IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NRS: JR44/2007 & JR352/07

In the matter between:

ITUMELE BUS LINES (PTY) LTD t/a
INTERSTATE BUS LINES — Applicant

and

TRANSPORT AND ALLIED WORKERS UNION
OF SOUTH AFRICA — 1st RESPONDENT

SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION — 2nd RESPONDENT

THE INDIVIDUAL EMPLOYEES OF THE
APPLICANT LISTED IN ANNEXURE "A"
HERETO — 3rd AND FURTHER RESPONDENTS

JUDGMENT

NEL AJ:

[1] The applicant approached this court for a declaratory order that the demand by the first and/or the third and further respondents ("the respondents") for an equity shareholding of 20% in the applicant does not constitute a lawful demand as contemplated in Chapter IV, and in particular Sections 64, 65, and 67, of the Labour Relations Act 66 of 1995 ("the LRA"). The applicant also seeks a declarator that this demand by the respondents for an equity shareholding in the applicant does not constitute a matter of mutual interest as contemplated by and defined in the LRA.

[2] The applicant further seeks an order to the effect that the respondents shall not be entitled to embark upon strike action pursuant to the demand for a 20% equity shareholding in the applicant and that it be determined that any such proposed strike action by the respondents shall be prohibited and unprotected.

[3] Lastly, the applicant seeks an order that the South African Road Passenger Bargaining Council has no jurisdiction to entertain the dispute referred to it by the first respondent on its own behalf and on behalf of the third to further respondents, in terms of which the respondents demand an equity shareholding of 20% in the applicant. I granted an order herein on 29 July 2008 and indicated that I will provide

my reasons as soon as they had been finalised. These are the reasons for my earlier order.

[4] In summary, what happened in this matter is that 10% of the applicant's shareholding was allocated to be acquired by its employees via a staff share trust ("the Trust"). A demand was then made by the respondents to award employees a greater percentage than the one granted them under an employee share ownership plan ("ESOP"), which itself form part of a broader black economic empowerment ("BEE") arrangement involving 100% of the applicant's shareholding. The second respondent made no such demand, nor has it raised any dispute with the applicant. It has been cited herein solely insofar as it has an interest in the matter.

[5] The applicant did not meet the demand by the respondents to increase the allocated shareholding for employees to 20%. This resulted in a dispute being referred by the respondents to the South African Road Passengers Bargaining Council ("the Council") on 16 November 2006. The applicant raised an *in limine* point in respect of the jurisdiction of the Council. The conciliator dismissed the jurisdictional point and in essence ruled that there had been an offer of 10% and that the demand of 20% constituted a dispute of mutual interest properly so called.

[6] The conciliator's ruling is also the subject of a review brought by the applicant in this court under case number JR352/07. The applicant filed an application for the consolidation of that case with case number JR44/07 on the basis that the central issue in each of them was the same, namely whether or not a demand of the kind in question could be made in contemplation of strike action. Putting it differently, central to both this application, as well as the review application, is the question whether employees can go on strike in support of a demand for equity shareholding in their employer. The application for consolidation was supported by the respondents and I was satisfied that I should grant the consolidation of these two matters.

[7] The respondents have in turn brought an application for the striking out of certain averments in the applicant's supplementary affidavit. The thrust of this application was that allegations made by the applicant relating to the respondents' threat to undertake strike action in respect of the level of the dividend payment in 2008 were "irrelevant and inadmissible". This application was opposed by the applicant herein on the basis that such allegations were relevant and hence admissible. It was also opposed on the basis that the respondents had asserted no prejudice.

[8] I was unpersuaded that the applicants to strike out had shown any prejudice if the striking out did not take place. Similarly, I did not find that the matter sought to be struck out was either scandalous, vexatious or irrelevant. I accordingly, after having heard argument from both parties, refused the application to strike out. The parties agreed that costs herein should be determined in respect of all the matters before me, and not piecemeal, and that costs in respect of the application to strike out should follow the result in what I will refer to as the main application. It was also common cause between the parties that the outcome in the main application will, in essence, determine the outcome of the review application.

[9] The applicant herein is a commuter bus passenger transport company operating in the Bloemfontein, Botshabelo and Thaba Nchu ("BBT") area. As at early 2007, it operated some 219 buses with a personnel complement of 556 employees. The applicant is the corporate successor to Interstate Bus Lines (its continued trading name), which was established in 1975. The provision of road passenger transport services has at all material times been regulated and could only be undertaken in terms of permits which were allocated for specific routes, with subsidies, as necessary. The applicant

contended that it was an important objective of the government to restructure and reform the public transport industry. As part of this restructure it involved, *inter alia*, a new system of competitive tendering, which came in effect in 1998. The applicant successfully tendered for the BBT area and it was awarded a contract for the period ending November 2003.

[10] Extensive discussions took place between the applicant and the Free State Provincial Department of Transport ("the Free State") on transformation issues. The applicant's employees were not part of these discussions. When the applicant's contract came to an end in 2003, a subsequent tender process still had to be completed. Its contract was accordingly initially extended until November 2004, and thereafter it continued on a month by month basis.

[11] The applicant entered into negotiations with the Free State with the view to extending its contract for a further five years. These negotiations, according to the applicant, brought into focus the government's objectives of broad-based black economic empowerment ("BBBEE"). According to the applicant, the grant of any further transport contract to it by the Free State was dependent on compliance with the government's empowerment requirements. Apparently, the

Free State wished to empower, amongst others, taxi groups and small bus operators. The applicant says that it embraced this and also wished to empower its own employees through an employee share plan.

[12] The implementation of empowerment objectives, according to the applicant, required a major financial exercise on its part. It had to first acquire issued shares in the applicant, which it says it successfully did through its majority shareholder. This was an expensive process which further necessitated the backing of financial institutions. One of the conditions stipulated by the financial institutions was that the applicant's management should retain a shareholding of 52% of the company's issued shares.

[13] According to the applicant, the negotiations with the Free State led to agreement whereby the BBBEE parties would acquire 63% of the applicant's issued shares, with the applicant's existing white management retaining only a 37% shareholding. This shareholding arrangement included sub-contractors, small bus operators and taxi groups who could take up 30% of the applicant's shares. The applicant's employees could take up 10% of the applicant's shares. If I understood the applicant's papers correctly, the applicant's existing black management would acquire 25% of the

applicant's shares and an entity called Ukwanda Investments (Pty) Limited would acquire 8% of the company's shares in terms of the applicant's BBBEE arrangement. Accordingly, the applicant so managed to satisfy the 62% management shareholding required by the financial institutions by its black management acquiring a 25% percentage shareholding, with white management holding 37%.

[14] It is worthy mentioning that in February 2006, the Free State MEC for Public Works, Roads and Transport, wrote to the applicant. In this letter he refers to "the process of transforming the bus company and empowering of previously disadvantaged people." I understood the applicant to contend that it introduced the 10% shareholding by its employee's into its negotiations with the Free State. Another letter from the Province, in January 2006, however, refers thereto that "…. In previous discussions we (the Free State) indicated that the shareholding should include 10% for (the applicant's) employees." I do not believe that the question whether the Province or the applicant introduced the 10% shareholding for employees in any manner materially influences the determination of this matter.

[15] In the event, an agreement was concluded with the Free State on 31 January 2006, and the applicant's tender award was

extended for five years. Pursuant to its agreement with the Free State, the applicant immediately set about establishing the Trust. The Trust would govern its incentive share scheme and would provide eligible employees of the applicant with an opportunity of acquiring shares in the applicant company, thereby acquiring a direct ownership interest in the applicant.

[16] A steering committee was formed (including the unions, their national office bearers and non-bargaining unit employees). The applicant alleges that these parties "were invited to enter into consultations with management of the applicant regarding the formulation of the terms and conditions of the Trust." A proposed Trust Deed was tabled at a meeting on 19 May 2006, which the union office bearers took away to consider and make further proposals. The labour representatives wanted to know whether there was room for changes and they needed to know whether management was prepared to negotiate some amendments without derailing the process.

[17] The applicant's management responded that although it was highly unlikely to change some of the principle clauses, it was still possible to amend some items. At the meeting an issue was raised by the labour representatives about the possibility of "offering more than 10% shares". The Unions then proposed engaging "ESOP Shop" to facilitate the setting up of

the Trust. ESOP Shop is a Gauteng based company with extensive experience in facilitating and assisting companies in setting up employee share trusts. The applicant's management agreed and this was done.

[18] ESOP Shop, *inter alia,* proposed drawing up a collective agreement. This was also done. The applicant contended that this process did not involve negotiation around the quantum of the 10% shareholding allocation. According to it that was always fixed as per the agreement concluded with the Free State. What the applicant says was to be established through the collective agreement was the functioning of the Trust, as was facilitated through ESOP Shop. All these worthy objectives of the intended agreement, so alleges the applicant, emerge clearly from the terms of the collective agreement.

[19] In my view it is significant that the draft CA recorded the 10% allocation of shares to employees and that it also recorded a mutual intention of the parties to explore ways to increase that amount of shareholding on the part of the employees. A proposed letter of agreement further indicates that, as a possible way to increase the percentage shareholding, a right of first refusal in respect of other shares that might become available, as well as a meeting with the Free State, were

envisaged. I will revert to this and other relevant aspects of the proposed collective agreement later.

[20] It became clear that the unions wanted a greater allocation of shares for the applicant's employees than the 10% shareholding proposed by it. According to the applicant, because this was not up for negotiation, a meeting was convened on 24 July 2006, at the offices of the Free State, where its chief director, one advocate Phahlo, explained how the 10% shareholding allocation had been arrived at. According to the applicant, in the believe that pursuant to this meeting and explanation the Trust could be established, all the applicant's employees were required to be trained in relation to employee trusts and this was done on 10 and 11 August 2006. 382 of the applicant's employees attended the training sessions and the applicant says that 411 out of 450 qualifying employees had purchased shares as at 18 August 2006.

[21] What was intended to be a final signing of the proposed collective agreement was then arranged for 27 September 2006. However, the applicant was surprised when the signing of the collective agreement did not take place. The day before, the shop steward councils had written to their respective unions. They expressed disappointment at the fact

that they had consented to the 10% share allocation and urged them not to sign the collective agreement, but to negotiate for a higher percentage shareholding (than the 10% offered by the applicant). Although no particulars were given, it was said in this communication that higher percentage shareholdings had been negotiated in other Provinces and companies with specific reference to Putco and Kwa Zulu Transport. This fact does not appear to be denied by the applicant, but it provides an explanation for this having happened elsewhere.

[22] A meeting was arranged with the applicant for 24 October 2006, hoping that the issue could be resolved. The applicant says that it again explained to employee representatives that the 10% shareholding had been agreed with the Free State. It is at this meeting that it was said on behalf of the applicant that it was not easy to compare one company with another relating to how many shares were made available to their employees. The applicant stated that the monetary value of the 10% shareholding it had made available to each employee could be bigger than that of a company for instance making 20% of its shares available to its employees.

[23] This meeting did not resolve the impasse. This posed a great problem for the applicant, as it contends that the entire

empowerment exercise had to be finalised by the end of November 2006 so that the tender award extension could be processed by the end of December 2006. Accordingly, it set out its concerns in a detailed letter of 6 November 2006 to the respondents. This letter, *inter alia*, states the following:

> "As was previously conveyed to the union, the company is not in a position to change the 10% allocation of shares to the employee share trust. This allocation was prescribed by Government as a specific condition of the extension of the tender. Government insisted that other broad-based groupings should benefit from the tender granted to IBL and therefore limited the number of shares to be issued to the employees' share trust. Government also indicated that it would reallocate any shares set aside for the employees' share trust should employees not agree to participate. Government conveyed its position to all stakeholders during a meeting held on 24 July 2006. Both shop steward councils, their principals, IBL management and Government, attended this meeting.
>
> Although management has empathy with the union's position, it is not in a position to change the allocation for reasons stated above. Management took note of the union's stance with regards to the fact that similar

exercises at other businesses such as Putco resulted in higher share allocation to the particular employee share trust that was established.

It must again be emphasized that management supported a higher allocation of shares to the trust but that the final decision in this regard was taken by Government in order to accommodate other industry shareholders. Management must however again emphasize that the percentage shares allocated to the IBL Employee Share Trust is in fact still more advantageous to the individual employee than that of other companies, even though the total allocated shares is lower. This is based on the fact that IBL employs fewer employees that will benefit from the Trust.

It must also be emphasized that management already committed itself to the possible allocation of further shares to the employee trust, should this become available from any of the broad-based groupings identified by Government. This commitment also forms part of the collective agreement and is subject to approval by the Department of Transport. …….”

[24] At a follow up meeting, on 13 November 2006, the second respondent signed the proposed collective agreement. The first respondent (the majority union) refused to sign the

agreement on behalf of its members. The applicant alleges that as all the representative parties needed to agree, and sign the agreement, no agreement could thus be concluded. The only reason why the first respondent did not sign the agreement is that its members wanted a greater percentage shareholding.

[25] On 17 November 2006, the first respondent referred a dispute to the Council on behalf of the individual respondents, concerning an alleged matter of mutual interest and in terms of which it demanded that the Trust be allocated a 20% shareholding in the applicant.

[26] The applicant alleges that the bus operators and taxi groups took up their share allotments by 1 March 2007. The applicant says that all its shares had accordingly been taken up. It further alleges that all the shareholders (with the obvious exception of the disgruntled employees) have confirmed that they are satisfied with the present shareholding position. They are not prepared to forfeit any part of their shareholding and they are strongly opposed to any form if dilution of such shareholding.

[27] The applicant further states that a dividend was paid to all shareholders as at 28 February 2007. By special resolution it

was decided to pay out the entire profit of the applicant instead of paying only at a level of 10% (I assume of the applicant's entire profit). This apparently resulted in a dividend per share of some R6 236,60. The applicant further alleges that in respect of the dividend for the financial year which ended on 29 February 2008, employees have declared that they would raise a dispute and embark on strike action if that dividend was not at least as large as the one for the previous year. This was apparently stated at a meeting of trustees on 6 December 2007. These are briefly the relevant factual circumstances under which the applicant is approaching this Court for relief.

The Application to Strike Out

[28] As far as the application by the respondents to strike out certain of the allegations in the applicant papers is concerned. I do not believe that it is necessary to say more herein than that I was not satisfied that the respondents would be prejudiced if I did not grant the application to strike out. In addition, I was also satisfied that the matter sought to be struck out was not shown to have been scandalous, vexatious or irrelevant. For these reasons I concluded that the application to strike out should be dismissed.

The Right to Strike

[29] Mr Tip SC, who appeared before me with Mr Davids, suggested that there is essentially one crisp question in this matter – can employees go on strike in support of a demand for an equity shareholding in their employer?

[30] Section 213 of the LRA defines a strike in the following terms:

> " 'strike' means, the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to **'work'** in this definition includes overtime work, whether it is voluntary or compulsory;"

It is apparent that the proper interpretation and application of the phrase in the definition:

> "…. resolving a dispute in respect of any matter of mutual interest between employer and employee"

is, *inter alia,* central to the determination of this matter.

[31] Quite clearly the issue in dispute herein is one between employer and employee. To bring it within the ambit of the definition of strike, the dispute, in addition to being between employer and employee, must be "in respect of a matter of mutual interest". Mr Wilke, on behalf of the first and the third and further respondents, referred me to The Compact Oxford English Dictionary of Current English Third Edition, which defines "mutual" as follows:

> "1. experienced or done by each of two or more parties towards the other or others. 2. (of two or more parties) having the same specified relationship to each other. 3. held in common by two or more parties. 4. …… - USAGE Traditionally it has been held that the only correct use of mutual is in describing a reciprocal relationship, as in mutual respect (sense 1). The use of mutual to mean 'held in common) (sense 3), has long been thought incorrect, although it has a long and respectable history (e.g. in the title of Dickens' novel Our Mutual Friend) and is now generally accepted as standard English."

[32] Having regard to this definition of "mutual", I am of the view that where an employer company offers a percentage equity shareholding in itself to its employees to be acquired by the employees at an agreed price, subject to very clearly specified conditions for such acquisition, and the employees accept such offer, the whole scheme of arrangement becomes a matter of mutual interest between employer and employee.

[33] Mr Tip suggested what I understood to be a more restricted interpretation of the relevant phrase. He argued strenuously that the key phrase in the definition: "..... resolving a dispute in respect of any matter of mutual interest between employer and employee" must be understood as employer *qua* employer and employee *qua* employee. He reasoned that it must therefor be understood that the dispute had to have to do with an employment relationship. This relationship, so he argued, was one that was governed by a variety of provisions of the LRA and it concerned the terms and conditions that governed the performance of work for reward. Those terms and conditions properly formed the subject matter of negotiations about matters of mutual interest. If a dispute arose in respect of such matters and remained unresolved, then strike action may lawfully ensue. He therefor argued that, at a general level, the question whether a demand for shares was a lawful one in a strike context may be linked with the question

whether such demand would fall within what is called "employment conditions" or "conditions of service". I considered this proposition of Mr Tip's carefully in order to arrive at a conclusion herein whether employees may go on strike in support of a demand for an equity shareholding in their employer.

[34] In terms of Section 23 of the Constitution of the Republic of South Africa 1996 ("the Constitution") every worker has the right to strike. In National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd and another (2003) 24 ILJ 305 (CC), the Constitutional Court dealt with a matter in which the interpretation adopted by the LAC restricted the ability of the union and its members to strike in the circumstances of that particular case. This restriction, so the applicant union argued before the Constitutional Court, resulted in a limitation of their constitutional right to strike. O'Regan J (at page 316, paragraph [13]) said the following:

> "[13] In s 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organizations to engage in collective bargaining, illustrates that the

> Constitution contemplates that collective bargaining between employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the right in s 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change."

[35] In determining the proper meaning of the LRA, it is necessary to have regard to the purpose of the Act as it is expressly stated in s 1 thereof:

"The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

(a) to give effect to and regulate the fundamental rights conferred by Section 27 of the Constitution;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."

[36] Insofar as the interpretation of the LRA is concerned, O'Regan J stated the following in the Bader Bop (Pty) Limited matter (supra) (at page 325, paragraph [37]):

> "[37] The first question that arises is whether the Act is capable of being interpreted in the manner contended for by the applicants, or whether it is only capable of being read as the respondents and the majority judgment in the LAC suggest. If it is capable of a broader interpretation that does not limit fundamental rights, that interpretation should be preferred. This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would have to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution."

[37] It is quite clear from the purpose of the LRA that it seeks to provide a framework for collective bargaining to determine

wages, terms and conditions of employment and other matters of mutual interest. As I have said, the definition of strike also clearly requires that what is involved is in essence "any matter of mutual interest between employer and employee..."

[38] The phrase "matters of mutual interest" is not defined in the LRA. In De Beers Consolidated Mines Limited v CCMA and Others [2000] 5 BLLR 578 (LCC) Pillay AJ (as she then was) stated the following (at page 581, paragraph [16]):

> "[16] The term 'matters of mutual interest' is not defined in the Act. It must therefore be interpreted literally to mean any issue concerning employment. It has been given a wide interpretation (*Rand Tyres and Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108; Du Toit *et al the Labour Relations Act of 1995* 2ed Butterworths 1998 at 198)."

[39] The LAC has now on more than one occasion described a dispute of mutual interest as one relating to proposals for the creation of new, or fresh rights, or the diminution of existing rights. See Gauteng Provinsiale Administrasie v Scheepers & others (2000) 21 ILJ 1305 (LAC) at page 1309, paragraph [8]; Hospersa and Another v Northern Cape Provincial

Administration [2000] 21 ILJ 1066 [LAC] at page 1070, paragraphs [11] and [12].

[40] It is in my view relevant to have regard to the fact the LRA defines the concept of an "**issue in dispute**" in s 213 and it does so in rather open terms, using wide language. It reads:

> "'**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 lockout."

It is apparent that "**issue in dispute**" may in effect be any demand, or any grievance, or any dispute that forms the subject matter of a strike (or lock-out). What the demand, grievance or dispute must be about is clearly not circumscribed. A strike in turn is in effect the withholding of labour for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee. It is accordingly against the backdrop of this wide and open terminology that I am to determine whether the words "*any matter of mutual interest between employer and employee*" must be interpreted as excluding, for the purposes of strike action, a demand by employees that their employer should make a higher

percentage of its shares available to them to acquire through a share participation scheme.

[41] Landman AJ (as he then was) approached the question of what a matter of mutual interest may be in Ceramic Industries Limited t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union & others [1997] 18 ILJ 716 (LC) in the following manner (at page 725D to F):

> "..... . A matter of mutual interest has long and consistently been given a wide interpretation. In *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108 at 115 it was said:
>
> > *'Whatever 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 can be no justification for restricting in any way powers which the legislation has been at the greatest pains to frame in the widest possible language.'*
>
> These remarks were uttered in the context of collective bargaining and not as regards a strike. They are probably not wide enough to encompass a demand for

dismissal. This is however of no consequence for the individual employees need not strike on a matter of mutual interest only; they make strike 'for the purpose of remedying a grievance'. The grievance is the cause of the unhappiness; the demand is the strikers' desired solution to the grievance. The two cannot be separated. The definition of 'issue in dispute' seems to make this clear."

[42] Accordingly, it must be borne in mind that the definition of strike makes provision therefore that it could be either for the purpose of remedying a grievance or it could be to resolve a dispute in respect of any matter of mutual interest between employer and employee. I find myself in full agreement with Landman AJ that a strike may not only be on a matter of mutual interest. It may also be "for the purpose of remedying a grievance". It may conceivably be to achieve or obtain compliance with a demand and also for the purpose of resolving any dispute – all which relate to the relationship between employer and employee.

[43] Mr Tip argued on behalf of the applicant that the question whether a demand for shares was a lawful one in a strike context might be linked with the question whether such demand would fall within what is called "employment

conditions" or "conditions of service". In this respect he relied on what Landman AJ (as he then was) had stated (at paragraphs [27] and [28]) in SA Democratic Teachers Union v Minister of Education & others (2001) 22 ILJ 2325 (LC):

> "What are conditions of service? The phrase has been considered in the context of s 64(1) of the Industrial Conciliation Act 36 of 1937. See *Godwin v Minister of Labour & others* 1951 (2) SA 605 (N) and the comment of Wallis *Labour and Employment Law* (issue 5) para 45 fn 10. Several possible meanings were considered in *Godwin*. The wider meaning of conditions of employment, on which I shall rely (as it favours the validity of the regulations), comprehends 'all the circumstances of an employee's employment, not merely the legal rights and obligations flowing from the contractual terms, express or implied' (at 609F – G). To this must be added the view of the court that 'the engagement, suspension, discharge, etc, of employees may fall within the ambit of the expression conditions of employment' (at 611D-E)."

[44] It must be remembered that one of the purposes of the LRA is to provide a framework within which employees and their trade unions, employers and employers' organisations "*can* -

collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest" (s 1 of the LRA). It is quite apparent, therefore, that "*terms and conditions of employment*" is a completely different issue to "*matters of mutual interest*". I am of the view that "*matters of mutual interest*" is a broader, or wider concept than "*terms and conditions of employment*". It follows, in my view, that 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 of "*matters of mutual interest*".

[45] Mr Tip suggested that, at a general level, the question whether a demand for shares was a lawful one in a strike context, might be linked to the question whether such demand would fall within what is called "employment conditions" or "conditions of service". At a general level, that may be an appropriate manner to approach the question as a point of departure. It is, however too restrictive an approach as it does not, in my view, mean that if a demand does not deal with, or fall within the ambit of "employment conditions" or "conditions of service" then it is not a lawful demand in a strike context. I believe a more appropriate approach to this particular question would be to consider whether a demand is one which may create new employment conditions or conditions of employment. May a demand for shares

constitute a proposal by the Union on behalf of its members for the creation of new rights? If one approaches the matter in this way, then I believe one may in the process also need to consider the question whether the demand (to acquire shares) is in any way unlawful in a strike context. I do not believe the applicant contended that the demand by its employees for a higher percentage shareholding in their employer as part of a share scheme is unlawful in and by itself. I can certainly see no reason why such a demand is not a perfectly lawful one. May the demand lead to the creation of new employment rights? I believe the answer is clearly in the affirmative. Does it really matter if the employer did not offer a percentage shareholding to its employees as part of their conditions of employment? I believe not. Does it matter if the employer did not offer shares at all, but that its employees, of their own accord, decided to make such a demand? I also believe not. I believe that in determining whether a matter is one of mutual interest between employer and employee, one will consider whether a demand may possibly create new rights and obligations as between employer and employee. Will these new rights be in the interests of both parties and for the common good of the enterprise?

[46] Mr Tip argued that "circumstances of employment" are confined to practical facets of the actual work conditions. He submitted that the notion of an employee asserting an entitlement to co-ownership of the employer as part of even a wide meaning of "conditions of service" was patently remote. This he said was not surprising since the concept of labour relations was precisely concerned with the relationship between an employer and an employee, whether individually or collectively. It was not concerned with questions of ownership. He therefore argued that, correspondingly, the LRA did not seek to incorporate the acquisition of ownership into its otherwise comprehensive statutory arrangement. He submitted that one would seek in vain to find anything in the preamble, the purpose or the content of the LRA that would suggest that an object of that kind formed part of the legislative intention. He argued that if it were otherwise, the notion of an employment relationship would cease to have a sensible boundary.

[47] In addition, he suggested, the notion of corporate integrity would simultaneously cease to have a sustainable terrain. He submitted that in the ordinary life of corporate institutions, upon which the health of the country's economy rested, it was absolutely impossible for a shareholder to increase his shareholding through strike action or any comparable

instrument of coercion. He submitted that the only lawful medium to do so was through normal commercial activity, which was closely regulated through company legislation. He therefore suggested that what the respondents sought to do herein was profoundly subversive of these principles and that it could not be permitted. He submitted further that the entire structure of capital investment and shareholding could not be eroded through a proposition which boiled down thereto that, if the employees' demand was not met, there was then a dispute about a mutual interest which entitled those employees to strike in order to secure a new right. He submitted that in the present case the demand was for shares, which the employees did not have. The new right would be the ownership of shares, which they had thus acquired through force of industrial action.

[48] Another fundamental objection to allow strike action to support a demand for shares raised by Mr Tip was that shares were not equivalent to an employer's profitability or its capacity to afford higher wages. He submitted that shares were defined and protected elements of ownership. They are generally fully subscribed. Their acquisition was ordinarily dependant upon there being a willing seller. If the would be buyer was keen, then he would push up his offer, in the hope of attracting a seller – and vice versa. It was submitted that

this was how the stock exchange functioned, and if potential sellers sat tight, the would be buyer would acquire no shares. He submitted that that was precisely the position with the shareholding in the applicant company. It was 100% subscribed. Mr Tip submitted that, other than the 10% shareholding allocated to employees, the other 90% holders of shares wished to retain their shares and they were strongly opposed to any attempts to dilute their holdings.

[49] In this matter, I am however not confronted with a situation where the applicants have raised impossibility of performance of that which was demanded. That, obviously, would remain a possible way in which the applicant could prevent a protracted strike in support of the demand for an additional 10% shareholding in the company for the employees.

[50] It is also in my view further relevant that sight must not be lost of the fact that the new shareholding structure of the applicant was the product of a black empowerment requirement imposed by the Free State. In this process, one is reminded that the negotiations with the Free State led to an agreement whereby the BBBEE parties would acquire 63% of the applicant company shares, with the existing white management retaining only a 37% shareholding. Although it is not expressly spelt out in the papers, I do believe I can

safely assume that the so-called existing white management were the ones who had to part with possibly even the whole of the 63% shareholding to be acquired by the BBBEE parties.

[51] I believe that I should approach the question whether employees may strike in support of the demand for an additional 10% shareholding in their employer from the point of view of asking whether there is anything which precludes them from proposing the creation of these new rights for themselves. Is it permissible for the employees to demand, as part of new "employment conditions" or "conditions of service" that they be allowed to have access to an additional 10% shareholding in their employer? These new rights will be the setting aside of a percentage of shares to be held by a share trust and which they then may acquire under stipulated terms and conditions, one condition of which is that they must be employed by the company in question. A further condition of the share trust is that such shares as an employee may have acquired during his period of employment are to be disposed of, and I imagine revert back to the share trust, to be further dealt with in terms of the share trust deed.

[52] It is widely known that the senior employees of companies very often, as part of their remuneration, participate in what I would term share incentive schemes. I asked Mr Tip what

made such share incentive schemes for senior executive employees different from a share participation scheme for the junior employees, or employees at the lower echelons of the company, as the applicant now proposed to establish for the individual respondents and its other employees. He submitted that senior executive share incentive schemes were not to be compared to the share participation scheme being considered herein. He argued that these senior executive share incentive schemes are distinguishable by reason of the fact that, first of all, shares allocated to the senior executive employees form part of their remuneration, and accordingly, of their terms and conditions of employment. If I understood Mr Tip correctly, he further suggested that it in essence was an operational requirement for companies to offer these senior executives such share incentive schemes, as that was the only way in which they could attract their services.

[53] These submissions, I believe, beg the question. Even accepting the correctness of these propositions, why should it not be open to junior, or so called blue collar employees, or for that matter to all employees as a group, other than senior executive employees, to make a demand of their employer to create new rights for them to participate in a share participation scheme of some sort, giving them part-ownership of their employer company? Are they precluded from

demanding, or proposing, that such a share participation scheme form part of their remuneration or for that matter be part of their terms and conditions of employment?

[54] I have earlier referred to the fact that the question to be asked is whether that which is in issue may be good for the trade. In Rand Tyres and Accessories v Industrial Council for the Motor Industry (Transvaal) (supra) it was said 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*". Imagine the following scenario. Employees are allowed to make a demand to acquire shares in their employer company through a properly structured share participation scheme and they become shareholders in their employer. In the first year 1, after the employees had now become shareholders, productivity of the company's employees is very high and it has a very successful year. That results in the share price of the company increasing and the company paying out a very good dividend to all its shareholders. The following year, the company is crippled by a long strike by its employees in support of a demand of higher wages. As a result, there is a significant drop in production. As a consequence, the company's results are very poor and its board decides not to pay out any dividend whatsoever. The share price drops as

well. This all has the result of showing in a very tangible manner to the employees the correlation between high productivity on their part and the financial success and wellbeing of the corporation. This in turn leads thereto that in the following years, the company's productivity continues to increase year on year. Its results are consequently continuously very good. As a result, payment of good dividends to its shareholders are made year after year whilst the employees deliver good productivity and the share price rises consistently. All the company's shareholders are very happy with the results of the company and the shares are very sought after. In my view there can be little doubt that to allow employees at all levels to participate in a share incentive scheme has every potential to promote the well-being of the trade concerned. Such participation in the ownership of the employer must, in my view, therefor be of mutual interest to the employer and its employees. It has the additional benefit of spreading the company's wealth created by shareholding in the employer to the previously disadvantaged employees.

[55] As I understand it, part of the reason why senior executives participate in so-called share incentive schemes is exactly for the purpose of acting as an incentive for them to manage the business to the best of their abilities in order for it to be more

successful. That will most likely result in the share price and the dividends of the company increasing and the senior executives accordingly similarly being awarded for their good management efforts. Why could, and should, the lower echelon employees of a company not similarly be incentivised by way of a share participation scheme put in place by the employer company? Why should these non-executive level employees not also benefit from their good work? Why should the employees be precluded from demanding such share participation scheme if the employer refuses to put one in place? Why should strike action to compel compliance with a demand by employees for a shareholding in the employer, or for a greater percentage shareholding than one offered, be outlawed as not being a lawful demand in a strike context? Why could all aspects of share participation trust scheme, its formation and the percentage of shares allocated thereto not be a matter of mutual interest between employer and employee? I can see no reason why not.

[56] I also turn to look at this issue from a different angle. Exactly as happened herein, the Government, since the advent of the new democratic South Africa, has embarked on a process whereby it expects companies doing business with Government to embark on black economic empowerment processes. As I understand these matters, and as happened

herein, the Government will insist that a company with which it will do business must have a particular shareholding structure which enables previously disadvantaged parties to hold shares in such company. If a company does not comply with the Government's requirements in this regard, the Government could possibly simply withhold further contracts from such company. Exactly as the applicant herein stated to the union representatives of the respondent unions in its letter of 6 November 2006, the share allocation "was prescribed by Government as a specific condition of the tender. Government insisted that other broad based groupings should benefit from the tender granted to IBL and therefore limited the number of shares to be issued to the employee share trust. Government also indicated that it would reallocate any shares set aside for the employees' share trust, should employees not agree to participate."

[57] I assume for the moment that the Free State had decided on the 10% allocation of shares to the employees' share trust. The question, which immediately arises, is whether it could not be regarded as a matter of mutual interest between employer and employee for the employees to demand that they should have been part of the negotiations with the Free State. In addition, or in the alternative, it is conceivable that the employees may have demanded that the employer should

have held out for more shares to be allocated to it by the Free State? Having regard to the parties which the Government insisted form part of the broad-based groupings who should benefit from the tender granted to it through a shareholding in the applicant, one can hardly imagine a grouping more worthy of benefiting from the tender than the company's own employees.

[58] The applicant was perfectly content to sign the draft collective agreement ("the draft CA"). This agreement had as its founding understanding that the employee share option plan ("the ESOP") was founded as an independent employee ownership vehicle to reward employees as shareholders in their employer's business and so provide employees with benefits in the form of cash or savings accumulation. The draft CA states further that the ESOP created the opportunity for all parties to continue to seek to promote transparent and inclusive management and stakeholder engagement methods based on consistent, open information disclosure to foster participative management solutions that build partnerships in areas of shared interest. The founding understanding of the draft CA concludes with the statement that the parties thereto believed that "the promotion and establishment of employee ownership constituted a further contribution by the social partners to the objective of our Government to promote

shared growth, in that employee ownership can strengthen the growth prospects of the company, while simultaneously sharing the rewards with employees."

[59] This self-same draft CA refutes the applicant's allegation that the 10% share allocation to the employee's share trust was never up for discussion. Clause 2.1 of this document states the following:

> "10% of Itumele Bus Lines (Pty) Limited t/a Interstate Bus Lines, which is equivalent to 100 000 shares, is being allocated to the ESOP. It is understood that the 10% allocation to the ESOP was given as an undertaking to government as a condition of extending the bus contract.
>
> The parties agree that the ESOP should have the right of first refusal for any shares made available by broad based participants which are not taken up by any party or if any broad based party sells their shares back to the company.
>
> The parties further agree that they should engage in ways to increase the current allocation in favour of employees. In this regard the parties commit to arranging a meeting with the Free State Department of Transport as soon as the trustees have been appointed.

> Both Unions plus management and the Interstate ESOP Trustees will attend this meeting, with a view to persuading the department that the employee allocation be increased. It is agreed that this matter of the allocation will be the only point of discussion for this meeting and that the parties will work together to achieve the objective of increasing the employee allocation."

[60] A further aspect of relevance contained in the draft CA is that it states that one of the objectives of the trust deed would be that:

> "The trust (would) be established to enable the ESOP members to participate in a broad based black economic empowerment initiative of the company. The main objective of the trust (would) be to acquire, hold and administer ESOP shares for the benefit of the ESOP members."

[61] Mr Wilke, in support of his argument that the demand by employees of a percentage shareholding in their employer is legitimate in a strike context, drew my attention to the fact that a company may assist its employees to acquire its shares. In determining this matter, it is in my view significant

to consider that the Companies Act, No 61 of 1973, although prohibiting financial assistance to purchase its own shares, allows a company to assist its employees to purchase its shares. Section 38(2)(b) thereof states:

> "the provisions of subsection (1) shall not be construed as prohibiting-
>
> (b) The provision by a company, in accordance with any scheme for the time being enforced, of money for the subscription for or purchase of shares of a company or its holding company by trustees to be held by or for the benefit of employees of a company, including any director holding a salaried employment or office in the company; ....."

[62] It is further not insignificant, in my view, that the trust deed proposed herein make the qualifying criteria to participate in the ESOP that you have to be in the employ of the applicant for at least 12 months. Further, the proposed trust deed stipulates that a person who left the employment of the applicant could not continue to be a member of the ESOP. People who left the service of the company for reasons of death, retirement, retrenchment, resignation or disability will be required to sell their shares back to the trust.

[63] I need not go any further to ascertain what the employer's view herein has been relating to the acquisition by its employees of shares in the employer. The draft CA really says it all. I understood the draft CA concerning the ESOP to represent a document, which the employer was willing to sign. In its preamble it says the following:

> "The parties believe that the establishment of the Interstate ESOP represents an important progression in the partnership between labour and management at Interstate and constitutes a further significant step in the black economic empowerment process which will see the company's employees becoming part-owners of the Interstate business.
>
> The parties recognise that the Interstate ESOP represents a further opportunity for employee shareholders, through their representative unions, and the management of Interstate, to negotiate ways to further align shared interests in relation to the performance challenges facing the company. It is agreed by all parties that the successful alignment of interests will enhance the benefits to workers and the value of employee ownership to all stakeholders in the business."

I can hardly imagine a clearer confirmation that the employer certainly regarded the establishment of the ESOP as a matter of mutual interest between it and its employees. How else could it associate itself with these sentiments if it did not at least regard the ESOP as a matter mutual interest between it and its employees?

[64] The question whether employees can go on strike in support of a demand for an equity shareholding in their employer is in my view not affected whether the employer had offered to introduce an equity shareholding by employees in the employer company or whether the employees, *mero motu*, made such a demand. This being my view, the question that arises is, would employees be able to demand that part of their remuneration received from their employer be paid by the employer by way of shares being transferred to the body of employees in prescribed and determinable numbers. May they, for example, simply demand that, in addition to their annual increase, or perhaps in lieu thereof, they be allowed to participate in the shareholding in their employer through a share participation scheme. I can in principle see no reason why such demands would not be perfectly legitimate. Once made, I can also not see any reason why it will not involve a matter, which can be brought within the concept of "any matter of mutual interest between employer and employee."

[65] Exactly as stated in the preamble to the collective agreement concerning the ESOP, if employees have shares in their employer company, it aligns their interests with that of the employer. The respondents' approach herein was that because persons who participated in the shares trust had to be employees of the employer, the allocation of shares was therefore a benefit of employment. The dispute hence arose out of the employment relationship, so the respondents argued. It was therefore a mutual interest dispute, which may lead to demands thereabout and to strike action.

[66] Mr Tip, *inter alia*, argued in response to this proposition that it was not correct to describe the allocation of shares as amounting to an employment benefit which would then result that disputes thereabout are capable of leading to strike action. The question is, however, what precludes the allocation of shares to become an employment benefit or a condition of service. I am not herein determining whether the specific demand made can form the basis for a protected strike. I am rather asked to determine, as a matter of principle, whether employees may strike in demand of a shareholding in their employer. If the employer says, as it appears to do herein, that the allocation of shares does not amount to an employment benefit, and the employees demand

that it be such a benefit, clearly it then is a matter of mutual interest between employer and employee.

[67] I have posed the question, what is in principle wrong for employees to demand that they be allocated shares in lieu of part of their remuneration. Such a demand may be that a stipulated number of shares be allocated to employees free of charge. Another conceivable demand is that shares must be made available to employees to be purchased at a discount by employees. The third possible demand, which I cannot see any principle objection to, is that the employer company acquires a stipulated percentage of its shares, which shares are then to be held by a share trust. A trust deed is then drawn up, as is the proposal herein, which will regulate the acquisition by employees of shares in their employer company from the share trust.

[68] I have said that if a demand for a higher percentage 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 demand must be met by the employer. It also does not mean that if

employees may demand a higher percentage allocation of shares, that they are entitled thereto. A demand by employees for shares to be allocated by the employer to a share incentive scheme in which employees may participate is in my view a legitimate subject matter for collective bargaining and, if necessary, industrial action to secure such new right for employees.

[69] I have earlier referred to what O'Regan J said in the National Union of Metalworkers of SA v Bader Bop (Pty) Ltd & another matter (supra) in relation to the right to strike and the limitation thereof. She confirmed that strike action is part and parcel of collective bargaining. Strike action is also, as O'Regan J said, key to a fair industrial relations environment. This case also concerns the right to strike. What is sought to be determined is the subject matter in respect of which employees may or may not strike. In this case it involves their right to strike in support of a demand from their employer for a shareholding in the employer. The right to strike, *inter alia*, allows workers to protect or ensure their dignity. It provides workers with the mechanisms to seek and secure fair working circumstances and new rights, not previously enjoyed. In an ever changing and evolving employment environment, flexibility in and around collective bargaining issues can be expected and required. It will have

to be anticipated, and where necessary and appropriate, facilitated. As O'Regan J said, with reference to the wage-work bargain, "...principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change."

[70] I do not believe that there is anything wrong in principle in employees being entitled to make a demand that they be given an opportunity to hold shares in their employer company. Such demand, as I have said, can be made in a number of ways. Employees do not need to wait for their employer to introduce the possible participation by employees in its shares. The employees may initiate such a demand.

[71] I believe it is irrelevant for the determination of the question whether employees can go on strike in support of a demand for an equity shareholding in their employer whether the employer offered these shares first, or whether the employees first demanded an equity shareholding in their employer. This proposition is particularly true, I believe, having regard to the changes in social and economic conditions that have taken place in our country.

[72] The participation by senior executives in share incentive schemes introduced by their employers has been common

place. I can think of no conceivable reason why it is not a perfectly legitimate demand for employees, other than senior executives, to now also participate in an equity shareholding in their employer. If they have made such demand, and it is not met, then if need be, they must be entitled to strike in support of such demand.

[73] Having considered the matter, I am therefor satisfied that if and when employees make a demand for an equity shareholding in their employer, it involves a matter of mutual interest between employer and employee. I am also satisfied that if that demand is not met, employees may go on strike in support of such demand for the purpose of remedying such grievance or resolving such dispute as may have arisen from their demand. Such interpretation does in my view not limit any fundamental rights of the parties and is to be preferred.

[74] It follows that I am satisfied that the demand by the first respondent and/or the third and further respondents for an equity shareholding of 20% (twenty percentum) in the applicant does constitute a lawful demand as contemplated by the provisions of chapter IV, and in particular ss 64, 65 and 67 of the LRA. I am equally satisfied that the stated demand is in respect of a matter of mutual interest between employer and employee as contemplated by and defined in the LRA.

The Council accordingly had jurisdiction to entertain the dispute referred to it under case number SARBBAC06-10 by the first respondent on its own behalf and on behalf of the third and further respondents. In terms of that dispute the first respondent and/or the third and further respondents is demanding an equity shareholding of 20% (twenty percentum) in the applicant and the applicant is refusing to comply.

[75] The jurisdictional ruling issued on 1 February 2007 by the Conciliator in the Council under the mentioned case number, pursuant to the conciliation proceedings between the applicant and the first respondent and/or the third and further respondents, is therefor not subject to review and being set aside. The jurisdictional ruling of the Council accordingly stands.

[76] As stated, I have already earlier issued my order herein. For the sake of completeness, that order is repeated. It was as follows:

1. The application to consolidate matters JR44/07 and JR352/07 is granted.
2. The interlocutory application to strike out is dismissed.

3. The applications in matters JR44/07 and JR352/07 are dismissed and the applicant is ordered to pay the respondents' costs of suit.

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DEON NEL

ACTING JUDGE OF THE LABOUR COURT

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Date of hearing: 17 April 2008

Date of Judgment: 29 July 2008.

Reasons for Judgment: 26 September 2008.

15 **Appearances**:

On behalf of the applicant: Advocate K S Tip SC with Advocate G Davids, instructed by Snyman Attorneys.

On behalf of the respondents: Advocate F Wilke, instructed by Medupi Lehong Incorporated.

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