

**IS A DEMAND FOR A HIGHER PERCENTAGE OF SHARE EQUITY
A MUTUAL INTEREST IN RESPECT OF WHICH EMPLOYEES MAY
EMBARK ON A STRIKE?***

*Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport and Allied Workers
Union of SA 2009 ILJ 1099 (LC)*

1 *Introduction*

In *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport and Allied Workers Union of SA*, a question under determination was whether a demand for a higher equity shareholding was a matter of mutual interest suitable for protected action and whether the employees in question were allowed to strike. The Labour Relations Act

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66 of 1995 (hereafter the act) allows every employee the right to engage in a lawful strike (s 64) for purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest (s 213). The acquisition of shares from companies is governed by the contractual principle of offer and acceptance. This may be effected by way of an offer made by the company followed by acceptance on the part of an investor or an offer on the part of an investor and acceptance on behalf of the company (*Moosa v Lalloo* 1957 4 SA 207 (D) 219). Shares can only be acquired from a company against a consideration which may be payable in cash or a consideration other than cash (s 92(1) of the Companies Act 61 of 1973 (hereafter the current Companies Act); see also s 40 of the Companies Act 71 of 2008 (hereafter the new Companies Act)).

Section 210(1) of the act provides that where there is a conflict between the act and any other act other than the constitution relating to the matters provided for in the act, the provisions of the act will prevail. The supremacy of the act over statutes other than the constitution is also recognised by the new Companies Act. Section 5(4)(b)(i)(bb) provides that in cases where the provisions of the new Companies Act cannot be applied concurrently with those of the act without contraventions, the act's provisions will prevail. The current Companies Act does not have a similar interpretation clause. This provision is superfluous in view of section 210.

Against the above background, two questions need to be addressed: Does the *Itumele Bus Lines* case allow labour law to make inroads into corporate law? And are the provisions of the 1995 act regarding a right to strike in conflict with those of the Companies Act (both the current and the new act) regarding the acquisition of shares?

2 Facts

The applicant, Itumele Bus Lines (Pty) Ltd, approached the labour court because the first respondent union, the Transport and Allied Workers Union of South Africa, and the respondent employees demanded a 20% equity shareholding in the company. The applicant alleged that this did not constitute a lawful demand as contemplated in sections 64, 65 and 67 of the act and that the respondent's demand did not constitute a "matter of mutual interest" in respect of which industrial action can be embarked on. The applicant wanted to prohibit the respondent from embarking on a strike because 10% of the company's shareholding had already been allocated to the employees in accordance with an Employee Share Ownership Plan that formed part of a larger Black Economic Empowerment agreement involving the shareholding of the company. The second respondent union and its members had accepted the allocation of shares as set out in the draft collective agreement.

3 Decision and analysis

3.1 What is the purpose of a strike?

Section 65(1) of the act provides as follows:

"No person may take part in a strike action or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if –

- (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
- (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
- (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour court in terms of this Act."

In *TSI Holdings (Pty) Ltd v National Union of Metalworkers of SA* (2004 ILJ 1080 (LC)) the court noted that it is self-evident that the determination of the “issue in dispute” in section 65(1)(c) is critical for a proper application and that the act (s 213) provides that the “issue in dispute in relation to a strike or lock-out, means the demand, the grievance or the dispute that forms the subject-matter of the strike or lock-out” (1087h). The court in the *TSI Holdings* case referred to *Coin Security Group (Pty) Ltd v Adams* (2000 ILJ 925 (LAC)), where it was held that: “It is the court’s duty to ascertain the true or real issue in dispute. In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented. The characterization of the dispute by a party is not necessarily conclusive.” The court in the *TSI Holdings* case added that the intention behind section 65(1) of the act is to prohibit strikes where the issue is a dispute of rights or at the very least where employees can elect either to strike or to pursue their right to have the dispute adjudicated (1089a-b). The principle highlighted in the *TSI Holdings* case was that a union may not strike in support of an unlawful demand. The respondents’ demand was not to dismiss the supervisor unfairly and was therefore not an unlawful demand. The court found that the strike was not prohibited in terms of section 65(1)(c) of the act. The purpose of the strike is thus important in order to determine whether employees may lawfully embark on strike action or not. The court in *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* (2003 ILJ 305 (CC)) confirmed that section 65(1)(c) proscribes a strike where a party has a right to refer the dispute to arbitration by the labour court and that this right must be derived from the act, which was not the case because the act does not confer the right to refer the dispute over organisational rights to arbitration by the labour court (336a-b). It accordingly found that section 65(1)(c) does not apply and thus the trade union was allowed to embark upon strike action in the pursuit of organisational rights (336b and 337e).

3.2 What constitutes “matters of mutual interest”?

The court was faced with the issue as to whether employees could strike in support of a demand for equity shareholding and held, after considering the definition of a strike in terms of section 213 of the act, that for a dispute to be brought within the ambit of the definition it should be in respect of a matter of mutual interest. Section 213 does not define a “dispute” and only defines a “dispute” to include an “alleged dispute” and “issue in dispute” in “relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out”.

The court held that the establishment of the employee ownership plan was indeed a matter of mutual interest (119b). In addition it held that “matters of mutual interest” was a broader or wider concept than “terms and conditions of employment” and if a matter is not a “‘term and condition of employment’, it may still be capable of being brought within the ambit of the concept ‘matters of mutual interest’” (1112g-h).

Although it has been suggested that labour disputes are normally categorised as “disputes of right” and “disputes of interest”, the act does not distinguish between disputes using these terms. Van Niekerk, Christianson, McGregor, Smit and Van Eck are of the view that this classification

“may be a convenient shorthand to distinguish respectively disputes about the creation of new rights and disputes about the application of existing rights, but these labels may lead to confusion when attempting to identify the nature of a particular dispute and its potential destinations under the dispute resolution structure established by the LRA” (*Law@work* (2008) 400-401).

However, the court on several occasions had to consider the meaning of these concepts (see also *Sithole v Nogwaza NO 1999 ILJ 2710 (LC) 2719 par 52*). In *Gauteng Provinsiale Administrasie v Scheepers (2000 ILJ 1305 (LAC) 1309j-1310a)* the court stated that disputes of right “concern the application or interpretation of existing rights”. A dispute of right is concerned with a right or rights and therefore the origin thereof must be indicated, be it a statute, a collective agreement or a contract of employment. In *SA Democratic Teachers Union v Minister of Education (2001 ILJ 2325 (LC) 2340e)* the court stated that the term “dispute of interest” has been described as “a term of art” and that although it is widely used in labour relations “it has never been precisely defined but the term generally is well understood”. In *HOSPERSA v Northern Cape Provincial Administration (2000 ILJ 1066 (LAC) 1070d-h)* the court held the following view:

“A dispute of interest should be dealt with in terms of collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated ... under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject-matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself. ... If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined.”

The court in *De Beers Consolidated Mines Ltd v CCMA (2000 5 BLLR 578 (LC) 581 par 16)* made it clear that the term “matter of mutual interest” is not defined in the act and that it must be literally interpreted to mean “any issue concerning employment” (see also *Media Workers Association of SA v Independent Newspapers (Pty) Ltd 2002 ILJ 918 (LC) 922 par 12*).

In *Rand Tyres and Accessories (Pty) Ltd and Appel v Industrial Council for the Motor Industry (Transvaal) (1941 TPD 108 115)* it was said regarding matters of mutual interest that “[w]hatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and there is no justification for restricting in any way powers which the Legislature has been at the greatest pains to frame in the widest possible language”.

A dispute of mutual interest generally refers “to proposals for the creation of new rights or the diminution of existing rights” which are ordinarily to be resolved by collective bargaining (see the *Gauteng Provinsiale Administrasie* case 1309j-1310a). These matters, *inter alia*, mean terms and conditions of employment, remuneration, employee compensation and service benefits. In *Durban City Council v Minister of Labour (1948 1 SA 220 (N) 226)* the court held that the term “matter of mutual interest” cannot be without limitation because if it was unlimited the result would often be absurd. A “matter of mutual interest” is one in which the trade union and employer have a material and simultaneous interest and must be related to the employment relationship between employee and employer. It must also be an issue that can be reduced to or regulated by a collective agreement (Mischke “What are ‘matters of mutual interest’?” 2001 *Contemporary Labour Law* 89). For example, the transfer of employees in terms of section 197 of the act is a matter of mutual interest “as bargaining collectively is to secure rights or to protect them when they are threatened by dismissal for operational requirements”. Some matters of mutual interest are channelled through resolution by means of

industrial action, whereas others are resolved through adjudication (*University of the Witwatersrand Johannesburg v Commissioner Hutchinson* 2001 ILJ 2496 (LC) 2499 par 7-8). It therefore appears that disputes of right are resolved by way of arbitration and adjudication. On the other hand, disputes arising from “matters of mutual interest” are regarded as disputes of interest and are normally resolved by collective bargaining (Qotoyi and Van der Walt “Dismissals within the context of collective bargaining” 2009 *Obiter* 66).

One of the purposes of the act is to promote collective bargaining and to provide a framework within which employers, employers’ organisations, trade unions and employees can bargain collectively to determine conditions of employment, formulate industrial policy and provide for other matters of mutual interest (preamble and s 1 of the act). Collective bargaining has a well-established meaning, namely

“a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial. In the process, different interests are reconciled. For workers joining together allows them to have a more balanced relationship with their employer. It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair and based on a collaborative effort to raise productivity and conditions of work” (International Labour Organization (ILO) *Organizing for Social Justice – Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2004) 7).

Because employees take part in the collective bargaining process, the interests of employees can be enforced by themselves or their trade union representatives. The collective bargaining process also ensures economic exchange between the collective workforce and the employer (Metcalfe “Workplace governance and performance” 1995 *Employee Relations* 9). Central to collective bargaining are the rights to strike and the recourse to lock-out that is respectively available to employees and employers. Although the right to strike is recognised by the Constitution of the Republic of South Africa, 1996 in section 23(2), it is not absolute as it can be limited. The right to lock employees out of the workplace is recognised by the act only, but this does not mean that it has lesser or weaker status than the right to strike or that the protection is less. This sentiment was illustrated by the constitutional court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* (1996 4 SA 744 (CC) par 65) where the court held that “the effect of including the right to strike does not diminish the right of employers to engage in bargaining, nor does it weaken their right to exercise economic power against workers. The right to bargain collectively is expressly recognised by the text”.

Employers can also utilise replacement labour as a bargaining tool. Section 76(1) (b) of the act provides that an employer can only make use of replacement labour when the lock-out is in response to a strike. However, an employer will not be allowed to use replacement labour where the whole or part of the employer’s business has been designated as a maintenance service (s 76(1)(a)).

Although labour disputes are generally regarded as either being disputes of interest or disputes of right it appears that “matters of mutual interest” is wide enough to encompass both types of disputes. It is important to note that the act forbids the dismissal of employees in order to compel them to accept a demand in respect of any mutual interest between the employer and employees as it would result in an automatically unfair dismissal (s 187(1)(c)). However, an employer may dismiss for

operational requirements, as illustrated in *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA* (2003 ILJ 133 (LAC)). In this case the court held as follows:

“A lock-out dismissal entails that the employer wants his existing employees to agree to a change of their terms and conditions of employment. In a lock-out dismissal the employer would take the attitude that, if the employees do not agree to the proposed changes, he would dismiss them – not for operational requirements – but to compel them to agree to the change. In such a case the employees thereafter have the opportunity to agree to the change. When they agree to the change, the dismissal ceases because it has served its purpose. If the employees do not agree to the change after they have been dismissed for the purpose of compelling them to agree, the employer dismisses them finally. The last mentioned dismissal is not a lock-out dismissal. It is an ordinary dismissal for operational requirements” (146g-147a).

An employer can also not make changes to the terms and conditions of employment unilaterally without consulting with trade unions. However, the employer may resort to power-play in that it negotiates with employees or resorts to a lock-out (Qotoyi and Van der Walt 66).

3.3 Corporate law: acquisition of shares from the company

A company is a creature of statute and its powers and the limits within which it can exercise its powers are as conferred upon it, expressly or impliedly, by the statute that creates it (*Bauermeister v CC Bauermeister (Pty) Ltd* 1981 1 SA 274 (W) 277; see also Blackman, Jooste and Everingham I *Commentary on the Companies Act* (2002) 5-14). One has to look at the provisions of the current and new Companies Act regarding the acquisition of shares for answers to the questions under discussion. The new Companies Act is expected to be effective only from 1 April 2011 (see www.thedti.gov.za/mediareleases).

In the case of a company with share capital, shares are acquired directly from the company through a contract of subscription or allotment of shares (*Moosa v Lalloo* 219 and Blackman *et al* 5-241). From the allotment and issue of shares, a shareholder acquires a proprietary interest in shares that affords him or her financial and management rights. Financial rights include the right to a dividend when declared (Table A s 85 and Table B s 84 current Companies Act) and the right to share in the distribution of the net assets of the company upon winding-up (Table A s 107(b) and Table B s 105(b)). Management rights include the right to receive notices of meetings (s 186 current Companies Act; s 62 new Companies Act), to attend meetings and to vote at meetings in person or by way of proxy representation (s 189 current Companies Act; s 58(1) new Companies Act).

3.3.1 Issue of shares from the authorised share capital

In terms of the current Companies Act directors are authorised to issue and allot shares only within the authorised share capital and with the prior approval of the members in general meeting (s 221(1)). The required prior approval is by way of an ordinary resolution passed by means of a simple majority of members present in a meeting who are entitled to vote and constitute a quorum. This is so since reference in the act to a “resolution” without specifying it as a “special resolution” is a reference to an ordinary resolution (*Swerdlow v Cohen* 1977 3 SA 1050 (T) 1053). The approval given by members may be in the form of a general authority, whether conditional or not, given to directors to allot shares in their discretion or it may be in the form of a specific authority in respect of a particular allotment of shares (s 221(2)). In exercising their discretion, the directors have a fiduciary

responsibility that requires them to act in the best interests of the company. This approval once given is valid until the next annual general meeting, but members at the general meeting are allowed to vary or revoke it before the next general meeting (s 221(3) current Companies Act). The reason why section 221 limits the power of directors to allot and issue shares is to ensure that they do not have unlimited powers, since “the issue by the company of further shares is a matter which directly affects the interest of each holder of shares in that company and is in this respect distinguishable from ordinary managerial acts by directors performed in carrying on the business of the company” (Commission of Enquiry into the Companies Act: Main Report RP 45/1970 par 44.40 and recommendation 101 as quoted in Blackman *et al* 8-292-3).

The possibility of an abuse of power by the directors is further avoided by requiring the members’ prior approval by way of an ordinary resolution where the issue of shares is to directors themselves or their nominees (s 222(1) current Companies Act).

It must be noted that the shareholders’ prior approval is not required under the new Companies Act. The directors are given the power to issue shares without the approval of shareholders (s 38(1)). However, where the issue of shares is to directors themselves or to persons related to them, an approval of members by way of special resolution, adopted by holders of at least 75% of the voting rights exercised on the resolution, is required (s 65(9)), except where the issue is as a result of certain agreements that do not require the approval of shareholders, for example underwriting of shares, pre-emptive rights and employee share schemes (s 41(1)-(2)).

A special resolution of members is also required where the issue of shares flows from a transaction or series of transactions, one dependent on the other, or transactions concluded within a twelve-month period involving the same persons, which will result in the voting power of a class of shares issued being equal to or exceeding 30% of the voting power of all shares of that class held by shareholders immediately before the transaction or series of transactions (s 41(3) and s 41(4)(b) new Companies Act). The move on the part of the legislature to subject both of these issues to a special resolution of members is a positive one that will avoid a substantial influence of voting power in a class resulting from directors’ abuse of power.

3.3.2 Consideration for issue of shares

Under the current Companies Act a company is authorised to issue shares only if the full issue price or a consideration other than cash has been received (s 92(1)). The consideration must equal or exceed the par value, unless a discount is allowed under section 81 of the current Companies Act. In the *Bauermeister* case an allotment of shares without the payment of the full issue price was held to be void, as a company cannot do anything that the Companies Act proscribes (277; see also *Etkind v Hicor Trading Ltd* 1999 1 SA 111 (W) 127).

The new Companies Act provides for the allotment and issue of partly paid-up shares. Section 40(5)(a) authorises the board of directors to effect the issue of shares payable by means of a consideration “in the form of an instrument that is not negotiable by the company at the time the shares are to be issued, or in the form of an agreement for future service, future benefit or future payment”. The board is required to cause an immediate issue of shares payable in future upon receipt of a future instrument that is not negotiated, and to have the shares held in trust by a third party until they are transferred to a subscribing party (s 40(5)(b)) upon payment of a future consideration or in accordance with a trust agreement (s 40(6)(d) (iii)). The company is allowed to cancel the issue of shares held in trust if the sub-

scribing party fails to fulfil his or her obligations under the trust agreement for a period of at least forty business days after the date on which the obligation was due to be fulfilled (s 40(7)(b)).

The board of directors is authorised to determine the adequacy of the consideration given for subscription of shares (s 40(2) new Companies Act). In determining the adequacy of the consideration, the directors are allowed to consider “the company’s current financial situation as well as market conditions” plus “the present value of existing shares” (Van der Linde 49). The board’s decision in determining the adequacy of the consideration can only be challenged on the basis of a breach of a director’s standard of conduct as provided for in section 76, on breach of the common-law fiduciary duties or in accordance with the common-law principles of delict (s 40(3) new Companies Act). This is so since directors owe a fiduciary duty to apply their minds in determining the adequacy of the consideration paid for shares (Blackman “Raising of capital” in IV.1 *LAWSA* par 202). The issue of shares for a non-cash consideration that is below the issue price results in a dilution of the value of existing shares (Blackman *et al* 5-249 and 5-253). A determination of the adequacy of a consideration that is in conflict with the provisions of sections 76 and 77(2) causes the director(s) to be personally liable for loss, cost or damage suffered by the company (s 77(2)(a)-(b)). The director(s) can also be personally liable for loss, cost or damage incurred by shareholders and/or creditors who suffered a loss as a result of an inadequate determination of a consideration contrary to the provisions of the Companies Act (s 218(2) new Companies Act).

3.3.3 Issue of shares outside the authorised share capital

Under the current Companies Act the authority to issue shares is limited to the company’s authorised share capital. However, a company is authorised to alter its share capital by increasing it if the articles allow for such an increase and if the increase is approved by members by means of a special resolution (s 75(1) (a)). The resolution to increase the authorised share capital must be followed by an amendment of the memorandum of association by way of a special resolution (s 56). Section 97(1) allows a court to make an order validating an irregular issue of shares, upon application by the company or any interested person and when the circumstances for the order are just and equitable. However, the validation of an irregular issue has been held not to extend to the validation of an issue that requires amendment of the memorandum of association (*Ex Parte Premier Paper Ltd* 1981 2 SA 612 (W) 615). This implies that under the current Companies Act the issue of shares in excess of the authorised share capital is void and cannot be validated by a court order. No new issue of shares can be made where the authorised share capital is exhausted unless the company’s share capital structure is amended in terms of section 75.

The new Companies Act provides for the issue of shares outside the authorised share capital. Section 38(2) provides for the “conditional” issue of shares. The issue in excess of the authorised share capital is conditional upon the board’s resolution or shareholders adopting a resolution to increase the company’s authorised share capital in accordance with the provisions of section 36 (s 38(2)). Section 36 grants the shareholders and the board a dual power, which has been referred to as the power of a “concurrent jurisdiction”, to alter the authorised share capital of the company (Delpont *The New Companies Act Manual* (2009) 18). The justification for this “concurrent jurisdiction” of the power is based on the fact that the power granted to directors in terms of section 36(3) is alterable through the provisions of the company’s memorandum of in-

corporation (Delpont 18). The delegation of the power to increase the authorised share capital to directors has been criticised on the ground that even if it “increases flexibility” it “decrease(s) the protection of shareholders” (Van der Linde 44). Adoption of the board’s or shareholders’ resolution to increase the authorised share capital will amount to the fulfilment of a condition for issue. The conditionally issued shares will then be issued to the subscriber retroactively from the date of adoption of the resolution and not from the date of their first issue (s 38(3)). Failure to adopt the board’s or shareholders’ resolution within sixty business days after the date on which the shares were issued (see s 38(2)(b) of the Companies Amendment Bill 2010 of 19 July 2010) causes the issue outside the authorised share capital to be null and void, entitling the subscriber to the return of the fair value of the consideration paid to the company (s 38(3)(a)-(b)). It is submitted that the move to allow the conditional issue of shares where the authorised share capital is exhausted is a positive one, creating “optimum conditions for aggregation of capital” and for “the investment of that capital” in line with the spirit and purpose of the act (s 7(g) new Companies Act).

3.3.4 Contractual limitations on the issue of shares

3.3.4.1 Pre-emptive rights

A pre-emption is a right of first refusal which may flow from the articles of a company (see Table B s 21-24 current Companies Act) or from a shareholder agreement. It can exist between co-shareholders, requiring a shareholder selling his shares to offer them first to his co-shareholders before an offer is made to outsiders. This pre-emptive agreement has been referred to as a “transfer pre-emptive right” (Van der Linde “Pre-emptive rights in respect of share issues – misnomer or mistake?” 2008 *SA Merc LJ* 510 511). A pre-emption agreement can also exist between the company and its shareholders in terms of which the company agrees to offer its shares for subscription to its shareholders first before it can offer them to outsiders. This right of first refusal has been referred to as an “issue pre-emptive right” (Van der Linde (2008) 511). The new Companies Act recognises “issue pre-emptive rights”. Section 39(2) provides private companies and personal liability companies with the obligation to offer their shareholders an opportunity to subscribe, within a reasonable time, for a percentage of shares equal to the voting power of a shareholder’s general voting right, before non-shareholders. This right may be excluded, limited or modified in the company’s memorandum (s 38(3) Companies Act). A public company or a state-owned company can in its memorandum of incorporation provide for the application of pre-emptive rights (s 39(1) new Companies Act).

An “issue pre-emptive right” limits the potential of a company’s obtaining external investments but affords internal shareholders having capital the potential of increasing their investments, an opportunity to avoid dilution of their shareholding and an opportunity to restrict membership to internal members only (Van der Linde (2008) 511). The limitation imposed by an “issue pre-emptive right” is removed when a company is undergoing financial distress. Section 152(7) of the new Companies Act makes pre-emptive rights non-applicable during business rescue proceedings, unless the business rescue plan provides otherwise. It is submitted that the exclusion of pre-emptive rights from companies facing financial distress, at the discretion of a business rescue practitioner after consulting the company’s management and affected persons, is a positive move that will assist these companies to achieve capital growth through external investments.

3.3.4.2 Option agreement

An option is an agreement between an option grantor (a company) and an option holder (a non-shareholder, a current shareholder, etc) in terms of which the option grantor agrees to keep a specified number of shares open for subscription, within a specified period and in return for a specified consideration. An option does not make an option holder a member of a company, unless the option holder is already a shareholder. The option holder becomes a “contingent creditor” of the company who has contractual rights flowing from an option, which afford him/her contractual remedies for breach of an option agreement (Blackman *et al* 5-259).

Section 42 of the new Companies Act authorises the directors to issue options for allotment and subscription from the authorised but unissued shares of the company. The issue of options outside the authorised share capital causes directors who were present at a meeting, participated in the decision to issue options and failed to vote against the decision to grant an option, to be liable to the company for loss, costs and damage suffered by the company (s 42(4)). It is submitted that the rationale behind confining options to the authorised share capital is to protect companies from possible actions for breach of option agreements that may result from the company’s failure to honour option obligations. The issue of options to directors and their related persons requires approval of members by way of special resolution, unless the option is granted to salaried directors in their capacity as employees (s 223 current Companies Act; s 41(1) and 41(2)(d) new Companies Act). The requirement of a special resolution protects shareholders from directors’ abuse of power.

The existence of an option agreement does not take away the power granted to the company to alter its share capital. A company will still be able to exercise its statutory rights to increase its authorised share capital during the existence of option agreements despite the fact that this may dilute the option rights of option holders (Blackman *et al* 5-259).

3.3.5 Share repurchases

A company that needs to issue further shares or increase the stake of employees without increasing its authorised share capital can consider share repurchases. A share repurchase or a buy-back is an agreement between a company and one or more of its selling shareholders, in terms of which the company buys back its issued shares in return for a consideration (Blackman *et al* 5-43). A company is required to cancel the repurchased shares and restore them to the status of authorised but unissued shares (s 85(8) current Companies Act; s 35(5)(a) new Companies Act).

A share repurchase intended for one or more specified shareholder(s) only is referred to as a “selective repurchase” or a “targeted offer”, whereas a repurchase offered to shareholders willing to sell on a proportionate basis is referred to as a “self tender offer”, a “pro-rata offer” or a “general offer” (Van der Linde “Share repurchases and the protection of shareholders” 2010 *TSAR* 288 288-289 and Blackman *et al* (revision service 6 2009) 5-78). A repurchase from shareholders other than employees will result in an increase in their relative stake in the company. Alternatively, if a greater increase is required, the company may issue the reacquired shares to the employees.

The current Companies Act allows companies, if authorised by their articles and with the special resolution of members, to offer share repurchases (acquisitions) if there are reasonable grounds for believing that the company will, after the repurchase, comply with the solvency and liquidity test (fair valuation of consolidated assets exceeding consolidated liabilities and the company’s ability to pay debts when they are due in the ordinary course of its business: s 85(4)) and there

would be shares in issue other than the convertible or redeemable shares (s 85(9)). Under the new Companies Act the authority to offer share repurchases is given to directors who must comply with section 46 requirements regarding distributions and the provisions of section 48 relating to acquisitions. The company's memorandum of incorporation does not need to authorise such acquisition. Directors are authorised to pass a board resolution to this effect, acknowledging compliance with the solvency and liquidity test if it reasonably appears (objective test) from the company's accounting records, financial statements, fair valuation of assets and liabilities and any reasonable foreseeable contingent assets and liabilities (future assets and liabilities that may not be realised: s 4(2) and (3)) that the company will be solvent and liquid after the repurchase and if they can reasonably conclude, based on their belief (subjective test), that solvency and liquidity will be met (s 48(2) and s 46(1)). The new Companies Act, like the current Companies Act, allows share buy-backs only if after the repurchase there will be shares in issue other than the convertible and redeemable shares (a provision which does not exist under the current Companies Act) (s 48(3) new Companies Act).

In terms of amendments proposed by the Companies Amendment Bill (B40-2010) certain repurchases will have to be approved by special resolution. A repurchase offered to directors or prescribed officers or their related or interrelated persons as defined in section 2 of the new Companies Act requires the approval of shareholders by way of special resolution (cl 48(8)(a) of the Companies Amendment Bill).

A series of acquisitions involving the repurchase of more than 5% of the issued shares of any particular class must be subject to the provisions of section 114 and 115 (cl 48(8)(b) Companies Amendment Bill). Section 114 of the new Companies Act provides that the reorganisation of shares as a result of the repurchase must be preceded by the appointment of a qualified expert who is unrelated to the company and who must prepare a report on the effects of the proposed reorganisation of shares on the affected shareholders, the interest of directors, the business and on the prospects of the company (s 114(3) new Companies Act). The repurchase must in terms of section 115 be approved by way of special resolution. Dissenting shareholders are afforded remedies despite the adoption of the special resolution. A company may be required to obtain a court's approval to proceed with the repurchase if 15% of the shareholders voted against the resolution, despite the adoption of a resolution to repurchase by 75% of the shareholders (s 115(3)(a) new Companies Act). Relief can also be granted to any dissenting shareholder who may be granted leave to apply for review of the decision to repurchase despite a special resolution being adopted (s 115(3)(b) new Companies Act).

4 *Concluding remarks*

The current and the new Companies Act recognise the issue of shares in terms of employee share schemes (s 144A current Companies Act; s 97 new Companies Act). Companies may establish employee share schemes for the purpose of offering participation therein to its employees, by means of either sale of shares in the company or the offer of options on shares by means of trust or otherwise (s 144A(1) current Companies Act). One way of establishing a trust for the benefit of employees and empowering employees is the creation of employee share ownership plans. Employee share ownership plans provide for financial participation by employees through their ownership of shares in the company they are working for (Finnemore *Introduction to Labour Relations in South Africa* (2009) 215). In terms of an employee share scheme, shares are issued out of the authorised but unissued shares. Where the authorised

share capital is exhausted, the company can, through its shareholders and exercising power of a constitutional nature, increase the authorised share capital. The company can also consider share repurchases. The repurchased shares will then form part of the authorised but unissued shares. The new Companies Act provides for a conditional issue in excess of the authorised share capital. The issue is conditional upon the increase of the authorised share capital.

The *Itumele Bus Lines* case dealt with the creation of new rights, that is, the right to a higher percentage of equity shareholding. The decision to establish employee share schemes in corporate law lies with the company itself. The power to issue and allot shares to employees in terms of employee share schemes under both the current and new Companies Act lies with the board, which under the current Companies Act requires prior approval of shareholders by an ordinary resolution. Employee demands play no direct role in the decision-making process to issue shares. Directors hold a fiduciary responsibility to ensure that in issuing the shares, they exercise the power to do so for its proper purpose, in the best interest of the company and not for their self-interest. Shares cannot simply be demanded but are issued in return for something of value to the company, unless the issue is in terms of conversion rights or capitalisation shares where a consideration is not required (s 40 new Companies Act).

The court in the *Itumele Bus Lines* case held that

“if a demand for a higher percentage of shares to be allocated is impossible to meet, that may in and by itself enable the company to resist protracted strike action. The fact that employees may bargain with their employer to make a percentage of its shares available to be owned by the employees, or a demand for a higher percentage share allocation, obviously also does not mean that such a demand must be met by the employer” (1120d-e).

However, it does not mean that employees are entitled to a higher percentage of shares when they demand such allocation from an employer. Such a demand will be a legitimate subject-matter for collective bargaining which will entitle them, if necessary, to embark on industrial action to secure the creation of such new right (1120e-f). Although (as illustrated in the *Itumele Bus Lines* case) the term “matters of mutual interest” is wide enough to include such a demand and employees could embark on strike action to legitimately bring up such a demand in the collective bargaining process, it must also be noted that this does not necessarily mean that the company is compelled to issue and allot shares to them.

The *Itumele Bus Lines* case did not allow labour law to make inroads into corporate law. If the court ordered the company to increase its authorised share capital as a way of offering employees a higher percentage of equity shareholding, the judgement could be said to have made inroads into company law. The provisions of the act on the right to strike and the Companies Act on the issue of shares are not in conflict. The act’s provisions on the right to strike cannot be said to prevail over the Companies Act’s provisions regarding the acquisition of shares as the two are not in conflict.

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