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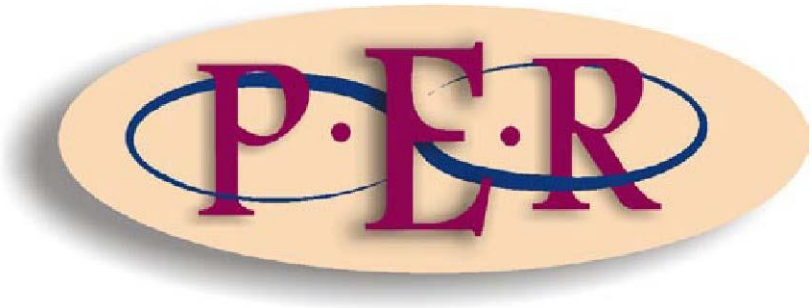

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THE INTERPRETATION TO BE ACCORDED TO THE TERM "BENEFITS" IN SECTION 186(2)(a) OF THE LRA CONTINUES: *APOLLO TYRES SOUTH AFRICA (PTY) LIMITED V CCMA* (DA1/11) [2013] ZALAC 3

S Ebrahim*

1 Introduction

The interpretation to be accorded to the term *benefits* in section 186(2)(a) of the *Labour Relations Act*[1] (LRA) has come before the Courts on several occasions. In terms of section 186(2)(a) of the LRA any unfair act or omission by an employer relating to the provision of benefits to an employee falls within the ambit of an unfair labour practice. In *Schoeman v Samsung Electronics SA (Pty) Ltd*[2] the Labour Court[3] held that the term benefit could not be interpreted to include remuneration. It stated that a benefit is something extra from remuneration.[4] In *Gaylard v Telkom South Africa Ltd*[5] the LC endorsed the decision in *Samsung* and held that if benefits were to be interpreted to include remuneration then this would curtail strike action with regard to issues of remuneration.[6] In *Hospersa v Northern Cape Provincial Administration*[7] the issue regarding the interpretation of the term benefits did not relate to whether or not it included remuneration but rather to whether or not it included the hope of creating new benefits which were non-existent. The Labour Appeal Court[8] held that the term benefits refers only to benefits which exist *ex contractu* or *ex lege* but does not include the hope of creating new benefits.[9] The

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1 *Labour Relations Act* 66 of 1995 (hereafter referred to as the "LRA").

2 *Schoeman v Samsung Electronics SA (Pty) Ltd* 1997 10 BLLR 1364 (LC) (hereafter referred to as "*Samsung*").

3 Hereafter referred to as the "LC".

4 *Samsung* 1368.

5 *Gaylard v Telkom South Africa Ltd* 1998 9 BLLR 942 (LC) (hereafter referred to as "*Gaylard*").

6 *Gaylard* para 22.

7 *Hospersa v Northern Cape Provincial Administration* 2000 21 ILJ 1066 (LAC) (hereafter referred to as "*Hospersa*").

8 Hereafter referred to as the "LAC".

9 *Hospersa* paras 8-9.

LAC adopted this approach in order to maintain the separation between a dispute of interest and one of mutual interest, the latter being subject to arbitration whilst the former is subject to the collective bargaining process (strike action).

In *Protekon (Pty) Ltd v CCMA*[10] the LC disagreed with the reasoning in *Samsung* and held that the term remuneration as defined in section 213 of the LRA is wide enough to include payment to employees which may be described as benefits. The LC remarked that the statement in *Samsung* to the effect that a benefit is something extra from remuneration goes too far. It further remarked that the concern that the right to strike will be curtailed if remuneration were to fall within the ambit of benefits need not persist. It based this statement on the reasoning that if the issue in dispute concerns a demand by employees that certain benefits be granted then this is a matter for the collective bargaining process (strike action), but where the issue in dispute concerns the fairness of the employer's conduct then this is subject to arbitration.[11]

It is then no surprise that the issue regarding the interpretation of the term benefits once again came before the LAC in *Apollo Tyres South Africa (Pty) Limited v CCMA*.[12] The LAC was tasked with deciding if the term could be interpreted to include a benefit which is to be granted subject to the discretion of the employer upon application by the employee. In deciding this, the LAC overturned the decisions in *Samsung* and *Hospersa* and opted to follow the decision in *Protekon*.

Apollo is worthy of note as it is the latest contribution from the LAC regarding the interpretation of the term benefits and it is of binding force for the Commission for Conciliation Mediation and Arbitration[13] and Labour Courts[14] in terms of the principle of *stare decisis*. The purpose of this note is threefold. Firstly, the facts, arguments and judgment in *Apollo* will be stated briefly. Secondly, the judgment will be critically

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10 *Protekon (Pty) Ltd v CCMA* 2005 JOL 14544 (LC) (hereafter referred to as "*Protekon*").
11 *Protekon* paras 19, 21-22.
12 *Apollo Tyres South Africa (Pty) Limited v CCMA* 2013 ZALAC 3 (hereafter referred to as "*Apollo*").
13 Hereafter referred to as the CCMA.
14 This includes the LAC.

anaylsed and commented upon. Thirdly, this note will conclude by commenting on the way forward for benefit disputes in terms of section 186(2)(a) of the LRA.

2 The salient facts

Apollo's case came before the LAC as an appeal from the Labour Court. Hoosen[15] was employed by Apollo Tyres South Africa (Pty) Limited[16]. During 2008 the appellant informed its employees that it intended to initiate an early retirement scheme[17]. A notice relating to the scheme was placed on the notice boards at the appellant's premises. The notice stated that the scheme would apply only to monthly paid staff who were between the ages of 46 and 59 years old. It stated that a successful applicant would receive two months additional pay and an *ex-gratia* payment computed on a sliding scale depending on the age of the applicant. It further stated that entry into the scheme would be subject to the discretion of management and that the normal retirement benefits would remain applicable. Hoosen applied for entry into the scheme but her application was refused on the basis that she needed to be 55 years old in order to qualify for entry, which was the practice of the employer. Hoosen was 49 years old at the relevant time.[18]

3 The crisp issue

The crisp issue for determination was whether an employee who alleges an unfair labour practice relating to the provision of benefits in terms of section 186(2)(a) of the LRA will have a remedy only if such an employee can prove that he/she has a right or entitlement to the benefits *ex contractu* or *ex lege*.[19] Put differently, does an employee have a remedy in terms of section 186(2)(a) of the LRA if the benefit is to be granted subject to the discretion of the employer upon application by the employee?

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15 Hoosen was the employee party and the third respondent in the appeal before the LAC.
16 Apollo Tyres South Africa (Pty) Limited was the appellant in the appeal before the LAC.
17 Hereafter referred to as "the scheme".
18 *Apollo* paras 1-2, 4-5, 8.
19 *Apollo* para 1.

4 Arguments by both parties

4.1 The appellant

The appellant argued that an employee may not rely on section 186(2)(a) of the LRA to create a new right as the section applies only to unfair conduct relating to an existing right. The appellant argued that fairness and clarity dictate that unfair conduct should be reprehensible only with regard to existing rights, and *Hospersa* provides clarity in this regard as the judgment respects the distinction between a rights dispute and one of mutual interest. The appellant further argued that the resultant of the distinction is that it avoids a situation where new rights may be created by recourse to the unfair labour practice jurisdiction, and thus avoids a duplication of remedies.[20]

4.2 The respondent

The respondent[21] argued that section 186(2)(a) of the LRA does provide a remedy to an aggrieved claimant such as Hoosen, who has no other remedy in the LRA or the common law. The respondent further argued that the term benefit should be construed wider than contractual entitlements[22] as this would be in accordance with the purpose and effect of the unfair labour practice jurisdiction; and *Hospersa* was incorrectly decided.[23]

5 Judgment

The LAC overturned the decision in *Samsung* and the resultant authorities[24] which distinguished between remuneration and a benefit as the approach in order to

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20 *Apollo* para 31.
21 Respondent refers to Hoosen, who was the third respondent.
22 One would assume also wider than *ex lege* entitlements.
23 *Apollo* para 32.
24 *Samsung; Northen Cape Provincial Administration v Comissioner Hambridge* 1999 20 ILJ 1910 (LC); *Gaylard*.

accord meaning to the term benefits. The rationale for this approach is that if the term benefits is interpreted to include any advantage or right in terms of the employment contract including wages, this would preclude strikes and lock-outs.[25] The LAC noted that it is clear from the case law and academic writings that the term benefit in the context of section 186(2)(a) of the LRA is imprecise and defies definition.[26] The LAC, rejecting this approach, held that the distinction postulated by the approach was artificial and unsustainable because the definition of remuneration in terms of section 213 of the LRA is wide enough to include benefits.[27]

The LAC overturned the decision in *Hospersa* and the resultant authorities[28] which require the benefit to exist *ex contractu* or *ex lege* as the approach in order to accord meaning to the term benefits. The rationale for this approach is to maintain the separation between disputes of interest and disputes of right as a failure to do so would result in the collective bargaining process being undermined.[29]

The LAC followed the authorities[30] which have voiced a move away from *Hospersa*. According to these authorities item 2(1)(b)[31] of Schedule 7 to the LRA creates a statutory right (an *ex lege* right) not to be subjected to an unfair labour practice relating *inter alia* to the provision of benefits;[32] section 186(2)(a)[33] cannot be used to create new benefits, new forms of remuneration, or new policies not previously provided by the employer - this should be left to the process of collective

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25 *Gaylard* para 22.
26 *Apollo* para 20.
27 *Apollo* para 25.
28 *Hospersa*; *Gauteng Provinsiale Administasie v Scheepers* 2000 21 ILJ 1305 (LAC); *GS4 Security Services (SA) (Pty) Ltd v NASGAWU* (LAC) unreported case number DA3/08 of 26 November 2009). See also *Sithole v Nogwaza* 1999 12 BLLR 1348 (LC) para 47 wherein the LC held that a benefit arises out of a contract of employment.
29 *Hospersa* para 10.
30 *Protekon*; *IMATU obo Verster v Umhlathuze Municipality* 2011 JOL 27258 (LC) (hereafter referred to as "*IMATU*"); *Department of Justice v CCMA* 2004 25 ILJ 248 (LAC) (hereafter referred to as "*Department of Justice*"); *Eskom v Marshall* 2002 23 ILJ 2251 (LC).
31 Item 2(1)(b) has been removed from Schedule 7 to the LRA. Item 2(1)(b) provided for an unfair labour practice, *inter alia*, relating to the provision of benefits. Item 2(1)(b) was subsequently placed in s 186(2)(a) of the LRA, see Du Toit *et al Labour Relations Law* 482.
32 *Department of Justice* paras 53-54.
33 Section 186(2)(a) of the LRA.

bargaining;[34] the legislature has intended with regard to section 186(2)(a)[35] to superimpose a duty of fairness regarding employer conduct irrespective of whether that duty exists expressly or impliedly in the contractual provisions that establish the benefit;[36] section 186(2)(a) was introduced primarily to permit the scrutiny of employer conduct, *inter alia*, the exercise of employer discretion in relation to the provision of benefits;[37] and the term benefits was intended to refer to advantages conferred on employees which did not arise from *ex lege* or *ex contractu* entitlements, but which have been granted at the employer's discretion.[38]

The LAC (per Musi AJA) postulated the *new approach*[39] as follows:

> In my view, the better approach would be to interpret the term benefit to include a right or entitlement to which the employee is entitled (*ex contractu* or *ex lege* including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment "benefit" in section 186(2)(a) of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion. In as far as *Hospersa*, *GS4 Security* and *Scheepers* postulate a different approach they are, with respect, wrong.[40]

The LAC further held that if *Hospersa* was applied to the facts *in casu* it would mean that the employer could act with impunity because Hoosen would not have a remedy in the civil courts as no contract came into being Neither would she have a remedy in terms of section 186(2)(a) of the LRA as she does not have a contractual right to the benefit and being a single employee she would not have the right to strike as stated in *Samsung*. The LAC then stated that in a case like Hoosen's the notion that the benefit must be based on an *ex contractu* or *ex lege* entitlement would render section 186(2)(a) sterile. The LAC concluded that there was no acceptable, fair or

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34 *Protekon* para 32.
35 Section 186(2)(a) of the LRA.
36 *Protekon* para 34.
37 *Protekon* para 35.
38 *IMATU* para 21.
39 Emphasis added.
40 *Apollo* para 50. See also *South African Revenue Services v Ntshintshi* 2013 ZALCCT 17 paras 36-37, wherein Steenkamp J found himself bound to follow *Apollo* in terms of the principle of *stare decisis* and held that a travel allowance offered to all fieldworkers in terms of a collective agreement must fall within the broad definition of benefit as postulated in *Apollo*.

rational reason as to why Hoosen was not allowed entry into the scheme in circumstances where she qualified to participate in the same, the resultant being that the employer did not exercise its discretion fairly, thus committing an unfair labour practice. The appeal was accordingly dismissed.[41]

6 Comments

6.1 Does the term "benefits" include remuneration?

The correct approach to interpreting the provisions of the LRA was stated in *Aviation Union of South Africa v South African Airways (Pty) Ltd,*[42] wherein the Constitutional Court[43] held that section 3 of the LRA is the starting point and mandates an interpretation which complies with the *Constitution* and public international law whilst giving effect to the primary objects of the LRA.[44] Section 186(2)(a) of the LRA gives effect to section 23(1) of the *Constitution* which provides for the right to fair labour practices. This means that the term benefit must be accorded an interpretation that gives effect to section 23(1) of the *Constitution*. In *NEHAWU v University of Cape Town*[45] the CC held that section 23(1) is not defined in the *Constitution* and is incapable of precise decision. It remarked that the Labour Courts are responsible for the interpretation of the LRA, which was enacted to give effect to section 23(1) of the *Constitution*, and should seek guidance from domestic and international experience in this regard. It stated that international experience is reflected in both the Conventions and Recommendations of the International Labour Organisation as well as related foreign instruments.[46]

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41 *Apollo* paras 48, 59-60, 63.
42 *Aviation Union of South Africa v South African Airways (Pty) Ltd* 2011 ZACC 39.
43 Hereafter referred to as the CC.
44 *Aviation Union of South Africa v South African Airways (Pty) Ltd* 2011 ZACC 39 para 34.
45 *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC).
46 *NEHAWU v University of Cape Town* 2003 24 ILJ 95 (CC) paras 33-34

Article 1(a) of the *Equal Remuneration Convention*[47] defines remuneration as follows:

> the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

Oelz *et al* states that this definition is broad enough to include all elements in addition to the basic wage.[48]

Article 141(2) of the *EC Treaty* defines *pay* as follows:

> the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.[49]

Duggan states that the Courts have interpreted this definition expansively so as to include payments made during or after employment, fringe benefits, severance payments, occupational pensions and redundancy payments. He further states that the definition also covers non-contractual pay such as a discretionary bonus.[50] It should be noted that these two definitions are related to equal pay discrimination. It is, however, suggested that the definitions and the commentary thereon provide guidance regarding the interpretation of remuneration in section 213 of the LRA.

According to *Apollo* the distinction drawn by the Courts between benefits and remuneration is artificial and not sustainable, because the definition of remuneration in section 213 of the LRA is wide enough to include benefits.[51] In terms of section 213 of the LRA, remuneration means:

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47 *Equal Remuneration Convention* 100 of 1951.
48 Oelz, Olney and Manuel *Equal Pay* 24.
49 Duggan *Equal Pay* 57.
50 Duggan *Equal Pay* 57.
51 *Apollo* para 25. See also Le Roux 1997 *CLL* 96-97; Le Roux 2005 *CLL* 2. *Protekon* para 19. *SACCAWU v Garden Route Chalets (Pty) Ltd* 1997 3 BLLR 325 (CCMA).

> any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State.

It is thus clear that the international practice is to interpret the term remuneration to include benefits. The finding by *Apollo,* that the definition of remuneration in section 213 of the LRA is wide enough to include benefits, accords with this practice even though it does not make reference to the practice in the finding.

Samsung excluded remuneration from the definition of benefits on the basis that it is not listed as an unfair labour practice and the legislature would have listed it as such if it so wished.[52] This reasoning follows the literal approach of interpretation and ignores the purposive approach (section 3 of the LRA) with all that it encompasses.[53] *NEHAWU* makes it clear that the Labour Courts are responsible for interpreting the LRA. Furthermore, international practice interprets the term remuneration to include benefits. It is suggested that as a corollary thereof, benefits includes remuneration. In the light of the above, it is suggested that *Apollo* correctly rejected the decision in *Samsung*.

One remaining issue here is the concern echoed in *Gaylard* that if the term "benefits" includes remuneration then this would preclude strike action.[54] The concern stems from the distinction between a dispute of right and one of mutual interest. The latter is subject to collective bargaining whilst the former is subject to arbitration. The concern is that the right to strike will be curtailed because matters of mutual interest relating to remuneration would be subject to arbitration and be barred from strike action in terms of section 65(1)(c) of the LRA. The concern is misplaced, because a claim to new forms of remuneration will be a matter of mutual interest which is subject to collective bargaining and thus falls outside the scope of arbitration. Disputes concerning unfairness relating to the provision of remuneration

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52 *Samsung* 1368.

53 Grogan *Employment Rights* 123 states that neither *Samsung* nor *Hambridge* has provided compelling reasons as to why disputes concerning remuneration should be excluded from the ambit of s 186(2)(a) of the LRA, as remuneration is the most important benefit to the employee.

54 *Gaylard* para 22.

are subject to arbitration and will not form the subject matter for collective bargaining.[55]

6.2 Does the benefit have to exist ex contractu or ex lege?

Apollo rejected the approach in *Hospersa* to the effect that a benefit has to exist *ex lege* or ex *contractu* in order to be arbitrable in terms of section 186(2)(a) of the LRA. It is suggested that *Apollo* employed the correct reasoning in rejecting the *Hospersa* approach. *Apollo's* reasoning was that if *Hospersa* was applied to the facts in *casu* it would mean that the employer could act with impunity because Hoosen (the employee) would not have a remedy in the civil courts, as no contract had come into being, neither would she have a remedy in terms of section 186(2)(a) of the LRA as she did not have a contractual right to the benefits, and being a single employee she would not have the right to strike as stated in *Schoeman*.[56] This suggestion finds support in the minority judgment in *Department of Justice,* wherein Goldstein AJA held that item 2(1)(b) (now section 186(2)(a) of the LRA) was designed for situations where neither the employment contract nor the common law provided a remedy to the employee. It is thus clear that if it is insisted upon that the benefit must exist *ex contractu* or *ex lege* in order to found the remedy in section 186(2)(a) of the LRA then a single employee faced with unfair conduct by her employer in relation to a benefit being granted to her subject to the employer's discretion upon application would be destitute and without remedy. This could never have been the intention of the legislature with regard to the term benefits as an unfair labour practice and it is also contrary to the purpose of the LRA. It is apposite to note that the definition of remuneration in article 141(2) of the *EC Treaty* covers non-contractual payments.[57] This lends credence to the rejection of *Hospersa*.

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55 Le Roux 2006 *ILJ* 61 referring to *Protekon* has suggested that: "The question is therefore not whether the benefit is apart or not from remuneration, but whether the 'issue in dispute concerns a demand by employees that certain benefits be granted or reinstated' or whether 'the issue in dispute is fairness of the employer's conduct'. The former cannot be the subject of arbitration, but the latter can."

56 *Apollo* para 48.

57 Duggan *Equal Pay* 57.

The concern that a claim to a new benefit could be arbitrable as an unfair labour practice is misplaced. In *Apollo's* definition, the term benefit refers only to existing rights or entitlements to which the employee is entitled *ex contractu* or *ex lege* and existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the discretion of the employer.[58] This definition effectively removes the concern that a claim to new benefits may be arbitrable in terms of the unfair labour practice jurisdiction. The definition refers only to existing benefits and not to a claim to new benefits.

6.3 The impact of section 65(1)(c) of the LRA on the right to strike within the context of a benefits dispute in section 186(2)(a) of the LRA

In *Protekon* the LC held that employees involved in disputes relating to benefits may choose to engage the employer in the collective bargaining arena instead of trying to prove unfairness as required by section 186(2)(a) of the LRA, and that the LRA does not preclude an employee from doing both at the same time.[59] *Apollo,* which was concerned with these remarks, made reference to *Maritime Industries Trade Union of SA v Transnet Ltd*[60] and held that the scheme of the LRA is to provide an employee with an election between referring the matter to arbitration and embarking on strike action.[61] The glaring omission in *Apollo* is that it did not explain whether or not an employee has that election with regards to a benefit dispute.

In terms of section 65(1)(c) of the LRA no person may take part in a strike if the issue in dispute is one that a party has the right to refer to arbitration or to the LC in terms of the LRA. In terms of section 191(5)(a)(iv) of the LRA[62] an employee has the right to refer an unfair labour practice dispute relating to the provision of benefits to arbitration. This would mean that if the benefits dispute falls within the

58 *Apollo* para 50.
59 *Protekon* para 25.
60 *Maritime Industries Trade Union of SA v Transnet Ltd* 2002 23 ILJ 2213 (LAC).
61 *Apollo* paras 29-30.
62 Read with s 186(2)(a) of the LRA.

ambit of section 186(2)(a) of the LRA then the employee would be barred in terms of section 65(1)(c) from embarking on strike action as the employee would have the right to refer the benefits dispute to arbitration in terms of section 191(5)(a)(iv). It is suggested that section 65(1)(c) of the LRA is conclusive as to whether an employee may refer the matter to arbitration or whether the matter may be dealt with in terms of the collective bargaining process. It should be noted that section 65(1)(c) curtails the right to strike only where a party has the right to refer the dispute to arbitration/adjudication in terms of the LRA.

Another issue which rears its head is the relationship between sections 64(4) and 186(2)(a) of the LRA in the context of a benefits dispute where the benefit exists *ex contractu*. In *Monyela v Bruce Jacobs t/a LV Construction*[63] the LC held that section 64(4) of the LRA allows an employee to embark on strike action if the employer unilaterally changes the terms and conditions of employment. This is one of the exceptions where a dispute of right may be the subject matter of strike action. The LC stated that a unilateral change of the terms and conditions of employment means that the employer has taken certain things or benefits away or has failed to honour the terms and conditions of employment.[64] At first blush it would seem that where an employee alleges a unilateral change in the terms and conditions of employment relating to the provision of benefits, the employee will have two avenues available, the first being in the form of strike action[65] as provided for in section 64(4) of the LRA and the second in terms of referring the matter to arbitration as provided for in section 186(2)(a) of the LRA.[66]

It is suggested that this anomaly may be resolved by adopting the following approach. Section 186(2)(a) of the LRA applies to disputes only where the employer

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63 *Monyela v Bruce Jacobs t/a LV Construction* 1998 19 ILJ 75 (LC).

64 *Monyela v Bruce Jacobs t/a LV Construction* 1998 19 ILJ 75 (LC) 82J, 82B. See also Le Roux 2013 *CLL* 79.

65 The writer is mindful of the decision in *Samsung* 1367 to the effect that a single employee cannot embark on strike action.

66 Le Roux 2013 *CLL* 79 commenting on *Apollo's* case is of the view that the fact that employees may have the right to embark on strike action or to institute legal proceedings in respect of the same dispute is irrelevant. The learned author states that the cardinal question is whether s 65 is applicable to a certain dispute or not.

has acted unfairly in relation to the provision of benefits.[67] Unfairness, then, becomes a pre-requisite to trigger the cause of action in the section. If unfairness is absent from a dispute relating to a unilateral change in the terms and conditions of employment involving benefits, then it cannot be arbitrated in terms of section 186(2)(a) of the LRA. An employee in such a case would then have the remedy in terms of section 64(4) of the LRA.[68] Section 65(1)(c) of the LRA expressly restricts the right to strike where the employee has a right to refer the matter to arbitration or to the LC. This would mean that section 64(4) of the LRA cannot accommodate disputes relating to a unilateral change of the terms and conditions of employment involving unfair conduct relating to benefits.[69]

It is suggested that in determining whether or not the dispute involves unfairness the CCMA and LC should look at the substance of the dispute and not the form, thereby ascertaining the true nature of the same.[70] It is further suggested that an employee cannot determine the route her dispute should follow by merely making an allegation of unfairness to bring it within the ambit of section 186(2)(a) of the LRA and an employee can similarly not remove her claim from the ambit of section 186(2)(a) of the LRA and bring it within the ambit of section 64(4) of the LRA if the substance of the dispute relates to unfairness which is arbitrable in terms of section 186(2)(a) of the LRA.[71]

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67 It is clear upon a reading of s 186(2)(a) of the LRA that the section requires an unfair act or omission that arises between the employer and employee relating to the provision of benefits.

68 The employee would then not be prevented from pursuing a contractual claim in the LC or High Court. See *SAPU v National Commissioner of the South African Police Service* 2006 1 BLLR 42 (LC) paras 81-82; *Nkutha v Fuel Gas Installatations (Pty) Ltd* 2000 2 BLLR 178 (LC) paras 73- 74 in this regard.

69 Du Toit *et al Labour Relations Law* 304 suggests that s 64(4) of the LRA does not apply to a unilateral change to a benefit that may be stigmatised as an unfair labour practice. It is suggested that a dispute relating to the provision of benefits can be stigmatised as an unfair labour practice proper only if the employer acted unfairly. This suggestion is in accordance with the prescripts of s 186(2)(a) of the LRA.

70 Du Toit *et al Labour Relations Law* 307.

71 In *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCABAWU (2)* 1997 18 ILJ 671 (LAC) 678A-B the LAC held that the union could not change the true nature of the dispute into a non-justiciable one by merely demanding a remedy which falls outside the ambit of the LRA. The LAC further held that if this were to be allowed it would mean that a dispute normally justiciable or arbitrable in terms of the LRA could be transformed into a strikeable issue simply by adding a demand to a remedy which falls outside the ambit of the LRA. The LAC remarked that this would be unacceptable. See also *Protekon* para 23 wherein the LC remarked that the court will look at the

7 Conclusion

The judgment in *Apollo* is welcomed, as its interpretation of the term benefits accords with section 23 of the *Constitution*, international law and the purpose of section 186(2)(a) of the LRA. It correctly rejected the distinction between a benefit and remuneration in *Samsung* as being artificial. The LC in *Samsung* was concerned with a literal approach to interpreting benefits and disregarded totally the purposive approach. The rejection of *Hospersa*, likewise, is unassailable because the LC focused on fitting unfair conduct relating to benefits into the realm of a rights dispute, thereby losing sight of the mandatory interpretative method in section 3 of the LRA. *Apollo* correctly endorsed the decision in *Protekon* to the effect that a claim to new benefits falls within matters of mutual interest and is subject to the collective bargaining process, whereas a claim that the employer acted unfairly in relation to benefits is subject to arbitration. The most significant finding in *Apollo* relates to the remark that where an employer acts unfairly in the granting of a benefit to an employee, where it is to be granted subject to the employer's discretion, the only remedy she will have is in terms of section 186(2)(a) of the LRA. In these circumstances section 186(2)(a) of the LRA reigns supreme as it presents an aggrieved employee with the only remedy. This is where the remedy in section 186(2)(a) is most needed. This finding makes the constitutional right to fair labour practices practicable for an aggrieved employee by providing her with an effective remedy. With regard to the impact on the right to strike within the context of section 186(2)(a), section 65(1)(c) of the LRA is conclusive. Employers who grant benefits to their employees subject to their discretion will no longer be able to grant such benefits at their will or fancy but will have to act fairly. Gone are the days when such employees were without remedy. Employers no longer enjoy an unfettered discretion, as *Apollo* fetters them in accordance with the *Constitution*.

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substance of the dispute and the characterisation of the same by a party is not necessarily conclusive. The LC further remarked that the court should ascertain the true nature of the dispute in order to determine if it is a dispute in terms of which a party has the right to refer same to arbitration. See further *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union (1)* 1998 19 ILJ 260 (LAC) 269G-I; *Coin Security Group (Pty) Ltd v Adams* 2000 21 ILJ 924 (LAC) para 16 in this regard.

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LIST OF ABBREVIATIONS

BLLR	Butterworths Labour Law Reports
CC	Constitutional Court
LAC	Labour Appeal Court
LC	Labour Court
CCMA	Commission for Conciliation Mediation and Arbitration
CLL	Contemporary Labour Law
EC	European Community
ILJ	Industrial Law Journal
ILO	International Labour Organisation
JOL	Judgments Online