IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU

Appeal Case No. 12/1989

BETWEEN : WILLIE MORRIS

Appellant

AND : THE PORT VILA MUNICIPAL COUNCIL

Respondent

JUDGEMENT

By originating summons, dated 15th July, 1988, the appellant sought declarations on eight matters arising out of a strike by members of the Vanuatu Municipal Workers Union of which the appellant is or was the interim President. The summons required interpretation of a memorandum of agreement signed on 1st November, 1986, between the Union and the Port Vila Municipal Council.

Affidavits were filed by the Appellant and the matter set for hearing. No papers were filed by the respondents but, at the hearing, counsel disputed that the memorandum of agreement annexed to the appellant's affidavit was in fact the document signed. The hearing was adjourned to 11th November, and on that day, further adjourned to 30th November when evidence was called limited to the identity of the document signed on 1st November, 1986.

There is no record of what transpired at the hearing on 11th November which is unfortunate because of a complaint by counsel for the appellant that he was to some extent taken by surprise at the hearing on 31st November and had only one witness. If he was so taken by surprise, we can only assume it was his fault rather than that of the Court because his opponent was clearly prepared.

The learned Chief Justice concluded that the agreement put in by the appellant, exhibit 4, was not the agreement signed

and that the respondent's document, exhibit 1, was the agreement signed. He stated:

"I studied both the agreements and am of the opinion that Exhibit 1 is a complete agreement covering all the essentials necessary for matters between the parties, whereas Exhibit 4, the shorter agreement, lacks many essentials for any agreement.

It is my opinion, considering the strong evidence in favour of the agreement, Exhibit 1, and the fact that it was a comprehensive agreement, that Exhibit 1 was in fact the agreement attached to the memorandum of agreement dated the 1st November 1986 and I so hold. As provisions exist in Exhibit 1 which the Defendants accept as the true agreement, for arbitration to deal with disputes, that procedure should be followed."

Where the lower court reaches a conclusion of fact based on the evidence, this court will only interfere if it feels there has been a fundamental error. The lower court has the advantage, as has been said so often, of seeing and hearing the witnesses. It can observe and rely on matters such as demeanour that cannot be conveyed by the written word.

In this case, the learned Chief Justice had to assess the truthfulness and accuracy of the witnesses before him and, had his conclusion been based entirely on that, we would have been reluctant to interfere. However, as the passage quoted above shows. his conclusion was based on the contents of the documents themselves.

Having considered the evidence on the record, we feel that there is a real possibility he has reached the wrong conclusion.

The respondent, as the party asserting, called three witnesses. Edward Bani, the Town Clerk, was present at the signing ceremony but did not actually sign the agreement. He signed two weeks later and says that Exhibit 1 was the agreement attached at the time. He pointed out it had been delivered by the President of the Union a few days before the signing and had been retained by the witness since. His evidence on the agreement was based on his memory of that later signing.

Alex Hopman was the Mayor at the time. He also stated exhibit 1 was the agreement but he agreed he had never read it.

Lionel Kalwat was an Industrial Relations Officer in the Labour Department and had chaired the negotations between the Union and the Council. He explained how the Union log of claims had been made into an agreement and presented to

the Council. He said he advised that any matters relating to discipline should be dealt with under the Employment Act but, despite that, was sure exhibit 1 was the memorandum attached at the time of the signing.

The appellant called only one witness, Ephraim Kalsakau, the President of the Union at the time of the signing. He told the Court that exhibit 1 was the log of claims and gave rise to the memorandum, exhibit 4, and that was the document agreed on 1st November.

It is important to note that the difference between the two exhibits is that exhibit 1 has seventeen sections and exhibit 4 only twelve, the main points omitted being the sections on grievance procedure and arbitration, retirement and gratuity, termination of service and a miscellaneous section.

The court was shown two letters written by Kalsakau to the Mayor on 24th October 1986. One of those, exhibit 3, appears to us to be of some significance in deciding whether the longer or shorter memorandum is the appropriate one. In it, the President of the Union suggests that an announcement should be made on the radio about the changes. He continues "Concerning the hours of work, ...it must be kept in mind that the constant of 40 hours per week for all employees is the norm." In exhibit 4 the hours of work are, as he states, 40 hours per week but in exhibit 1 they are stated to be 44 hours.

There is also later in the letter a request for a meeting on 10th November "to consider the remaining issues." There was no suggestion by any of the respondent's witnesses that the agreement was incomplete. However, it is clear that a number of issues were omitted from exhibit 4 and presumably still needed to be considered.

Quite apart from that, exhibit 1 has all the appearance of a draft. It contains numerous alterations and corrections, some in typescript and some in manuscript. Some sections have clearly been typed at another time and inserted and, at one point, lines and arrows have been put in to rearrange the order of the provisions. None of those alteration have been initialled or signed.

Exhibit 4, on the other hand, has all the appearance of a properly drafted and typed document.

At the hearing on 30th November, it was on the respondent to prove exhibit 1 was the true memorandum. We feel that the evidence did not satisfy the burden of proof that fell on them and we therefore allow the appeal.

The case is remitted to the Supreme Court for hearing de novo. It would seem that the question of the memorandum

could be considered at the same time as the declarations and we direct that the Supreme Court give any necessary directions accordingly.

Dated at Port Vila, this 26th day of October, 1990.

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MR JUSTICE G. WARD
COURT OF APPEAL JUDGE

MR JUSTICE E. GOLDSBROUGH
COURT OF APPEAL JUDGE