IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

REPORTABLE CASE NO. P302/03

In the matter between:-

VENTURE OTTO S.A. (PTY) LIMITED **Applicant**

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **First Respondent**

LOUIS VERMAAK N.O. **Second Respondent**

T.D. STEVENSON **Third Respondent**

J U D G M E N T

CORAM FARBER AJ:

On 17 November 2004, I dismissed the application of the applicant to review and set aside an award of the second respondent.

I at the time indicated that I would provide reasons for having done so in due course. These are they:-

15. At all material times during the course of the events giving rise to the dispute between them, the third respondent was

employed by the applicant as a maintenance foreman in East London.

15.During March 2002 the applicant, in respect of its employees, introduced what has been described as a "new grading system". The grades ranged from A to C.

15.The merits of the system do not require elaboration. I need merely record that the third respondent was accorded a "C" grade. This grade was allocated to those employees who were considered by the applicant as "bottom performers".

15.The consequences to the third respondent of the grading in issue were severe - he, unlike the situation which had previously obtained, no longer qualified for the payment of incremental increases in salary. Moreover, he fell outside the category of employees who were from time to time rewarded through the payment to them of discretionary bonuses. To boot, his performance was now "managed".

15.Consequent thereon, the third respondent did not receive the bonus and increase in salary which would, but for his regraded status, have accrued for payment to him from

March 2002 onwards.

15. Aggrieved thereby, the third respondent referred the matter to the first respondent for conciliation.

15. Attempts to resolve the dispute were unsuccessful and it was referred to the second respondent for resolution by way of arbitration under the auspices of the first respondent.

15. On 29 May 2003 the second respondent issued an award in the matter. Paragraph 6 thereof reads as follows:-

"6. **ORDER**

6.1 The demotion of the Applicant was unfair.

6.2 The Respondent is ordered to pay the Applicant as compensation an amount of R41 396.00.

6.3 The above money must be paid to the Applicant within fourteen days of the date of this award.

6.4 No order is made as to costs."

15. The applicant was furnished with a copy of the award on 13 June 2003 by Mr Longhurst, the applicant's human resources

manager.

15. On that occasion, Longhurst congratulated the third respondent on his success.

15. After the expiry of the period referred to in paragraph 6.3 of the award, the third respondent telephoned Longhurst to enquire why payment had as yet not been made thereunder.

15. Longhurst undertook to raise the matter with Mr Hilliard-Lomas, the applicant's local director in East London.

15. Some two to three days later, Longhurst advised the third respondent that he had spoken to Hilliard-Lomas, who had indicated that the applicant would comply with the provisions of the award, but that it sought an indulgence in regard thereto. In this respect, the applicant wished to make payment to the third respondent on 25 July 2003, being the date of "the pay-run of the following month".

15. The third respondent was agreeable thereto and on 3 July 2003 he concluded a written agreement with the applicant in the following terms:-

"RE: ARBITRATION AWARD - CASE Ment 2710

The Arbitration Award dated 20 May 2003 and received by me on 13 June 2003 refers. The order is for the Company to pay you the amount of R41396.00, being bonuses not paid to you from March 2002 to December 2002.

As agreed with yourself, this amount will be paid to you on the 25th July 2003 in the normal monthly salaried payrun."

15. On 9 July 2003 Longhurst advised the third respondent that the applicant had resolved not to comply with the terms of the agreement. According to him, the matter was no longer in his hands but in those of "senior management".

Reliant on the provisions of the agreement, the third respondent contended that the applicant has acquiesced in the award of the second respondent and that in consequence the remedy of a review as a mechanism to impugn its terms was no longer available to it.

In *Dabner v S A Railways and Harbours* 1920 AD 583, INNES CJ, writing on behalf of an unanimous Court, said the following in

regard to the principle of peremption at 594:-

"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it.
But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven." [1]

1 The point, and the principle which underpins it, were raised in the context of an appeal. There is no reason why it should not be applied to review proceedings.

[See also *Natal Rugby Union v Gould* 1999(1) SA 432 (SCA) at 443E-G.]

The threshold required to be satisfied before the principle of peremption might be successfully invoked is high. The matter, as in all cases, must be approached on the basis of a conspectus of all the facts, for it is only in the light thereof that a determination of what may often be a vexing question falls to be made.

In casu, and given the applicant's undertaking to comply with the second respondent's award, the indulgence which it subsequently sought, the third respondent's positive response thereto and the coalescence of it all by way of the conclusion of the written agreement, proclaims in my judgment that the threshold has

been satisfied. The circumstances which I have outlined point "indubitably and necessarily" to the conclusion that the applicant wholly accepted the second respondent's award. In short, the facts unequivocally proclaim that the applicant had fully acquiesced in the award without the slightest intention of impeaching it. What it thereafter did was to repudiate an agreement which was seriously and deliberately entered into. And it only did so when the applicant's managing director had some misgivings and thereafter sought legal advice. By then, it was all too late.

I pause to observe that the applicant does not suggest that the agreement is open to impeachment on some cognisable basis in law, such as absence of authority, duress, misrepresentation and the like.

In my view, the point taken by the third respondent was quite unassailable, and on this ground alone the application fell to be dismissed with costs.

For convenience, the order which I originally made in the matter is restated.

The application is dismissed with costs.

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G FARBER
ACTING JUDGE OF THE
LABOUR COURT

DATE OF HEARING:
17 NOVEMBER 2004

DATE OF ORDER:
20 NOVEMBER 2004

DATE REASONS HANDED DOWN:
01 FEBRUARY 2005

ADV J G GROGANMR F LE ROUX
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