

REPORT OF THE SMALL JSC ON THE MATTER OF JUDGE PRESIDENT MBENENGE

Introduction

1. On 5 March 2026 the Judicial Service Commission (constituted without members designated by the National Assembly and the National Council of Provinces) (“the Commission”) convened to consider the report of the Judicial Conduct Tribunal constituted in terms of sections 19 and 21 of the Judicial Service Commission Act 9 of 1994 (“the JSC Act”), which enquired into allegations of judicial misconduct against Judge President Mbenenge, the Judge President of the Eastern Cape Division of the High Court. These allegations are based on a complaint by Ms Andiswa Mengo, a secretary to one of the Judges in the Makhanda High Court, that she was sexually harassed by Judge President Mbenenge over the period from approximately June 2021 to around November 2022.
2. Prior to considering the matter, the Commission called for written representations from JP Mbenenge and Ms Mengo. Both parties took up the opportunity to file extensive written representations.

The report of the JCT

3. In paragraph 99 of its report, the JCT concluded that JP Mbenenge is not guilty of gross misconduct, gross incompetence and / or gross incapacity under section 177

of the Constitution. The JCT concluded however that JP Mbenenge is guilty of misconduct simpliciter in that he contravened Article 5.1 of the Code of Judicial Conduct, read with Note 5 (iii), in that he, at a workplace and during working hours, initiated and subsequently conducted a flirtatious relationship with Ms Mengo through a series of whatsapp messages exchanged between them.

4. In arriving at this decision, the JCT excluded from its consideration several pieces of evidence itemised at paras 5.1. – 5.7 of its decision. In addition, the JCT criticised the complainant for giving false evidence in some parts of her testimony. It concluded, after narrating the common cause and admitted whatsapp exchanges between the complainant and JP Mbenenge, that the exchanges were not unwelcome by Ms Mengo on the balance of probabilities. It was on this basis that at paragraph 98.1. of its decision, the JCT concluded that no sexual harassment had taken place and that the communication between the two parties was consensual.

5. Although it was argued before the JCT that it would be incompetent for it to reach a conclusion of misconduct other than sexual harassment, the JCT rejected that argument, finding that based on section 20(4), (5) and section 33(1) of the JSC Act, it was within its mandate to consider whether the conduct of JP Mbenenge, viewed cumulatively breached the terms of the Code of Judicial Conduct for South African Judges.¹

¹ See paras 91 – 95 of the Report of the Judicial Conduct Tribunal

6. In the submissions of the parties before this Commission, divergent approaches are taken. JP Mbenenge submits that the finding that he is not guilty of sexual harassment and, therefore, not guilty of gross misconduct is clearly correct and should be upheld. He also submits that the finding of misconduct *simpliciter* should be set aside because it is *ultra vires* the terms of reference of the JCT. By contrast, it is submitted on behalf of Ms Mengo that the conduct of JP Mbenenge amounts to sexual harassment and that the Tribunal misdirected itself in its assessment of the facts and conclusions of law in the matter. It is also submitted that in any event, the finding of misconduct is inappropriate because the conduct of JP Mbenenge constitutes gross misconduct. In the final instance, it is submitted that, if the finding of misconduct is upheld by the JSC, an appropriate sanction should be imposed that reflects the seriousness of the conduct of JP Mbenenge.

Discussion

7. In deliberating on the report, the JSC is guided by the findings of the Supreme Court of Appeal in the case of *Freedom Under Law v Judicial Service Commission and Another* 2023(3) All SA 631 (SCA) where it was held that the JSC should enquire into whether or not the JCT has addressed the issues fully and fairly and directed its mind to the right questions in reaching its decision.² The court also held that the JSC may depart from the factual findings of the Tribunal provided that it demonstrates reasons for doing so.

² Id at para 75

8. As a point of departure, the Commission noted that the Tribunal's terms of reference required it to make a finding on whether the conduct of JP Mbenenge amounted to gross misconduct. The Tribunal was thus not limited to finding what it describes as '*the real question*', namely whether or not there was sexual harassment. In view hereof, it was unquestionably within the Tribunal's power to conclude that JP Mbenenge was guilty of misconduct simpliciter and not gross misconduct.
9. Against this background the JSC deliberated on two questions. The first was whether to uphold the finding that the conduct of JP Mbenenge amounts to misconduct. The second was whether this conduct amounts to misconduct *simpliciter* or gross misconduct in terms of section 177(1) of the Constitution.
10. The JSC agrees with the Tribunal that, on the admitted facts, JP Mbenenge is guilty of contravening section 5.1 of the Code of Judicial Conduct which provides that: "*A judge must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office.*"
11. The JSC however departs from the report of the Tribunal in several key respects:
 - 11.1. First, the JSC notes that, in its finding, the Tribunal limited its assessment to whether the conduct of JP Mbenenge in initiating and sustaining a "flirtatious" relationship with the complainant took place at a place of work and during working hours. The JSC considered this to

be a misdirection. What the Tribunal should have had regard to was not merely the place and timing of the exchanges, but their nature, content and context as well as the fact that they were admittedly initiated by JP Mbenenge and sustained over a period of time. On the admitted facts, the communications were not confined to working hours or the workplace, but extended beyond both, and included exchanges which, by their nature, bore directly on the standard of conduct expected of a Judge and, more particularly, of a Judge President engaging with a junior member of staff. By characterizing the matter principally as a flirtatious relationship at work and during working hours, the Tribunal understated the significance of the admitted conduct and failed to properly assess the extent to which section 5.1 was contravened.

11.2. Second, bearing in mind the nature and content of the communication as set out in various parts of the report including paragraph 60 thereof, the view of the JSC is that such conduct is grossly inappropriate for a person holding the position of Judge (let alone a Judge President) especially in relation to a person in the position of the complainant. It is conduct incompatible with the standard of honourable behaviour and propriety required of judicial office.

11.3. Third, the JSC does not endorse the finding by the Tribunal that there was no sexual harassment. In this regard it notes that:

- 11.3.1. The Tribunal did not apply the appropriate standard for assessing whether there was sexual harassment. Instead, it appears to have treated the enquiry principally as an objective one directed at whether the admitted communications were unwelcome, instead of a balanced amalgamation of an objective and subjective standard which took into account the complainant's position and the respondent's conduct in context;
- 11.3.2. The Tribunal failed to consider whether or not JP Mbenenge ought to have known that his conduct was unacceptable bearing in mind the responsibilities entrusted to him by virtue of his office and the position of the complainant. This resulted in the Tribunal focusing almost exclusively on the conduct of the complainant without giving due consideration to the conduct of JP Mbenenge, including whether, in the circumstances, he should have appreciated that the conduct in question was inappropriate and unacceptable.
- 11.3.3. The Tribunal concluded that the advances by JP Mbenenge were cumulatively welcome, rather than considering whether particular incidents or exchanges, viewed individually and in

their proper context, constituted unwelcome conduct of a sexual nature; and

11.3.4. The Tribunal failed to properly consider the impact of the relationship of power between JP Mbenenge and the complainant. This was relevant to its assessment of whether or not the advances of JP Mbenenge were unwelcome. Instead, it approached the matter on the basis that the parties were consenting adults on an equal footing who had the right to freedom of association, thereby giving insufficient weight to the significance of the disparity in position between them.

12. On the admitted facts, the JSC concluded that the conduct of JP Mbenenge is not misconduct simpliciter but amounts to gross misconduct. In reaching its conclusion, the JSC took into account the following:

12.1. The specific context of this matter including:

12.1.1. The sexual nature of the communications initiated by JP Mbenenge; his pursuit of Ms Mengo and his stated intention to pursue a sexual relationship with her.

12.1.2. The position of authority held by JP Mbenenge and the imbalance of power between JP Mbenenge and Ms Mengo;

12.1.3. The testimony of JP Mbenenge before the Tribunal revealed that he does not appreciate the responsibility associated with his position as Judge President and the power imbalance it creates in the work environment³; and

12.1.4. JP Mbenenge showed no remorse for his conduct.

12.2. The gravity of the matter. The conduct concerned is serious and constitutes an affront to the propriety of judicial office and the values underpinning the Constitution. It undermines core values of the Judiciary including integrity, accountability, equality, respect and dignity.

12.3. The impact of JP Mbenenge's conduct on the workplace and on public confidence in the judiciary.

³ See page 32 of the JCT Transcript (7 July 2025) at lines 3-11 where JP Mbenenge stated: "This thing about class distinction during this age and era, is something that I look down upon. I do not believe that a JP when it comes to engaging in whatever relationship, they are confined to persons of the same class. They are human beings and they are judges in any event. Let me rather not even say anything. Let me just mention it in passing. I know of judges who married their secretaries in this country. Heavens did not fall."

Finding

13. For these reasons the JSC concluded that the admitted facts establish gross misconduct rather than misconduct simpliciter. Accordingly, in the JSC's view JP Mbenenge is guilty of gross misconduct under section 177(1) of the Constitution.