



JUDGES MATTER

Judicial Service Commission interviews

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Western Cape Division of the High Court

Interview of Mr S.J. Koen

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2017 JSC Interviews/Mr S.J. Koen

CJ M. Mogoeng: Good afternoon Mr Koen.

Mr S.J. Koen: Good afternoon Chief Justice.

CJ M. Mogoeng: Are you well?

Mr S.J. Koen: As well as I expect to be under the circumstances.

CJ M. Mogoeng: Just as you told me outside greeting you. You've been here before?

Mr S.J. Koen: That's correct.

CJ M. Mogoeng: Just say anything additional to what you have said before that you believe needs to be said to demonstrate to us just how ready, fit and proper you are.

Mr S.J. Koen: I -

CJ M. Mogoeng: As briefly as you can without compromising the quality of what you need to say.

Mr S.J. Koen: I'll keep it as brief as I can, thank you, Chief Justice. I have acted over 10 years on 9 occasions in the High Court. I have been exposed to all of the work that gets done in that court. I believe that I would be able to shoulder my fair share of the workload of the Division. I have had excellent professional and cordial relationships with all of the judges in the Division. I'd like to say something if I may about just my general approach to judging, which I don't think I have been asked before. But I, I consider a judge to be a servant of the people. I think that a judge or the judiciary can function properly only if it has the respect of the people and I strongly believe that in order to be respected one needs to be respectful. And one is respectful as a judge by having an open mind; by listening carefully to the cases that are, that come before you; by being open to persuasion; by being courteous; accommodating and lastly but not leastly, not least by doing one's work to the best of one's ability and getting one's judgements out quickly. Having a sound work ethic.

CJ M. Mogoeng: How long does it ordinarily take you to deliver a reserved judgment?

Mr S.J. Koen: Chief Justice as I said in my last interview I've certainly picked-up reserve judgment over my time as an acting judge. I generally speaking will have my reserve judgments out within a month or two. I think in the last term that I acted which was the first term of last year I didn't take longer than two or three weeks to hand down any of my judgments.

CJ M. Mogoeng: Just a question I never asked anybody. Have you come across truly arrogant judges? Arrogant to their colleagues, arrogant to counsel real arrogance?

Mr S.J. Koen: I'm afraid to say that in my 30 years as a lawyer I have to answer that question with a yes. As we know it's spoken about jokingly but it's real. The Judge Itis affliction is sometimes prevalent. Personally, I would be mortified if anybody thought that I behaved in an arrogant or disrespectful way.

CJ M. Mogoeng: How then would an otherwise arrogant judge be able to treat counsel, witnesses with courtesy? How does the one become arrogant only towards colleagues but never witnesses or unrepresented litigants or counsel? How does it work?

Mr S.J. Koen: No, I think that the arrogance in those situations and there aren't many I have to add but the arrogance in those situations is endemic. And I have certainly can recall occasions when I've been in court and I've thought to myself someone has to maintain the dignity of these proceedings and I've tried as best I can to pour oil on calm on waters, troubled waters and cool things down a bit.

CJ M. Mogoeng: In one word, well not one word but very, very briefly what would you suggest this body does to be able to identify the arrogant ones? Because it looks like everybody generally looks well behaved when they appear here but let me not put it too high I've come across judges who are certainly less than courteous in their interactions, even with the heads of court. What would you suggest we do to be able to identify subdued arrogance when it becomes when it comes before us for interview?

Mr S.J. Koen: I have always thought that the fact that a judge's job is done in public is a very restraining force on how one conducts oneself within a courtroom. Certainly, speaking for myself it is probably the force which holds me most accountable. So, there are people there they are watching, there is a tape recorder, it's all recorded I think and I did have experience of it in the Western Cape Division. I think that peer interaction in the judiciary is very important. One is not going to turn

an arrogant person into a courteous person by beating him with a stick one is going to have to set an example and, and teach them that that sort of behaviour is not appropriate in the performance of a judicial function.

CJ M. Mogoeng: JP.

JP J. Hlophe: Thank you, Chief Justice. Mr Koen in the interest of time I'm not going to focus on what has already been submitted before this commission. Save to highlight. I'd like your comments in respect of the negative comments made Mr Booth.

Mr S.J. Koen: Yes thank you, Judge President. I'll –

JP J. Hlophe: Can I take you through, please? He wrote a letter to this commission dated the 18th of September 2017 in terms of which he refers to a letter that he wrote objecting to your appointment on the 18th of September 2012.

Mr S.J. Koen: Yes.

JP J. Hlophe: He refers to it and he says he stands by it.

Mr S.J. Koen: Yes.

JP J. Hlophe: Do you have that in front of you?

Mr S.J. Koen: I have the correspondence, or I have read it and I know it. So, if I may deal with it I would like to do so in the following way. To start at the beginning; he said in the letter which he submitted to the commission on, in September 2012 that he knew that on the 10th of September 2012 I represented a client, the Law Society, whilst I was an acting judge. I have with me a copy of my letter of appointment for that period signed by Minister Radebe at that time. I was not acting as a judge on the 10th of September 2012. My term came to an end on the 24th of August that year. I only acted for half of that term.

JP J. Hlophe: Right. Thank you.

Mr S.J. Koen: He makes other allegations about my not having done anything without billing the Law Society and general comments which are difficult to deal with because they are not particularised and it's a bit like boxing against an invisible opponent. But you will note that, and I hope the commission has it before you, that in 2012 a member of the council of the Law Society wrote also to the commission to point out that Mr Booth's views were not representative of the views of the council of the Law Society and that he had always known me to be an honest person of integrity. I can't remember the exact words but that's the impression I got. The Law Society itself has seen fit to comment this time. They have said in their comments that explained what I had done for the Law Society, the mentoring work that I've done, the presentations I've made to the council and members of the staff have not been charged for. I have done that because it is the right thing to do. I am not sure that there is anything else in those comments that I've omitted to address.

JP J. Hlophe: Yes. Yes, he says Mr Koen, paragraph 2 over the page, as far as I'm aware has really never served the profession and so other than doing ... Sorry, he says in paragraph 1, I also do not believe that he holds the necessary human rights credentials that I believe are necessary for an appointment to the Bench. Okay, do you care to comment on that?

Mr S.J. Koen: Yes. I disagree with that.

JP J. Hlophe: Is that the comment?

Mr S.J. Koen: That is my answer to that question. I disagree with that. I, as you would have seen from my application I have been a commissioner of the Small Claims Court for a very long time. As you know that is work that we do in service of the public. You would have seen that I have done work for the Pallotine Sisters and assisted them over some years. I believe that I am a fair person that I hold human rights close to my heart. The persons who nominate me, Advocate Jamie, nominated me this time around says much the same. And one of the other candidates you'll be

interviewing later who nominated me on two previous occasions has also contradicted Mr Booth's statements in that regard.

JP J. Hlophe: Fine, right. Let's talk briefly about your practice whereby you do work largely for the Law Society. The Cape Law Society and I can say this because I live in Cape Town is one of the most conservative Law Societies in the country. It's generally perceived as being harsher when it comes to black attorneys who have violated the rules, but when it comes to white attorneys who have similarly violated the rules white attorneys tend to be treated with kids' gloves. Would you care to comment on that?

Mr S.J. Koen: First of all, JP it's not correct that the Law Society is my biggest client. I have a number of other clients and in fact my involvement in Law Society work has tapered off over recent times. In regard to the suggestion that the Law Society is, or treats black people differently to white people I have never seen any evidence of that. The council of the Law Society was transformed many years ago it is a council that is representative of our country and I, without you indicating to me which person was unfairly treated I am not in the position to deal with a generalised statement of that nature.

JP: Fine. Mr Koen is there racism on the Bench in the profession and in South Africa?

Mr S.J. Koen: Judge President yes, there is racism everywhere regrettably. And in my view, I think it is an evil a pernicious evil that we will face and have to fight until the day we die.

JP: What has been your contribution in this regard in terms of fighting racism? Which quite rightly you have identified as existing in our society and on the Bench and in the profession. What have you as an individual practitioner done to fight it?

Mr S.J. Koen: I think that the fight against racism starts firstly at home. And my wife and I decided very early on when we had children that we were going to take them out of the private school that my daughters were at, at that stage and put them into a

local governments school which was far more representative of the demographic of our country. We were very pleased that we made that decision and I like to think, and I've seen because I have people of all races in and out of my house. My children's friends on a regular basis. I have seen that their attitude towards one another is worlds apart from the way I and black people, when I was a young person related to one another. So, I'm gratified about that. So, I started at home. I have in my professional capacity, when I say I, I have to refer to me and my partners because we're in this together. We have taken steps over a long period of time to give opportunities to black people. When I started at my firm back in the 1980's it, they really, we really were just white men. We have started a program in the early 1990's of trying to attract black candidate attorneys, we've done so. One of the black candidate attorneys has served at our firm is a judge in your Division today. A number of them have moved on to set-up their own practices and they practice successfully as far as I know. Others have gone into commerce and they are doing well as far as I know. We have a bursary scheme where we pay the tuition fees for a final year disadvantaged law student. We do it on a no-strings attached basis but as it happens the beneficiary of that scheme this year is a black African man who will be serving articles with us starting next year. I am deeply conscious of the fact that one can never really do enough to reverse what it is that we've lived through. But I do take comfort in the fact that I live in probable the only country in the world which has transitioned from a really vile and unjust system to a modern constitutional democracy without a civil war. And I think that speaks volumes to the character of the people who live in this country.

JP J. Hlophe: Finally from me Mr Koen. Have you ever in your life briefed any black counsel?

Mr S.J. Koen: Yes.

JP J. Hlophe: In any matter. Give us the names and the matters.

Mr S.J. Koen: I have, I have briefed advocate Ismail, I feel very uncomfortable mentioning the names of counsel who, whom I have briefed. And I prefer not to, but I have briefed black counsel. And my firm has briefed black counsel.

JP J. Hlophe: You don't want to tell us the names?

Mr S.J. Koen: I don't see Judge President why I need to drag other people into my problems.

JP J. Hlophe: Fine, I respect that. Thank you, Chief Justice.

CJ M. Mogoeng: Ms Steward?

Ms Steward: Thank you Chief Justice I have two questions. Mr Koen given that you've acted consistently for the Law Society out of curiosity have you ever acted against Mr Booth for the Law Society? That's my first question.

Mr S.J. Koen: Yes. That's what I didn't mention when I dealt with the question that Judge President answered me. Mr Booth said that on the 10th of September 2012 I was acting for the Law Society. I was, I was acting in a disciplinary proceeding against him in respect of which he was subsequently found to be guilty of unprofessional conduct.

Ms Steward: Thank you. And one more question which relates to a judgment you gave in 2010 it was the Transnet eviction and quotes have been provided in the comments by the Democratic Governance and Rights Unit and I'm interested in your agreement on a criticism of one of the principles of our law which is that the term of the lease agreement leaving the power to determine the rental entirely to the discretion of one of the parties renders the agreement invalid. You found that the Rule applied but also said it was illogical and agreed with the criticism of it being illogical and not in accordance with the position in other legal systems. That was 10 years ago. Given the inequalities in our society in general and especially relating to land do you still think the principle that leaving the rental to the determination of one party entirely renders a lease agreement invalid is an illogical principle?

Mr S.J. Koen: To be honest I've forgotten completely what the case was about and in what context it was that I made those, that I made those findings. I do, I do

remember that I had to follow precedent in that case and I did so. I, if I, I can't remember where it was criticised and I'm afraid I can't actually take it any further. I just can't remember.

Ms Steward: Thanks Chief Justice.

CJ M. Mogoeng: Thank you very much Ms Steward. Judge President Molemela?

JP M. Molemela: Thank you CJ. Good afternoon sir.

Mr S.J. Koen: Good afternoon.

JP M. Molemela: How are you?

Mr S.J. Koen: I'm fine thank you.

JP M. Molemela: Okay. I see you've been at the firm Bezui- I'm sorry I've lost the name, but you've been at that firm as a partner for 27 years now.

Mr S.J. Koen: I think that is correct yes.

JP M. Molemela: Okay. Is your firm transformed in terms of race and gender?

Mr S.J. Koen: Yes. Transforming is what I prefer to say because I think transformation is a process and not just a happening. We at the moment just speaking for the general staff we have a general staff, non-professional or it includes the professional but a general staff of about 65; 70 per cent, just over 70 per cent of them are generic black people. Not black African people but coloureds and black people and Indians and the rest are white. Amongst our professional staff more than half of the lawyers; candidate attorneys through to partners are women. And 25 per cent a quarter are black people. It is, it is something that we feel we must do. It is the right thing to do. And we continue to work at it.

JP M. Molemela: How are you working on it to improve the representation, because at the moment you say it's only a quarter on the professional staff. What steps are you taking to improve in that regard?

Mr S.J. Koen: So we run, we have the bursary which I mentioned which hopefully will introduce disadvantaged black people to us. We run vacation workshops for students, most of whom are black people to, during their holiday time at university to come to us. We run programmes there. I deal with the moots that we have so that we get to know people while they're still in the course of their studies and hopefully will interest them in applying to us for articles and hopefully will be able to do articles with us.

JP M. Molemela: Last question CJ. On director level what percentage is black?

Mr S.J. Koen: Jeepers, I don't offhand know. If you let me count quickly. Three are black so I suppose that's about 20 per cent.

JP M. Molemela: Thank you CJ.

CJ M. Mogoeng: Thank you JP. Yes, President Maya follow-up.

Pres M. Maya: Thank you Chief Justice. Of the black component of your professional staff how many are African? What percentage do Africans if any constitute?

Mr S.J. Koen: Yes. If you let me have a look I can tell you. I'll just round up to the nearest percentage. Black males are 4 per cent, black females are 8 per cent, coloured males are 10 per cent, coloured females are 39 per cent, Indian males are nought and Indian females are 4 per cent, white males are 8 per cent and white females are 29 per cent.

Pres M. Maya: Thank you Chief Justice.

CJ M. Mogoeng: Thank President. Commissioner Montsomi.

Comm Montsomi: CJ I'll pass I've been covered by Ms Steward. Thank you.

CJ M. Mogoeng: Thank you so much. Commissioner Nochesi?

Comm Nochesi: Thank you Chief Justice. I just have two questions of course. We, first I must disclose that I work in the Cape Law Society [24:46 inaudible] this year and I work with you and I know you very well Mr Koen. There is a suggestion that the Cape Law Society is one of the conservative, is that a correct position?

Mr S.J. Koen: I certainly have no direct knowledge of any occasion where a black person was treated more harshly than a white person would have been treated. In any particular scenario. I know that the Law Society takes a strong line on certain forms of professional misconduct. So, if you steal trust money they are going to bring an application to have you struck off the roll. I think that is perfectly in line with the established authority. I think that was a general statement I certainly have no knowledge of it whatsoever of course I don't know everything that happens but the matters that I've come across our Law Society has not been harsher.

Comm Nochesi: Lastly, on your roll currently we are under what you call, Uniform Rules for, for attorneys unlike when we have Provincial Rules. What was your role if any in the drafting of those Uniform Rules? Which now services as a basis for the new dispensation?

Mr S.J. Koen: Yes, I was asked to serve as the Chairperson of an ad hoc committee of the Law Society which comprised of myself and a Mr Steyn and Mr Dalwane, and Mr Mohammed. And our role was to bring about as best we could unanimity between the provincial Law Societies so that we had one set of Rules. I was very involved in the drafting of the Rule dealing with professional conduct and disciplinary proceedings and together with my committee I think we, we achieved what we had been asked to do. Which was to bring about a set of almost Uniform Rules.

CJ M. Mogoeng: Thank you Commissioner Nochesi. Commissioner Smith.

Comm Smith: Thank you Chief Justice. According to the record attached to your nomination you seem to have appeared, at least on the face of it, on the first appearance on 12th of April 2011. Mr Booth letter was written on 18th of September 2012. I take it that there would be a purpose for that letter, and that was that you appeared here after that. How many times have you appeared before the JSC?

Mr S.J. Koen: Well I'll tell you what happened. I appeared in April 2011 those, that set of interviews as you might know was held to be unconstitutional and was set aside as being invalid. So, I'd like to think perhaps that one doesn't count for me. I then appeared in, I then was shortlisted in October that year but that round of interviews for the Western Cape was cancelled. I was then shortlisted and appeared before this commission in October 2012, I seem to attract this problem but that round of interviews, as you will know is the subject of a legality review by the Helen Suzman foundation and I suppose the jury is out as to whether that was there or not. And I appeared before the commission in April last year and again now. So, it's four times in total, three presently held to be lawful rounds of interviews.

Comm Smith: Then just coming back to the letter by Mr Booth. Has he at any stage indicated to you, has he indicated to you at any stage why he would be of the view that you're not a fit and proper person to be appointed nor that you hold the necessary human right credentials?

Mr S.J. Koen: He has never raised any of the matter in his letter directly, directly with me. You know in all disciplinary proceedings but in this as a proforma prosecutor which is what I was, I stand in the shoes of the complainants who in this matter were two elderly people who had spent their life savings, set aside for their retirement, on the defence of their son who had been convicted of murder. Sometimes that requires me to be brave and courageous and stand up to people who'd done wrong things. If that means that it makes me unpopular, well that's bad luck as far as I am concerned. But I know what my duty as a lawyer is and I will always do my best to live up to my responsibilities.

Comm Smith: If I may just one last matter. You see Mr Booth basically ask and says the following in his letter, 18 September 2017; it has now come to my attention that a

Mr Steven Koen is apparently on the short list as well. I was surprised to hear that his name was not contained on the list when the official announcement was made. If this is indeed the case I would question as to how this occurred. Now I believe in transparency which you apparently also do. It was upon request by one of the members of the Bar that I requested you to be short listed. Is that correct?

Mr S.J. Koen: Yes. I know that a member of the Bar asked you to put my name on the short list. I don't, I don't really know what happened. Nobody's told me why I wasn't short listed all I know a short list came out. Former Deputy Judge President Traverso telephoned me and in her inimitable way berated me for not having applied because she had encouraged me to apply. I told her I had applied but I hadn't been short listed. She was aware of the regulations which govern the process of the commission and it was apparent that they had not been complied with. And in the process of rectifying that my name and four other peoples' were added to the short list which had been prepared by the screening committee.

Comm Smith: And I would like to put on record that we haven't discussed, we haven't talked, spoken to each other outside the confines of these four walls ever. Is that correct?

Mr S.J. Koen: Never.

Comm Smith: Before any other deduction is being made.

Mr S.J. Koen: Never.

CJ M. Mogoeng: Commissioner Norman?

Comm Norman: Thank you Chief Justice and good afternoon Mr Koen.

Mr S.J. Koen: Good afternoon.

Comm Norman: Is Mr Booth still a member of the Society?

Mr S.J. Koen: I believe he is still a practising attorney and all practising attorneys are members of the Society.

Comm Norman: Yes. But what, you know, what bothers me is that you've got this man who wrote in 2012 these things I understand Ms Steward had asked you about it and it transpires that you had disciplined him somewhat. Now he is doing this persistently and you do not respond directly to these accusations that he levels against you because we've not had any letter from you saying that for example what he says about you having practice or operating your practice whilst you were acting as a judge that is not true and you attach documentation to show the commission that this is not true. And again, now in 2017 September similar letter is sent, you do not respond directly but someone else responds on your behalf. What steps have you taken, if he is still a member of the Society what steps have you taken to report him to the Society. Because clearly if you say as you have, in answer to Ms Stewards's question, if then he is not being truthful about the allegations you have a responsibility as an Officer of the Court and as a member of the Law Society to report him. What steps have you taken?

Mr S.J. Koen: I have no intention of reporting Mr Booth to the Law Society. Mr Booth like anybody else is entitled to his opinions. I, I am not inclined to get involved in a spat with him which I regard to be undignified and unseemly and rightly or wrongly it's my choice to ignore him and that's what my position is.

Comm Norman: Sorry as a follow-up Chief Justice, are you suggesting that the allegations that he is making against you, as far as you are concerned they do not bother you. They are not serious. You are not worried about them?

Mr S.J. Koen: No. No, they are serious allegations and they are, and I don't agree with them and I came here to this commission to explain myself. I never understood that candidates were expected to respond to the commission in regard to adverse comment before the interview. I am here to answer your questions as honestly and openly as I can.

Comm Norman: Thank you Chief Justice.

CJ M. Mogoeng: Thank you commissioner Norman. Commissioner Nkosi-Thomas?

Comm J. Malema: Follow-up Chief Justice?

CJ M. Mogoeng: [34:28 inaudible] Malema.

Comm J. Malema: This allegation where they brought to your attention by the staff of the commission?

Mr S.J. Koen: Yes.

Comm J. Malema: And you're saying in your rightful mind you never thought it was the right thing to write and respond. Because we didn't tell you verbally it was sent to you. Don't you think it's the logical thing to do to put down what you're saying? For instance, you're saying to us Mr Radebe appointed you on what, what, what date you've got a letter to that effect. Why can't you just write and attach all of those things to us. Because we responded, we sent to you in a dignified way correspondence. As a practitioner, you will know that the best thing is to write back and say this my side of the story.

Mr S.J. Koen: Commissioner as I explained, and I might be wrong, if I am I have to accept responsibility for that. As I explained it's my understanding that the opportunity to respond to adverse comment comes at the interview. What I did do is ask the secretariat of the commission to put the letter which controverted what Mr Booth had said in 2012 before the commission. I hope you have that. The letter from Mr Alberts. I was told it would be put before you.

CJ M. Mogoeng: Ms Nkosi-Thomas?

Comm Nkosi-Thomas: Thank you Chief Justice, and good afternoon Mr Koen.

Mr S.J. Koen: Good afternoon.

Comm Nkosi-Thomas: My I direct your attention to page 6 of the questionnaire that you submitted to the commission there a question is asked namely, and it is that; what proportion of your litigation work has been in the field of criminal law. And you say there almost none. Now if you were to be appointed as a judge and the JP allocates a criminal trial to you, how would you deal with it given this answer to 6.2.

Mr S.J. Koen: Yes. As a practitioner, I don't practice in the field of criminal law at all. As a judge, I have dealt with a number of criminal trials. I sat in a criminal trial which lasted for over 40 days in 2015 and wrote a judgement which ran to about 170, 180 pages. I certainly would hesitate to call myself a criminal law expert, but I think that if I apply myself and think carefully about issues which arise and consult the books that I, that I can manage to do criminal work. I think I do refer in my questionnaire to criminal cases. There was one a judgement Masellani I think which went on appeal to the Supreme Court of Appeal where the sentence I imposed was changed and I know that in the Jacobs matter, which was the matter which ran for over 40 days I refused and application for leave appeal and I know that the application for special leave to the SCA was refused. So, I take some comfort that I got that case right I suppose.

Comm Nkosi-Thomas: Hundred and seventy pages long judgement?

Mr S.J. Koen: Yes. It was a long, it was a long case. I give you an extract from the judgement in the authorities which I put before the commission. It was a trial which ran for, if my recollection service me correctly 44 days.

Comm Nkosi-Thomas: If I may please. Was it not possible to summarise a judgement such that you emerge with a crisp judgment that is readable and clear and clearly understandable. Instead of a long thesis?

Mr S.J. Koen: No it wasn't. It was a series of offences perpetrated by a husband on his wife over a period of more than a year. And it culminated with the charge that he had murdered his wife. There was no direct evidence in relation to the murder charge. It was, the state case was based completely upon circumstantial evidence. It was necessary for me to deal with the reception of hearsay statements, which are

statements which the deceased had made to police when she had gone to report. And I felt that in dealing with the circumstantial evidence I had to deal with all of it so that it could all be taken into account and it was a long and time-consuming job but in my estimation, it was necessary to do it that way. There were no short cuts that I could see.

Comm Nkosi-Thomas: Very well let me move to the next question. And it has to do with briefing black counsel. On the invitation of the JP you decided against disclosing the names of the counsel but my question to you is what proportion of the entire body of counsel that you use in your firm is black and by black, I mean black in the narrow sense. Please not coloured black, black if that make – African thank you. If that make sense. Thank you, Professor.

Mr S.J. Koen: I think I said it at my last interview that I very rarely brief counsel. I encourage the practitioners in our litigation department to do their own appearance work and we are, we by and large do that. I have not briefed any counsel in a litigation matter for a long time. I have briefed, I suppose there is no harm in it, but I've briefed in relation to an opinion which I was asked to obtain for the Law Society and I can't tell you more about it because I am bound by confidence not to discuss their business openly. I briefed Ismail Jamie SC and Karrisha Pillay for advice and that's going on. In relation to overall what proportion of black Africans do we brief, I can't tell you because I don't really know how many counsel some of my partners brief. But I, it's probable not a large number to be honest.

Comm Nkosi-Thomas: If I may follow-up. I'm talking about you. The question is directed towards you not your partners or, or your candidate attorneys but the question relates to you. It's directed at you Mr Koen how many, what is the proportion of black counsel that you have briefed as an attorney. And Black, I'm talking about African.

Mr S.J. Koen: Black African counsel?

Comm Nkosi-Thomas: That's right.

Mr S.J. Koen: I have not briefed a black African advocate in any matter.

Comm Nkosi-Thomas: Thank you. Thanks Chief Justice.

Comm Nkosi-Thomas: Thank you commissioner Nkosi-Thomas. Minister you say you'll follow-up?

Minister J.M. Masutha: Yes. Because you see when the interview started we got the impression that you saying you are involved, I think you used the term that you are in a progressive state as oppose to an end state of being transformed. By that you are transforming a law firm and you allude to having engaged the services of about, I think you said three is it directors? Black directors? Which make about 20 per cent, if I heard you correctly of your professional staff is about 25 per cent of your white more or less. Did I understand you correctly more or less?

Mr S.J. Koen: Yes. Of the lawyers, 25 per cent are black people. Not black African people, generic black people, I the word –

Minister J.M. Masutha: Generic black.

Mr S.J. Koen: I think that is the term we use.

Minister J.M. Masutha: Very well. But the further question I want to clarify because I really want to get a sense of what value to attach in terms of contribution to transformation all that has had including issues of briefing black counsel or not briefing black counsel. There is a concern that even where attempt is made to extend work, or to give exposure to black professionals that very often it is minuscule work that does not really constitute the provision of solid legal skills. You know high-end legal skills to black practitioners. Would you say that the 20, 25 per cent of those practitioners obviously haven't briefed black counsel? But those that are employed in your firm are being exposed to the cutting-edge area of work of your firm. Or they just somewhere in their mediocre area of the work of the firm?

Mr S.J. Koen: No they are most certainly, we have a partnership that has no written agreement. We work together in a collegial way. We encourage with, certainly in the time I've been a partner with various degrees of success people to uplift their practises. There is no question that anyone, that a partner decides what work another partner does. And I know that a, one of my black female partners who works with me, she is a coloured woman does all the same work that I do. She certainly exposed to that work and has the opportunities to do it. And she's done a lot of work for the Law Society.

Minister J.M. Masutha: Thank you Chief Justice.

CJ M. Mogoeng: Thank you Minister. Commissioner Masuku?

Comm Masuku: Thank you Chief Justice. Good afternoon Mr Koen. Good afternoon.

Mr S.J. Koen: Good afternoon. Yes.

Comm Masuku: You were asked questions about racism and I was comforted by the answer that you gave and then were asked about the Law Society, the characterisation of the Law Society as being a conservative body and you said certainly not a conservative body. Now would you say that the Law Society of Cape Town is a progressive organisation that has spoken out against racism; that has spoken out against social economic situations that people generally found themselves in? And I'll be very happy to know that because I don't know that. And also, just a related question what is your view about the role and the function of the Equality Court in the problem that you identify which is the combating and the elimination of racism. Do you think that the Equality Court can be useful, can be more used, a bit more frequently? To actually deal with those kind of problems especially in Cape Town where people talk about racism [46:46 inaudible] including calling people who live there as not living there.

Mr S.J. Koen: Yes. Firstly, I have no mandate to speak on behalf of the Law Society. I, am aware that –

Comm Masuku: Sorry, sorry I beg your pardon. I beg your pardon Chief Justice I did not ask you on the basis of a mandate. These questions are follow-ups from questions that had been asked earlier on. I was not asking you to speak on behalf of the Law Society. I am asking because you were asked, you answered them without objecting to giving the answer that you gave. And so, it is not a mandate that I'm looking for.

Mr S.J. Koen: In, I am aware that, that the Law Society, the Provincial Law Societies prefer to speak through the mouth piece of the Law Society of South Africa. I am aware that the, I believe that the Law Society of South Africa is a progressive organization. I know that it has spoken out against, or spoken up when matters which it perceives are wrong need to be addressed. I don't think that my Provincial Law Society makes public statements. I am not aware of it having done so. That's done through the LLSA. In regard to the Equality Court I have in fact been involved in some Equality Court matters and, and I was impressed at the way that they were dealt with by the judge who was presiding. I think that we live in a country where we have a long way to go to get everybody onto an even footing and I think that the equality court is a very useful way of achieving that end. As an acting judge, I've never been asked to preside, I don't think I'm allowed, I think you need to have special training to preside in an equality court matter so I've never as an acting judge been involved in an Equality Court matter. But if training was required to do so I certainly see a role for the resolution of disputes in a, in a less formally confrontational way that classic litigation is.

Comm Masuku: Thank you Chief Justice.

CJ M. Mogoeng: Thank you Commissioner Masuku. Commissioner Mpofu and you are the last.

Comm Mpofu: Okay. Thank you very much Chief Justice. Mr Koen our job really here is to check your suitability as a judge. Now and that involves among other things checking whether apart from your technical abilities, checking whether you are a person who is likely to infuse the values of our constitution into the Bench. You accept that?

Mr S.J. Koen: Yes.

Comm Mpofu: Are you familiar with the concept of transformative justice? Which really captures that notion that ours is a transformative constitutionalism. We are trying to create a new world and all that.

Mr S.J. Koen: Yes, I am.

Comm Mpofu: Thanks. Now one of the, of the key, of the values of our Constitution in Section 1 thereof, and also it is a right enshrined in the Bill of Rights in Section 9 is equality. Now in the South African context do you think it's possible of even conceivable that we can ever achieve equality, that constitutional ideal without addressing the question of land?

Mr S.J. Koen: No. I don't think we can. I, I was asked to act pro bono for a community of black people who were respondents in an eviction application. There were a few hundred women and, mostly elderly women and children and I consulted with them and I dealt with a, a full Bench Appeal which I argued for them. And I am still helping them because their endless problems that they are experiencing I, I saw through my involvement in that case just how critically important it is that the land question and housing question ultimately is resolved.

Comm Mpofu: Okay. Sorry, sorry to cut you just in the interest of time. I'm happy with that. What do you think should be then done practically to achieve that constitutional ideal of an equal society?

Mr S.J. Koen: I wish I had a magic wand that I could wave and give you an easy answer to that question. I don't, I really don't know what can be done. The Constitution deals with, with land issues. The Land Claims Court deals with Land Issues, I hope that, that using those instruments one is able to address the obvious inequality because I absolutely agree with you that it has to be resolved.

Comm Mpofu: Ja. Okay thank you very much. Now the next question is you were asked by, I think Commissioner Norman, there was a follow-up from Commissioner Malema about the serious accusations which have been made by a Mr Booth. Now what, what must we do as a Commission? Remember Mr Booth is an officer of the court, you are an officer of the court. He has put allegations here. So, and these pieces of paper in front of us are unable to tell us who, which version we must believe. Now you have an opportunity to, you have had an opportunity to refute Mr Booth's accusations which you have not taken up. And you have referred Mr Malema I think, Commissioner Malema to this loose document that was distributed which includes a letter in your defence, so to speak, from a Mr Alberts. Correct.

Mr S.J. Koen: Yes. I thought that as Mr Booth have reference the, his September 2012 letter that the response to that should also be referenced.

Comm Mpofu: Thank you. Now, ja well, firstly one would have expected you to refer to something that you say rather than somebody else. But putting that aside even Mr Alberts who's supposed to speak in your favour, if you go to page 2 of the letter that you refer us to.

Mr S.J. Koen: Yes, I have it.

Comm Mpofu: You have. The very last sentence of the letter before yours faithfully Mr Alberts says, I have no doubt that Mr Koen has dealt with all the matters raised by Mr Booth in his application. And you have failed to do that. So, referring us to this letter actually exacerbates the problem that you have not met the accusations made against you as even your supporter Mr Alberts expected naturally for you to do. So, how are ever going to be able to say Mr Booth is not telling the truth?

Mr S.J. Koen: Mr Commissioner I hoped that I had conveyed that I had dealt with the allegations made by Mr Booth herein my interview. I was also asked about it I recollect in 2012 and I addressed it. I addressed those issues there. I think you have sufficient material and the commission has sufficient material before it to decide what weight it wants to attach to Mr Booth's comments. You certain- you have comment which is favourable comment which is being put to by other persons. You have the,

my letter of nomination from Advocate Jamie. You will have seen that there are a number of people who hold a contrary view to the view by Mr Booth. Ultimately, it's for the commission to make a call on what weight to attach to that. And I'm not sure that I can take it any further.

Comm Mpofu: You're not sure you can take it any further? Do you think that Mr Alberts your supporter was reasonable in his expectation that you will deal with Mr Booth accusations in your application, not in your interview?

Mr S.J. Koen: No. I understood Mr Alberts to mean that I would deal with the allegations with the commission and explain my position.

Comm Mpofu: Thank you Chief Justice.

CJ M. Mogoeng: Thank you Commissioner Mpofu. Commissioner Fourie?

Comm Fourie: I'll be brief, but I feel compelled as a representative of -

CJ M. Mogoeng: Commissioner Mpofu if you could switch off your mike please.

Comm Mpofu: Oh, I'm sorry.

CJ M. Mogoeng: Thank you.

Comm Fourie: I'll try and be brief. Hello Mr Koen.

Mr S.J. Koen: Hello Mr Fourie.

Comm Fourie: But as a representative of the Attorneys Profession on this Commission I think I just need to put the following into perspective. You are aware of the fact that on the Council of the Cape Law Society the Black Lawyers Association and NADEL are represented to the extent of 50 per cent of the counsellors on the Council of the Law Society are representing BLA and NADEL am I correct?

Mr S.J. Koen: I am aware of that. Those changes were made to the rules a long time ago, decades ago.

Comm Fourie: That's right.

Mr S.J. Koen: To facilitate a more inclusive society.

Comm Fourie: And secondly you are aware that the Full Statutory Law Societies as well as the Black Lawyers Association and NADEL formed the voluntary organisation called the Law Society of South Africa?

Mr S.J. Koen: I am aware of that.

Comm Fourie: And that 50 per cent of the counsellors on the counsel of the Law Society South Africa are also members from the Black Lawyers Association and NADEL.

Mr S.J. Koen: I am aware of that.

Comm Fourie: And you are also aware of the fact although there is no prohibition against any of the other Law Societies to issue media releases such media releases as you've indicated are mostly done through the Law Society of South Africa and particularly by the co-chairs at any given time?

Mr S.J. Koen: That is my understanding as to how it works.

Comm Fourie: And that several and many media releases are published on very sensitive issues like racism etcetera, etcetera and are to my, in my view very progressive media releases that are being made. Are you aware of that?

Mr S.J. Koen: I have certainly seen what I regard to be progressive statements made about various issues which have risen from time to time.

Comm Fourie: Thank you Mr Koen. Thank you, Chief Justice.

CJ M. Mogoeng: Thank you Commissioner Fourie. Mr Koen thank you very much, you are excused.

Mr S.J. Koen: Thank you Chief Justice. Thank you, commissioners.