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THE SUPREME COURT OF

WESTERN AUSTRALIA

WELCOME TO THE HONOURABLE JUSTICE MUSIKANTH

FULL BENCH

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON THURSDAY, 23 NOVEMBER 2023, AT 4.18 PM

QUINLAN CJ: The court sits this afternoon to welcome the Honourable Justice Alain Musikanth as a judge of the court. We acknowledge the traditional custodians of the land on which the court sits this afternoon, the Whadjuk people of the Noongar nation, and pay our respects to their elders past and present.

We warmly welcome members of his Honour's family who are here present, his Honour's wife, Gerda, and their daughters, Hannah and Beth, his Honour's mother-in-law, Mrs Marion Finneran, who joins us here in court, and his Honour's parents, Gerald and Celia, who join us via video link from South Africa, and we welcome many other members of his Honour's extended family, colleagues and friends.

We also welcome many other distinguished guests here this afternoon, including her Honour Chief Judge Julie Wager and other members of the District Court of Western Australia, his Honour Stephen Heath, Chief Magistrate, his Honour Judge Hylton Quail, President of the Children's Court of Western Australia, Mr Michael Celenza, Manager Superior Courts, Ms Kelly Martinelli, Executive Manager of the Supreme Court, Mr Craig Bydder SC, Solicitor General for Western Australia, Mr Robert Owen SC, Director of Public Prosecutions, together with many past members of this and other courts.

Finally, I welcome those who will address the court this afternoon, Mr Ante Golem, President of the Law Society of Western Australia, and Mr Brahma Dharmananda SC, President of the WA Bar Association.

Justice Musikanth's appointment fills a vacancy on the court arising from the recent retirement of Justice Andrew Beech. Justice Beech served as a judge of the court for over 16 years, including over six years as a judge of appeal.

We take this opportunity to publicly acknowledge and thank the Honourable Andrew Beech SC for his contribution to the life of the court, to the administration of justice, and for his service to the people of Western Australia as a judge of the court over many years.

Justice Musikanth's appointment also marks an important milestone in the history of the court. His Honour is the 100th judge appointed to the court since its creation in 1861. His Honour, therefore, joins 99 men and women past and present who have taken the judicial oath or

affirmation of office as judges of the court over that 162 year history.

Much, of course, has changed in that 162 years. At the time of its establishment, the common law administered by this court did not acknowledge Aboriginal ownership or interest in the land which we now acknowledge. For many, many decades, all of the judges of the court were British-born subjects, which, of course, at the time included the Irish, and it took 135 years and 51 judges before the first woman was appointed to the court.

The court today comprises 25 men and women, a quarter of the judges appointed in the court's history, both born in Western Australia, interstate, and overseas from a variety of backgrounds and cultural heritage, including English, Irish, Italian, Greek, Croatian, Dutch and Aboriginal.

While much has changed over that 162 year history, however, some things have not. What endures is a commitment on the part of each judge and the court as a whole to the impartial administration of justice according to law and to the collegiate discharge of the judicial oath for the benefit of the community as a whole, and it is to that collegiate environment that we welcome Justice Musikanth.

His Honour's appointment reflects both the evolution of the court, his Honour having emigrated from South Africa a little over 20 years ago, and also the court's enduring adherence to the oath of office that his Honour swore earlier this month to do justice to all manner of people according to law.

His Honour's wide experience in civil and commercial litigation and advocacy make him well placed to discharge that oath, as will his strong leadership of the legal profession, including as President of the Law Society of Western Australia, President of the WA Society of Jewish Jurists and Lawyers, and Chairperson of Francis Burt Chambers. His Honour also brings to the office a natural civility and courtesy, attributes that are so essential to the judicial task. All of these qualities, together with his Honour's strong work ethic, stand him and the court in good stead for the years ahead.

Justice Musikanth, on behalf of the court, including all the judges, the Master, Registrars, and staff, can I express how pleased we are to have you join us on the court and bring your talents to our work, to extend our warm

welcome to you, Gerda, Hannah and Beth to the family of the court, and assure you of our continued solicitude and support throughout what will, no doubt, be a distinguished judicial career. Yes, Mr Attorney.

QUIGLEY, MR: May it please the court, and thank you, Chief Justice Quinlan. I would like to begin by recognising the distinguished guests welcomed by your Honour here this afternoon, and I also pay my respects to the traditional owners of the Whadjuk people of the Noongar nation, their elders past and present.

It is my great pleasure to stand before the court today on behalf of the State of Western Australia and the Government of Western Australia, as well as the people of Western Australia to welcome the Honourable Justice Alain Musikanth to the Supreme Court of Western Australia.

I welcome Justice Musikanth's family to the court this afternoon for this welcoming ceremony, and welcome all of the guests that your Honour has welcomed, Chief Justice, and particularly welcome Justice Musikanth's wife, Gerda, and daughters, Hannah and Beth. I extend a warm welcome to your Honour's parents, Gerald and Celia, who are watching, as I'm told, live stream this afternoon watching these proceedings.

Your Honour is a highly experienced and qualified member of the legal profession with a legal career spanning close to three decades. Your Honour was admitted to practice in Western Australia in 2002, having begun your career in the Independent Bar in Cape Town in South Africa in 1994. While in South Africa, your Honour appeared frequently in criminal trials, appeals, and commercial matters. In 2000, your Honour also appeared as a junior counsel before the Constitutional Court of South Africa in the Grootboom case, an early important decision of South Africa's Constitutional Court, which at that time had been in force for less than four years.

Your Honour moved to Western Australia in 2001 and joined Corrs Chambers Westgarth before practising as a barrister at Francis Burt Chambers from 2007. Your Honour has extensive experience as a trial and appellate counsel, especially in commercial and tax matters, and has sat as an arbitrator and a mediator. You navigate complex legal issues with precision and integrity, and your eminence to the legal profession has been recognised by the appointment to this Honourable Court.

Not only has your Honour excelled in the courtroom, but you've also taken on a number of important and influential roles. Prior to becoming a judge, your Honour was the Chair of the Francis Burt Chambers. Your exceptional leadership qualities have also earned you high regard within the legal community. Your Honour has served as President of the Law Society of Western Australia and as the Director of the Law Council of Australia in 2017. Your Honour has also been involved in a wide variety of committees and associations.

Your Honour has demonstrated commitment to the legal education. You have served as a presenter at many CPD seminars for the profession, as a presenter and a coach for the WA Bar Association's bar readers course, and as an adjunct professor at the Law School of the University of Western Australia. Your Honour has been recognised by your peers with numerous accolades, a testament to the reputation you have built as a formidable legal practitioner. Beyond your professional achievements, your Honour has also displayed a strong commitment to pro bono legal work and improving access to justice for all.

Justice Musikanth, your appointment to the Supreme Court is a testament to your hard work and dedication to the legal profession. Your commitment to upholding the principles of justice have earned you the respect and admiration of your colleagues and the wider community, and it is my privilege on behalf of the State of Western Australia and, indeed, the people of Western Australia to congratulate you on your well-deserved appointment and wish you all the very best as you begin this new chapter in your life. May it please the court.

QUINLAN CJ: Thank you, Mr Attorney. Yes, Mr Golem.

GOLEM, MR: May it please the court, it is my privilege to appear this afternoon representing the Law Society of Western Australia in welcoming your Honour to the bench of this Honourable Court. May I also welcome and congratulate members of your Honour's family and acknowledge friends and colleagues, distinguished guests, and members of the judiciary present here today.

The Law Society joins in acknowledging the traditional owners of the land on which we meet, the Whadjuk people of the Noongar nation, and on the Society's behalf I pay my respects to their elders past and present.

As we have heard this afternoon, your Honour is highly regarded and well respected in the legal profession, having

had an outstanding career for some 29 years. While your Honour has worked across diverse areas of the law, as the Attorney has mentioned, you have spent most of your career practising at the independent bar and are known for your areas of practice in commercial and tax litigation.

Your Honour was appointed Senior Counsel in 2018. In addition to your very busy practice, your Honour has contributed to the legal profession in this State by holding many roles, many of which have been mentioned this afternoon and I won't repeat.

Your Honour's time as President of the Law Society of Western Australia stands out as a presidency that reflected on the past, but also kept a firm focus on change and the future of the legal profession. The timing of your Honour's presidency coincided with you being called upon to host not one, but two significant milestones for the society and the profession. These being the 180th anniversary of the old courthouse and the 90th anniversary of the Law Society itself.

In fact, your Honour was responsible for driving the Society in its production of the 90th anniversary publication in that year 2017, which showcased the previous 90 years of the Society and, indeed, the legal profession of this State. As President of the Law Society, your Honour advocated during the run up to the State elections on many important community issues. Your Honour embarked on a campaign to inform candidates seeking election of the current crisis in legal assistance funding, and called upon candidates to make pledges about the need for legal assistance funding in this State.

When the subsequent change of government occurred following that election, your Honour proactively engaged including the uniform law, where your Honour identified the importance of its introduction to the legal profession, but also the wider community. Your Honour has also continued until recently to be an active member of various Law Society committees and other initiatives, many of which I have had the privilege of serving on with you.

As I've said on many other occasions during the course of this year at other welcomes to this Honourable Court, being a judge requires very many specific personal qualities. Those learned authors who have written on this topic have placed emphasis on a number of these. They include independence, patience, cultural awareness,

tolerance, courtesy, compassion, a sense of perspective, and definitely a sense of humour. There is no doubt that your Honour demonstrates these qualities. This is confirmed by your Honour's own colleagues and peers who speak very highly of you.

On talking to several of them about your Honour, the words "considerate", "measured", "generous" and "meticulous" were often mentioned to me. With your Honour's good character, depth and breadth of experience, your peer recognition, your Honour will be well placed to be a valuable member of this Honourable Court. In closing, may I draw particular attention to your Honour's service of the profession and the broader community through your many roles at the Law Society, including, as I have said earlier, as President.

I have personally benefited from your Honour's support, encouragement and wisdom delivered through many hours of selfless service, and I will always be grateful for that. In closing, on behalf of the Society and the wider profession of this State, we warmly congratulate your Honour on your appointment to this court. We wish your Honour all the best in your new role in serving the community and the administration of justice. May it please the court.

QUINLAN CJ: Thank you, Mr Golem. Mr Dharmananda.

DHARMANANDA, MR: May it please the court. May I also acknowledge the traditional owners of the land on which we meet. On behalf of the WA Bar, it is my honour and privilege to speak at this welcome for the Honourable Justice Alain Musikanth. As has been said more than once today, Your Honour is amply qualified to take on the responsibility of administering justice as a judge of this Honourable Court. Your Honour was appointed as Senior Counsel in 2018, has degrees in arts, law, including a Masters of Laws, and is a Fellow of the Tax Institute.

Your Honour has appeared in many important cases and particularly tax cases. Your Honour practised for much of your long and distinguished career as an advocate or barrister in Cape Town and at the WA Bar. It is no criticism of your Honour, but a recognition of the virtues of our fused profession in Western Australia that your Honour chose first to practise as a solicitor at Corrs in 2001 when your Honour emigrated from Cape Town some 21 years ago. Your Honour saw the light soon enough and moved to the WA Bar in 2006.

Your Honour has been described as, and is in fact, polite, reasonable, balanced, discreet, calm, collegiate, measured, methodical, and fair. Each of these attributes, of course, make your Honour eminently qualified to be a judge. The Legal Profession Uniform Conduct (Barristers) Rules provide that the rules are made in the belief that barristers must maintain high standards of professional conduct, act honestly, fairly, skilfully and bravely. The Rules also say that barristers owe duties to the court, their clients, and, no less importantly, their barrister and solicitor colleagues.

As a leading barrister, your Honour abided by these standards without exception. That is not to say that your Honour was a shrinking violet; far from it. Your Honour always maintained the integrity of your client's position and your argument but with politeness, not harshness. I'm told that your Honour's approach was once recognised even by a witness that you cross-examined. Apparently, the witness thanked you for the fact that you had cross-examined the witness fairly.

Your Honour was unfailingly on time, always seeking to get to court well in advance. I am told there may have been one exception where your Honour was defending an application for special leave to appeal in *Burton v Commissioner of Taxation*. Chief Justice Kiefel and Justice Edelman told the applicant to proceed even though you had not yet arrived, despite counsel seeking to persuade the court that you were moments away. The blame lay with the court registry that had misinformed you about the start time. I'm happy to report that you successfully defended the Full Federal Court's view as to the ambit of division 770 of the Tax Act and its relationship with the Tax Treaty between Australia and the United States. A Project Blue Sky argument about statutory purpose was rejected.

Such was your life as a leading barrister in tax law. Your practice routinely involved the intricacies of statutory construction, seeking to divine proper construction. Your task was not to turn to definitions in the Tax Act and mechanically apply them, but to identify the true meaning and effect of the jumble of words used in the Tax Act. As Alan Watts put it in *Wisdom of Insecurity* 1951, words do not give life; they merely symbolise it. All explanations couched in language are circular and the dictionary itself is circular.

Your Honour is highly skilled in the task of taking the words and giving them proper meaning. Your skills will be of obvious utility in your new role. Your Honour

recently attended a brilliant lecture by Associate Professor Nicholas Tiverios on the fusion fallacy and how equitable principles are distinct and prevent the unjust exercise of legal common law rights. Professor Tiverios argues that there is always a need for equitable rules to prevent an infinite regress in the application of strict common law rules, thus requiring equity to be kept separate.

I'm not quite sure about the argument, but, as I understand it, even though South African law apparently does not formally recognise the constructive trust or chancery's equity, the law gave the judge a discretion to decide based on principles of fairness and reasonableness. Reinhard Zimmermann explores the role of exceptio doli, dolus, and bona fides in South African contract law in his article Good Faith and Equity in 1996. I digress. I do recall, however, that your Honour asked an incisive question of Professor Tiverios at the seminar, seeking to tease out the issues.

Quite apart from your role as barrister, your Honour had a significant leadership role. Most recently, your Honour was the Chairman of Francis Burt Chambers. I'm told your Honour led with sensitivity and decisiveness. As the President of the WA Society of Jewish Jurists and Lawyers, your Honour led with care and conviction. Your Honour's juniors say that you were a pleasure to work with and to learn from.

You were apparently quite self-sufficient and relatively undemanding, but you would gratefully consider drafts of submissions prepared by your juniors and tell them that you were very happy with their draft. When you came to settle the draft, you would make many changes improving the quality of the document. You would then apologise profusely for having changed the junior's draft. It is fair to say that not all Senior Counsel at the Bar show such kindness.

Your Honour may be described as the elegant swan who appears to glide through the world with grace and apparent effortlessness, masking the hard work ethic that is your true character. Your Honour has a wonderful sense of humour. You have a great ability to make a big point succinctly and move on without dwelling on it.

I understand you enjoy a fine scotch, especially after a trying day in court, enjoy travel and fine dining. I hope you will have the time to enjoy these things in the next period. On behalf of the WA Bar, may I again

congratulate you on your appointment. The Bar looks forward to appearing before you to assist the furthering of the administration of justice. May it please the court.

QUINLAN CJ: Thank you, Mr Dharmananda. Your Honour.

MUSIKANTH J: May I too begin by acknowledging the traditional custodians of the lands upon which we meet, the Whadjuk people of the Noongar nation, and by paying my respects to their elders past and present. Thank you, Chief Justice, Mr Attorney, Mr Golem, Mr Dharmananda for your very kind words, and thank you everyone for taking the time out of your busy lives to be here this afternoon. I strongly suspect my family came here this afternoon anticipating, indeed perhaps hoping, for something of a roast as I did not warn them about the hagiography for which these occasions are notorious. Some of my family may therefore be a little disappointed, but at least I am certainly very grateful.

Chief Justice, thank you for your kindness, your support and encouragement, both in the lead-up to my appointment and in recent weeks. I'm also particularly grateful to all my new colleagues for their extraordinarily warm welcome, for their generosity, regular check-ins, and plentiful offers of help and guidance.

Mr Attorney, I would like to thank you and the government for granting me this great honour on behalf of the people of Western Australia. I am acutely conscious of the significant responsibility which has been entrusted to me and I will do my very best to make good my oath.

Mr Golem, I first joined the Law Society within a matter of months of migrating to Perth in 2001. Indeed, I believe my association with the Society is the longest I have ever had with any professional body in my legal career. I have very much enjoyed the time I've spent being involved in some of the important aspects of the Society's work, and I am thankful for the many friendships which have been formed as a result of this connection.

Mr Dharmananda, we are in this State fortunate to have had for just over 60 years now such a strong and independent institution that is the Western Australian Bar. It's an institution which is, and has always been, crucial both to the advancement of the administration of justice and the maintenance of the rule of law in this State, and long may it so remain. I have had the privilege and the honour of having spent more time at the Western Australian Bar practising from Francis Burt Chambers than in the other

two chapters of my legal career combined, and my days at the bar have been among the happiest and most professionally satisfying of my time in the law.

I also wish to thank everyone who has called, written or messaged me in the past few weeks. I've been quite overwhelmed by the good wishes and generous words, and I have done my best to try and respond to each message, but if I've forgotten anyone please take what I've just said as a heartfelt expression of my thanks and gratitude.

There are so many other thank yous that are due on an occasion such as this that I know that in mentioning some by name, as I must, will carry the inevitable risk of others being omitted, but I will do my best.

First, I would like to thank my parents. Unfortunately, they could not make the trip, but I know they are watching the ceremony online with much more than just a fleeting interest. To the best of my knowledge, none of my ancestors were lawyers, let alone judges. Indeed, law had not even occurred to me as a possible career path until late in high school. It was only then that it became necessary to select an occupation and since anything mathematical, science-based, or remotely practical was completely off the table for me, law eventually emerged as an option worth considering.

I will forever be grateful to my parents for the sacrifices they made to allow me to pursue my chosen profession and for the love and support which they have given my brothers and me throughout our lives. I'm also grateful to my late grandparents to whom I was very close. Two of them were migrants and none of them had many of the opportunities in life which were later enjoyed by their children and grandchildren, but they actively guided and encouraged me every step of the way throughout my studies and into adulthood.

As has been mentioned, I commenced my legal career as an independent barrister at the Cape Bar in 1994. My pupil master was William King, now King SC, a talented criminal advocate whose formidable reputation, particularly as a cross-examiner, belied his kindness and patience, particularly with me. In those first few months of pupillage, William taught me so much more about the forensics of advocacy than I ever truly appreciated at the time.

The seven years which I spent at the Cape Bar were a particularly happy time for me. It was also a time when the sheer diversity and volume of matters to which I was exposed was perhaps greater than at any other period in my career, at least to date. The steep learning curve which accompanied that challenge was eased by the fact that I was surrounded not

only by so many other juniors facing similar challenges, but also by some of the finest silks which the Cape Bar had to offer.

They included the legendary Peter Hodes SC, with whom I had the privilege of working as a junior in the matter to which the Attorney referred, and also Ashley Binns-Ward SC, as his Honour then was. I am grateful to both of them and to many others, notably Ismail Jamie SC, Fiona Gordon-Turner, and Alan Maher for their support and collegiality in those early days and for their enduring friendship over the many years which have followed.

When the time came to say goodbye to my friends at the Cape Bar, it was with much regret and reluctance, but in July 2001 Gerda and I made our move to Western Australia. It was then just the two of us and I'm delighted that my uncles, Peter, Jeff and Tim Lurie, and aunts Brenda and Gina are here to share this day with me, with Gillian sending positive vibes and thoughts from down south.

When Gerda and I landed in Western Australia, neither of us had a job lined up. Indeed, we had no idea what fate would have in store for us on this side of the Indian Ocean. But, ultimately, we decided it was worth assuming the risk. Some six weeks after arriving, I was extremely fortunate to secure a role in the commercial litigation division of Corrs Chambers Westgarth. I will always be grateful to Kirsty Sutherland and Caroline Brown for granting me that first interview and to both of them, along with Julian Sher, for subsequently taking a chance on me.

Corrs was the first and the only law firm at which I had ever worked. During my five and a half years at the firm, I had the considerable fortune of working with some of the smartest and most astute lawyers in town. But as my first professional love was the Bar, it was the Bar to which I wished to return. Those who encouraged me to do so and who supported me in my very early days at the Bar included Grant Donaldson SC, Anette Schoombee, Paul Mendelow and Kanaga Dharmananda, as he then was, among others, and I'm very grateful for that.

Although I began on level 16 of Francis Burt Chambers, I later moved to level 17 in my home away from home for the past decade and a half. Level 17's alumni includes several who have graced the bench of this Court and others and a

number who still do. Its past luminaries also include, of course, Chris Zelestis KC.

As a junior barrister, I worked with and received valuable guidance from a number of leading silks, including Zelestis KC and John Vaughan SC, as his Honour then was. I was also greatly assisted by, and learned much from, the nearly 20 juniors with whom I had the privilege of working over the past five years, most of whom I'm delighted are here this afternoon as well.

I would also like to publicly acknowledge and thank Kim Lendich SC, members of the Francis Burt Board, Pauline McKay, and all staff for their support and dedication, particularly over the past almost two years. I will miss my many friends at chambers enormously.

If I may now move away from matters legal and finally focus on other members of my family present today. First, my mother-in-law, Marion, who moved to Perth 10 years ago. As mothers-in-law go, I have to say that I've been incredibly fortunate. Then there are our daughters, Hannah and Beth. Both of you are, and will always remain, our pride and our joy and our greatest sources of happiness in the world.

Lastly, I turn to the foreperson of the jury. As those who know her well will attest, my wife, Gerda, is a plain-speaking antidote to all of the excessive flattery which you've heard this afternoon and, as such, I'm somewhat relieved, Mr Attorney, that you did not consult her during any sounding out which might have preceded this appointment.

I am particularly grateful that you did not canvass her views concerning topics such as my listening capacity, let alone my ability to make the most basic of decisions. In all seriousness, Gerda has both been by my side and has had my back for nearly 27 years. And, although we've been through many of life's twists and turns together, it is she who has done most of the heavy lifting in our relationship in nearly every significant respect. This she has done despite having her own busy and demanding career. In short, I would not be sitting her today were it not for her unconditional love and support over all these years.

Finally, it might be thought fitting for me, as the apparently 100th judge of this court, to conclude on a historical note. There has been, I believe, only one other occasion on which both of my daughters and I were present in this very courtroom all together. That occasion was in

2011. The occasion was an Open Day which had formed part of the 150th anniversary celebrations of this court. I tender Exhibit A.

Part of the Open Day involved what at least I considered to be a most interesting and informative presentation to members of the general public about this courtroom, its history, and about the Western Australian legal system in general. The presentation was delivered by a judge of this court. I will not reveal whether or not his Honour has since retired or whether he is, perhaps, now one of my colleagues sitting on this bench.

At any rate, at the time, 12 years ago, both of my daughters were still quite young. The three of us were seated together in the press gallery just under where Sir Francis Burt's portrait now hangs. About 10 minutes into his Honour's engaging presentation, one of my daughters - I will not reveal which one - vanished abruptly. I looked around to see where she disappeared to. Nothing.

I then glanced down at my shoes and noticed that she had dropped to the floor and was sitting there on the floor hidden behind the front of the press gallery, cross-legged with her fingers in both ears. So I lent down and in my quietest whisper I asked her very quietly, "What's the matter?" to which my daughter responded, "I wish this man would just stop talking".

And so with that clear warning ringing very loudly in my own ears, I thank you all once again for attending this afternoon.

QUINLAN CJ: Thank you, Justice Musikanth. That concludes today's formal sitting. One of the things that has definitely changed in 162 years is the time that it takes for the judges to get off the bench, so please bear with us. The court will now adjourn.

AT 4.52 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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