IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 23/3416 COA/CIVA

BETWEEN: **TEACHING SERVICE COMMISSION**
Appellant

AND: **DIRECTOR-GENERAL IN THE MINISTRY OF EDUCATION AND TRAINING AND THE DIRECTOR-GENERAL IN THE MINISTRY OF FINANCE AND ECONOMIC MANAGEMENT**
First Respondents

AND: **PUBLIC SERVICE COMMISSION**
Second Respondent

Coram:	***Hon Chief Justice Lunabek*** ***Hon Justice R Young*** ***Hon Justice R White*** ***Hon Justice O Saksak*** ***Hon Justice V M Trief*** ***Hon Justice E Goldsbrough***
Counsel:	***K T Tari for the Appellant*** ***G M Blake for the Respondents***
Date of Hearing:	***9 February 2024***
Date of Decision:	***16 February 2024***

JUDGMENT OF THE COURT

Introduction

1. A dispute arose between the Teaching Service Commission (TSC) and the Director-General of Education (DGE) regarding control over TSC's day-to-day expenditure of its operating budget. The TSC asserted it should control its budget. The DGE required the TSC to get its approval for expenditure of their budget.

2. The TSC filed an urgent judicial review claim in the Supreme Court, together with an application for an interlocutory injunction. Two further interlocutory injunction applications followed.

3. The judicial review claim asked the court to:

   (a) Declare that the decision of the DGE to control the operating budget of the TSC was "*unlawful, null and void, or void ab initio*".

(b) Declare that the payroll and incidental budget for the TSC employees was "*unlawfully located at the Ministry of Education and that the budget be under the control of the TSC*".

(c) Restrain the Public Service Commission (PSC) and the DGE from interfering "*in the affairs of the independent TSC*".

4. The interlocutory injunctions sought were:

(a) To allow the TSC to spend its operation budget until a resolution of the case.

(b) To stay the instruction by the PSC to the TSC employees to resume work ; restraining any further directives by the PSC against TSC employees; to restrain the imposition of disciplinary offences; and restraining the PSC from "dealing with TSC employees",

(c) To stay the temporary suspension of the Acting Secretary of the TSC and staying the appointment of the new Acting Secretary for the TSC until final determination.

Supreme Court Judgment

5. The judge in the Supreme Court refused the interlocutory injunctions, considering they were not urgent; that no serious question was to be tried; that if the evidence of the appellant remained as it was, the application was unlikely to succeed; and finally there would be no serious disadvantage to the appellants if the orders weren't made.

6. The judge also considered rule 17.8 of the Civil Procedure Rules which directs a judge not to hear a judicial review claim unless certain matters are established. The judge concluded in terms of R 17.8(3) that the appellants did not have an arguable case given he had concluded, when considering the injunctions, that there was not a serious question to be tried; there was undue delay in bringing the claim and that there was another remedy available to resolve the matter.

7. The judge said that the assertion that the TSC should manage its own financial affairs ignored the DGE's responsibility to the Minister to ensure public funds were spent responsibly. The judge considered this was a reasonable level of oversight and that it did not infringe the TSC's independence. The judge noted there was nothing in the relevant legislation which said the DGE did not have a layer of authorisation of such expenditure.

8. The judge accepted that the TSC was directly affected by the decisions of the DGE.

9. As to the question of undue delay he identified the relevant decision for assessment of delay as being the DGE's decision to locate expenditure approval for the TSC budget with the DGE. Tested against that decision there had been undue delay.

10. Finally, as to an alternative remedy, the judge considered that constructive dialogue between the

parties could resolve the matter.

Appeal submissions

11. The appellant's case was that the Teaching Service Act, the Public Finance and Economic Management Act [CAP 244] and Article 60(3) of the Vanuatu Constitution all pointed to an arguable case that the TSC should have control over its budget. The TS Act provided that the TSC was an independent body with a budget allocated to it over which it should exercise control. There was no law which permitted the DGE to exercise control over the TSC expenditure. The Public Finance and Economic Management Act identified the Chairperson as the head of a government agency, namely the TSC, which had reporting obligations to the Director-General of Finance. This in turn illustrated there was oversight of the expenditure of the TSC budget.

12. The appellant submitted that while Article 60(3) referred to the Teaching Service rather than the TSC, if the Director-General of Education and through him, the PSC, was to control the operating budget of the TSC, then those organisations would be able to exercise effective control over the Teaching Service through the TSC.

13. The respondents submitted, in supporting the Supreme Court judge's assessment, that the dispute between the TSC and the DGE was an internal dispute between government agencies, and it should be left for them to resolve in the absence of any legal authority. The TSC had no legal authority to exclusively run its operating budget. The TSC had not established any right in law had been infringed and that there was no law to support the TSC's claim to sole right to its operating budget. There was no law which prevented the DGE from exercising oversight of the TSC's expenditure

14. Article 60 (3) was concerned with the teaching service, not the TSC and therefore had no relevance to the question before the Court.

Discussion

15. The decision to refuse the injunctions and the conclusion not to hear the judicial review claim are interlocutory decisions, although the latter resolved this litigation. The appellants therefore applied to this Court for leave to challenge the Supreme Court's decision (R 21.1 Civil Appeal Rules).

16. We grant leave. This was effectively a final judgment on an issue of significant importance to the Vanuatu Teaching Service and the refusal to grant the injunctions also raised important issues regarding such applications.

17. The judge in the Supreme Court approached the case by first considering the interlocutory injunctions under rule 7.5 of the Civil Procedure Rules, and then considered the judicial review matter under rule 17.8. We consider the appropriate approach was to rule on the 17.8(3) matters regarding whether the judicial review could proceed to a full hearing first, and then, if the conclusion was that the full hearing was appropriate, consider the interlocutory applications.

18. We therefore consider the appeal against the R 17.8 decision first.

19. Rule 17.8(3) of the Civil Procedure Rules provides that a judge should only hear a judicial review claim if the judge is satisfied that:

(a) The claimant has an arguable case and,

(b) The claimant is directly affected by the enactment or decision and,

(c) There has been no undue delay in making the claim and,

(d) There is no other remedy that resolves the matter fully and directly.

20. The judge in the Supreme Court concluded that the appellants were directly affected by the decision of the DGE and the PSC, but that they did not have an arguable case, that there was undue delay in making the claim and that there was another remedy which would resolve the matter.

21. It seems that for some time the DGE has exercised day to day control over the TSC budget and expenditure. The DGE required that the TSC seek its approval for its expenditure. The TSC sought the Attorney-General's advice about the lawfulness of this arrangement. The A-G's advice was that the TSC should exercise control over its budget, not the DGE. Finally in November 2023 the Acting Chairperson and others from the TSC were on Maewo Island signing teachers' contracts when they discovered the DGE had not approved their aircraft hire fee. Shortly afterwards these proceedings were filed.

22. The essential issue between the TSC and the DGE, with respect to the authority to commit the TSC's operating budget, is whether the relevant legislation authorised the TSC or the DGE to exercise that control. A resolution of that issue in the context of R17.8(3) required consideration of the TS Act, the Public Finance and Economic Management Act and any other relevant legislation. It did not involve a consideration of how the system had operated in the past and whether the DGE or the TSC had in fact exercised control over the budget. The question was who in law could exercise that power.

23. The objects of the TS Act (s 2) include;

"(b) to establish an independent Teaching Service Commission that is efficient and effective".

24. The guiding principles of the Service and the Commission (s3) include;

(a) To be independent and perform their functions in a fair, impartial and professional manner without undue influence.

25. Other principles that apply to the TSC include obligations to be accountable (s3(e)) and responsive to government in providing advice and implementing government policies (s3(f))

26. The TSC's functions are set out in detail in section 9 and include recruiting teachers, ensuring schools are adequately staffed, monitoring teacher efficiency and conduct, including a disciplinary process and setting standards for continuing education.

27. Section 10 sets out the powers of the TSC as follows:

> *"Subject to this Act, the Commission has power to do all things that are necessary or convenient to be done for, or in connection with the performance of its functions".*

28. The Government is to ensure a sufficient budget is allocated to the Commission to enable it to *"perform its function efficiently and effectively and professionally"* (s16).

29. Finally, the TS Act requires the Chairperson to provide a detailed annual report to the Minister of Education on the operation of the TSC, which in turn is tabled in Parliament (s 17).

30. This court observed in *Lowe v Markson* [2022] VUCA 34, at (17), that a Rule 17.8 conference and decision of the Court, as to whether the JR claim should be heard, is in the nature of a screening process, designed to weed out the frivolous or practically pointless judicial review applications. We apply such an approach in this case.

31. We are satisfied there is an arguable case established by the appellants. The TS Act, with its emphasis on the independence of the TSC in carrying out its extensive functions relating to teaching services, the power of the Commission to do all that is necessary to carry out its functions and the obligation on the government to ensure the TSC has sufficient funding to carry out these functions appropriately, support the argument that Parliament intended the TSC to exclusively control its allocated budget. With that expenditure control it will be able to focus on its statutory functions and will be accountable accordingly. If another entity has expenditure control without those statutory obligations its accountability will not be clear. In this case the DGE in approving or refusing expenditure will not need to be guided by the obligations in the TS Act.

32. While the respondents say that the statutory provisions do not support the claim by the TSC to exclusive control of the budget, it cannot be fairly said that the statutory provisions could not arguably provide exclusive expenditure control to the TSC. In contrast there are no statutory provisions identified by the DGE which could give the DGE expenditure control over the TSC.

33. The judge in the Supreme Court was concerned to ensure that there was proper oversight of the TSC's use of its operating budget, and the involvement of the DGE was one way in which that could occur. The DGE has been exercising approval control of the TSC's day-to-day expenditure.

34. Section 2 of the Public Finance and Economic Management Act (2020 consolidated edition) provides that a government "agency" includes:

> *"(d) a Statutory Entity"*

35. Section 5 of the TS Act establishes the TSC as an" Entity". The TSC is therefore a "Statutory Entity".

36. The head of such a Statutory Entity means (s2 Public Finance and Economic Management Act) the *"person in charge of the office or body."*

37. By virtue of s13 of the TS Act the Chairperson *"is the head of the Commission"*

38. And finally s5(1) of the Public Finance and Economic Management Act provides;

> *"The head of an agency must manage the affairs of the agency in a way that promotes the efficient and effective and ethical use of the public resources and public money, for which the head of the agency is responsible."*

39. Regulation 13(1) of the Public Finance and Economic Management Regulation Order (88/2021) provides that *"the head of an agency must approve all purchases and other expenditures of public money by the agency".*

40. These provisions therefore appear to support the claim that the Chairperson of the TSC has ultimate expenditure responsibility for the TSC's budget and there is a process for oversight of the Chairperson's TSC expenditure approval through the Public Finance and Economic Management Act

41. To return to this court's observations in *Lowe v Markson* (supra). The judicial review claim in this case was neither frivolous nor was it practically pointless. The TSC's claim was that it had the statutory right and obligation to spend the budget allocated for the work it was required to do under the TS Act and that the DGE was preventing the Commission from doing so. These were important questions raised about whether the TSC was to control the operating budget or the Director-General of Education. They were beyond internal disagreements between government agencies. The dispute in turn affected the Vanuatu Teaching Service.

42. The objects of the TS Act and the guiding principles of the TSC included an independent TSC performing its functions without undue influence, with the adequate funding allocated to the TSC to carry out its functions together with financial responsibilities and oversight through the Public Finance and Economic Management Act. These all illustrate an arguable case that it was the TSC itself which Parliament intended should control its own expenditure.

43. We therefore consider the judge in the Supreme Court was wrong to find that there was no arguable case. We are satisfied there was.

44. There were two other factors which the judge concluded did not support, under rule 17.8, a full judicial review hearing. The judge said at [45]:

> *"Mr Tabi submitted that there was no undue delay because the claim was filed within six months of the decision. The six-month time limit in rule 17.5 does not define what is undue delay in rule 17.8(3)(c). The latter depends on the nature of the claim and the remedy sought. The six-month time limit in rule 17.5 is very much a procedural outer limit within which any undue delay in rule 17.8(3)(c) must be found. As the heart of the matter seems to be the decision to locate authorisation of expenditure of the TSC payroll and incidental budget in the DG – MOET, I consider there has been an undue delay in making the claim".*

45. The evidence before the Court established that the DGE had in the past, exercised operational budget control over the TSC. In April 2022, the Acting Chairperson advised the DGE and the Director of Finance that the TSC believed that the TS Act provided that it should have control over its own budget. The issue came to a head when the Acting Chair and some TSC officers were on Maewo

Island to sign contracts with teachers. The Acting Chairperson was told the cheque to pay the aircraft hire from Port Vila to Maewo, was stopped because the DGE had not approved the expenditure.

46. The Acting Chairperson then sought advice from the Attorney General as to his view of the legal issues regarding who had control of the TSC budget. The Attorney General supported the TSC's position.

47. Further discussion between the TSC and the Director-General followed without resolution.

48. On 24 November 2023, the TSC Board met and decided to file these proceedings, and also to close the TSC offices pending the resolution of the "TSC finance access issues". The judicial review was then filed four days later on 28 November 2023.

49. In those circumstances we do not consider there was any undue delay in the filing of the proceedings.

50. The final issue relates to the availability of another remedy. As to this, the judge said at [46]:

> *"Finally, there is another remedy that resolves this matter fully and directly. It is one that Mr Tabi had been pursuing. Remedy is a constructive dialogue, which may take some time, between the TSC and the DGMOT, to agree to a policy that both ensures the TSC independence in performing its functions as set out in section 9 of the Teaching Service Act and that acknowledges the DGMOT's obligation to ensure the responsible expenditure of public funds. As earlier mentioned, the Court should not concern themselves with administrative political and managerial matters, more appropriately dealt with internally within the executive branch".*

51. Constructive dialogue is not in our view, an alternative remedy in terms of rule 17.8(3)(d). This rule requires a remedy to be available in law, which has the capacity to resolve the dispute if ordered and is legally enforceable. We are satisfied the judge was wrong to find there was an alternative remedy. While constructive dialogue is always to be encouraged, it is not, in the context of rule 17.8, an alternative remedy.

52. We therefore allow the appeal against the judge's decision to decline to hear the judicial review claim under rule 17.8(5). The judicial review claim should now be urgently dealt with by the Supreme Court.

53. We consider that it is appropriate that the judicial review claim is heard by a judge other than the judge in the Supreme Court, who decided this case.

54. The second part of this appeal relates to the judge's decision to refuse the three interlocutory injunctions. As to the three injunctions sought, the appellant did not pursue the challenge to the refusal to grant the third injunction relating to the Acting Secretary and new Acting Secretary of the TSC. The issue relating to that employment dispute is before the Supreme Court in separate proceedings. The appeal regarding the order of the judge with respect to that third injunction, is dismissed.

55. In reaching his decision with respect to the two other interlocutory injunctions, the judge in the Supreme Court relied upon rule 7.5.

56. Rule 7.5 provides as follows:

> *"Application for interlocutory order before a proceeding is started.*
>
> *7.5 (1) a person may apply for an interlocutory order before proceeding as started if:*
>
> *a) the applicant has a serious question to be tried; and*
>
> *b) the applicant would be seriously disadvantaged if the order is not granted.*
>
> *(2) the application must:*
>
> *a) set out the substance of the applicant's claim; and*
>
> *b) have a brief statement of the evidence on which the applicant will rely; and*
>
> *c) set out the reasons why the applicant would be disadvantaged if the order is not made; and*
>
> *d) have with it a sworn statement in support of the application.*
>
> *(3) the court may make the order if it is satisfied that:*
>
> *a) the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed; and*
>
> *b) the applicant would be seriously disadvantaged if the order is not made.*
>
> *(4) when making the order, the court may also order the applicant file a claim by the time stated in the order.*

57. Rule 7.5 therefore applies where the application for an interim injunction is filed *before* proceedings are filed. In this case the injunction applications were filed either at the time of the filing of the proceedings, or later.

58. The Supreme Court judge in his decision referred to *Letlet v Salwai* [2023] VUSC 255 as support for the application of the R7.5 criteria in an application for an injunction applied for at the time or after the proceedings had commenced (interlocutory). That case in turn referred to this court's observations in *Letlet v Republic of Vanuatu* [2016] VUCA 36 at [6], when we said in relation to an application for an injunction brought after proceedings had been filed:

> *"The trial judge correctly noted that as an application bought pursuant to R7.5, 7.7(a)(i) of the Civil Procedure Rules 2002, Mr Letlet had to satisfy the court there was a serious question to be tried and that he would be seriously disadvantaged if the orders he was seeking were not granted. He also correctly noted that the exercise involved a consideration of the balance of convenience".*

59. This court in *Letlet* did not note that rule 7.5 is concerned only with applications for orders before a proceeding is started. Even if rule 7.5 had applied in *Letlet,* this court did not mention the requirement in Rule 7.5(3)(a), that in addition to a serious question to be tried, the court needed to be satisfied that if the evidence brought by the applicant remained as it was, the applicant was likely to succeed. The judge in the Supreme Court did apply the full 7.5(3) test to the applications for the injunctions.

60. Rule 7.5 should not be used by trial courts to assess whether to grant an interlocutory order when the application has been filed at the time or subsequent, to the filing of proceedings. There are good reasons why this is so. A Rule 7.5 application will be before there are any pleadings. It will typically involve an urgent request to stop an action by another. It will typically be sought without serving the other potential party with the relevant documents to the potential litigation. And so, the court will not have the benefit of opposing evidence or submission. These factors all point to the need for caution by the court in granting such an injunction. The standard in R 7.5(3) reflects such a need. The standard an applicant is required to reach for such an interim injunction is therefore properly high. These factors, other than possible urgency, will not apply when there is an interlocutory application in proceedings which are current. The Court will have the benefit of pleadings and a contest on the facts and law.

61. Rule 7.2 of the Vanuatu Civil Procedure Rules applies to applications for interlocutory injunctions filed at or after the proceedings are filed. No guidance is given to counsel, or the courts on the standard to be applied when seeking such an injunction.

62. Given the absence of guidance we consider it may therefore be helpful if this court summarises the approach in New Zealand and Australia to interlocutory applications made at the time or after the filing of proceedings.

63. The position in New Zealand and Australia as to the elements the court should consider in an application for an interlocutory order, are similar. (See, *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries* [1985] NZLR 129 (HC and CA) 140; *Samsung Electronics Co. Limited v Apple Inc.* [2011] FCAFC 156; *De Smiths Principles of Judicial Review* (second edition, Woolf, Jowell, Donnelly and Hare QC 15-07- to 15074)

64. They are in summary:

(a) The first enquiry is what are the legal or equitable rights in the case before the court and does the injunction relate to those rights in the meantime? The purpose of an injunction is to preserve those rights;

(b) Is there a serious question to be tried in the litigation? This is the New Zealand test. In Australia the test is perhaps slightly different. In Australia, the test is whether the claimant has made out a prima facie case in the sense that, if the evidence filed at the time of the interlocutory application remains the same at trial will the claimant probably be entitled to the relief sought?

(c) The balance of convenience test. Here the court must balance the risk of refusing the order and doing a possible injustice to the applicant, against the grant of the order and doing a possible injustice to the respondent. There will be a variety of relevant factors. They are likely to include the attraction of preserving the status quo; the claimant's need to show injury that could not be adequately met by damages; whether there is a viable undertaking as to damages, such that if the injunction is granted whether the respondents may be able to enforce the undertaking if later needed; and

(d) Overall justice. Here the court might consider whether the applicant comes to court with clean hands. This part will require the judge to make an overall assessment of where justice might lie in granting or refusing the application.

65. For the reasons given, when the Supreme Court judge applied the R7.5 criteria to the injunction applications, he applied the wrong test.

66. In the circumstances we reconsider the injunction applications.

67. In relation to the first injunction sought with respect to the financial control question, we are satisfied that the TSC has an arguable case or meets the prima facie case test. We have identified the reasons in our consideration of the R17.8 test.

68. The second injunction sought orders restraining the PSC in various ways, from involvement with TSC staff. In the judicial review proceedings, the TSC sought an order that the PSC be *"restrained or stopped from interfering (in whatever form) in the affairs of the independent TSC"*. The injunction sought orders giving effect to that claim in the meantime.

69. The TSC claims that, while the PSC can hire and remove TSC employees (section 15 of the TS Act), they are not employed by the PSC. The TSC therefore maintains that the various instructions from the PSC to TSC employees, including a letter to return to work after closing the TSC office, was unlawful. Further the appellants say that Article 60(2) of the Vanuatu Constitution protects the position of employees of the TSC, from involvement with the PSC.

70. We note s15(1) of the TS Act, which provides:

Staff of the secretary of the Commission

(1) The Public Service Commission is to appoint a secretary and such other staff after consultation with the Commission, to be staff of the Secretariat of the Commission.

...

(3) The secretary and other staff referred to in subsection 1 are subject to the direction of the Chairperson".

71. For the purpose of this decision, we are prepared to accept the appellants have established a serious question to be tried or applying the prima facie case that it is satisfied, that they are not subject on a day-to-day basis to direction by the Public Service Commission.

72. We therefore consider the balance of convenience test. We are satisfied the balance of convenience strongly favours the respondent in both situations. We agree that the judge was correct to refuse to grant the interlocutory injunctions although we differ in our reasoning.

73. As to the dispute relating to financial control of the TSC (the first injunction sought) the DGE had exercised financial control over the TSC for some time. That was the existing position before the TSC attempted to assert control. We consider it would be significantly disruptive to teachers and

indeed the TSC, to now give them exclusive financial control as asked, for the relatively short time before the case is due to be resolved in the Supreme Court.

74. We therefore consider the preservation of the status quo as far as financial control is concerned on the facts of this case best meets the balance of convenience test. We are satisfied therefore, that the balance of convenience with regard to the financial control issue lies in favour of the respondents.

75. The same assessment applies to the PSC and its involvement with the TSC staff and the second injunction sought. The PSC has had long involvement with the TSC staff. To change that arrangement now, shortly before the Supreme Court hearing of this judicial review, would not be conducive to good governance in this important area of teacher support for Vanuatu. The balance of convenience favours the status quo.

76. Finally, we do not consider the TSC in this aspect of the case, came with clean hands. The decision to close the TSC office when the DGE would not agree to cede financial control to the TSC, was ill judged. There is, as we have found, a legitimate dispute between the DGE and the TSC as to financial control. Further, as we have found, there is a legitimate dispute between the PSC and the TSC as to capacity to direct staff.

77. We acknowledge efforts were made by both parties to resolve the dispute but when the dispute could not be resolved by agreement, the TSC resolved to file proceedings. Again, this was an appropriate response to an important dispute. However, to then close the TSC office, apparently because that the DGE would not agree with the TSC's approach, both with respect to its staff and financial control, was unwise. Despite the TSC's claim to the contrary there were sufficient funds to keep the TSC functioning. The TSC, pursuant to the Teaching Service Act, has an obligation to provide essential services for large numbers of teachers in Vanuatu. To close its office and thereby effectively refuse to undertake its statutory obligations under the TS Act, was, we consider, most unwise.

78. For the reasons given therefore, we dismiss the appeal with respect to the judge's decision to refuse the interlocutory injunctions.

79. In summary therefore:

(a) The appeal against the judge's decision under rule 17.8, refusing to allow the judicial review proceeding to come to trial, is allowed. We are satisfied pursuant to R17.8 that all the criteria have been met and the judicial review should proceed to trial before the Supreme Court as soon as reasonably possible.

(b) The application for an injunction relating to the employment of the Acting Secretary of the TSC and the new Secretary of the TSC, was not pursued on appeal and is struck out.

(c) The appeal against the Supreme Court judge's refusal to grant the other two injunctions is refused.

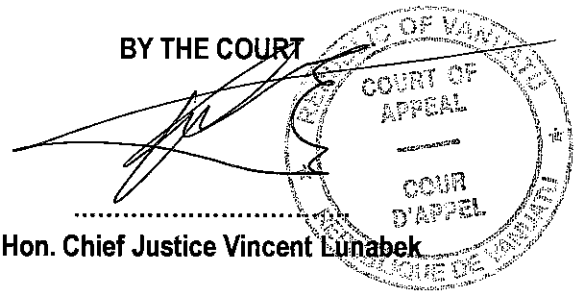
(d) We do not consider that it would be appropriate for the judge who decided this case in the Supreme Court to now be allocated this judicial review

Costs

80. We consider that no order for costs currently should be made. Costs can be considered by the trial judge at the completion of the judicial review trial.

DATED at Port Vila, this 16th day of February, 2024

BY THE COURT



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Hon. Chief Justice Vincent Lunabek