

FINAL TRANSCRIPT 31 JULY 2013

Johann Kriegler

Constitutional Court Oral History Project

24th November 2011

Int Johann, welcome to the Constitutional Court, this has been your home for many years. I'm doing an interview with Judge Johann Kriegler, and it's the 24th...

JK I think so, yes.

Int ... of November 2011. Johann, thank you so much. I've had the opportunity to interview you previously for the Legal Resources Centre Oral History Project, and I've asked you many questions during that interview, and I also managed to gain an extensive biography. I wondered though, for the purposes of this interview, if you would be so kind as to perhaps retrace how your particular life trajectory may have prepared you for life on the Bench?

JK That's a very difficult question, and it invites one to be presumptuous. I don't think I was prepared for life on the Constitutional Court Bench. I think I grew a great deal in the years that I was privileged to serve on the Constitutional Court. I brought some attributes that I had acquired during my legal career and judicial career before that. I think one quality that I did bring was experience as a judge, which was a useful contribution to make. I had been at the Bar for twenty-five years, I'd learnt how to write tidily, tightly, as a lawyer. I had been trained as a lawyer in the hard knocks of legal practice, and as a judge I had served both as a judge of first instance, where you get to know a bit more of the hurly-burly of South African society, and then as an appellate judge. So I could sit on a collegiate court, such as the Constitutional Court, I knew the tricks of interacting with colleagues in joint sittings, the methodology of producing successive drafts, memoranda and the like, until you eventually reach a consensus or a defined dissensus. Those skills I brought to this Bench. As far as personality, ideology, world-view, is concerned, I was a product of a fairly unusual Afrikaner background. Dissent was part of my upbringing, although I grew up in the home of a professional soldier where things had to be neat and tidy. I think I rebelled a little against that from the beginning. I did not like rules. I battled with the Nationalist government from my student days at Pretoria University, trying to form a Young Communist League at Pretoria University before the Suppression of Communism Act. Being a dissident, being a minority thinker, I was to be a little more serious and I was committed to the dignity of human beings. I was raised as a fairly serious Calvinist. I do believe – although I'm a pretty failed Calvinist nowadays – I do believe and did believe in the immortal spark that every human being possesses as of right, by the very fact that you are a human being, that you're

entitled to dignity, to respect, to a say in the affairs of the community in which you live, to express your views, to have your opinions, to have your right to privacy. I didn't do that via socialism. On the contrary, I was a fairly vehement opponent of socialism and certainly its extreme form of Marxism. I nevertheless fitted in with the anti-government group at the Bar over many years, and was perfectly happy to be part of the Legal Resources Centre's founding group to fight apartheid as we lawyers could do it through the tools that we had, and did so very successfully. I was happy to be a founder of Lawyers for Human Rights, to agitate, to advocate, to bring pressure to bear, to try to bring conscience to bear on decent members of my own language group. To some extent it succeeded. So I came to the Constitutional Court as a human-rights lawyer, an anti-communist human-rights lawyer, with a fairly strong religious background to it, and an experienced judicial officer. So that's what I brought to the Constitutional Court.

Int I'm just wondering, prior to coming to the Constitutional Court, you had been involved in the elections in 1994, and I wondered whether we could talk a bit about that?

JK Certainly. Where do we start?

Int Well, how you came to be involved, the genesis of that, and also your memories of that particular time?

JK Very briefly, because it's a long tale. I got involved ... first of all I don't know why I was selected. I have heard from some people that I was probably the last apple in the barrel. My own reconstruction is that I was equally unacceptable to both main protagonists at the negotiations. I had been an outspoken anti-apartheid anti-communist. So maybe that helped. I was on holiday, seaside holiday, just before Christmas 1993. When I got back from the beach at lunchtime I was told that "the minister" had phoned for me. I didn't know any ministers. I did know the Minister of Justice remotely but I was not on friendly terms with anybody. It turned out to be the Minister of Home Affairs and the line was bad, he was phoning from Pretoria, I was on the then Natal South Coast. He offered me what I thought was a job on the Electoral Court the next year. And I said, yes, of course, I'd gladly accept that, but I want to talk to the Chief Justice and see whether he'll release me from my obligations. But yes, I'd like to do that. It was only on the plane down to Cape Town, to go to a meeting which the Minister had called for three or four days later, that I was told on the plane that I had actually accepted the job to chair the Electoral Commission. I wasn't frightened, because I didn't know what it entailed. If I had known what it entailed, I don't think I would have accepted it.

Int Really?

JK

Yes, I don't think I would have. It was on all accounts a mad undertaking. We should not have tried to do it, it was impossible, all of the experts said, "You cannot run national elections with universal suffrage in four months. It can't be done. You need eighteen months, you need at least a year, to do some sort of a Heath Robinson sticky-tape putting-something-together. Four months can't work." We were amateurs. The commissioners mostly didn't know one another. I knew some of them remotely. I knew Dikgang Moseneke, I knew him over several years from when he'd started at the Bar in Pretoria. We were friends. I knew Helen Suzman remotely. We were not friends – I don't think we'd ever spoken more than a dozen words to one another. I didn't know anybody else on the commission. I had met Fanie van der Merwe, who was at that stage the main government agent with Mac Maharaj as his ANC equivalent – the two were the two organisers of the background administration. I had met him once. I had never met Mac before. I got to know him, I got to like him. Never mind what the newspapers say, and whether or not he pinched money, or took money, he's a friend of mine, I admire him, and I like him. And I got to know him then. We worked madly. We found that the electoral administration within the Department of Home Affairs, such as it was, was not acceptable – it wasn't acceptable to the liberation movements. We had to put together our own administration. We started from scratch early in January, we eventually built up a staff on election days of some three hundred thousand, over a period of four months. It worked. The elections did work. There are all sorts of silly stories that are told, even by some responsible people who should know better, that the election result was some manipulated, negotiated conclusion. It was just too good to be true. The ANC got sixty-two percent, not sixty-six percent. The Nationalists got the Western Cape province. The IFP [Inkatha Freedom Party] got KwaZulu-Natal. This thing was all rigged. It couldn't be that good. Nobody with any common sense or any knowledge of elections would believe that. But you simply cannot fix it like that, and if you can, we didn't have the capacity to do it. We certainly weren't skilled enough. There were lots of mistakes, lots of errors, the elections battled forth with fits and starts. We came across problems that we had never anticipated. We came across problems that we had anticipated. The major reason why the elections worked is because there was a real political will for them to work. The leaders of the main political participants were dedicated to the process. They were determined to make it work. The leaders had agreed that they would rather swim together than die together. The cooperation we got from the political parties right from the start was outstanding. I think the one contribution the IEC [Independent Electoral Commission] of 1994 made to world electoral knowledge and skill was that we evolved the system of party liaison. It had not been done anything near as extensively as we did it. We had a network built on the old peace structures to some extent, but we had party liaison from voting-station level upwards all the way to the national level, and no decision of any consequence at any of those levels was taken without consulting the parties in advance, which meant a number of things. It meant most importantly that you did not have complaints afterwards. If people had bought into the process they couldn't complain afterwards. That was the most important technical result. And the enormously

important political result was that the political party representatives came to appreciate one another as opponents, yes; as colleagues in the same national convulsive effort, yes; and as human beings. They came to accept one another and eventually many of them came to like one another. The process was an interactive, cooperative process, and that's why it worked. Right from Madiba [Nelson Mandela] and [F.W.] De Klerk down to the voting-station level, where if there was a dispute about the location of the voting station, we could consult the parties there, and once they had bought in, and signed off that they'd bought in, we obviated many, many disputes and of course made many wise decisions, having consulted properly. So the elections were a great political success: administratively barely acceptable, not competent but certainly honest. And, curiously, if you compare our elections of '94 with the Mexican elections of just a few months later, the Mexican elections were run brilliantly, magnificently. They had decided after many, many years of one-party rule to go for multi-party government. They wanted genuinely visible, acceptable, legitimate elections. They spent a fortune on their electoral system. They were infinitely better than we were. Our elections were accepted, warts, pimples and all. Their elections were largely rejected by the electorate because of the lack of the buy-in that we had from our electorate, and the suspicion that they never overcame in their elections. So our defective elections were accepted as legitimate. Their clearly very nearly technically perfect elections proved to be unacceptable to the electorate. The second and conjoined main lesson together with party liaison is ... and once you've got that and you've got party buy-in, you've got ninety percent of your legitimacy problems solved, and even halting and defective elections can work. I've used that experience in many places since then around the world successfully. That's the elections. It opened up a new world for me personally, because after I retired from the Constitutional Court I was offered and accepted many electoral briefs in fascinating places around the world, from East Timor to Sierra Leone to most of sub-Saharan Africa. It's been a wonderful new career for me, so ...

Int Right, and I want to talk to you about that at the end, I'm sure. Coming back to just after the elections, at what point did you get a sense that you may be in the running, that you were nominated, and that you may even be selected to be a Constitutional Court judge?

JK I had never thought of it. I had just been appointed to the Appellate Division, which later became the Supreme Court of Appeal. It was the culmination of my life's ambitions. I'd hoped to end on that court. I'd worked there some years as an acting judge. The very day that the minister phoned me, my permanent appointment to the Appellate Division was promulgated, and I wanted to serve on that court and I had agreed with the Chief Justice that I would take a short spell of leave after the elections and would then start in Bloemfontein in the Appeal Court in the third term of the year. My then wife and I went to Mexico for their elections, and while we were in Mexico I got a communication. It must have been by fax, because email wasn't around yet in

those days, asking whether I would accept nomination to the Constitutional Court. I think it was Johann van der Westhuizen's office, if I remember correctly, I may be wrong. And I said, ja, fine, I know nothing about constitutional law, I don't claim to be an expert, but ja, fine, if they want to appoint me, I'd be happy. And that was the first I knew about it. And I forgot about it for the rest of the tour that we were there. When we got back I found that I was shortlisted and I went for an interview, which I found a sobering experience. I had not applied for a job at an interview since I started as a candidate officer in 1950 and had to sit before a selection panel as a nervous youngster.

Int And this was before the Judicial Service Commission?

JK Before the JSC [Judicial Service Commission], ja.

Int And what was that experience like? What are your memories?

JK I found it exhilarating. I found it exhilarating because the standard of the questions that were put was so high. Clearly people like Mick Corbett and Arthur Chaskalson had thought about my candidacy and wanted to ask questions that they thought would be relevant, or the answers to which would be relevant, in establishing my *gestalt* as a human being. And I must say I am profoundly disappointed by the current Judicial Service Commission that has descended into a political talking-shop, asking questions that are both improper and irrelevant. But that's just an aside and you can delete that from the text. I found it interesting. I found it stimulating, and in fact it was the first time I really got excited about the possibility of actually serving on this Court. And it then proved to be very exciting indeed to start with a complete blank slate in virtually every respect. We had no rules, we had no principles, we had no background, there was no South African body of constitutional precedent in the context of a predominant Constitution with a Bill of Rights and a testing power for the courts. These were all exciting things, because during the seventies and the eighties and my involvement with the human-rights work, this was part of what we had been agitating for. I had done a good deal of reading and a good deal of writing, about constitutional democracies and the interaction between the various pillars of state and the separation of powers. I was familiar with all of that by then. So I was excited to be able to join in actually putting into practice that which we had preached for so long.

Int Just coming back slightly, you found it exhilarating, and I was wondering, the eventual selection, what was your understanding of the eventual selection?

JK I'm not sure I understand the question.

Int In terms of the ...

JK My eventual selection?

Int Yes.

JK I don't know. I think I would have appointed me [*elicits laughter*]. No, I do. I think I did ... those skills that I mentioned earlier were very, very useful. I'm not a jurist, I never have claimed to be a great lawyer, but I'm a very good practical lawyer, and I think we needed some feet on the ground in this new exciting venture. I can draft, I can collate, I can ... and I did do so. And I think that that was a useful component to build into the overall makeup of the Court. And I do think, and with no false modesty, I think I belong to nobody, I think I owed nobody anything. I owed no allegiance to any ideology, to any party, to any national, ethnic or religious group. I was really independent. So to that extent I think it was a good appointment.

Int Okay. I was wondering about your memories of the first meeting of the Court?

JK I am not sure how much of it is actual recollection and how much of it is idealised retrospection [*laughter*]. I can remember meeting some of the colleagues and being delighted at how promising working with them was going to be. I can remember, in particular, Tholie Madala and Yvonne Mokgoro, whom I had not known, neither of whom I had known. And Yvonne speaking to me in Afrikaans and good colloquial Afrikaans was such a surprise. I can remember ... I knew Laurie Ackermann of course, I knew Richard Goldstone, I knew Arthur [Chaskalson] ... and meeting up with them and with John Didcott, and with Sydney [Kentridge], who was there at that stage. The first meeting I can recall; although I can't remember the room where we were, I can remember my sentiments. I was a little awestruck at the solemnity of the occasion, but Arthur is Arthur. Arthur obviously has emotions, and I have seen Arthur emotional, but he's a very, very controlled person. And Arthur handled this disparate group with great skill and unobtrusive firmness from the beginning. So I can remember clearly my admiration for the way in which he managed to bring us together. I had worked in Bloemfontein in a very much more stuffy, structured, status-aware, hierarchical system. This brand-new free-for-all was a liberation for me. That there was no pecking order. It was great fun to sit down and work with these people. And of course then shortly thereafter we went to Germany together, which helped create or strengthen or facilitate the development of, an *esprit de corps* among the members of the Court.

Int What was the trip to Germany about?

JK The German government had invited us to their constitutional court to go and see how they do things, and to go and interact with our colleagues on that court, and to have a look at the *Bundestag* and see how it works. I'm not a great believer in study tours. In fact, I think study tours are an invention to enable academics who aren't paid what they're worth to make it worth their while to stay in academic life. You learn very little in a study tour, or at least you learn less than you could have learnt for the time and money spent. By sitting nowadays certainly and just plain Googling you could do better. I did find that we were ideologically, culturally, so entirely different from the German approach, that we could possibly have done better if we'd gone to Canada, which was a much more kindred kind of common-law post-Westminster system, now human-rights, separation of powers, kind of society. And of course so it developed in our jurisprudence later: we relied very much more heavily on the Canadians than on the Germans, *inter alia* because only Laurie [Ackermann] could read German fluently. So a language problem as well.

Int And as I understand it, when the Court started initially, you were in Braampark ...

JK Yes.

Int And I wondered what your memories are of that particular building?

JK [*Laughs*] It's a Sanlam development [*laughter*]. I'm not a Sanlam fan, or as a dissident Afrikaner I had been anti-Sanlam for many, many years. I did not like the thought of going into a Sanlam building. I didn't like the looks of the place, it looked to me not quite as "Broederbond Baroque" as the hospital on the hill, but I was unimpressed with the building. But it was very conveniently located, it had the accommodation we needed, we could get it in a hurry, they were prepared to do quite a lot to accommodate a courtroom for us, our chambers were quite comfortable, we had room for our library. So the building was adequate. The building was more than adequate, and it had the great advantage that it was immediately available and provided facilities for our staff. There was a tuck-shop or even a little restaurant café downstairs. Easy walking distance from the bus routes and so forth. So it was well-located and it offered everything we needed. So it was not an impressive building and I didn't like its ownership, but we worked well there. It was an adequate building.

Int You were really credited with finding this site, and I'm very curious to hear the story about how you arrived at this, because it was an unusual choice ...

JK It's a long story and I'll make it very short.

Int [Laughs] I want to hear the full version, Johann.

JK I ... I've been fascinated by Johannesburg all my life. My paternal grandfather, who was killed by the British in the Boer War, had been a speculator and he'd actually had an option on land where Doornfontein is today. If he had not been forced to give up the option that he had on the land, I would never have needed to work in my life. We would have been very, very wealthy people. Anyways, I'd been a Johannesburg-interested fellow, in the history of Johannesburg, the development of the mining camp, the building of the Fort, the irony of having a Fort looking not on your borders, pointing the artillery pieces at a town within your jurisdiction. It was a curious place, an odd place. I had ... when I qualified in Pretoria, I insisted on starting at the Bar in Johannesburg. I didn't want to be anywhere else. This is my town. I'd been to school in Johannesburg, and I liked the vibe, I liked the throb. Johannesburg was my city, although I wasn't born here. I got to know the Fort as a place where I came to see clients who were in custody. Number Four became a legendary place for many of us. I had on two occasions come to collect employees who had been picked up under the Pass Laws at Number Four. I knew the site, I'd been to the district surgeon's offices, the mortuary. I knew the hill, I got to know Melville Koppies, I got to know Northcliff as a youngster. The Witwatersrand and its history and its pre-history fascinated me. So when we were moving into Braampark, we weren't looking for permanent premises yet. It was only once the Constitutional Assembly had decided that there would be a permanent Constitutional Court that we were given the go-ahead to look for a site, and the promise that the Constitutional Court would be the first major public building of the new South Africa, and we were told, go and look. Johannesburg was obviously where it would have to be: the 1993 Interim Constitution had laid that down. It was going to be where the capital of Gauteng was, it was the commercial heart of the country, and far and away the most communicable place in the country. So we started looking. I went and looked at a number of places, Midrand, Crown Mines, the old Wolmarans Street synagogue, the site of the old technical college downtown in De Villiers and Eloff Street. I was going through the motions. I had said from the start this is public land, it sits on a hill that looks over a vast stretch to the Magaliesberg, it is redolent with history, the Fort is the place that nobody who's interested in South Africa could contemplate without being excited. It's where [Mahatma] Gandhi was kept. Where Christiaan de Wet was kept. Where Nelson Mandela was kept. Anybody who was anybody and from any kind of dissident movement in South Africa was a prisoner here at some stage. Number Four was a place of legend. The magazine *Drum* had had a series of articles about it with photographs and this had caused a big *gewolt*. And there'd been the prison trials during the sixties in which the Nationalist government had clamped down on critics of the prison system very harshly – I can't remember the prison officer's name. But anyway, this area had been in my head for many years. I had visited the Fort after the prisons department had abandoned it in 1983. They had taken over the women's prison, the municipality had, and the Fort itself had just been left. And I was horrified,

because there were wonderful old things. There were coats of arms in plaster, there were wonderful old prison doors and the engravings and there were graffiti on the walls. I was much more excited about the Fort than I was about Number Four, or about the awaiting trial prison. The awaiting trial prison was a prison. It had no real character; it was too young to have a character. It dated from the late twenties. But Number Four was banal from the beginning. Neglected, symptomatic of an apartheid attitude towards non-white men. Low in its structure, low in its maintenance, low in its status. Not cruel. And I think many critics of apartheid get the emphasis quite wrong. It was a crude, humiliating system, more than a cruel system. Of course it was cruel in many respects, but its basic attitude was dehumanising. Anyway, it had all of that atmosphere for me, and I thought that the idea that we could have the Constitutional Court, phoenix-like, grow out of the ashes of the old ... the Fort complex that had been the place of incarceration and humiliation and dehumanising for a century, would now be the site of the new hope for the new South Africa. A place where people could come to be protected, to come to feel that this is the place that is a shield between us and the might of the state. I'm a sentimentalist and it appealed to me. Albie [Sachs] and I, independently of one another, had formed a preference. I had a commitment, I think Albie had more a preference than a commitment, but we were the two that then advocated this site. I had hoped to have a tower block inside the ramparts of the Old Fort. That we couldn't negotiate with the heritage people and they were quite right. The place has been reasonably preserved and I think it is a memorial to where we come from. So ... and we did very well with the site where we are.

Int Well, it's proven to be a wonderful site and a wonderful choice. I wondered, Johann, whether there were any difficulties and challenges to actually negotiating the move here?

JK I would like to say yes, but I recall very little. I think we were ... we were at the time very much the flavour of the month, the flavour of the year, and everybody was excited and imbued with a new spirit of constitutional democracy, and of course Madiba played an enormous role in that. You've been told about the first judgment in which we set aside a proclamation of his – the *Western Cape [Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others]* case. And in which he went on television and radio nationally within an hour of our having set aside one of his proclamations as being invalid. He said, I don't like the result, but I accept the result, and my government accepts the result and everybody in the country accepts the result, because the court that has the last word has spoken. You know, that was the kind of attitude, the kind of atmosphere in which we operated. I can remember working very well with Jeff Radebe who was then Public Works. There were some difficult financial negotiations to get the contributions by the Johannesburg City Council, the Gauteng province and the national government. Those were detailed but not really difficult. They took time and they took effort. There were discussions

and negotiations with the Public Works Department as to the specifications. You know, they've got specifications for everything, or they had then. But we had ministerial backing to say that we don't have x square metres of carpet and chairs with armrests for people above a certain level. That kind of bureaucratic rigour was relaxed. The idea to have a competition for the design met with support from government. We had excellent backing from the architects' profession, from the heritage people – Herbert Prins in particular should be mentioned. He made a major contribution in the committee doing the planning. And we split into subcommittees. Albie and Yvonne were the pretty stuff; Laurie and I were the unexciting stuff, the functional stuff, what a court building needs, what your flow of business is, what you need in the court chamber, what you need in your administration, in your judges' chambers. The design people, Herbert Prins and others. There was Arthur with the finances and the negotiations. So we split into subcommittees and it worked well. It took a lot of time; it took longer than we had hoped. And I never actually served as a judge in this building.

Int Really?

JK I retired before this building was occupied. I made the arrogant joke that I was Moses; I couldn't enter the Promised Land [*laughter*]. Anyway, I can remember some pretty heated discussions when we sat in the hospital building down the road here, which has not been developed as it should have been. The site has unfortunately not developed as we had hoped it would in the first ten, fifteen years. This whole area was supposed to have been a node of commercial and residential activity. That hasn't come about. It will in time, I'm sure. You know we have the massive parking garage, which is serving virtually nobody at the moment. But real difficulties, real hitches, real hostility, opposition? Not really. There was too much general enthusiasm for the project.

Int What were some of the heated discussions in the hospital building? I'm curious.

JK You know, you get down to the level of arguing about finishes. Arguing about architectural ideas. The pillars in the foyer that are not perpendicular but at an angle – stylistically the trees in a forest or a clump of trees. Oh, there was very strong internal opposition to this idea, where have you seen pillars that are not upright? *Skuins* [slanted] pillars – Pius's [Langa] expression – what's this nonsense! So that was an issue. The design, the openness was a problem for some people. Oh, my goodness, there was a heated debate whether every set of judge's chambers should have its own lavatory. And I believe that has raised its ugly head recently again. We were dead against it, we said nonsense. You can have a unisex loo for all concerned. That was an issue of quite some moment. Why South Africans are so anally retentive, I don't know [*laughter*]. But anyway, silly things like that is what I can

remember. There were holdups. There was irritation at falling behind schedule. *What* was the reason? *Why* was the reason? The occupation date had to be moved many times. No major stuff, no earth-shattering stuff. Not that I can recall anyway.

Int Sure, Johann, you're noted for your tour, and I joked about this prior to the interview. Several people, including Harvey Dale, have mentioned what a wonderful tour you give. The passion you imbue your tour with ...

JK Harvey is a flatterer that you must never believe.

Int [*laughs*] Johann, I wondered when you walked through this building now, the vision that you had then, is it a happy marriage in terms of ...?

JK No, I don't feel welcome here anymore. I feel an alien here. I don't like to tell you, but I do. I was embarrassed to come here today. I prefer not to be here. Certainly not when the Court is in session. I would ... I do tours if I can during court recesses. Let me tell you, I was mortally offended by the previous Chief Justice. Before ... you know I was involved in the Trust for many years.

Int The Constitutional Court Trust ...

JK The Constitutional Court Trust.

Int Yes, I'd like to ask you about that at some point ...

JK And I resigned from that because I didn't feel welcome here anymore. We'd got into some very, very silly confrontation with government, with [Menzi] Simelane, who's a snake in the grass if ever there is one. When he was DG [Director-General] of Justice and Constitutional Development. There was a suggestion that we had been dipping into government funds, whereas we had been working to supplement it, to establish a monument for South Africa, with our own time and donor money. And I felt that we did not have the backing of some of the newer judges. I was hurt and disillusioned and thought I'd served my time. I was part of the problem, not part of the solution. So it's not a recent feeling, it's come over some years.

Int And this originated before you retired?

JK No, no. No, no. No, I was very happy here. I was always very happy here. Happy on the Court when we were working across in Braampark. I was happy here that they gave me an office. I was delighted by the privilege of having the

office. I used it extensively. I liked coming here, although I believe that there's a time to come and a time to go. I did not believe that I should be seen here often. I'm not a justice of this Court, I'm a former justice. I liked coming here and seeing staff, and even occasionally seeing colleagues. I felt at home here. But it was once the tension between the Constitutional Court Trust and government developed, and I sensed an absence of support from the then leadership of the CC [Constitutional Court], that I started feeling a little disenchanted or alienated. But when I was here, when I was living ... you know, when I had an office in this building, Laurie, Sandile Ngcobo, [Tholie], [Pius], Zak [Yacoob], would come to us for a drink and for dinner. We were friends, we weren't just colleagues. And that dried up in the mid-nineties ... no, in the mid-two thousands, in the mid-noughties ...

Int So you would date that period to maybe 2004, 2005, maybe ...?

JK Ja.

Int When the problems emerged?

JK Maybe even a little later, a little later. And of course now, I have this enormous embarrassment that ever since that scoundrel [John] Hlophe came to try to bend the decisions of this Court, I've been in a very awkward position. I don't want to be seen talking to justices of this Court, lest it be suggested that there's something improper about it, or lest people just suspect it. So if I see Dikgang in a public place, I will greet him and move on. Whereas it never was like that. So things have poisoned the atmosphere. Unfortunately. There it is.

Int Thank you for sharing that with me.

JK I don't think it's of any significance in the history that you're writing.

Int Certainly not ... but I think that your role and your experiences are, and so thank you for that.

JK Ja, well ...

Int I want to just retrace and certainly we can talk about your involvement in the [Constitutional Court] Trust, but I just want to go back a little bit and talk about the initial processes of institution-building. What you brought to the table, given your extensive experience as a judge, and I wondered whether you could talk about some of the processes involved in actually building up this institution?

JK You know, I've told you what skills I brought to the job, and I exercised them. I'll give you an example, the very, very difficult case: the *Certification [Certification of the Constitution of the Republic of South Africa]* judgment needed management. The case needed ... the handling of such a diverse case needed management. I think I was of significant assistance to Arthur in planning how we would go about it, how we would run the case, the notices, whom we would invite, in what form. Obviously all of those were done by consensus eventually, but I assisted in the administration of the case, and then eventually in writing the judgment, which was a very difficult judgment, and a very lengthy and detailed judgment. I stitched it together. I saw to it that the seams between the various contributions were as invisible as possible, that the style remained the same, that it ran logically, that the sequences were right, that what we said in chapter one was not watered down in chapter three, or contradicted in chapter eight – that kind of managerial judicial skill. I also did a good deal, right at the beginning, in helping colleagues with limited judicial experience on the format of a judgment: how one goes about thinking it through, and how one then goes about putting on paper what you have thought through. And Albie and I had some wonderful occasions when he breathed spirit into me and I breathed order into him *[laughter]* – you know, that kind of interaction. Ismail Mahomed was here at the beginning. Ismail was a very forceful character, a most, most attractive man. And I think, certainly by the time I retired, he and I were the only two who had had an actual very nearly physical fight in conference.

Int *[Laughs]* Tell me about that.

JK Well, *[laughter]* I can't even remember what it was about. But we were of an age, we'd known one another for a long, long time ...

Int You both came from Pretoria ...

JK We both came from Pretoria. We were just about the same age. I think he was a couple of months older than me. We, in many respects, had the same attitude towards the political systems in the country. We got on well, but he was a passionate man and when I had not yet reached the years of discretion *[laughter]* I was a passionate man. And he expressed himself forcefully always, very, very articulately. I expressed myself fairly forcefully, and we got into some confrontation about something. And I must have said something that upset him and he said something that upset me, and we both got up ... and anyway, it was silly *[laughter]*. But it was the most heated that anything ever got here in the time that I was here. And that's why I mentioned it. By and large we got on very well. Arthur organised it exceedingly well. Very good in managing people, and of course, he's an outstanding jurist. He managed to distribute the work. Obviously we were of disparate abilities in different things. Kate [O'Regan] has not yet been mentioned. I haven't referred to her. Probably because I want to spend a chapter on Kate O'Regan, who is the

most outstanding success of the Constitutional Court. She came here as a very bright young academic and I think she can hold her own on any supreme court in the world today. She's a person of such substance in terms of legal knowledge, in terms of judicial ability, in terms of courage, clarity of vision, precision of expression. She's a remarkable person. And Kate was brought along very nicely by Arthur. Yvonne was brought along very nicely. I had known only one female colleague on the Bench before and that was Leo [Leonora] van den Heever, who survived in an Afrikaner environment by being more male than the males. You know, she could tell you the weight of the front rank of the Springbok rugby team. These were totally different people. Arthur handled it very, very well. There was tension between him and Ismail at times, understandably. I think Ismail had thought he should have had the job. Maybe he should have, I don't know. But Arthur did it exceptionally well, and I don't think anybody could have done it better. The first cases we dealt with were relatively easy. The Criminal Procedure Act shortcomings that we identified early on, the reversal of the onus in respect of certain issues in criminal procedure, were easy for us to deal with, and we cut our teeth on them well. We had people like Sydney to write them. We had John Trengove. People of vast experience. Mature. And then we had these inspired youngsters like Kate. It worked well. And Arthur saw to it that the mix was right, just enough cherries but some cake flour as well. So when we started getting to the difficult cases and when we started agreeing to differ, we trusted one another, we understood one another. We related well to one another.

Int Much has been made of the collegiality of the Court, and Sydney has also mentioned how remarkable it is to have a Bench where people came from such diverse backgrounds. And I wondered what your experience was, Johann, in terms of difference and belonging?

JK I've actually never thought of that but of course, that's exactly what it was about. It was in a sense a microcosm of the new South Africa. People who have enough in common, unity of purpose, can overcome a diversity of origin. I think it worked like that. But you've also got to work at it. I think we all tried hard. The fact that I had heated debate with only Ismail, and I'm a fairly gravelly person, indicates I think that my colleagues tried. But Sydney is correct that we did come from a vastly diverse set of origins. But I don't think that ever made any earthly difference to us. Over time one found out where people came from, what their backgrounds were. It was interesting but it was never part of defining the person. You were here to do a job and an exciting job and a worthwhile job, and I think at times we were damn scared; the responsibility was enormous. We did have one major strategic difference. You start with a blank slate, you've got to establish a constitutional framework, a constitutional jurisprudence as efficiently, as quickly, as clearly as possible. We have a system of precedent, what we say here applies in the periodical court in *Nietverdiend*. So what you say has got to be weighed three times and turned over four times, lest it misleads somewhere along the way. And the strategic problem was, you've got this blank sheet. Do you try to fill it as much

as possible with each case that you get, so that you get the picture, perhaps not completed but certainly in broad outline, there as quickly as possible, as a guideline to the others, and as a restraint on the old apartheid judiciary that needed a bit of restraint and a good deal of correction? Do you go as quickly as possible, or do you go as slowly as possible? Do you go in as much detail as possible, or do you go as skeleton-minded as possible? That was a difference; I don't think we ever resolved it. I was one of those that said you should never have to retrace your steps. You mustn't have to correct something that you've said before. That leads to a great deal of confusion, lack of confidence in the process. If you put a dot on the board, you must know that that dot is in the right place, the right colour, the right size. Laurie, whom I had known virtually all my life, was a philosopher. Broad sweep of perspective with a mind and a knowledge that I could never hope to match. He wanted to fill in much more fully, more nuanced, more detailed. I was trained in the tradition where you deal with what you have to deal with and nothing more. If they say, how you are, you say you're fine. But you don't say why you are fine and that you're feeling better than yesterday. So that was a difference that we never resolved. I think that the Court latterly – later, not latterly: I don't claim to be a close observer any longer, although I still observe – it tended to get more discursive. And I think every time you get discursive, you create pitfalls for yourself. If you say something that isn't necessary, it is necessary that you don't say it. Tight, lean, neat ... It has the disadvantage that it has no soul, and I wish I could write like Albie. I wish Albie could write like I do [*laughter*]. You know, it's the ... I think it's part of the strength of the Court that it could embrace both of those extremes and make them gel with one another. But if you wanted somebody to write about that [*pointing up in the air*], I write about it. If you want to write about disadvantaging Muslim women, Albie must write about it. Horses for courses.

Int Right. I mean, certainly Albie, whom I've interviewed recently, has spoken about the support you have given him in terms of his judgment-writing [*laughter*]. I wondered, what was also unique – and certainly Arthur has been given credit for this – is the workshopping, the conferencing of judgments, and I wondered whether you could talk a little bit about that process and your memories of particular judgments?

JK You know, it's the first, it's the only Court in which I have ever served where we had the benefit of computers. I, as a judge, grew up writing with pencil and an eraser on a Z15 lined government pad, and rubbing out, arrowing and putting it here. I had then written a textbook and for that I used a computer and I became computer-literate. So when we came here it was an enormous opportunity and the consultative facility provided by a local area network, such as we had, was enormous. It was the major operational breakthrough, in this Court compared to any other court on which I had served. You could have an idea, wake up with an idea, and you go and put it on your computer and you send it to the office and you get here and you look at it, and you polish it a little and it can stand, and you can circulate it immediately. An enormous

advantage. That was one major advantage. The second major advantage here, compared to anywhere else, was that we had research assistance. I was not used to that. I think none of us was used to that. Maybe those from the academic world were used to having junior assistants doing your background work, but I wasn't. Even when I was at the Bar, I as a senior, as a silk, I had juniors working with me, but I tried to separate the work. I'm a lone worker. And I had to learn to use my clerks here properly. But they were enormously important. Not only because each set of clerks fed their own judge, but because they linked with one another and they formed a dotted-line circle around the solid-line judicial circle. They were very, very useful, and they could ... even to the extent of giving you gossip, it was useful gossip. You know, you found out what was going on in those chambers, what their line of thinking was on a particular case. But it was the network, it was the clerks, it was the nature of the work that we did, which was not fact-bound, it was conceptually bound, which made it an entirely different ball-game from the one one had been used to. You know – and this was the third main advantage – you'd come to the same conclusion but for three different reasons. That's much more important than the conclusion. Why do you say the appeal must be dismissed? I would do it on a reading of the facts. Laurie would do it on an interpretation of the right to privacy. Freedom of speech would be somebody else's approach. Like we did in the death penalty case. Go and look at *Makwanyane* [*S v Makwanyane and Another*]. We all agreed with Arthur's principal approach, and more particularly the most important part of it, before we had the final Constitution, we drafted section 36 in the *Makwanyane* case – how you qualify rights, how you can diminish them, how you can shade them – but then each one of us wrote a separate judgment from a different point of view in respect of the constitutionality of capital punishment. So we learnt to work together, but we learnt to work also along different routes, along different lines of reasoning. I think the fourth thing here, and that I want to claim credit to some extent for, is I insisted that you do not discuss a case before it is argued. Even though you have the submissions of the lawyers and you have the judgments of the courts below, all at your fingertips by the time you go into court, you have not discussed it with anybody else. The Court as a Court goes in with an open mind – because there's no point in discussing a thing unless you want to come to a conclusion, and it was very important that we discovered the other members' thinking in court for the first time. And I can remember a number of occasions when I was puzzled by a question that was asked by a colleague and then it slowly penetrated, ooh, that's a line of thinking that I had not had in mind. So this is a long way of answering the question because I think it's not an easy question. We would then go into conference after having heard the arguments and the case, preferably there and then. If we couldn't, if it adjourned too late, we'd stand over to the next day, or perhaps if the argument had finished at one, we would convene at two o'clock. And Arthur would go round the table. Now the courts where I came from, it didn't work like that. The senior would speak first, and then the next senior, and then the next senior. And if there were five sitting in that court, by the time it got to you as the jack of clubs [*laughter*], you know, you would have to be very bold indeed to make any novel contribution.

It didn't work like that here. It was a complete ... open discussion, a free discussion, and a non-directed discussion. Later, Arthur did ask people in advance to prepare, as a sort of rapporteur, to kick the ball to get it rolling. I think that was necessary. I think it was necessary because we did talk in circles too much at the beginning. Well, too much in the sense that for a functional court that has got to produce product, we were dillying and dallying a little. For a court finding its feet and breaking new ground, perhaps it was as well that we contemplated and thought and cogitated. But you would feel obliged at the conference to speak your mind as you saw it. I would go in ordinarily with a note, which I had prepared or which my clerks had prepared on my instructions, so that when the scribe went off to go and do the first draft, that scribe knew just about everybody's point of view, right from the beginning. So there was a multi-faceted input into the thinking process from that stage onwards. And then you would go back to your chambers, tidy up your note and send it to the scribe, in fact circulate it, so that everybody was kept up to speed on that case, which sounds a little better than it was – because this court took too long and still takes too long in delivering its judgments. I'm a firm believer that a court should not adjourn for a recess without having finished the work on its workload. But be that as it may, it certainly helped to stimulate the free exchange. You come across a case, you come across an article, you have an idea. You can immediately put it into the melting process, and hopefully it strengthens the amalgam that is produced. I had not experienced that in a court before, and I don't think an eleven-member court can work in any other way. Heaven knows how you keep track of everybody unless you do it electronically, where everybody is immediately on record. So it produced good work, I am proud of the work we did, I am proud of the initiatives we took, I do think that, as Kate is the one towering success of this institution, the Court itself is a success, a notable success of the new South Africa. I think it has worked, it has worked well, and it has done its job, sometimes in very difficult circumstances. And I believe that the criticism that is levelled at it, and at the judiciary in general, by politicians ... is deplorable. I think it's often disingenuous. I don't believe that there is any occasion for the head of state to express criticism with the judiciary *en masse*, as the judges are trying to do the government's job. But it worked here, and it did good work.

Int I'm just wondering, you mentioned the importance of research assistance, the law clerks in fact, and I wondered whether there were any that stood out in particular, and some of the relationships that may have developed with you in terms of working – because you obviously worked long hours etc?

JK Yes, I did not, as I've said before, I did not have experience of working closely with somebody else. I'd been a lone worker. I found it difficult. Somebody like [Laurie] Ackermann or Kate O'Regan developed much better, much closer, more harmonised relationships with their clerks. And lasting ones. Laurie has kept up a network, and it's commendable. I just don't have that skill, I don't have that experience. I had some outstanding people. My first clerk, Lisa Thornton, I could never have coped without her. She's an American – she was

a qualified, experienced American attorney when she came to work at the IEC [Independent Electoral Commission] in 1994 out of idealism, to come and help the process, to help South Africa advance. She was outstanding at the IEC. I had no hesitation in asking her to come and be my first clerk here. Lisa proved invaluable. Kim Robinson is an entirely different person. Lisa quiet, withdrawn, a bit of an introvert, quiet sense of humour, when she's really amused she'll smile. Lisa small and neat, petite. And Kim an enormous beautiful black athlete, loud, exuberant, outgoing, when she's amused you can hear it in the next block *[laughter]*. They both, in their own way, contributed enormously to my knowledge, to my ability to work. I didn't know how to do electronic research and in fact it was very much in its infancy in this country, in those early days in the nineties. I remember the two of them, in particular, as making a major contribution to my life in those days. I remember ... what was MK's ... ja, I can't remember ... MK Mathipa ... a lovely boy. A Pedi nationalist, who would debate – not debate, *instruct* me – for hours on the culture of his people and their approach to freedom of speech – homosexuality – freedom of religion. We had wonderful discussions. He instructed me, he taught me a great deal. Nadine Fourie. Nadine, brilliant young woman, lovely person, still see one another. In fact, Lisa's coming here with her two children from America, and we hope to see her over Christmas. And Kim and I see one another from time to time. She's married to the Deputy Minister of Justice. So we're in touch. Nadine and I see one another quite often. She's at the Bar and I do work with the Bar.

Int So you do keep in touch ... *[laughs]*

JK Oh, yes. With some. But I play favourites *[laughter]*. I didn't regard myself as a hen with chicks *[laughter]*. As the proper custodians of the next generation of thinkers would do it. I remember some of the other clerks, many of whom I still see from time to time, particularly those in the legal profession. And of course their [Constitutional Court Clerks'] Alumni Association is a wonderful idea. This initiative they've taken to have special speakers on particular topics of interest – on a broader legal interest than just for lawyers – is a very, very commendable one. They are probably a greater monument to this Court than the body of written opinion that the Court has created. We've produced a couple of hundred very, very good, trained, directed constitutional lawyers. Whether they do constitutional work in their daily occupations is a different matter, but they've got the spirit. It was a ... the clerks made an enormous difference to the way the place worked. You know, it's not coincidence that I remember the women's names and not the men's names. The men were also memorable. There was MK [Kgomoane Mathipa], there was the bright young man ... the fancy spectacles ... oh ... father was the principal of Damelin College. [Ross] Kriel. Oh, brilliant boy who could think in five different directions. Made an enormous contribution to the work I did.

Int Sorry, his name was Kriel?

JK Kriel, his surname was Kriel. Jewish Kriel, not the boere Kriel. Boere Kriel are thick like me [*laughs*]. I'm trying to think what his first name was. I can't remember. Ja, so those are the clerks I can remember specifically. Of course, Patric, who was Arthur's first clerk... see him from time to time.

Int Is that Patric Mtshaulana?

JK Ja. Made great strides in the legal profession. Assumed a leadership role there. I don't think because of his time here, I think ... he comes from a background of senior responsible positions in MK [Umkhonto we Sizwe] and he's taken that through into his life now ...ja.

Int Johann, thank you for that. In terms of the cases you had when you were here, so that was from 1995, I would say, to 2003, would that be correct?

JK End of 2002.

Int 2002. And I wondered what were the cases and the judgments that stood out for you, and where you may have had dissent?

JK [*Pause*] I would have needed notice of this question.

Int [*Laughs*] Sorry...

JK I can tell you what caused me the most discomfort, not necessarily in a particular case, but in the general trend of the work of the Constitutional Court, which manifested itself in various ways. I was uncomfortable from the beginning with the two-pinnacled judicial system. I don't believe a hierarchy can work. I don't believe ... I didn't believe and I still don't believe, although I'm not as dogmatic as I was ... I believe that for a judicial system in our system of precedent to work properly, you need a single-pinnacle hierarchical structure. There's one court that is the final court whose word is gospel. I had misgivings about this two-peaked mountain. It was discussed throughout the eighties in many circles in which I participated, and I understood why there was a Constitutional Court, I understood why under the Interim Constitution the Supreme Court of Appeal, the Appellate Division, didn't have constitutional jurisdiction. It was right and proper that this eclectic new body should have the last word in this new, unique, vitally important branch of the law, and that there should be one Constitutional Court and it should have the only and ultimate final say. But I was unhappy, uncomfortable, from the outset as to where you draw the line between these two areas of jurisdiction: what is a constitutional issue, what is not a constitutional issue? Ultimately as it panned

out this Court decided, in effect, that any matter of significant debate about state power, anywhere, is a constitutional issue. And therefore this Court is the court of final instance really in all cases other than purely and simply factual cases. And even there clever lawyers, such as Dr [Allan] Boesak's counsel, could dress up a factual appeal as a constitutional issue quite disarmingly skilfully, so that you have to be very clear that, no, this is not a constitutional issue, this is that they went wrong in the facts. That was very difficult, I think ultimately the line became so blurred that in effect today the amendment foreshadowed by the minister to make this the pinnacle court, the ultimate court, is emphasising what is already the law. It's not creating anything, it's just recording it. I was uncomfortable with that from the beginning, this dichotomy between the constitutional world and the black-letter world. And it is difficult, it still is difficult, even though it is much more blurred, and sometimes it's perfectly clear, that although this is apparently a simple private-law matter, actually at bottom it's a constitutional issue, as in *Carmichele's* [*Carmichele v Minister of Safety and Security*] claim for damages for failure on the part of the prosecutor and an investigating officer to do their job properly vis-à-vis a sex offender: a claim for damages in delict, but it's clearly a constitutional issue. At the other end Dr Boesak: a document referred to in the evidence only obliquely, which the court takes as the basis for a factual finding against him, is that a constitutional issue? Does it mean he didn't have a fair trial and therefore the Constitution has been breached? No. He had a fair trial, they may or may not have been right or wrong in what they did, but that's not a constitutional issue. I think it's because of my inherent conservatism about the law that I believe it must not step unless it knows where it's going to put its foot and what the footprint will be. I was always uncomfortable about that. And I remained uncomfortable. I was uncomfortable in a different sense. I was unfamiliar and awkward with third-generation, with socio-economic, rights. It's a very much more difficult field than merely saying to the state you may not interfere in the sphere of this person's life – privacy, freedom of expression, whatever. Once you start getting into the *Grootboom*-type issue [*Government of the Republic of South Africa and Others v Grootboom and Others*] it gets very difficult, it gets very awkward, it's intellectually tricky. I found that difficult. I found it awkward to deal with. The quasi-political issues didn't bother me – didn't bother me because I thought the Constitution made provision for them. The floor-crossing case [*United Democratic Movement v President of the Republic of South Africa and Others*], in which we were bitterly criticised inter alia by [Frederick] Van Zyl Slabbert for not having ruled something unconstitutional: I thoroughly agreed with him on floor-crossing, but I didn't believe we had any power to deal with it because the Constitution makes provision for it. So that would have been exercising a political judgment in an area where we didn't have a constitutional basis for saying so. I had a difficulty in some of the electoral cases, where I believed that the decision to consider certain identity books only as being satisfactory, I thought that that was politically motivated. I still think so. And I was uncomfortable because it was a political area in which I thought the law was pretty clear. But it was in conflict with the politics. But when it came to something like TAC and Nevirapine [*Minister of Health and*

Others v Treatment Action Campaign and Others], I realised that I was a political animal. After all I was ... I wanted to nail the denialists. I thought it was an abomination. I thought it was a disgrace. I thought it was a public disgrace. And fortunately the case was so well presented by Zackie Achmat and his lot, and so disgustingly handled by the minister and her administration, that I could follow my heart, because that happened to be the correct interpretation. But it's socio-economic, and it is certainly interfering, in a sense, with the exercise of executive power by the executive. I had no difficulty with that. I had no difficulty with *Grootboom* [*Government of the Republic of South Africa and Others v Grootboom and Others*], where you say, I have a housing policy and in twenty-five years time you will qualify for a brick-and-mortar, two-bedroom house with hot-and-cold running chambermaids; in the meantime your children must die of misery in a squatter camp that is six inches deep in water in winter in the Cape. You know, that kind of thing is not difficult. Difficult cases? Specifically? Death penalty was difficult. A very difficult case. I'm not an abolitionist, I never have been. I believe that ... let's not go into that. But I believe that the Constitution renders capital punishment unconstitutional, so ... I grappled a little with my own views on that. I had no difficulty in the end. Floor-crossing I had. Of course *Soobramoney* [*Soobramoney v Minister of Health (KwaZulu-Natal)*] – being effectively party to a death sentence, and a decent man. Very, very sad. Very difficult. But, ja, you say you're a lawyer, you do it.

Int That brings me to questions of the binary between pragmatism and principle. And I wonder how you managed that, because it certainly sounds that cases of socio-economic importance, they do in some ways bring out a certain side of you, other than the lawyer, or the judge?

JK Yes. I don't think that you can ever honestly ... or I certainly cannot, I don't think anybody can, claim ... I don't think anybody should think it's good to claim that you're impervious to emotional or moral or value issues. I don't think the Constitution expects you to be an empty shell. It expects you to be impartial, honest, independent, do your job as you see it, as you see the law, but as you see it through your spectacles. I've never denied the ideological, moral, political component to the work of any judicial officer. You don't sit on the Bench as a cipher. You're a human being, you're a product of your environment, your background, your upbringing, much of which you're unaware of. Pre-eminently in this court those things play a significant role, and it's no use denying them. But I do believe that you should say to yourself you're here to apply the law, you're not here to apply your instincts. I have done quite a bit of judicial training in my life, and I have a little aphorism that I use and which is appropriate here: just go and look at your letter of appointment, you were appointed a judge, not God. You can do so much only, but you can only do it as a judge. You can't assume powers that you haven't got. So I don't see a conflict between pragmatism and principle. They've got to be kept in balance with one another: it's not easy. And your balance and my balance may differ and my balance today may differ from my balance

tomorrow. As long as I'm aware of it, I try to counteract it. And in a collegiate system such as this, in debate, in oral debate, in written debate, if you have an open mind, if you're honest with yourself, you see where your own petticoat is sticking out, where you're leaning over too much to a preconceived idea, and you try to counteract it. You never succeed entirely because you're not a computer. I think by and large good judicial officers try their level best, and succeed mostly to a large extent.

Int I also wanted to ask you about the politics and is it irrelevant to decision-making within the Court; how does it affect the politics of the country and what's happening in government?

JK Politics can't be irrelevant to the decisions of the Court. It can never be. But it can also never be the be-all and end-all. It must never be the starting point, never be the controlling influence. The fact that individual members of the Court have certain political affiliations – or had them, or still have them – is a reality. I do believe that in the exchange as a judicial officer and as a judicial body ultimately as a corporate decision-maker, it plays little role. It should play a minor role. Obviously one can never be blind to the implications of where it is going to end, what its political implications are. But you can't be persuaded by that, you can put it into the mix.

Int In terms of judicial transformation, and that brings in what you've just raised about the Judicial Service Commission ... it's more than just demographics, so judicial transformation in the country, what is your sense of that during the time you were on the Court?

JK During the time I was on the Court I worked ... I worked as a member of the Court and I worked part-time as a judicial trainer, as an advocacy trainer. I believe that no system ... let's not talk in generalities. We had, and to a substantial degree still have, a neo-colonial legal profession and a neo-colonial judiciary. It is largely staffed by the former ruling class and the former ruling gender and the former ruling language. That is inconsistent with the new South Africa, it is incompatible with the new South Africa, and had to change and had to change as rapidly and as smoothly as possible. I never had any other view, and I believed that from Day One – and in fact from before '94. Question is, at what rate and how do you do this? I do believe that the primary function of the judiciary is to administer justice. To administer justice according to the laws and the Constitution of the land. To do so competently, honestly, efficiently. That's what the Constitution says it must do. If you appoint people to the Bench who are not able to do this, not because of their language, or their skin colour, or their religion, or their gender, but because they haven't been around, you cannot be a judicial officer without experience. The stuff of the law is experience, not logic. That is universally accepted. You cannot put a young, bright person, however bright you like, on the Bench. Ironically you can do it here, because there are the Krieglars to

help you. And you can teach them and they can teach you. But if you put a youngster on the Bench, however brilliant, in the magistrates' court, to sit alone with incompetent counsel arguing cases badly, the quality of the jurisprudence is poor, because the person hasn't got the background. Therefore, train as many people from the previously disadvantaged categories, as quickly as possible, as effectively as possible. Have a mentoring system, have a training system. You know, I spent three years trying to establish judicial education. Three years of my life, and they pissed it against the wall. Why? Because it's ideologically not acceptable to the governing party that judges should train judges and magistrates. It's a separation of powers issue, it's a power control issue. Excuse my crude language but I feel very strongly about it. We could have had today a body of people on the Bench that have gone through a rapid training system, a proper training system. Not bringing female lawyers into the Johannesburg High Court two days a week for an hour-and-a-half for six weeks, and then you say, I have candidates to send to the Judicial Service Commission. It doesn't work like that. You need a much more structured, a much more organised, a much more gradual process. If the ideologues had listened to me seventeen years ago, we would not have been in the situation where I feel constrained to criticise the Judicial Service Commission for bending the balance of what the Constitution requires, which first and foremost is to ensure an efficient, competent, independent judiciary. Not to transform. That's not its primary purpose. Its primary purpose is to ensure that it has that. And it cannot be a legitimate judiciary, and therefore effective, unless it broadly reflects the composition of society. And you must strive towards that with every fibre and every competence and every skill that you have. We've done nothing. Do you know that there isn't a judicial training college now as we sit here? In nearly 2012. We're how many years into the new South Africa? The Canadians gave a lot of money and the answer was evolved, far too long it took them, in '98. Nothing's done. Thirteen, fourteen years down the line. And then people like Dumisa [Ntsebeza] had the temerity to say I'm ethnically biased or I'm anti-transformation, because I say you're doing a lousy job of work. You're appointing people who can't cope. And I'm talking frankly to you and I don't mind talking frankly to you. I'll talk frankly in public if I have to. There are people on the Bench in the Johannesburg and Pretoria courts that can't do the job. I've been there, I know. It's unfair to them, it's unfair to society. And they don't get better, because they don't learn from muddling. That's not the way we should have done it. It's too late to change that now. But there are, at any given time, twelve, fifteen members of the Johannesburg Bar acting in the Johannesburg court, and they do the bulk of the motion court work, the difficult commercial work, the really tricky civil work. Now that's bogus transformation. That's ... if ever there were a shop-front, a Wild West cardboard saloon/livery stable cut-out, it's what you're doing there. The work at the back is being done by others. That's not transformation.

Int I was also wondering, Johann, in terms of your having the power as a judge, and exercising that power; how does it sit contrary to state power?

JK I don't think it's contrary to state power, it's part of state power. The judge derives her or his power from the Constitution and the structure that it creates. You have no power other than what you derive from the Constitution. Your job in terms of the Constitution is to interpret and apply the Constitution. If that brings you into confrontation with others, so be it. Well, that's your job, you're supposed to do that. That's in the essence of the separation of powers recognised in our Constitution. I am extremely disappointed, I'm upset, when exercise of judicial supervision is regarded as somehow hostile to the executive. On the contrary, we ... [*pause*] ... a proper judicial correction prevents the executive or the legislature from making mistakes. Now who on earth can resent being prevented from making mistakes? I've often used the analogy of a wicketkeeper. You've got a backstop. You can stand right up to the stumps with a reasonably quick bowler because you've got a backstop. It's a tremendous reassurance, and I always felt that about a court of appeal. I've got to deliver judgments like this [*snaps fingers*] in the court of first instance because justice delayed is justice denied. The commercial cases they go off very, very quickly, you've got to give the answers. And if I make a mistake, the appeal court is there to save my bacon – and the litigants' bacon. So I cannot understand an honest politician resenting having the assurance that there's the Constitution, a framework, a blueprint, and there's an inspector who in given circumstances, as the Constitution requires, respectfully, deferentially, but honestly and firmly says, no, you can't do that. Or you did that wrongly – rather do it this way. I see no conflict between judicial power and executive or legislative power. I see us as a helpmeet, just as I see them as a helpmeet. Judges step out of line, judges get arrogant. I know that only too well. You start off arrogant for certain if you practised at the Bar: you went to the Bar either because you were an egotist, or you wanted to be one. You became more of a one, and then you get put on the Bench, and you who yesterday made jokes and nobody listened to you, now when you make a silly joke on the Bench everybody rolls in the aisles. His lordship is such a wit, ha ha ha! Of course you get arrogant. They need to be cut down by the legislature, by the executive, certainly – if not by the judiciary itself. So I've got no problem with the interaction between state power and judicial power.

Int Okay. In terms of the transition to democracy and the role of the Constitutional Court, what do you think have been the challenges then, when you were on the Bench, and what are the challenges that remain now?

JK I think the challenge when we took over was to identify what the Constitution can and cannot do for the ordinary citizen in the land, what the Constitution can and cannot do in attaining the aspirational society that the Constitution sketches in the Preamble. Or how the Constitution, as interpreted by the Constitutional Court, can provide the bridge from the old to the new. Not in theory, but how. Now. Practice. What does it do? How does it help? How much do you express yourself, how much do you organise yourself? How must you select the work that you do in order to promote that transition as

clearly, as soundly in principle and as quickly as you can? So as to retain the structures, the sinews of the law, the bones of the legal system, but change the muscles, change the features, make it function better, more amenably with its environment, more sympathetically, more sensitively, but without falling apart. And that's a very, very difficult job. That was the challenge then. The challenge now, sadly I see, is to stand as a guardian against a ruling party that has lost its head, or at least lost its heart, its conscience. It's about power, it's about control, it's not about the people. Very difficult, very difficult. Much more difficult task. It's a prophetic task. It's got to speak clearly, credibly, to power. And courts have always done it ... well, always had to do it and sometimes to their great credit they have done it, as in India in the eighties. To their great discredit, Germany in the thirties. And the United States, to its discredit, in the forties. House of Lords in the forties. So, ja, it's got to be done.

Int In terms of the Constitutional Court and the time you were here, what do you think have been the failures of the Court?

JK Purely functionally it has not produced as quickly and as clearly and as succinctly as it should have, in many respects. It is ... It tends to get chatty, and it shouldn't. I think it's got very much better. I think Sandile Ngcobo had a major role to play in that. I don't think the Constitutional Court has exercised sufficient of an influence over government. And I don't think it should do so publicly. I think it should always have done so privately. I take one example: independence of the judiciary is demanded by the Constitution. In 1997 there were serious discussions between the Chief Justice and the then Minister of Justice about the handover of, transfer of, administrative control of the court system to the judiciary. And it was a detailed and serious discussion. It wasn't an airy-fairy debate over a cup of coffee. That debate continued under two further Ministers of Justice. We got no further – in fact regressed. We reached the stage where the rules of court were taken away, the formulation of the rules of court, Parliament had to decide them. Now I beg you with tears in my eyes, what on earth has Parliament got to do with the rules of court? They don't, can't be expected to, know anything about it. But this is a seeking of power, and it manifests a megalomania, an overweening desire, urge, to control. And it's got nothing to do with control: how many days do you need to file a particular document, and how many kilometres must you be from the seat of the court, and how many words must you put on a page? You know, purely functional day-to-day rules of court had to go to Parliament. Utter nonsense. We drafted our own code of conduct. It wasn't acceptable to the executive. No, the judges mustn't do that. We drafted our own proposals for judicial education, fully detailed, reasoned, based on worldwide research, how it should be done, when it should be done, cheaply, quickly, efficiently, quietly. That was blocked. The gradual assumption of responsibility for the administration of courts was reversed. Instead of having a registrar who was accountable to the senior judge at the local seat of the court, you now had a court manager who reported to Pretoria, reported to the bureaucracy. Not to the minister, which is a theory, but only a theory. So the tide went out, it went

in the wrong direction. Until quite recently, until the advent of Chief Justice Ngcobo. And then miraculously there was an acceptance – ostensible, as yet not real – of the principle that the responsibility for the administration of the whole court structure should reside within the Office of the Chief Justice. The Chief Justice should actually run the courts. That, as I say, has ostensibly been accepted. I will believe it when I see it. I don't believe it. My own political view is that the powers-that-be believe that they have political control of the Office of the Chief Justice and therefore it does no harm to ostensibly give administrative power. Softly, softly, catchee. That's been a grave retrogression over the last fifteen years. We should have had a system such as they have in the United States, which is a federal system and there will have to be adaptations to make it locally suitable. But there's no earthly reason why we shouldn't long since have run everything relating to courts, judges, magistrates, clerks of the court, prosecutors, from here. And it hasn't come. And it hasn't come because there hasn't been a political willingness to do that which the Constitution requires. Because if you want proper full independence of the judiciary, it's got to run itself. We all know that the best way to control an organism is just to turn off its supply lines, and you don't have to do that overtly, you do it in any one of a number of ways. Nobody who's worked with the bureaucracy has any doubt about that. Conflicts we had between the Constitutional Court and the department are evidence of the jealous desire of the bureaucracy, quite apart from the political head of the bureaucracy, to control what does happen in this building. The fact that the library, which belongs to the state – every single book there is public property – but it has been built up to the magnificent structure that it is, both architecturally and in terms of content, it's been built up not by the state, but by the sweat and kindness of private individuals and institutions here and abroad. And that they hate. Because it's independent. It does not belong to them. The artworks in this building, they belong to the people of South Africa as represented by the Department of Justice, the technical owner of the building. But they've been collected by the Albie Sachs and the Johann Krieglers of this world. And that they hate in Pretoria. So, ja ... I don't know how I got on to this topic, but still ... I'm sure it's not an answer to the question.

Int Well, no, in fact you did answer the question. We were talking about failures. And then the counter-question, what have been the greatest achievements? Because you've alluded to the importance of the Court throughout your interview, but I wondered what you would esteem to be the greatest achievements of the Court?

JK I think the greatest achievement of the Constitutional Court was that it established itself in the eyes of the ordinary citizens, and at the same time in the eyes of similar courts around the world, as a competent, honest upholder of the Constitution. I think it has established its credibility, its legitimacy and its efficiency in the eyes of the people of South Africa and of the observers abroad. I think that's an enormous achievement. Whether it is going to

continue to do so will depend on how it manages the very tricky new era in which I see a sinister element on the part of some people within the governing party – I don't believe all, and I certainly don't believe that it'll be permanent. I think it's a question of holding the line for a while.

Int Thank you for that, Johann. You had mentioned to me that once you left the Bench in 2002, you've gone on to great things, and I wondered if you could talk about your role, with the Court somehow, through the Constitutional Court Trust, in the period after your retirement.

JK Well, the Constitutional Court Trust was a very pleasant and not very demanding aspect of remaining involved with the administration of justice, remaining involved with the welfare of the Court, with the welfare of the clerks. I found it certainly not onerous. I found it a pleasure and I found it a privilege to be involved in the financial administration, in the oversight of the selection of bursars to send overseas, negotiation and interaction with donors, the support that we provided for the library, for the artworks, the development and the increasing complexity of the artworks and of the library, increasingly complex demands in terms of staffing, insurance, maintenance and so forth. It was fun, I enjoyed it, I felt it was valuable, I felt I was a public servant still, I enjoyed that. I then found it increasingly irksome that there was a cold wind blowing from Pretoria. And suggestions, as I said earlier, that we were somehow up to hanky-panky. And a lack of understanding and a lack of ... *[aside]* ja, stupid ... lack of acknowledgment. Some signification of gratitude that hey, guys, thanks for doing this for us. On the contrary. What are you up to? What have you done with the money? Trying to work through the court manager here to undermine our authority. For petty political purposes. To establish who's boss. As Simelane showed in the witness box in the course of the Ginwala Inquiry, for him he's the ... was the top spider in the web. I found that irksome, I found it difficult. Fortunately, I had a lot of other judicial work that I was doing, was still working on: on advocacy, on judicial training and mentoring in Johannesburg and Pretoria, and at Justice College. So between those I kept my hand in and my interest in the judicial process. And it was wonderful to see the library grow in strength, the virtual library get established, the bright young people who are working there, the initiatives they took, the great potential that it had, that you could go to Uganda and in Kampala you can say, you know, let's get going, let's give you access through the internet to whatever is available in Braamfontein in Johannesburg, at your fingertips. I was proud of it – vicariously: I had done very little of it, other people had done it. But things got difficult. I became more and more disgruntled with the way government was not wanting to do what should be done. You know, I spent six months working on case-flow management, popularising it and explaining it, and demonstrating it around the country. And the department did nothing. I felt I was a fool. I was disgruntled, disaffected, and when the hostility towards the Constitutional Court Trust was not met with indignation by the judges, I said, well, why must I take flak for nothing? In any event, I thought that I had been involved in fairly acrimonious correspondence with the department and

with two ministers, and that perhaps I was the problem. I was too confrontational, I was too abrasive. So I walked away from it, and I have since then rarely put my feet inside the building otherwise than to bring tour groups here. Oh, and I was often engaged elsewhere. Let's make that clear. I had a lot of other work. I had all of these electoral briefs that I found very stimulating, very rewarding, and I was doing a lot of arbitrations, which took a lot of my time and I was no longer dependent upon the Constitutional Court for emotional support.

Int That's interesting, because some of the judges I've interviewed have described their final year as a very emotional period, and certainly their farewells as very difficult, and adjustment to life after the Court. And I wondered whether that was the case for you at all, and your memories of the final year and events?

JK I would like to support what they say but it would not be a hundred percent true. I'm a firm believer in moving on. I was very happy here, I was extremely embarrassed and very gratified by the things said when I left. If only half of them were true I would have been even more gratified. But I didn't disappear. I had an office here. I was involved with judicial training, I was involved with the Trust. I ... I found the separation socially awkward, but not professionally. I had enough to keep me very busy. And I was perfectly happy to give Dikgang my robe and say, go well, enjoy the new Court.

Int Johann, you have led such an interesting life and you've had such an interesting trajectory. In the interview I did with you previously you described yourself as a pariah – you know, during apartheid. And I wondered in the post-apartheid context, within the context of the Court, what your sense of that was if ... well, what had evolved and transformed itself ...

JK No, I'm not going to do psychoanalysis ...

Int [*Laughs*] No, not at all, not at all, but in terms of a sense of belonging ...

JK Of course I belonged. We were working at that which we had hoped to achieve over many, many years. Certainly from the mid-seventies onwards, with the Legal Resources Centre, Lawyers for Human Rights and Verligte Aksie and the NGOs [non-governmental organisations] in which I was involved, this is what it was all aimed at. And we were, I suppose, a little naïve. It was a honeymoon. The tremendous adrenalin rush of the election gave me a great boost. It meant the end of my marriage. It was socially very awkward but I had a new place, I had new friends. It was a club to which I happily belonged. It was a working-place. And I get on well with people, I like working with people and I enjoyed it a great deal here. And I enjoyed getting to know the people. But I had a world outside as well. So when I left, I knew I

was going to leave, I was one of the oldest here, and I would be one of the first to go. I'd left courts before, it wasn't going to kill me. So it was a wrench but it was an anticipated wrench and I still saw many of the colleagues from time to time socially. Arthur had an annual get-together. It was great. So not lost in the woods.

Int Sure, not at all [*laughs*].

JK [*Laughs*] No Snow White syndrome.

Int Johann, I've asked you a range of questions, I wondered whether there was anything I'd neglected to ask you that you'd like to actually have included in this oral history?

JK Ye gods! No. I think we've covered the territory. If there's anything that doesn't gel, if you want to come back to me, you've got my email address, you've got my cell phone, be my guest.

Int Thank you so much, Johann, for your time, we appreciate it.

JK Thank you.

Collection Number: AG3368

CONSTITUTIONAL COURT TRUST ORAL HISTORY PROJECT

PUBLISHER:

Publisher:- **Historical Papers Research Archive**

Location:- **Johannesburg**

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