case 265/85, Van den Bergh en Jurgens BV and Van Dijk Food Products (Lopik) BV v Commission, 1987 E.C.R. 1155, Case 52/81, OHG Firma Werner Faust v Commission, 1982 E.C.R. 3745.

relied upon.³² This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.³³ The subjective dimension in determining whether a reasonable expectation was created is the requirement that the individual must subjectively, that is in actual fact, hold the expectation.³⁴ The representations on which expectations can be based may take many forms.³⁵ It may be in the form of an express statement,³⁶ including general policy statements.³⁷ The expectation may also be generated by long-standing practice.³⁸

Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.³⁹ Should the individual's interests outweigh the public interest underlying the administrator's purported action, the reasonable expectation will also be legitimate.⁴⁰ In such a case there will be a legitimate expectation, which must be respected by the administrator.⁴¹ It is the administrator in the first instance who strikes the balance between the private and public interests and determines whether the expectation should be upheld or disregarded.⁴² The decision of the administrator is however subject to judicial review. An individual whose expectation has been disappointed may approach the court to review the administrator's actions and the court will then weigh up the relevant

³² Case T-243/94, *British Steel v Commission*, 1997 E.C.R. I-1887; Case 78/77, *Lühns v Hauptzollamt Hamburg-Jonas*, 1978 E.C.R. 169; Case 265/85, *Van den Bergh en Jurgens v Commission*, 1987 E.C.R. 1155; Joined Cases 424-425/85, *Frico v VIV*, 1987 E.C.R. 2755; SCHØNBERG, *supra* note 16, at 127-8; SEERDEN & STROINK, *supra* note 16, at 284.

³³ Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

³⁴ SCHØNBERG, *supra* note 16, at 125.

³⁵ SCHØNBERG, *supra* note 16, at 120.

³⁶ Joined Cases 424-425/85, *Frico v VIV*, 1987 E.C.R. 2755.

³⁷ Case 74/74, *CNTA v Commission*, 1975 E.C.R. 533, Case C-400/92, *Germany v Commission*, 1994 E.C.R. I-4701.

³⁸ Case 344/85, *Ferriere San Carlo v Commission*, 1987 E.C.R. 4435.

³⁹ Case 120/86, *Mulder v Minister van Landbouw en Visserij*, 1988 E.C.R. 2321; Case 74/74, *CNTA v Commission*, 1975 E.C.R. 533; Case 96/77, *SA Ancienne Maison Marcel Bauche et SARL Francois Delquignies v Administration française des douanes*, 1978 E.C.R. 383.

⁴⁰ *Id.*; SCHØNBERG, *supra* note 16, at 128.

⁴¹ SCHØNBERG, *supra* note 16, at 128.

⁴² *Id.*

public and private interests to determine which trumps which.⁴³ If the court finds that the private interest in relying on the representation outweighs the public interest underlying the administrator's actions, it will declare the expectation to be legitimate and order such expectation to be upheld.⁴⁴

A good example of this jurisprudence is the *Mulder* cases.⁴⁵ In those cases Mulder participated in a regulatory measure to curb excess milk production in the EU by entering into a five-year-non-marketing period in exchange for a non-marketing premium. At the end of the five year period he applied for a reference quantity to resume production under a new levy system, which was introduced since he entered into the non-marketing arrangement. The application was rejected on the grounds that Mulder did not prove his milk production in the preceding reference year, which was a requirement for a successful application. Mulder subsequently launched review proceedings claiming that he had a legitimate expectation to resume production after the five year non-marketing period. The ECJ concluded that Mulder had a legitimate expectation to re-enter the market without being specifically prejudiced due to his participation in the non-marketing arrangement. The court consequently declared the new levy system invalid to the extent that it resulted in no allocation to those producers who participated in the non-marketing arrangement. As a result of the first *Mulder* case, the Council adopted a regulation which allocated a special quota to producers in Mulder's position in the amount of 60% of their production in the year preceding the year in which they entered into the non-marketing arrangement. Mulder again brought review proceedings, which the court upheld ruling that the 60% quota was too low. Mulder as a result claimed damages. The ECJ upheld Mulder's claim to the extent that he was originally denied any quota, but rejected his claim to the extent that he was awarded a 60% quota, despite the fact that the latter regulation was also struck down by the court. The reason for this difference was due to the fact that in the first instance there were no compelling public interests which outweighed Mulder's expectation, so that his legitimate expectation had to be protection. However, in the latter instance, there were important public interests involved in awarding the limited 60% quota, which outweighed Mulder's expectations so that he could not claim damages for loss suffered due to those administrative actions.⁴⁶

⁴³ Case 120/86, *Mulder (I) v Minister van Landbouw*, 1988 E.C.R. 2321.

⁴⁴ *Id.*

⁴⁵ Case 120/86, *Mulder (I) v Minister van Landbouw*, 1988 E.C.R. 2321; Joined Cases C-104/89 & 37/90, *Mulder v Council and Commission*, 1992 E.C.R. I-3061.

⁴⁶ Joined Cases C-104/89 & 37/90, *Mulder v Council and Commission*, 1992 E.C.R. I-3061; Sharpston, *supra* note 28; Craig, *supra* note 22, at 308-309.

It is important in the current analysis to note the standard of review which the ECJ employs in legitimate expectation cases. The ECJ will enforce a legitimate expectation and invalidate administrative action disappointing such expectation where it finds a significant imbalance between the private and public interests.⁴⁷ Although it is generally accepted that this standard is more intensive than the traditional *Wednesbury* reasonableness review in English law, applied in similar circumstances,⁴⁸ Schönberg's analysis of ECJ case law applying the *significant imbalance* test seems to suggest that the ECJ is generally just as deferential to administrative discretion, especially in matters regarding policy, as its English counterparts.⁴⁹ However, Schönberg illustrates that the *significant imbalance* test is much more "precise, structured and coherent" than the traditional approach in English law and should therefore be favoured above the English approach.⁵⁰

Finally, a word needs to be said about the principles underlying the legitimate expectation doctrine in EU law. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.⁵¹ Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.⁵² Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:

Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.⁵³

⁴⁷ Case 120/86, *Mulder (I) v Minister van Landbouw*, 1988 E.C.R. 2321; Joined Cases C-104/89 & 37/90, *Mulder v Council and Commission*, 1992 E.C.R. I-3061, Case C-152/88, *Sofrimport SARL v Commission*, 1990 E.C.R. I-2477, Case C-189/89, *Spagl v Hauptzollamt Rosenheim*, 1990 E.C.R. I-4539; SCHØNBERG, *supra* note 16, at 149-150.

⁴⁸ Christopher Forsyth, *Wednesbury Protection of Substantive Legitimate Expectations*, 1997 PUB. L 375 at 381, Paul Craig & Søren Schönberg, *Substantive Legitimate Expectations after Coughlan*, 2000 PUB. L 684 at 697, SCHØNBERG, *supra* note 16, at 150.

⁴⁹ SCHØNBERG, *supra* note 16, at 150. His analysis is supported by that of Sharpston, *supra* note 28.

⁵⁰ *Id.*, at 155.

⁵¹ Joined Cases 424-425/85, *Frico v VIV*, 1987 E.C.R. 2755, SCHØNBERG, *supra* note 16, at 12; Sharpston, *supra* note 28, at 106; CRAIG, *supra* note 11, at 611; Forsyth, *supra* note 48, at 375; CRAIG, *supra* note 22, at 299, 304, 311.

⁵² SCHØNBERG, *supra* note 16, at 12-23, Craig & Schönberg, *supra* note 48, at 685.

⁵³ Forsyth, *supra* note 48, at 384.

Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.⁵⁴ The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires*. That would be the case where an administrator has created an expectation of some conduct which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation he would be forced to act *contra legem*. It is clear that such representations will not be upheld by the ECJ.⁵⁵ The value of legality in EU law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate.⁵⁶ Legality therefore seems to take precedence over legal certainty in EU law. The ECJ will not weigh up the individual's trust in administrative representations against policy considerations to depart from that representation if the representation is *contra legem*. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.⁵⁷

It is against the background of this well developed doctrine of substantive protection of legitimate expectations in EU law that the recent South African developments must be viewed in order to highlight the important lessons that South African law can take from the European position. The South African position is explored in the following paragraphst.

C. South African Case Law

As was stated in the introductory paragraph, the doctrine of legitimate expectation was imported from English law to South African law in the 1989 case of *Administrator Transvaal v Traub*.⁵⁸ In line with English law, at least at that time, the ambit of

⁵⁴ Joined Cases 205-215/82, *Deutsche Milchkontor GmbH et al. V Germany*, 1983 E.C.R. 2633.

⁵⁵ SEERDEN & STROINK, *supra* note 16, at 284, SCHØNBERG, *supra* note 16, at 147-148..

⁵⁶ *See* note 30 *supra*.

⁵⁷ Some member states of the EU, notably Germany and the Netherlands, however, afford greater protection to the individual in such cases and in fact weigh up the legal certainty interests against legality interests when adjudicating substantive legitimate expectation claims. See Forsyth, *supra* note 16, at 243 where he discusses a German case of 1956 in which it was stated that both legal certainty and legality are elements of the *Rechtstaatprinzip* (rule of law) and should consequently be weighed up against each other in substantive legitimate expectation claims. *See also* Gio ten Berge and Rob Widdershoven, *The Principle of Legitimate Expectations in Dutch Constitutional and Administrative Law*, in NETHERLANDS REPORTS TO THE FIFTEENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 422 (E.H. Hondius ed., 1998) and SEERDEN & STROINK, *supra* note 16, at 170 for a discussion of the Dutch position.

⁵⁸ *Supra* note 1.

the doctrine was restricted to procedural protection. It was incorporated into South African law as an extension of the rules of natural justice, that is the procedural requirements for fair administrative action.⁵⁹ Only most recently, has there been mention of substantive protection of legitimate expectations in South African law.

The determination of whether a legitimate expectation exists that merits judicial protection in South African law is very similar to EU law. The requirements for the existence of such an expectation in South African law were recently restated in *National Director of Public Prosecutions v Phillips*.⁶⁰ These include: (i) that there must be a representation which is “clear, unambiguous and devoid of relevant qualification”,⁶¹ (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it,⁶² (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation.⁶³ If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed.⁶⁴ Failing such procedure, the individual may approach a court to review the administrator’s actions on the ground of procedural unfairness.⁶⁵ If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.⁶⁶

A number of recent South African court decisions, however, have referred to the possibility of extending the protection of legitimate expectations to substantive relief, that is the doctrine of substantive legitimate expectation. Against the backdrop of conflicting opinions in the lower courts,⁶⁷ this question has recently sur-

⁵⁹ HOEXTER, *supra* note 2, at 209-211.

⁶⁰ 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

⁶¹ Phillips case, *supra* note 60, at paragraph 28.

⁶² *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at paragraph 216, *Szymanski case*, *supra* note 60, at paragraph 21.

⁶³ Phillips case, *supra* note 60, at paragraph 28.

⁶⁴ Traub case, *supra* note 1, at 761.

⁶⁵ *Id.*

⁶⁶ Pretorius, *supra* note 8, at 524 to 529.

⁶⁷ Compare the High Court judgements in *Putco Limited v The Minister of Transport for the RSA and others* 2003 JDR 0484 (W) (assuming for purposes of the judgement that the doctrine of legitimate expect-

faced in two judgements by the Supreme Court of Appeal⁶⁸ and two Constitutional Court opinions.⁶⁹

In both the Supreme Court of Appeal cases the court rejected the claim based on substantive legitimate expectation. It is important to note, however, that although the court expressed considerable reluctance in embracing the doctrine, it did not reject it and expressly left the door open to an acceptance of the doctrine in South African law in future.⁷⁰ In both cases the court rejected the claim on the grounds that no legitimate expectation in fact existed.⁷¹

In *Meyer v Iscor Pension Fund*⁷² the appellant appealed against an order of the High Court setting aside a determination of an adjudicator appointed in terms of the Pension Funds Act. Meyer retired before reaching the normal retirement age and as a result received reduced pension benefits in terms of the rules of his employer's, Iscor, pension fund.⁷³ These rules stated that pension benefits will be reduced in case of early retirement, calculated with reference to the number of months by which actual retirement precedes the normal retirement age.⁷⁴ Less than two months after Meyer's retirement the rules of the fund was amended as a special measure to encourage early retirement, which formed part of rationalisation scheme agreed to between Iscor and the trade unions.⁷⁵ The amended rules removed the penalty imposed on pension benefits in case of early retirement for a

tation forms part of South African law), *University of the Western Cape v Member of Executive Committee for Health and Social Services* 1998 (3) SA 124 (C) (stating that it is in the interest of good governance that administrators should be held to their promises as long as those are *intra vires*) and *Durban Add-Ventures Ltd v Premier, KwaZulu-Natal, and Others* (No 2) 2001 (1) SA 389 (N) (stating the legitimate expectations can only be protected procedurally and not substantively).

⁶⁸ *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA), *South African Veterinary Council and another v Szymanski* 2003 (4) SA 42 (SCA).

⁶⁹ *Premier, Province of Mpumalanga and another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC), *Bel Porto School Governing Body and others v Premier of the Province, Western Cape and another* 2002 (9) BCLR (CC).

⁷⁰ Meyer's case, *supra* note 68, at paragraph 27.

⁷¹ Meyer's case, *supra* note 68, at paragraph 28; *Szymanski's case*, *supra* note 68, at paragraph 16.

⁷² Note 68 *supra*.

⁷³ Meyer's case, *supra* note 68, at paragraph 1.

⁷⁴ *Id.*

⁷⁵ *Id.* at paragraph 2 and 9.

certain group of employees.⁷⁶ Had Meyer retired two months later, he would have received more than twice the benefits he did.⁷⁷ Meyer subsequently laid a complaint against the fund in terms of the Pension Funds Act and the adjudicator appointed under the Act determined the dispute in Meyer's favour.⁷⁸ The adjudicator ordered the fund to pay Meyer increased pension benefits under the amended rules.⁷⁹ The fund succeeded in the High Court to set the adjudicator's order aside upon appeal, but the court allowed Meyer to appeal the judgment.⁸⁰

One of Meyer's arguments in the Supreme Court of Appeal was that he had a legitimate expectation that any amendment to the rules, which resulted in increased pension benefits as part of the rationalisation scheme, would be implemented with retrospective effect. Had this been done, he would be entitled to increased pension benefits. Meyer based his legitimate expectation on promises made by Iscor in the course of the rationalisation program that improved retrenchment benefits would be implemented with retrospective effect.⁸¹ He did not, however, claim that his legitimate expectation entitled him to procedural relief, but that the substantive benefit should be afforded to him.⁸²

The court assumed for purposes of the judgment that trustees' decisions in terms of the rules of pension funds can be reviewed on a basis analogous to the review of administrative decisions.⁸³ It noted the recent developments in English law accepting substantive legitimate expectations, but also noted the rejection of this doctrine in other Commonwealth jurisdictions such as Australia and Canada.⁸⁴ The court expressly refused to either accept or reject the doctrine of substantive legitimate expectation in South African law.⁸⁵ It held that whether to adopt this doctrine or not is a "difficult and complex" question and cautioned against simply grafting

⁷⁶ *Id.*

⁷⁷ *Id.* at paragraph 3.

⁷⁸ *Id.* at paragraph 5.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at paragraph 25.

⁸² *Id.* at paragraph 26.

⁸³ *Id.* at paragraph 22.

⁸⁴ *Id.* at paragraphs 27 and 28.

⁸⁵ *Id.* at paragraph 27.

foreign doctrines onto local law.⁸⁶ The court emphasized the importance of understanding the underlying needs that prompted the development of the doctrine in its country of origin.⁸⁷ In this respect the court suggested that the doctrine of substantive legitimate expectation may have developed in English law in response to the requirement that valuable consideration be given before an undertaking can be legally binding, which requirement is foreign to South African law.⁸⁸ Despite these remarks the court continued to analyze Meyer's alleged legitimate expectation and found that even if the doctrine of substantive legitimate expectation were accepted as part of South African law, he would still not be entitled to the relief claimed.⁸⁹ This conclusion seemed inevitable on the basis that the facts did not support a legitimate expectation.⁹⁰

The second Supreme Court of Appeal case, *South African Veterinary Council v Szymanski*,⁹¹ involved a substantive claim to be registered as a veterinary surgeon. As part of a special arrangement in terms of which South African citizens holding foreign veterinary degrees could be registered to practice in South Africa, the Council conducted a special admissions examination.⁹² Szymanski wrote this examination and was awarded a combined mark of 45.25%. The Council regarded this as a failure, taking 50% to be the pass mark and refused to register him.⁹³ Szymanski subsequently applied to the High Court for an order setting aside the Council's decision that the pass mark was 50% and an order requiring the Council to register him as a veterinary surgeon in South Africa.⁹⁴ He based his claim on a legitimate expectation that the pass mark was 40% and not 50%, which expectation followed from numerous statements by the Council and its officials.⁹⁵ The High Court ruled in favour of Szymanski setting aside the Council's decision and order-

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at paragraph 28.

⁹⁰ *Id.* at paragraphs 29 to 30.

⁹¹ *Supra* note 68.

⁹² *Id.* at paragraph 2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at paragraph 3.

ing the Council to register him as a veterinary surgeon, that is, the High Court granted Szymanski substantive relief based on his legitimate expectation.⁹⁶

Upon appeal Cameron JA, for a unanimous Supreme Court of Appeal, dealt with the doctrine of substantive legitimate expectation in a single paragraph.⁹⁷ He noted that the court⁹⁸ recently cautioned against “an over-hasty” adoption of the doctrine in South African law.⁹⁹ According to the judge, it was, however, not necessary in the present case to decide the matter, because “Dr. Szymanski’s case was deficient in its most basic essentials.”¹⁰⁰ The court continued to show that the applicant did not have a legitimate expectation on the facts of the case.¹⁰¹ Resultantly the appeal was upheld.

The doctrine of substantive legitimate expectation has also been mooted in the Constitutional Court. Two judgments are noteworthy in this respect.¹⁰² In the first of these, the *Premier, Province of Mpumalanga* case,¹⁰³ the member of the provincial executive council responsible for education¹⁰⁴ terminated bursaries paid to certain state schools for needy students.¹⁰⁵ These bursaries were paid to schools educating mainly white students as part of the apartheid education system.¹⁰⁶ The MEC’s decision to terminate these bursaries formed part of the general transformation of the education system.¹⁰⁷ About 100 of the schools that previously received such bursaries subsequently challenged the MEC’s decision on the grounds that it was

⁹⁶ *Id.* at paragraph 14.

⁹⁷ *Id.* at paragraph 15.

⁹⁸ Meyer’s case, *supra* note 68.

⁹⁹ Szymanski’s case, *supra* note 68, at paragraph 15.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at paragraphs 16-21.

¹⁰² *Premier, Province of Mpumalanga and another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) BCLR 151 (CC) and *Bel Porto School Governing Body and others v Premier of the Province, Western Cape and another* 2002 (9) BCLR (CC).

¹⁰³ *Supra* note 102.

¹⁰⁴ The MEC for education.

¹⁰⁵ *Premier, Province of Mpumalanga* case, *supra* note 102, at paragraph 2.

¹⁰⁶ *Id.* at paragraphs 2 and 7.

¹⁰⁷ *Id.* at paragraph 17.

procedurally unfair and unjustifiable.¹⁰⁸ The schools applied for an order setting aside the decision and an order compelling the MEC to continue to pay the bursaries until the end of that school year, that is 1995.¹⁰⁹ They based their case on the legitimate expectations that bursaries would be paid for 1995 and that they would be afforded a fair procedure before the administration terminated the payments.¹¹⁰ These expectations entitled them to a fair procedure in terms of section 24(b) of the Interim Constitution,¹¹¹ a failure of which would result in the administrative action being invalid, so the argument went.¹¹² At paragraph 36 of the judgement, O'Regan J stated that it was not necessary in the present instance to decide whether a legitimate expectation may entitle an applicant to substantive relief. The reason for this conclusion is that section 24(b) of the Interim Constitution expressly stated that an individual shall have the right to procedurally fair administrative action where his or her legitimate expectation is affected. A claim based on legitimate expectation in terms of section 24(b) of the Interim Constitution is therefore clearly restricted to a procedural remedy. In the present case, the court found that the legitimate expectations of the schools entitled them to a fair procedure before the bursaries were terminated and that no such procedure was followed.¹¹³ Consequently, the decision was set aside.¹¹⁴ The court, however, refused to sanction the substantive relief ordered by the High Court, that is that the bursaries must be paid until the end of the school year in line with the applicants' legitimate expectation.¹¹⁵ O'Regan J concluded that this was not a case in which a court could substitute its own decision for that of the administrator.¹¹⁶ However, it was not possible to refer the decision back to the MEC to be taken in a procedurally fair manner, seeing that the judgement date was 1998 while the bursaries terminated naturally at the end of 1995.¹¹⁷

¹⁰⁸ *Id.* at paragraph 3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at paragraphs 31 and 38.

¹¹¹ Constitution of the Republic of South Africa, act 200 of 1993.

¹¹² Premier, Province of Mpumalanga case, *supra* note 102, at paragraph 30.

¹¹³ *Id.* at paragraph 42.

¹¹⁴ *Id.* at paragraph 46.

¹¹⁵ *Id.* at paragraph 51.

¹¹⁶ *Id.* In common law a court could only substitute its own decision on the merits for that of the administrator in very narrow circumstances. These included cases where the end result is a foregone conclusion and referring the matter back to the administrator would only be a waste of resources and cases where the administrator exhibited such degree of bias that referring the matter back to him or her would result in an injustice, *id.* at paragraph 50.

¹¹⁷ *Id.* at paragraph 52.

The end result of the Constitutional Court's judgement was therefore that the bursaries had to be paid until the end of 1995, that is a result similar to the substantive relief granted by the High Court.

The second case in which the Constitutional Court referred to the doctrine of substantive legitimate expectation is that of *Bel Porto Governing Body v Premier of the Province, Western Cape*.¹¹⁸ In that case the governing bodies of a number of schools challenged certain decisions taken by the provincial education department as part of a rationalisation scheme. In order to eradicate inequalities between former "whites-only" and "non-white" schools, the provincial department embarked on an extensive rationalisation program. At the same time, the applicants, which were all former whites-only schools catering for disabled children, started making requests to the department to employ special assistants who were currently employed by the schools themselves.¹¹⁹ Upon the department's refusal to take over these employees prior to implementing the rationalisation program, the schools instituted review proceedings. The schools averred that a number of their constitutional rights have been infringed by the department's actions and applied for substantive relief in the form of an order enforcing the department to employ the special assistants currently on the schools' own pay-roll.

The High Court rejected the application and the schools appealed to the Constitutional Court. The Constitutional Court dismissed the appeal, but only narrowly on a 6-4 split. Chief Justice Chaskalson wrote the opinion for the majority,¹²⁰ with three dissenting opinions being filed.¹²¹ The majority rejected the claim based on administrative justice on the ground that a fair procedure was followed vis-à-vis the schools and specifically declined to express an opinion on substantive legitimate expectation.¹²²

¹¹⁸ *Supra* note 102.

¹¹⁹ These schools argued that while they employed their special assistants themselves, the former non-whites state schools did not have to do so. The assistants at the latter schools were employed by the respective education departments. The former whites-only schools were finding it increasingly difficult to afford their special assistants and therefore appealed to the education department to employ the special assistants working at these schools, *id.* at paragraphs 11 to 19.

¹²⁰ Justices Goldstone, Kriegler, Madlanga, Somyalo and Yacoob concurring.

¹²¹ Justices Mokgora and Sachs filed a joint opinion and justices Madala and Ngcobo each filed their own opinions.

¹²² *Bel Porto School case*, *supra* note 102, at paragraph 96.

It is, however, Madala J's dissenting opinion in the *Bel Porto School* case,¹²³ which is the most relevant for present purposes. He bases his opinion on a general duty of fairness, which rests on the administration.¹²⁴ From there he continues to discuss the doctrine of legitimate expectation and its development in English law and reception in South African law.¹²⁵ He notes that the doctrine has developed in English law to include substantive protection.¹²⁶ There is, however, a flaw in his argument where he jumps from the statement that the doctrine of legitimate expectation, as it exists in South African law, protects both procedural and substantive expectations to the statement that legitimate expectations will be protected substantively in certain instances.¹²⁷ While the former statement is undoubtedly correct,¹²⁸ his second statement does not follow from the first. As indicated above, the legitimate expectation doctrine was originally restricted to procedural protection.¹²⁹ That is, although the *content* of the expectation could be procedural or substantive in nature, the *relief* afforded was restricted to procedure and specifically the extension of the *audi* principle.¹³⁰ Although the extracts from the *Traub* case¹³¹ quoted by Madala J¹³² support the contention that substantive expectations are protected by the doctrine of legitimate expectation, they are no authority for the proposition that substantive legitimate expectations will be protected substantively.¹³³ The only further authority that Madala J offers for his conclusion that substantive expecta-

¹²³ *Bel Porto School* case, *supra* note 102, at paragraphs 191 to 218.

¹²⁴ *Id.* at paragraph 207.

¹²⁵ *Id.* at paragraphs 208 to 211.

¹²⁶ *Id.* at paragraph 209.

¹²⁷ *Id.* at paragraphs 211 to 213.

¹²⁸ As Madala J clearly indicates Corbet CJ already made this clear in the *Traub* case, *supra* note 1, which originally adopted the legitimate expectation doctrine in South African law.

¹²⁹ See paragraphs 0 and 17 above.

¹³⁰ See paragraph 1 note 1 above.

¹³¹ *Supra* note 1.

¹³² *Bel Porto School* case, *supra* note 102, at paragraphs 210 to 212.

¹³³ In the *Traub* case, *supra* note 1, at 758D-E Corbett CJ concludes with reference to the relevant English law: "As these cases and the quoted extracts from the judgments indicate, the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken." It is clear from this extract that although the content of the expectation may be substantive or procedural in nature, the protection afforded remains procedural.

tions will be “given substance to” is an article by Professor Robert E Riggs¹³⁴ in which he examines the development of the doctrine of legitimate expectation in English law.¹³⁵ It would therefore seem that Madala J’s casual acceptance of the doctrine of substantive legitimate expectation is rather lacking in authority as far as South African law is concerned. This is not to suggest that the doctrine cannot be imported into South African law as was originally done with legitimate expectation in the *Traub* case¹³⁶ and as recently suggested by Brand JA in the case of *Meyer v Iscor Pension Fund*.¹³⁷ However, any such reception must be done on a careful analysis of the relevant foreign developments and an evaluation of the need that prompted that development in the foreign jurisdiction(s) and the corresponding need in South African law.¹³⁸

It seems evident from the discussion above that the development of substantive legitimate expectation in South African law is still in a very early stage and it is not clear whether the doctrine will be accepted at all. At least Brand JA seemed very reluctant in his opinion for the court in *Meyer v Iscor Pension Fund*¹³⁹ to accept the doctrine. With the exception of Madala J in the *Bel Porto School* case,¹⁴⁰ all the statements in the higher courts suggest that a much more careful analysis of the relevant issues regarding the doctrine must be put before the court before it will be prepared to endorse the doctrine. In such an analysis it will be important to take note of the development of legitimate expectation in other jurisdictions. Since that doctrine has always included substantive protection in EU law, the development in that jurisdiction is of particular importance. The next section focuses on some of the lessons to be learnt in South African law from EU law.

¹³⁴ Robert E Riggs, *Legitimate Expectation and Procedural Fairness in English Law*, 37 AM. J. OF COMPARATIVE L. 395 (1988).

¹³⁵ *Bel Porto School* case, *supra* note 102, at paragraph 213.

¹³⁶ Note 1 *supra*.

¹³⁷ Note 68 *supra*. See the discussion of that case in paragraphs 0 to 0 above.

¹³⁸ As was suggested by Brand JA in *Meyer v Iscor Pension fund*, *Id.*, and as illustrated by Corbet JA in the *Traub* case, note 1 *supra*, when he accepted the doctrine of legitimate expectation as part of South African law.

¹³⁹ *Supra* note 68. See the discussion of that case in paragraphs 0 to 0 above.

¹⁴⁰ *Supra* note 102. See the discussion in paragraph 0 above.

D. Comparing EU and South African law

The first important lesson for South African law is the structure of legitimate expectation analysis in EU law. In EU law there is an added policy analysis, which is absent from South African law. After it has established that there is a reasonable expectation, the ECJ weighs the public interest in disappointing that expectation against the individual's interests in relying on the expectation before arriving at the conclusion that the expectation is legitimate and should be protected.¹⁴¹ This brings the analysis closer to reasonableness review in South African law than the application of traditional legitimate expectation doctrine in procedural fairness review. Since in procedural fairness cases the matter will ordinarily be referred back to the administrator who will revisit the decision in a procedurally fair manner, it has not been necessary for the court to investigate the opposing public and private interests in the substance of the matter. That was left to the administrator. In substantive legitimate expectation cases, however, it is the court that will decide on the substantive outcome of the particular administrative action. It is therefore important for the court to keep in mind the relevant substantive interests involved. When South African courts consider substantive legitimate expectation claims, they should thus be aware that they are involved in reasonableness review rather than review in terms of traditional legitimate expectation doctrine.

The second important point to note, which flows from the first, is the standard of review employed by the ECJ. As noted above, it is only when there is a significant imbalance between the public and private interests that the ECJ will interfere and afford substantive protection of the legitimate expectation.¹⁴² As the EU case law suggests, this is a very deferential approach, which allows a large measure of freedom to the administration in exercising its discretionary powers. This is important in the current South African context where there is a particular need in allowing the government to effect the transformation efforts needed to eradicate the remaining injustices of apartheid South Africa. The discussion of the developing substantive legitimate expectation doctrine in South Africa above suggests that such claims typically arise in instances where existing policies are changed and replaced by various transformation programs. It is submitted that South African courts should be slow in holding back that process by imposing substantive obligations on the administration. At the same time, the value of legal certainty and the accompanying trust in government that infuse the protection of substantive legitimate expectations is also very important in the current South African climate. The majority of the population has been oppressed by the government for decades and has conse-

¹⁴¹ See paragraph 0 above.

¹⁴² See paragraph 0 above.

quently lost faith in such structures. It is therefore important that citizens regain a sense of trust in government. The courts can play a vital role in re-establishing such trust by protecting expectations created by organs of state. Between respecting the transformation process and fostering trust in the legal system, the courts must find an appropriate standard of review. The *significant imbalance* test of EU law, may just be such a standard or at least provide an important starting point in developing a South African standard of review in substantive legitimate expectation cases. The strict foreseeability requirement in EU law may also be quite helpful in this regard. South African courts may incorporate this requirement to rule out claims in transformation type cases on the ground that individuals must foresee that old policies and practices, pre-dating democratization, will be changed and therefore cannot form any expectation on such policies and practices.

As I have indicated, the principle of legality counters legal certainty in EU law as the principles underlying substantive protection of legitimate expectations.¹⁴³ South African courts should be likewise mindful of legality as an important value in this context. While legitimate expectations are protected only procedurally, legality is of less concern seeing that the court will only require the administrator to observe enhanced procedure when revisiting the invalidated administrative action. The court will not order substantive action by the administrator and hence there is no fear of the administrator being forced to act *ultra vires*. However, this changes as soon as legitimate expectations are enforced substantively. In such a case the doctrine may result in administrators being forced to act *contra legem*. South African courts should therefore consider the effect of any substantive order very carefully against the background of legality.

E. Conclusion

The doctrine of substantive legitimate expectation is only starting to find its way into South African law at present. The courts have suggested that a careful analysis of the development of the doctrine in English law is required before it can be accepted in South African law.¹⁴⁴ While this is certainly important seeing that the doctrine of legitimate expectation was originally taken from English law into South African law, the comparative analysis should not be restricted to English law. In English law the substantive legitimate expectation doctrine is all but settled and while the development of the doctrine in that jurisdiction has preceded South African law for a considerable period of time, many uncertainties regarding the doctrine still remain in English law.¹⁴⁵ In contrast, substantive protection of legitimate expectations is well established in EU law. It will therefore be foolish not to pay

¹⁴³ See paragraph 0 above.

close attention to EU law in this regard. Any comparative analysis clearly shows that EU law holds some very important lessons for the development of substantive legitimate expectations in South African law.

¹⁴⁴ Brand JA in *Meyer v Iscor Pension Fund*, *supra* note 68, at paragraph 27.

¹⁴⁵ Craig & Schönberg, *supra* note 48, at 701.