Revisiting the Definition of Unfair Labour Practices Relating to Benefits: *Apollo Tyres South Africa (Pty) Limited V CCMA* (DA1/11) [2013] ZALAC 3·

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1 Introduction

Section 186(2) of the Labour Relations Act[1] defines unfair labour practices by setting out a list of unfair labour practices which if committed by an employer against an employee will be actionable as an unfair labour practice in terms of the LRA. The list of unfair labour practices constitutes a *numerus clausus*. The LRA, and in particular, section 186(2) thereof, gives effect to section 23(1) of the Constitution[2] which provides that everyone has the right to fair labour practices. The Constitution is the supreme law of South Africa.[3] The list of unfair labour practices in terms of section 186(2) of the LRA includes the following: a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals related to probation) or training of an employee or relating to the provision of *benefits* to an employee; b) unfair suspension of an employee or unfair disciplinary action short of dismissal; c) failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement to do so; and d) an occupational detriment (excluding a dismissal) in contravention of the Protected Disclosures Act as a result of the employee having made a protected disclosure as defined therein.[4]

· This paper is based on an article published by the author in the Potchefstroom Electronic Journal (*PELJ* / *PER*), titled: Ebrahim S "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" *PER* 2014 17(1) 596 (hereafter referred to as "Ebrahim "Benefits").

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

2 Constitution of the Republic of South Africa, 1996 (hereafter referred to as the "Constitution").

3 Section 2 of the Constitution.

4 Section 186(2)(a)-(d) of the LRA.

Unfair Labour practices relating to benefits in terms of section 186(2)(a) of the LRA has been the subject of much debate before the Labour Courts.[5] The debate centred around the meaning to be accorded to the term benefits. In *Schoeman v Samsung Electronics SA (Pty) Ltd*[6] the Labour Court held that the term benefits could not be interpreted to include remuneration. It stated that a benefit is something extra from remuneration.[7] In *Hospersa v Northen Cape Provincial Administration*[8] the Labour Appeal Court held that the term benefits only refers to those benefits which exist *ex contractu* or *ex lege* but does not include a hope to create new benefits.[9] In *Protekon (Pty) Ltd v CCMA*[10] the Labour Court disagreed with the reasoning in *Schoeman* 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.[11]

In *Apollo Tyres South Africa (Pty) Limited v CCMA*[12] the Labour Appeal Court was called upon to decide whether the term benefits in section 186(2)(a) of the LRA 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, It effectively overturned the decisions in *Schoeman* and *Hospersa* and elected to follow the decision in *Protekon*. The purpose of this paper is threefold. Firstly, the judgment in *Apollo* will be analysed within a constitutional and international law matrix. Secondly, guidance will be sought from international law regarding the interpretation to be accorded to the term benefits. Thirdly, this paper will conclude by suggesting the way forward for the adjudication of benefit disputes in terms of section 186(2)(a) of the LRA.

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5 This includes the Labour Appeal Court.

6 [1997] 10 BLLR 1364 (LC) (hereafter referred to as "*Schoeman*").

7 At 1368. In *Gaylard v Telkom South Africa Ltd* 1998 9 BLLR 942 LC (hereafter referred to as "*Gaylard*"), the Labour Court endorsed the decision in *Schoeman* and held that if benefits were to be interpreted to include remuneration then this would curtail strike action with regard to issues of remuneration (at para 22).

8 2000 21 *ILJ* 1066 (LAC) (hereafter referred to as "*Hospersa*").

9 At para 9.

10 2005 JOL 14544 (LC) (hereafter referred to as "*Protekon*").

11 At para 19.

12 (DA1/11) [2013] ZALAC 3 (hereafter referred to as "*Apollo*").

2 Facts and Judgment

During 2008 the appellant informed its employees that it intended to initiate an early retirement scheme.[13] The notice stated that the scheme would only apply to monthly paid staff who were between the ages of 46 and 59 years old. It further 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. Entry into the scheme would be subject to the discretion of management and the normal retirement benefits would remain applicable. Hoosen (the employee) applied for entry into the scheme but she was refused entry on the basis that she needed to be 55 years old in order to qualify for entry and this was the employer's practice. Hoosen was 49 years old at the relevant time.[14]

The question before the Court 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 only have a remedy if such an employee can prove that she has a right or entitlement to the benefits *ex contractu* or *ex lege*.[15] 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?[16]

The appellant argued that an employee may not rely on section 186(2)(a) of the LRA to create new rights because the section only applies to unfair conduct in respect of an existing right. The appellant argued that unfair conduct should only be reprehensible with regard to existing rights and not new rights and *Hospersa* provides clarity in this regard by respecting the distinction between a rights dispute and one of mutual interest. The appellant further argued that the distinction is important as it avoids a situation where new rights may be created by having recourse to the unfair labour practice jurisdiction.[17]

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13 Hereafter referred to as the scheme.

14 *Apollo* at paras 1-2, 4-5 and 8. Ebrahim "Benefits" at 598.

15 *Apollo* at para 1.

16 Ebrahim "Benefits" at 598.

17 *Apollo* at para 31. Ebrahim "Benefits" at 599.

The respondent (employee) argued that the term benefit in terms of section 186(2)(a) of the LRA should be construed wider than contractual entitlements as this would be in accordance with the purpose of the unfair labour practice jurisdiction and *Hospersa* was incorrectly decided.[18]

The Labour Appeal Court overturned the decision in *Schoeman* and the resultant authorities[19] which distinguished between remuneration and a benefit as the approach in order to 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 then this would preclude strikes and lock-outs.[20] The Labour Appeal Court noted that the term benefit in the context of section 186(2)(a) of the LRA is imprecise and defies definition. The Labour Appeal Court rejected this approach and 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.[21]

The Labour Appeal Court overturned the decision in *Hospersa* and the resultant authorities[22] which require the benefit to be rooted in contract or law 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.[23]

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18 *Apollo* at para 32. Ebrahim "Benefits" at 599.

19 *Schoeman; Northen Cape Provincial Administration v Comissioner Hambridge NO and others* (1999) 20 *ILJ* 1910 (LC); *Gaylard*.

20 *Gaylard* at para 22. Ebrahim "Benefits" at 599-600.

21 *Apollo* at paras 20, 25. Ebrahim "Benefits" at 600.

22 *Hospersa*; *Gauteng Provinsiale Administasie v Scheepers and others* (2000) 21 *ILJ* 1305 (LAC); *GS4 Security Services (SA) (Pty) Ltd v NASGAWU and others* (unreported judgment of the LAC case no DA3/08). See also *Sithole v Nogwaza NO and others* [1999] 12 BLLR 1348 (LC) at para 47 wherein the LC held that a benefit arises out of a contract of employment.

23 *Hospersa* at para 10. Ebrahim "Benefits" at 600.

The Labour Appeal Court followed the authorities[24] which have voiced a move away from *Hospersa*. According to these authorities; item 2 (1)(b)[25] of Schedule 7 to the LRA creates a statutory right (*ex lege* right) not to be subjected to an unfair labour practice relating to, *inter alia*, the provision of benefits;[26] section 186(2)(a)[27] cannot be used to create new benefits, new forms of remuneration, new policies not previously provided by the employer, this should be left to the process of collective bargaining;[28] the legislature has intended with regard to section 186(2)(a)[29] to superimpose a duty of fairness regarding employer conduct irrespective whether that duty exists expressly or impliedly in the contractual provisions that establish the benefit;[30] section 186(2)(a) was introduced primarily to permit scrutiny of employer conduct, *inter alia*, the exercise of employer discretion in relation to the provision of benefits;[31] 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.[32]

The Labour Appeal Court postulated the *new definition of benefits* 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

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24 *Protekon*; *IMATU obo Vertser v Umhlathuze Municipality* and others [2011] JOL 27258 (LC) (hereafter referred to as "*IMATU*"); *Department of Justice v CCMA and others* (2004) 25 *ILJ* 248 (LAC) (hereafter referred to as "*Department of Justice*"); *Eskom v Marshall and others* (2002) 23 *ILJ* 2251 (LC).

25 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 section 186(2)(a) of the LRA, see Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 5th ed (LexisNexis Durban 2006) 482 (hereafter referred to as "Du Toit *et al Labour Relations Law*").

26 *Department of Justice* at paras 53-54.

27 LRA.

28 *Protekon* at para 32. Ebrahim "Benefits" at 600-601.

29 LRA.

30 *Protekon* at para 34.

31 *Protekon* at para 35.

32 *IMATU* at para 21.

> 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.[33]

The Labour Appeal Court held that if *Hospersa* was applied to the facts before it then it would mean that the employer could act with impunity because the employee 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 *Schoeman*. The Labour Appeal Court then stated that in such a case the view that the benefit must be based on an *ex contractu* or *ex lege* entitlement would render section 186 (2)(a) sterile. The Labour Appeal Court concluded that there was no acceptable, fair or rational reason as to why the employee was not allowed entry into the scheme in circumstances where she qualified to participate in same. The employer committed an unfair labour practice by not exercising its discretion fairly. The appeal was accordingly dismissed.[34]

3 Comments

3 1 Is a benefit apart from remuneration?

Section 3 of the LRA sets out how the Act must be interpreted. It states that the provisions of the LRA must be interpreted to give effect to its primary objects, in compliance with the Constitution and in compliance with the public international law obligations of the Republic.[35] In *Aviation Union of South Africa & another v South*

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33 *Apollo* at para 50. See also *South African Revenue Services v Ntshintshi and others* (C 546/12) [2013] ZALCCT 17 at 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*. Ebrahim "Benefits" at 601.

34 *Apollo* at paras 48, 59-60 and 63. Ebrahim "Benefits" at 601-602.

35 Section 3(a)-(c) of the LRA.

African Airways (Pty) Ltd & others[36] the Constitutional Court held that section 3 of the LRA is the starting point to interpreting the LRA.[37] This interpretive method will be followed to determine whether a benefit forms part of remuneration or not. One of the primary objects of the LRA is to give effect to and regulate the fundamental rights as espoused in section 23 of the Constitution.[38] Section 23(1) of the Constitution provides that everyone is entitled to fair labour practices. Section 186(2) of the LRA gives effect to section 23 of the Constitution by setting out a list of unfair labour practices. It follows that the term benefits in section 186(2)(a) of the LRA must be interpreted to give effect to section 23(1) of the Constitution.

Section 39(1) of the Constitution makes it mandatory for a court, when interpreting the Bill of Rights, to consider international law. Section 39(2) of the Constitution further provides that every court, when interpreting any legislation, must promote the spirit, purport and objects of the Bill of Rights. Section 233 of the Constitution makes it mandatory for every court to select any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. This means that the provisions of the Constitution and the provisions of the LRA must be interpreted in a manner that is consistent with international law. Ngidi states that international law has an intrinsic role within South African law and as an interpretative tool it should be applied within the context of the South African legal system. She further states that the South African courts should view international law as an aide with which to interpret human rights.[39] In *S v Makwanyane*[40] the Constitutional Court remarked that comparative and international law should be utilised while having regard to the South African legal system, its history, circumstances and the language and structure of our own Constitution.[41] It is clear that when utilising international law in interpreting the term benefits in section

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36 [2011] ZACC 39.

37 At para 34.

38 Section 1(a) of the LRA.

39 Ngidi RLK "The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective" in Killander M (ed) *International law and domestic human rights litigation in Africa* (Pretoria University Law Press 2010) at 177.

40 1995 6 BCLR 665 (CC) (hereafter referred to as "*Makwanyane*").

41 At para 39.

186(2)(a) of the LRA regard must be had to the South African legal system and in particular, the Constitution and the LRA.

Article 38(1)-(d) of the Statute of the International Court of Justice contains the sources of international law. These sources are namely; International Conventions, International Customs, the general principles of law recognised by civilized nations, judicial decisions and teachings of the most highly qualified publicists of the various nations.[42] Botha states that the following three sources should be added to the list contained in section 38(1) of the Statute of the International Court of Justice; decisions of international organisations, *ius cogens* and soft law.[43] The main sources of international labour law are the Conventions and Recommendations of the International Labour Organisation.[44] The following sources may be added: the Constitution of the ILO; less formal instruments, for instance, resolutions adopted by the ILO; case law; Instruments adopted by special conference under the auspices or with the co-operation of the ILO; United Nations Instruments and Regional Instruments.[45]

In *Makwanyane* the Constitutional Court held that the reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation relating to applicable provisions of chapter 3 of the Interim Constitution.[46] In *NEHAWU v University of Cape Town & others*[47] the Constitutional Court held 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

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42 Dugard J, Du Plessis M and Pronto A *International Law: A South African Perspective* 4th ed (Juta, Cape Town 2012) at 24; Botha NJ "International Law" in Joubert WA *et al The Law of South Africa* 2nd edition (LexisNexis Durban 2008) at 442 (hereafter referred to as "Botha "International Law").

43 Botha "International Law" at 442.

44 Hereafter referred to as the "ILO." Valticos N and Potobsky G *International Labour Law* 2nd ed (Kluwer Law and Taxation Publishers Deventer-Boston 1995) at 49 (hereafter referred to as "Valticos and Potobsky *International Labour Law*") ; Servais JM *International Labour Law* 2nd ed (Kluwer Law International 2009) at 65.

45 Valticos and Potobsky *International Labour Law* at 49, 66, 68-71, 73-75.

46 At para 35.

47 (2003) 24 *ILJ* 95 (CC).

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 Organization as well as related foreign instruments.[48]

Article 1(a) of the Equal Remuneration Convention[49] 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 the definition of remuneration in article 1(a) of the Equal Remuneration Convention is *broad enough* to include all elements in addition to the basic wage.[50] They further state that if there is equality only with regard to the basic wage and not in respect of other work-related payments or benefits then discrimination will be perpetuated. They list, *inter alia*, the following as examples of elements of remuneration: productivity bonus, performance payments.[51]

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."[52]

Duggan states that the Courts' have interpreted the definition of pay in article 141(2) of the EC Treaty to include severance payments, occupational pensions, redundancy payments, payments made during or after employment and *fringe benefits*. The definition also covers *non-contractual pay* such as a discretionary bonus.[53] It should

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48 At paras 33-34. Ebrahim "Benefits" at 602.

49 No 100 of 1951.

50 Ebrahim "Benefits" at 603.

51 Oelz M, Olney S and Manuel T *Equal Pay: An Introductory Guide* (ILO Geneva 2013) 34-35.

52 Duggan M *Equal Pay-Law and Practice* (Jordans Bristol 2009) 57 (hereafter referred to as "Duggan *Equal Pay*").

53 Duggan *Equal Pay* 57. Ebrahim "Benefits" at 603.

be noted that these definitions relate to equal pay. It is submitted that the definitions and the commentary thereon provide an invaluable source of guidance regarding the interpretation of remuneration in section 213 of the LRA.[54]

It is apposite to note that the definition of pay in terms of article 141(2) of the EC Treaty replaces article 119 of the Treaty of Rome. Therefore case law interpreting article 119 of the Treaty of Rome remains relevant for the purposes of article 141(2) of the EC Treaty. Only article 141 of the EC Treaty will be referred to.

It is apposite to note that definition of remuneration in section 213 of the LRA bears resemblance to the definitions of pay and remuneration as set out above. Remuneration in terms of section 213 of the LRA is defined as follows:

> "… 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 …"

In *Garland v British Rail Engineering Ltd*[55] the European Court of Justice held that the term "pay" in terms of article 141 of the EC Treaty comprises "any consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer." The Court further held that the argument that the special travel facilities did not amount to a contractual obligation was immaterial. It held that the legal nature of the facilities is not decisive for the purposes of article 141 as all that is needed is that the facilities are granted in respect of employment.[56] In *Barber v Guardian Royal Exchange Assurance Group*[57] the European Court of Justice held that notwithstanding the fact that many advantages granted by an employer reflects considerations of social policy, the fact that a benefit is in the nature of pay cannot be disputed if the worker's entitlement to receive it from his employer is based on the existence of the employment relationship. The Court further held that, a redundancy payment made by an employer cannot fall outside the ambit of pay for the sole reason that it is not

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54 Ebrahim "Benefits" at 603.

55 [1982] IRLR 111 ECJ.

56 At 112.

57 [1990] IRLR 240 ECJ.

rooted in the contract of employment, but is rather a statutory or ex gratia payment.[58] In *Lewen v Denda*[59] the European Court of Justice held that a Christmas bonus falls within the ambit of pay in article 141 of the EC Treaty, irrespective of the fact that it is voluntarily paid by the employer as an exceptional allowance.[60] In *Kowalska v Freie und Hansestadt Hamburg* [61] the European Court of Justice held that article 141 is precise enough to be utilised by an individual before a national court in order to have a national provision, including a collective agreement, which is contrary to article 141 set aside.[62] In *Bestuur van het Algemeen Burgerlijk Pensioenfonds v Buene*[63] the European Court of Justice held that in determining whether the benefits provided by a pension scheme fall within the scope of article 141, the decisive criterion to be used is whether the pension is paid to the worker by reason of the employment relationship.[64] It is clear from the above analysis that International law interprets pay (remuneration) to include benefits. International law, moreover, does not require the benefit to exist *ex contractu* or *ex lege*.

Schoeman held that commission paid to an employee forms part of the employee's salary. It stated that remuneration is always a term and condition of the employment contract but a benefit is not always a term and condition of the employment contract. The Court held that remuneration is different from *benefits* as a benefit is apart from remuneration. It further held that if the legislature wanted remuneration to be arbitrable as an unfair labour practice then it would surely have listed it as such specifically.[65] It is submitted that this interpretation follows the literal method of interpretation and does not accord with the purposive method of interpretation as set out in section 3 of the LRA.[66]

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58 At 242.

59 [2000] IRLR 67 ECJ.

60 At 67.

61 [1990] IRLR 447 ECJ.

62 At 448.

63 [1995] IRLR 103 ECJ.

64 At 104.

65 At 1368.

66 Ebrahim "Benefits" at 604.

In *Gaylard* the Labour Court held that accumulated leave pay is not a benefit. It held that if the term *benefits* is interpreted to include remuneration then this would preclude strike action and lock-outs.[67] This concern stems from the distinction between a dispute of right and one of mutual interest.[68] The distinction between a dispute of right and one of mutual interest is important in terms of the LRA as one of its purposes is to encourage orderly collective bargaining to determine wages, terms and conditions of employment and other matters of mutual interest.[69] Matters of mutual interest are subject to collective bargaining whilst rights disputes are subject to arbitration. The concern is that the right to strike will be curtailed if benefits were interpreted to include remuneration because matters relating to remuneration would be subject to arbitration and consequently be barred from strike action in terms of section 65(1)(c) of the LRA. This concern is misplaced because a claim to new forms of remuneration constitutes a matter of mutual interest which is subject to collective bargaining and would thus falls outside the scope of arbitration. On the other hand, disputes concerning *unfairness* relating to the provision of remuneration is subject to arbitration in terms of section 186(2)(a) of the LRA and will not form the subject matter for collective bargaining.[70] Grogan states that *Schoeman* has not provided compelling reasons as to why disputes concerning remuneration should be excluded from the ambit of section 186(2)(a) of the LRA as remuneration is the most important benefit to the employee.[71]

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67 At paras 21-22.

68 One of the primary objects of the LRA is to provide a framework for employers and trade unions to collectively bargain to determine wages and other matters of mutual interest – section 1(c)(i) of the LRA.

69 Section 1(c)(i), 1(d)(i) of the LRA.

70 Le Roux R 'The Anatomy of a Benefit: A Labyrinthine Enquiry' (2006) 27 *ILJ* 53 at 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." Ebrahim "Benefits" at 604-605.

71 Grogan J *Employment Rights* (Juta Cape Town 2010) 123.

It is submitted that *Apollo* has correctly rejected the distinction between benefits and remuneration as artificial and unsustainable as the definition of remuneration in section 213 of the LRA is *extensive enough* to include benefits.[72]

3 2 The existence of the benefit ex contractu or ex lege

Apollo correctly rejected the *Hospersa* approach to the effect that a benefit has to be rooted in law or contract before it can be arbitrable in terms of section 186(2)(a) of the LRA. It is submitted that *Apollo's* reasoning in rejecting the *Hospersa* approach is unassailable. *Apollo* reasoned that if the *Hospersa approach* was applied to the facts before it then this would allow the employer to act with impunity because the employee would not be able to found a remedy in terms of section 186(2)(a) of the LRA as there was no contractual right to the benefits, neither would she be able to found a remedy in the civil courts as no contract came into being, and the right to embark on strike action would not be available to her as stated in *Schoeman*.[73] This reasoning finds support in the minority judgment of *Department of Justice* which remarked that item 2(1)(b) (section 186(2)(a) of the LRA) was intended for circumstances where the employment contract and the common law failed to provide an employee with a remedy. It is clear that if the courts are to require the benefit to exist *ex contractu* or *ex lege* before an employee may utilise 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."[74] This untenable position does not accord with the purpose of the LRA which is to promote the effective resolution of labour disputes and would in effect deprive an employee of her constitutionally entrenched right to fair labour practices in terms of section 23(1). International law lends credence to the rejection of the *Hospersa* approach. Duggan states that article

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72 *Apollo* at para 25. See also Le Roux PAK 'Preserving the Status Quo in Economic Disputes' *CLL* Vol 6 No 11 June 1997 93 at 96-97; Le Roux PAK 'What is an employment benefit' *CLL* Vol 15 No 1 August 2005 1 at 2. *Protekon* at para 19. *SACCAWU v Garden Route Chalets (Pty) Ltd* [1997] 3 BLLR 325 (CCMA). Ebrahim "Benefits" at 603.

73 *Apollo* at para 48. Ebrahim "Benefits" at 605.

74 Ebrahim "Benefits" at 605.

141(2) of the EC Treaty covers *non-contractual payments*[75] and the European Court of Justice in *Barber v Guardian Royal Exchange Assurance Group*[76] has found that a redundancy payment made by an employer cannot fall outside the ambit of pay for the sole reason that it is *not rooted in the contract of employment*, but is rather a statutory or *ex gratia* payment.[77]

The concern in *Hospersa* that claims to new benefits could be arbitrable in terms of section 186(2)(a) as an unfair labour practice is misplaced. *Apollo* answers this concern successfully as it states that the term *benefit* refers to an existing right or entitlement 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.[78] This finding (definition) removes the concern that a claim to new benefits may be arbitrable in terms of section 186(2)(a) of the LRA. The finding refers only to existing benefits and not to a claim to new benefits.[79]

3 3 The relationship between sections 65(1)(c) and 186(2)(a) of the LRA relating to benefits

In *Protekon* the Labour Court remarked that employees involved in benefit disputes may decide to engage the employer in the collective bargaining arena rather than trying to prove *unfairness* in terms of section 186(2)(a) of the LRA and the LRA does not preclude them from doing both at the same time.[80] *Apollo* did not agree with these remarks and made reference to *Maritime Industries Trade Union of SA & others v Transnet Ltd & others*[81] and held that the framework of the LRA is to provide an employee with an election to refer the matter to arbitration or embark on strike

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75 Duggan *Equal Pay* 57. Ebrahim "Benefits" at 605.

76 [1990] IRLR 240 ECJ.

77 At 242.

78 At para 50. Ebrahim "Benefits" at 606.

79 Ebrahim "Benefits" at 605.

80 At para 25. Ebrahim "Benefits" at 606.

81 (2002) 23 *ILJ* 2213 (LAC).

action.[82] It further held that having employees embark on strike action and referring their dispute to arbitration at the same time will cause confusion and uncertainty.[83] *Apollo* did not, however, state whether an employee has that election with regard to a benefit dispute.[84]

In terms of section 65(1)(c) of the LRA an employee may not embark on strike action if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA or any other employment law. Section 191(5)(a)(iv) of the LRA read with section 186(2)(a) of the LRA provides an employee with the right to refer an unfair labour practice relating to benefits to arbitration. This means that where the dispute relating to benefits falls within section 186(2)(a) of the LRA then the employee is barred from embarking on strike action in terms of section 65(1)(c) because she would have the right to refer the dispute relating to benefits to arbitration in terms of section 191(5)(a)(iv). It is suggested that section 65(1)(c) of the LRA is decisive regarding whether or not an employee may refer her matter to arbitration or whether it should be dealt with in terms of the collective bargaining process.[85]

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* warrants brief discussion. *Monyela and others v Bruce Jacobs t/a LV Construction*[86] held that section 64(4) of the LRA allows an employee to strike where the employer unilaterally changes terms and conditions of employment. This constitutes an exception to the rule that a dispute of right may not be the subject matter of a strike. The Labour Court stated that a unilateral change to the terms and conditions of employment means that the employer has taken certain things or benefits away from the employee or has failed to honour the terms and conditions of employment.[87] This does not mean that an

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82 *Apollo* at paras 29-30. Ebrahim "Benefits" at 606.

83 *Apollo* at para 30.

84 Ebrahim "Benefits" at 606.

85 Ebrahim "Benefits" at 606-607.

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

87 At 82J, 82B. See also Le Roux PAK 'What constitutes a 'benefit'?' *CLL* Vol 22 No 8 March 2013 76 at 79. Ebrahim "Benefits" at 607.

employee who alleges a unilateral change in terms and conditions of employment relating to the provision of benefits will have two avenues available to her. The first in the form of strike action[88] as provided for in section 64(4) of the LRA and the second in terms of referring the matter to arbitration in terms of section 186(2)(a) of the LRA.[89]

Section 186(2)(a) of the LRA only applies to benefit disputes where the employer has acted *unfairly*.[90] Unfairness triggers the cause of action in section 186(2)(a) of the LRA. If unfairness is absent from a dispute relating to a unilateral change in terms and conditions of employment involving benefits then it cannot be arbitrated. Section 64(4) of the LRA would then be available to such an employee.[91] Section 65(1)(c) of the LRA restricts the right to strike where an employee has the right to refer her dispute to arbitration or to the LC in terms of the LRA or any other employment law. This means that section 64(4) of the LRA cannot accommodate disputes relating to a unilateral change of terms and conditions of employment involving *unfair* conduct relating to benefits.[92]

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

89 Le Roux PAK (n 87) at 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 section 65 is applicable to a certain dispute. Ebrahim "Benefits" at 607.

90 It is clear upon a reading of section 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 (emphasis added).

91 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) at paras 81-82 and *Nkutha v Fuel Gas Installatations (Pty) Ltd* [2000] 2 BLLR 178 (LC) at paras 73- 74 in this regard.

92 Du Toit *et al Labour Relations Law* 304 suggests that section 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 only be stigmatised as an unfair labour practice proper if the employer acted unfairly (emphasis added). This suggestion is in accordance with the prescripts of section 186(2)(a) of the LRA. Ebrahim "Benefits" at 607-608.

The substance of the dispute and not the form should be considered to determine whether the dispute involves *unfairness*.[93] An employee cannot determine the route her dispute should follow by simply alleging *unfairness* to bring it within the ambit of section 186(2)(a) of the LRA and she can likewise not remove her claim from 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.[94]

4 Conclusion

The judgment in *Apollo* is welcomed as it brings an end to the method of defining the term benefits by ascertaining whether or not it forms part of remuneration. This method ignores the purposive method of interpretation which is mandated by section 3 of the LRA. International law interprets remuneration to include benefits. This interpretation weighs heavily in the interpretation of the term benefits when one has regard to the Constitution and the LRA which requires the provisions of the LRA to be interpreted to be consistent with international law. *Apollo* correctly rejected the *Hospersa* approach which required the benefit to exist *ex contractu* or *ex lege* before it could be arbitrable as an unfair labour practice relating to benefits in terms of section 186(2)(a) of the LRA. International law lends credence to the rejection of the

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93 Du toit *et al Labour Relations Law* 307.

94 In *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCABAWU* (2) (1997) 18 *ILJ* 671 (LAC) at 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* at para 23 wherein the LC remarked that the court will look at the substance of the dispute and the characterisation of 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 whether 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 and others* (1) (1998) 19 *ILJ* 260 (LAC) at 269G-I and *Coin Security Group (Pty) Ltd v Adams and others* (2000) 21 *ILJ* 924 (LAC) at para 16 in this regard. Ebrahim "Benefits" at 608.

Hospersa approach as it does not require remuneration to be rooted in contract or law in order to fall within the ambit of remuneration as defined in section 141 of the EC Treaty. *Apollo* has also successfully clarified the concern in *Hospersa* that new benefits could be arbitrable in terms of section 186(2)(a) of the LRA by defining the term benefits to refer only to existing benefits.

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 decisive. The most important part of the judgment in *Apollo* relates to the finding that if employer acts *unfairly* in the grant of a benefit to an employee where the benefit is to be granted subject to the employer's discretion, the only remedy available to her 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 which she otherwise would not have.[95]

[95] Ebrahim "Benefits" at 609.