

BEFORE THE JUDICIAL TRIBUNAL OF THE JUDICIAL SERVICE COMMISSION

CASE NO: JSC 1059/2022

In the matter between:

MS ANDISWA MENG

COMPLAINANT

AND

JUDGE PRESIDENT S M MBENENGE

RESPONDENT

Members of the Judicial Tribunal:

Judge B M Ngoepe, Retired JP, President of the Tribunal

Judge C Pretorius, Retired, Member

Adv M G Mashaba SC, Member

REPORT

PART I

BACKGROUND, MANDATE AND SUMMARY OF THE PARTIES' VERSIONS

1. This is a Report in terms of section 33 of the Judicial Service Commission Act 9 of 1994 (the Act) by the above Tribunal appointed by the Chief Justice in terms of section 21 of the Act. The Report is in respect of a complaint of sexual harassment by Ms Andiswa Mengo (complainant) against Judge President Selbey B Mbenenge, Judge President of the Eastern Cape Division of the High Court (respondent). The complaint was lodged with and processed by the Office of the Chief Justice (OCJ), and later placed before the Judicial Complaint

Committee (JCC). After considering the complaint and the respondent's response, the JCC called for submissions from both parties, written and oral. The matter was heard on 28 June 2023. The JCC decided, on 14 September 2023, to recommend to the Judicial Service Commission (JSC) in terms of section 16(4)(b) of the Act that the complaint be investigated and reported upon by a Tribunal.

2. This was the decision of the JCC:

[28] Having considered: the complaint by Ms A M and the Judge President's response to it, as well as their representations, respectively, we are satisfied that the complaint established a prima facie case, which if substantiated, is likely to result in a finding of gross misconduct.

[29] We now turn to consider the forum to which this matter should be referred. Given the seriousness of the allegations, a referral to a s17(2) enquiry would not be appropriate. It follows that the matter must be referred to a Tribunal. For these reasons, in terms of s16(4)(b) of the Act, we hereby recommend to the JSC that the complaint be investigated by a Tribunal in terms of s19 of the Act".

The JCC said the following, leading up to its above conclusion:

[27] The contours of sexual harassment are complex and in this case, they would be best resolved in an investigation where the parties' versions would be tested through cross-examination and

possibly expert evidence. For example, this Committee is not equipped to determine whether certain pictures were downloaded from the internet, as alleged by the Judge President or sent from the Judge President's phone, as alleged by Ms AM. The most appropriate conclusion is to refer all those aspects, including the contents of the Acting Judge President's affidavit, for further investigation."

The above recommendation by the JCC was accepted by the JSC and this Tribunal was duly established. The Tribunal must conduct its own investigation of the matter, and submit a Report, with its findings, to the JSC. The investigation includes the testing of the parties' versions through cross-examination and the taking of expert evidence so as to resolve issues for which the JCC was not equipped. This Tribunal is not simply to endorse the decision of the JCC; it is a new hearing.

3. As this is a new hearing, but based on the complaint filed under oath by the complainant with the OCJ, and the responding affidavit by the respondent, we must refer to such affidavits as originally filed, together with their respective annexures. We provide the gist of each affidavit below. Full copies thereof have been attached to the papers, and are thus available.

Complainant's affidavit

4. The complainant lodged a sexual harassment complaint against the respondent in the form of an affidavit attested to on 12 January 2023. It turned out later that this was in fact a second statement the complainant had made, the first one having been misplaced at the OCJ and could not be found at that time. The

complaint was largely based on a number of WhatsApp messages exchanged between the parties over a long period of time. A number of these messages were attached by the complainant to her affidavit. The messages were jocular, flirtatious and even salacious, sent by both parties. According to the complainant, these messages were unwelcome. A number of the messages were attached to the complainant's statement of complaint which was in the form of an affidavit; we need not reproduce them here.

5. In her affidavit, the complainant also said that the respondent sent her explicit pictures of a sexual nature as well as some crude messages. She said the respondent sent her the pictures listed below:

- 5.1 The picture of a man muffing a woman; it was Annexure "H1—H2" to the affidavit;
- 5.2 a video of a woman lying on her back with a man on top. There was no picture attached; the respondent disputed sending this;
- 5.3 a picture of private parts; the picture is blurred and indistinct, attached as annexure "K8" to the affidavit; the respondent denied sending such a picture or saying "yours please" as alleged by the complainant; an expert witness said he could not tell whether the picture did come from the respondent's cell phone as alleged;
- 5.4 a picture of two people having sexual intercourse, attached as Annexure "K9"; the picture is indistinct;
- 5.5 an image of (his) penis allegedly sent on 27 June 2021, which the complaint said was swiftly deleted;

5.6 a picture of a dressed leg, annexure “N”;

5.7 a picture of a naked leg, annexure “P”.

The respondent disputes sending the above pictures; we deal with these disputed pictures later in detail in PART III under the heading: THE DISPUTED OFFICE INCIDENT, THE DISPUTED PICTURES AND THE DISPUTED MESSAGES, where we go into details

6. Furthermore, in her affidavit, the complainant alleged that an incident took place in the respondent's office (the disputed office incident). She said that on Monday 14 November 2021, the respondent made certain innocuous remarks about her dress code. However, the following day, which would be 15 November 2021, the respondent, after calling her into his chambers, and in the absence of his secretary, pointed to his trousers and said “*do you see the effect that you have on me?*”, and said do you want to “suck” it, whereupon she ran out of the office. This became a hugely contested issue during the hearing.

The respondent not only denied this, but also called his former secretary to dispute such a visit by the complainant. Secondly, he relied on the fact that the security camera video recordings of that day showed that the complainant did not go to his office. Thirdly, he relied on the Tracker Report on the movement of his vehicle. Fourthly he relied on what is known as the Laptop Register record at the court. The disputed office incident will likewise be dealt with later in PART III.

Respondent's affidavit in response

7. In response to the complainant's founding affidavit, the respondent filed his own affidavit. Barring the disputed WhatsApp messages and the disputed pictures referred to earlier, as well as other disputed messages to be referred to later, all of which the respondent strenuously disputed sending or receiving, he did not deny sending WhatsApp messages to the complainant. Furthermore, he did not deny having had certain conversations with the complainant in the beginning at the office, such as about her life and her child.

He dealt with a number of messages exchanged between him and the complainant which, he said, were approximately from June 2021 to February 2022. A number of these messages, which he does not dispute, were also attached to the complainant's statement of complaint. There is no need to go into the respondent's exposé of those admitted messages as they speak for themselves; as already mentioned, they are part of the record.

8. The respondent's contention was that an objective reading of the WhatsApp messages would show that they were not unwelcome to the complainant and therefore that there was no sexual harassment; he says the messages show that there was a consensual flirtatious engagement between the parties.
9. The respondent denied in his affidavit that he had sent the disputed pictures and messages, or receiving such messages, referred to earlier as well as the alleged office incident. Below is a summary of his defence, which will be dealt with in more details under PART III.
10. The respondent stated that he did not send annexure "K8", the picture of a private part. He raised certain points in relation to the alleged picture, which we will deal with later. The denial also related to annexure "K12" to the

complainant's affidavit which was supposed to be an answer to the disputed picture of the private part. There are indeed serious contentions about the alleged picture including whether it was sent by the respondent; all of which are dealt with in PART III.

11. The respondent also denied that he sent "*an image of a man muffing a woman*", being annexures "H1 – H2" to the complainant's affidavit. He went into details to show amongst others that the annexures were stickers; reliance was also placed on the evidence of an information technology expert (PART III).
12. The respondent also denied sending annexure "N" to the complainant's affidavit, being the leg of a man sitting on a chair, apparently in an office. The picture is by itself innocuous. The respondent said he surmized that the annexure was a picture that the complainant screen-grabbed from his WhatsApp status. He said he usually uploaded his WhatsApp status images of his location in the various seats of the Division. The respondent also points out that the word "no comment" were evidently typed under the photo. As will be seen later, an expert was not able to tell whether the picture came from the respondent's cell phone.
13. Furthermore, the respondent denied sending the picture of a naked leg, being annexure "P" to the complainant's affidavit, which makes for a very obscure picture. He said the annexure did not depict his leg. He said there was no indication of who sent it, where and to whom, and appeared to be a random leg of an unknown person (PART III). The expert could not assist.
14. The respondent said that to the best of his recollection, the last of the flirtatious chats between him and the complainant was around February 2022; beyond

that he continued to interact with the complainant cordially about work. He referred to several instances of that nature, up to and including October/November 2022.

15. In his affidavit, the respondent stated that towards the end of the week of 21 November 2022 he was called by a colleague to a meeting when in East London. Once there the following week, he was told the meeting was about annexures “K8” and “P”; he immediately informed the colleague that he knew nothing about the two pictures. While he was initially amenable to attending the meeting, he later, on further reflection, decided against attending a meeting where, he said, he would be confronted with pictures he had not seen; more so in the presence of others.
16. On 2 December 2022 the respondent was informed by the Director of Court Operations (DCO) via WhatsApp that at the proposed meeting the complainant intended presenting material that had been the subject of chats between them including screenshots of a message he had deleted. The respondent appealed in a voice note to the DCO for a meeting himself and the complaint that “*to the extent that Ms Mengo may have been offended by the stuff (the chats) I shared with her, I [would be] amenable to a meeting between the two of us where we reconciled (sic) any possible difference*” without the involvement of others. He says the meeting did not come to pass; in his view, it was overtaken by events.
17. The respondent’s affidavit moved on to respond to the complainant’s allegation that he attempted to show her his private parts or pointed to his private parts in his chambers (the office incident). He said he was confronted by this allegation by the same colleague who had called him regarding a meeting with the

complainant. He was told he had called the complainant to his office when this had happened. He said this was untrue. He said it was supposed to be in the week of 14 November 2022.

18. He denied the allegation and dealt with the events of 14 November 2022. What took place between him and the complainant, he said, was an innocuous discussion about the dress code at work, all of which occurred in a jovial mood. Beyond that, he never interacted with the complainant again that day.
19. Regarding 15 November 2022, he had no interaction whatsoever with the complainant. He added that it should be possible for the CCTV footage of the events of 14 and 15 November 2022 to be obtained which he believed would clear him. This allegation by the complainant was hugely contested. Expert evidence was heard and indeed recordings were looked at. We will deal with this allegation in detail later.
20. The respondent also denied that he failed to deal with the dispute between the court manager and the complainant as alleged by the complainant. He said he twice invited the complainant to his office to deal with the matter; the door of his office would be closed by his secretary after had ushered a person in.
21. The respondent also admitted the conversation between himself and the complainant took place in the presence of, and about her child; the respondent said he did so from the perspective of a parent. He said he did not recall saying of the complainant: "*such a beautiful woman without a man.*"
22. He said the complainant's affidavit, paragraph 8 thereof, alleging that he asked her to take off her clothes, was not born out by the annexure "C" to her affidavit,

but said he had no independent recollection of that. However, he did not deny the chats in that annexure, and went on to try and clear the air as to why he had asked the complainant to scroll down the picture.

23. The conversation contained in annexure "D" to the complainant's affidavit was admitted by the respondent but he added that it did not contain the complete conversation; it will appear later that indeed some chats were left out of the complainant's statement of complaint.
24. The respondent contended that the WhatsApp messages were between two consenting adults, who had, for that matter, agreed to delete them so as not to be seen by others. That there was an agreement to delete is confirmed by the WhatsApp messages sent by both the respondent and the complainant; examples of such messages are tabulated elsewhere below.

Oral evidence

25. Both parties gave oral evidence before the Tribunal and were extensively cross-examined. Both parties also called witnesses who were thoroughly cross-examined. There is a lengthy transcribed record of proceedings, which speaks for itself. We will refer to parts of the record only in relation to certain aspects of the matter which we consider germane to both the complaint and the defence as well as to the resolution of the dispute.

The real question

26. The real question is whether or not there was sexual harassment; if yes, there should be a finding of gross misconduct. The respondent admits to making flirtatious advances to the complaint, and says that these messages were not

unwelcome. According to the respondent the complainant went along over a long period of time. In our view, sexual harassment must be shown to have occurred to found gross misconduct. If a mere approach were to give rise to misconduct, it would, in our view, not amount to gross misconduct, especially where it was not unwelcome and was moreover conducted in an agreed confidential manner between two adults; it may possibly amount so some misconduct.

27. It must therefore be common cause that once sexual harassment is established, a finding of gross misconduct must follow. At the same time, where sexual harassment and thus no gross misconduct has not been established, the evidence may lead to a finding of misconduct *simpliciter* as opposed to gross misconduct. This Tribunal has to determine whether or not sexual harassment has been established. This must be done in accordance with the law and the proven facts; regard must be had to the affidavits filed, the WhatsApp messages, oral evidence including expert evidence and real evidence.

Interlocutory Rulings

28. Before dealing with the matter further, it is necessary to refer to a few interlocutory rulings which the Tribunal made in the course of the proceedings.

On whether the hearing should be in-camera or open

29. Initially the Ruling was made, in terms of section 29(3)(a) of the Act, that some parts of the hearing would be in-camera while others would be open to the public. The Ruling was, however, subsequently amended, at the request of both parties, to open the entire hearing to the public. The Ruling is found in the record of proceedings.

Request by the Respondent to be legally represented by a Judge

30. There was a request that a Judge from the respondent's Division to be part of his legal team. This request was refused; the Ruling forms part of the record, with the reasons therein given for the refusal; briefly, the Tribunal ruled that while in terms of section 28(2) of the Act a respondent is "*entitled to be assisted by a legal representative*", a Judge does not fall under the contemplated meaning of "*a legal representative*". A copy of the Ruling is attached to this Report as "**Annexure A**".

Allowing legal representation to the complainant

31. Permission was granted for the complainant to be legally represented, albeit with some limitations. Her legal representative would for example assist her in putting her case in addition to her evidence in-chief by the leader of evidence and also to put questions to witnesses called by the leader of evidence. In fact the complainant was already legally represented as early as before the JCC with no objection from the respondent.

On whether complainant's legal representative could cross-examine the Respondent

32. The ruling was that complainant's legal representative could not, over and above the cross-examination by the Leader of Evidence, also cross-examine the respondent or his witnesses. This ruling was made on 1 July 2025.¹ It was indicated then that full reasons for the ruling would be given; they are found in "**Annexure B**" to this Report.

PART II

WHETHER THE ADMITTED WHATSAPP MESSAGES SHOW SEXUAL HARASSMENT

33. To restate it, the Tribunal's mandate, as formulated by the JSC, is to investigate and report on:

"The allegations against JP Mbenenge set out in Ms Mengo's complaint whether or not, as a result of the above conduct, JP Mbenenge is guilty of gross misconduct, gross incompetence and/or gross incapacity under section 177 of the Constitution."

It can be stated at the outset that the issue of gross incompetence and/or gross incapacity do not arise; the matter is about gross misconduct.

34. There is no presumption – let alone an irrebuttable one – of guilt, nor should there be a biased view one way or the other, simply because, for example, the complainant is a woman in a junior position in relation to a man accused of sexual harassment; otherwise the Tribunal proceedings would be a mere charade, with the outcome already predetermined. These proceedings are not

¹ Transcript 01–07–2025 page 108

a mere formality. Section 26 of the Act sets out the objectives of the Tribunal: To inquire into the allegations of gross misconduct by collecting evidence, conducting a formal hearing, making findings of facts, and making a determination on the merits of the allegations, and then submit a report containing its findings to the JSC. The following are some – and only some – of the important factors against which the matter must be considered:

- 34.1 In terms of section 26, the inquiry is conducted in an inquisitorial manner and there is no *onus* on any person to disprove any fact, and the determination against a judge is on a balance of probabilities.
- 34.2 The respondent was, throughout the relevant conversations and the exchange of the WhatsApp messages, the Judge President of the Eastern Cape Division of the High Court, and the complainant was a Judge's clerk at the same Division; therefore, workwise, the complainant was in a junior position in relation to the respondent even though the respondent was not her employer.
- 34.3 Both parties were of course adults, with children. It is clear that the respondent was at that time married; while it is not clear whether at that time the complainant was already divorced (she said the father of her child was no longer in her life), it is clear that at least at some point she had been married.
- 34.4 It appears from the messages that the agreement was for the messages to be deleted so as not to be seen by third parties; for example:

Complainant: *R u deleting?*

Respondent: *And U*

Complainant: *Am deletin bcz my phone's space isn't that big that's one ... 2 I dnt want these to be seen, kanjani asazi (how, we do not know)*

Respondent: *I'm with you there* **Vol 3 page 659; Translation: Vol 3 page 1297**

Respondent: *Remember to delete plz.... When this bout is over.*

Complainant: *Okcool*

Vol 3 page 1175

Complainant: *Umane uncimelani na ...ingati ungumntu lo wake wangena engxakini* **Interpretation in Court: Why do you keep on deleting as if you are someone who was once in trouble.**

Respondent: *Kukho ii peeping toms* **Interpretation: There are (peeping toms)**

Complainant: Responds with five laughing emojis

Respondent: *Caution is not a bad idea. If you faint and your kid picks up your phone*

Complainant: Responds with two laughing emoji's and the words: *I hear u*

See Vol 3 page 1261; Translations p 1328

It is important to point out that while during the hearing there was an interpretation of messages from isiXhosa into English, there was also a

professional translation of the same messages filed of record. The interpretation and the translations were substantially the same; indeed, the interpreter would from time to time reference the translations. We do the same.

- 34.5 As already indicated, barring a few disputed messages and pictures referred to earlier, the respondent did not dispute sending the WhatsApp messages to the complainant; and the complainant admitted to sending WhatsApp messages to the respondent.
- 34.6 Of fundamental importance in the context of this case, is section 18 of the Constitution of the Republic of South Africa, 1996: "*Freedom of association: Everyone has the right to freedom of association.*" In an open and democratic society like ours, everyone has the right to choose with whom they wish to associate. We cannot divide people into categories of the rich and poor, powerful and wretched, senior and junior, etc, and prohibit association, such as a flirtatious association, across those supposedly dividing lines. Moreover, people can meet each other at a work place and start a relationship which may result in a marriage, which is why it is so common to find couples in the same profession: teachers, doctors, police officers, soldiers etc. Ask some of them where they first met – at the place of work! However, in terms of section 36 of the Constitution, like all other fundamental rights barring the right to life, the right to freedom of association cannot, as we demonstrate later, be exercised without limitation; not even by mutual consent; for example, the rights of an employer may come into the picture.

Reading and understanding the WhatsApp messages

35. It is common cause that the test whether a message is wanted or not is an objective one. The messages speak for themselves. The question is how a reasonable reader would understand them; for example, whether it is a rebuff or not. It was suggested for the complainant that the words “*haayi/hayi/hayini*” used in some instances by the complainant was an expression of a rebuff. That was incorrect. Firstly, the words were interpreted and also translated as an expression of exclamation. Secondly and more tellingly, where such a word was used by the complainant, it was often accompanied by flirtatious messages and a number of laughing emojis from herself in response – a clear indication that respondent’s messages she would be responding to were not unwelcome; for example, “*hayini*” in Vol 3 page 673; translation being “*No ways!*” This response was accompanied by 3 laughing emojis. It was in response to the respondent’s message that he had been fooled.

Dr Zakeera Docrat on the reading of emojis

36. Dr Zakeera Docrat was called to testify at the instance of the complainant. She was described as a forensic and legal linguistic expert. She testified about the emojis; about their use and how they were to be understood. She said both parties were conversant about the use of emojis. The ultimate importance of her evidence was that she would defer to whatever meaning or understanding the parties attached to a particular emoji; that is, she would not impose her interpretation. This made sense as the parties had to be in command of their

own conversations. She illustrated this point with reference to a particular emoji as follows:²

“ADV SCHEEPERS: Just to come back to that, so what you just said, this (sic) hands were developed as the high five?

DR DOCRAT: Yes, that is correct.

ADV SCHEEPERS: But the users of emoji use it for a different meaning?

DR DOCRAT: That is correct.

ADV SCHEEPERS: So that comes to what you testified earlier that you cannot have a standard meaning to an emoji; because different people uses (sic) it for different meanings?

DR DOCRAT: that is correct ...”

Dr Docrat again made this point clear:³

“JUDGE PRESIDENT NGOEPE: Now, if Ms Mengo’s understanding of emoji’s is the same as that of the respondent, which is what I asked earlier on, they have a common understanding. Is it competent of you as an expert to say, I override your understanding of this emoji?

² 06-05-2025 Transcript p 27

³ 06-05- 2025 Transcript pp 124 - 125

DR DOCRAT: *No chair, because if there is common understanding between them and they understood what the two of them were sending to each other and the intention behind that, then there is no dispute.*

JUDGE PRESIDENT NGOEPE: *Alright If Ms Mengo, according to a particular emoji, conveys a particular meaning to it and you attach a different meaning to it, can you override her? If you override her, because you are an expert, are you then not creating a conversation which is not there?*

DR DOCRAT: *If for example, I hope I am understanding your question correctly. Please correct me if I am wrong and I am misunderstanding it. If Ms Mengo sends the respondent a specific emoji with a specific understanding from her perspective and the respondent shares that understanding with Ms Mengo, then there is a common understanding and there is no need for me as an expert to come and give evidence or interpret that emoji specifically. Where the respondent sends a message to Ms Mengo, an emoji, or Ms Mengo send one to the respondent and one of them are in disagreement with the understanding and the meaning of the interpretation of that emoji, then that is where I would have a role to play say this is the specific meaning and understanding from the perspective based on the context....”*

Dr Docrat's own meaning of an emoji would come in only if there was a difference between the parties regarding the meaning of that emoji. From the way the parties communicated, there is no basis to say they misunderstood each other's messages as per these emojis. According to Dr Docrat, no one,

not even an expert, can create a conversation for the parties through emojis which they did not intend to have! Therefore it is important as to what the parties intended to say to each other by their emojis they chose to use.

37. Dr Docrat also testified that she was never given any affidavits of either party. She only worked on the messages themselves, which she regarded as the data. She did not regard the parties' affidavits, as part of the data.⁴ She also made the point that context was important. On the whole, she testified fairly and objectively.

The gist of the complainant's case

38. We return to the gist of the complainant's case, as also presented in her oral evidence and submissions on her part. As said earlier, she did not deny sending several messages which appeared consensual; indeed some of them, as will be shown later, were very salacious and of a very personal nature. She said in her evidence that she sent those messages as she was afraid that the respondent might make her situation difficult at work; that she was in a junior position in relation to the respondent as the Judge President. She sent the messages just to appease him. Reliance was placed on the issue of power relations by the complainant.

At the complainant's instance a witness, Dr Vetten, was called to give evidence on the issue of power relations. This remained the fundamental point even in the submissions on behalf of the complainant. Dr Vetten was described as a Gender and Sexual Harassment Specialist. This is part of her evidence on the

⁴ 06-05-2025 Transcript p 136

issue of what she called coercive circumstances and the impact of power imbalances:⁵

"DR VETTEN:I mean the law has also as I said had this recognition of coercive circumstances In relation to rape for example it recognises that there are situations and it is going back to this point of submission, and one of the points it looks at is where there is an abuse of power and authority. That again somebody can abuse their position and this is why you are submitting and appearing to say yes but this force of abuse or power and authority is making it hard for you to say no because you are not in equal positions But when you look at consent you actually have to look at the context, what are the circumstances under which somebody is saying yes or no or not saying anything at all, are they circumstances that enable somebody to speak clearly, to be firm, to state their expressed desires, preferences and needs.

ADV SCHEEPERS: Help us understand consent in context where power imbalances are present?

DR VETTEN: Ja, well you have this in the Sexual Offences Act that there is an abuse of power or authority so coercive circumstances help us understand that is hard for somebody to say no because of the authority that the other person wields that that person, them saying no, that person is in a position where they can make life very very unpleasant so coercive circumstances, you can think about as the recognition that it is a so-called choice in a context of no choice or

⁵ 30-06-2025 Transcript, pp 27- 29

constrained choice so coercive circumstances are saying to us look at the context, yes or no does not occur in a vacuum.

Look at what is going on around that person, what are the end what are the pressures on them, have they giving meaningful consent.

I meanwe look at context for example."

39. The complainant and Dr Vetten were cross-examined in great detail on the issue of power relations to show that the complainant willingly engaged in the flirtatious exchange of the messages, and therefore that they were not unwelcome. As for Dr Vetten, we deal with the engagement between her and Adv Sikhakhane SC, counsel for the respondent, in the next two paragraphs.

Dr Vetten's evidence under cross-examination

40. Interestingly, it appeared that Adv Sikhakhane SC, had also read the book on which Dr Vetten was particularly relying in her articulation of power relations. In the course of that x-examination, Dr Vetten made certain concessions. It is not necessary for us to go into that debate.
41. The issues of coercion and power imbalances are important points, and what Dr Vetten gives as a general exposition, cannot be faulted. However, as it often happens with general propositions, the difficulty arose with Dr Vetten's application of it to the facts of the case before us. She was cross-examined at length about possible shifting power relations in interactions of this nature. It is not necessary to enter that contest. The essence of Dr Vetten's evidence was that, given the power relations between the two, while objectively complainant's own messages gave an impression that respondent's messages were

welcome, that was not the case. She testified that that was because the complainant was not able to indicate to the respondent that the messages were unwelcome. The theory of power relations becomes unhelpful where there is no evidence of abuse of power, overt or covert. Abuse of power cannot be assumed simply because the one person is senior to the other. As counsel for the respondent argued, it would be absurd to say a judge may only make advances to another judge; a court manager to another court manager; a clerk to another clerk. We have no evidence of coercion through the exercise of power to the extent that the covert exercise of power is alleged. The argument would also fall away if it is established, as contended for by the respondent, that the complainant herself crafted and sent many flirtatious and salacious messages to the respondent. Secondly, that some of her responses to the respondent's flirtatious messages, far from being dismissive, were instead flirtatious and salacious.⁶ Confronted with this difficulty, Dr Vetten gave the following evidence which can only be described as startling:

"ADV SIKHAKHANE SC: It makes the point I was making to you about, faced with what your interpretations of what she does. I see now that for some reason, now you respect the fact that it would depend on her. And that is what I was saying to you earlier , is that faced with what she says and does, we have got to give weight as you do now, to her intentions and what she means. This is a 42 year old woman, smart , divorced, has been through life and knows what she

⁶ We refer to the relevant jurisprudence later

means, and says what she means and means what she says. You and I have no reason to doubt it . Do you disagree with me?

DR VETTEN: No, but that does not mean she always knows exactly what she wants...⁷

With respect to Dr Vetten, one of the causes of the abuse of especially women is the thinking that they don't always know what they want or mean what they say. Nobody dare second guess a woman. This reply was one of the difficulties with Dr Vetten's evidence. For example, when the complainant explained to the respondent that she was not able to respond then as she was busy cooking – this at about 18:00 when indeed a mother would be preparing dinner – Dr Vetten read a lot more into it to extract a rebuff; a rebuff out of an explanation which made perfect sense to any reasonable person; in other words, to her the complainant did not mean what she said or said what she meant! Dr Vetten said it must have been clear to the respondent that his flirtatious messages were unwanted. This assertion is contested by the respondent, who says, amongst others, that there was no such indication from the messages; that, instead, there were messages from her that led him on. Before dealing further with Dr Vetten's evidence, it must be restated that the test as to what a message means, even within the contours of power relations, is an objective one. If it requires an expert witness to tell whether a message is a rebuff, an accused person, not being an expert, could hardly be blamed for failing to pick up the rebuff, assuming there was any. We all take messages at their face value without consulting an expert.

⁷ 01 – 07 – 2025 Transcription p 36

42. As already mentioned, there are serious difficulties with Dr Vetten's evidence to the extent that she sought to apply her general proposition referred to above to the facts of this case. Respondent's counsel submitted that Dr Vetten repeatedly sought to be sympathetic to the complainant and to provide excuses for the complainant's clear conduct, including her salacious messages to the respondent. To illustrate the point, counsel referred to an example during Dr Vetten's cross-examination. In issue was the following message, which counsel said was salacious, sent by the complainant herself to the respondent: "*Keep on drooling*". "*I like it like that when you arrive, you will be interested.*"⁸ This was a clearly salacious message from the complainant. Yet Dr Vetten prevaricated and did not want to concede that against the complainant. Surprisingly, she wrestled with counsel for some time about this simple and unambiguous statement:

"ADV SIKHAKHANE SC: I will tell you the danger with what you are saying, is that you are giving a generalised interpretation which is sympathetic and this is the deficiency in your testimony, because you did not speak to her. You are imposing your own, as I said, idiosyncrasies, your own generalisations and your own inclinations in these issues. Had you spoken to her, is it not possible that she would have been blunt and tell you that is what she wanted?

DR VETTEN: That may have been the case, as you say. I did not speak to her, so I do not know.

⁸ See i.a. Vol 3 p1229

JUDGE PRESIDENT NGOEPE: Mrs Vetten, is there any ambiguity in this statement?

DR VETTEN: No, there is no ambiguity. Her response are ambiguous.

What I am trying to, perhaps I have not put that sufficiently clearly, is that when you look at the context of times where she is saying no, no, no, no and then she gives a response like that, that is where the ambiguity comes in.

JUDGE PRESIDENT NGOEPE: But why do you bring other things when we look at this specific statement, which stands on its own, written partly in Xhosa and partly in plain, simple English? Does is not say what it says?

DR VETTEN: It does say what it says".

43. It was in light of the “drooling” message that Adv Sikhakhane SC challenged Dr Vetten’s likening of the relationship between the complainant and the respondent as that of daughter and father. Adv Sikhakhane SC: “*This is not a child talking to a father*”.

*“Yes, I am putting it to you that this statement is not consistent with your description of the complainant in this conversation. No child says this to a father. Not that I know.”*⁹

⁹ 01 – 07 –2025 Transcript p 57 line 24 to page 58

That is, no one could use such a salacious language to someone she regarded as a father; counsel put it to the witness that she seemed to be sympathetic to the complainant.

44. It is, in any case, not necessary to go into other aspects raised against Dr Vetten's evidence – and they are many and not trivial – because of other considerations. Firstly, Dr Vetten admitted that when drafting her report on the basis of which she testified and which contained her formulated opinion, she did so without having:

44.1 read the complainant's statement of complaint;

44.2 interviewed the complainant;

44.3 read the respondent's response to the complaint;

44.4 read the complainant's cross-examination.

In the matter of Twine and Another v Naidoo and Another¹⁰ the court had to consider the value of expert evidence to pronounce on the validity of a disputed Will. It was stated that if the expert has omitted to consider relevant facts, the opinion is likely to be valueless; furthermore, that an expert witness must not omit to consider material facts which could detract from his or her opinion. Dr Vettel conceded that taking the above steps could have enhanced her report; failure on her part to do so drastically detracted from her report and evidence. Failure to read the cross-examination became particularly important because it was at that stage that the complainant's credibility was questioned regarding

¹⁰ (38940/14) [2017] ZAGP JHC 288; [2018] ALL SA 297 (GT), paragraph 18

her claim that the identity of the Gauteng Statement and the Eastern Cape Statement (the two are dealt with later) was coincidental, even though they were, word for word, punctuation to punctuation, identical (credibility issue); again it was during cross-examination that the complainant was challenged that she had withheld flirtatious and salacious WhatsApp messages initiated by herself (honesty issue). In any case, Dr Vetten's contention that the complainant was an unwilling participant in the exchange of the messages, is countered by the respondent's argument that there are several flirtatious and salacious messages, such as the "drooling" one, which were initiated by the complainant herself; also, that there were instances where she flirtatiously and sensually responded to the respondent's messages. This brings us to the respondent's case.

The gist of the respondent's case

45. The gist of the respondent's case, as also amplified in his evidence and in submissions on his behalf was that he admitted sending WhatsApp messages to the complainant. The respondent raised certain specific points in support of his case. (i) Firstly, the complainant's lack of credibility. This was based on the argument that she lied in saying that when she made the second statement to replace the lost one, she did not have a copy of the first one; we refer to this as "the issue of two statements". (ii) Secondly, it was argued that the complainant contrived to omit out of her complaint statement flirtatious or salacious WhatsApp messages ("omitted WhatsApp messages") from her to the respondent. Should this be established, it would not only show lack of honesty, but also belie her story that she was an unwilling participant. (iii) Thirdly, the

respondent pointed out to some flirtatious responses, others salacious, by the complainant in response to the respondent's messages. This too would belie the complainant's version that she was not a willing participant. (iv) Fourthly, it was pointed out that the exchange, which was over a period of time, was replete with laughing emojis from the complainant, in reaction to respondent's flirtatious messages, again showing a willing participant. These points, some alone, others cumulatively, would, if established, destroy the basis of the complainant's case that, despite her seemingly consensual participation, respondent's WhatsApp messages were unwelcome to her. We therefore deal with these points *seriatim*.

(i) Complainant's "two" complaint statements: Complainant's credibility

46. The complainant's evidence was that, to initiate the complaint, she came to Gauteng, Midrand, to the OCJ. One person, Ms Kutloano Moretlwe then working at the OCJ, was assigned to help her in preparing and typing her statement of complaint which had to be under oath. When it became apparent that they would not finish with the statement of complaint at the OCJ, they both moved to the hotel next to the OCJ, where the complainant had to check in, which she did. Their work continued there; with Ms Moretlwe typing the statement on her own laptop.
47. The complainant says Ms Moretlwe continued typing the complaint on her own computer until 12 midnight when she decided to leave the hotel, with the statement in her (Moretlwe's) computer. The following morning Ms Moretlwe caused the statement to be printed out of her own computer, so that the complainant could go and sign it under oath, which she did. She then returned

to the Eastern Cape. What stands in this particular paragraph, was to be later strongly disputed by Ms Moretlwe. Briefly, her evidence was, firstly, that she left the hotel for home at about 21h00 as she felt it was late; she denied leaving only after midnight. Secondly, she said that as she was typing with her own computer, before she left the room, she took a memory stick, saved the draft on it and gave the stick to the complainant to upload it on her own computer and continue working on it. The complainant told Ms Moretlwe that she had brought her own laptop as she was working on a judgment which she had to finish. Ms Moretlwe left the complainant to continue typing her own statement with her own computer. Ms Moretlwe's evidence was that the following day, the complainant had finalized the complaint, and gave the memory stick to her to print the document at the OCJ. After the statement was printed, Ms Moretlwe gave it to the complainant to go and sign it under oath before leaving for the Eastern Cape; this was done.¹¹ The material difference between the versions of Ms Moretlwe and the complainant, is that, according to Ms Moretlwe, the complainant's computer contained an electronic version of her statement when she left for the Eastern Cape; she too (Ms Moretlwe) had the same version in her own computer. To sum up the difference between the two versions:

47.1 Firstly, the complainant says Ms Moretlwe left the hotel only at 12 midnight, and after the typing of the statement was completed. Ms Moretlwe strongly disputed that. She said she left at 21h00 as it was getting late, at which time the typing had not yet completed; the

¹¹ Transcript 07-05-2025 pp 105-108

complainant remained to complete the typing herself and on her own laptop.

47.2 Secondly, according to the complainant, when she returned to the Eastern Cape, she did not have any electronic version of her complaint with her while according to Ms Moretlwe, she had it.

48. The version of the statement which Ms Moretlwe printed out of her computer and then gave to the complainant to sign is, for the sake of convenience, henceforth referred to as the “*Gauteng Statement*” and is attached to this Report as “**Annexure C**”.

49. It is common cause that after the complainant had signed the Gauteng Statement and lodged it with Ms Moretlwe, after it was commissioned, she immediately returned to the Eastern Cape. While there, she was informed by Ms Moretlwe that her complaint as *per* the Gauteng Statement, was lost; she had to make a fresh statement. While in the Eastern Cape, she produced and submitted “*another*” statement which, for the sake of convenience, is henceforth referred to as the “*Eastern Cape Statement*”; a copy thereof is attached to this Report as “**Annexure D**”. Sometime early this year and upon the insistence of the respondent’s attorneys, the electronic version of the misplaced “Gauteng Statement” (Annexure C) was retrieved by Ms Moretlwe who had in the meantime left the OCJ for the Ministry of Justice. She said she retrieved it from her computer after some repeated search. We attach hereto for the reader’s comparative purposes, a copy of both the “*Gauteng Statement*” and the “*Eastern Cape Statement*”. As the comparison will show, the two statements are in many respects identical, word for word, including some grammatical or

punctuation errors, such as a “full stop” that is misplaced, exactly the same way in both statements. It is abundantly clear that the two are mostly exactly identical; that the one is a copy of the other.

50. It was indicated to the complainant that she was not telling the truth when she said that when she prepared the “*Eastern Cape Statement*” she did not have a version of the “*Gauteng Statement*”, but she persisted that she did not, thus giving the impression that the fact that the two statements were exactly identical, word for word and even in punctuation, was coincidental! She obviously cannot have been telling the truth; this is clear from the comparison of the two statements, which, as indicated, are identical in many respects, including same grammatical errors for which she could not account.¹²
51. It was bad enough for the complainant to persist with the obvious lie that she did not have a copy of the Gauteng Statement when she produced the Eastern Cape Statement; but even more worrisome is the fact that she told further lies in order to maintain that first lie, in the process trying to cast Ms Moretlwe as a liar:
 - 51.1 Firstly, she went so far as to try to lengthen Ms Moretlwe’s stay at the hotel from 21h00 to 24h00. In this crime-ridden country, Ms Moretlwe’s evidence made every sense that she left the hotel at 21h00 as it was late. In a proverbial case of the thickening of the plot, the complainant sought to lengthen Ms Moretlwe’s stay with 3 hours to bolster her evidence, which Ms Moretlwe denied, that the Gauteng Statement was

¹² Detailed comparison of the two statements by counsel from around page 81 et seq 23/01/2025 Transcript proceeding to around page 26 of 24/01/2025 Transcript

already completed by the time Ms Moretlwe left the hotel; with this lie, the complainant wanted to fortify her lie that she did not have a copy of the Gauteng Statement when compiling the near identical Eastern Cape Statement.

51.2 Secondly, in an attempt to bolster her version that she did not have the electronic version of the Gauteng statement when she was in the Eastern Cape, she said that she did not have her laptop with her when she was in Gauteng to lodge the complaint. Ms Moretlwe insisted that she did have her laptop; she said the complainant had told her that she had brought her laptop as she was typing a judgment for her judge, something Ms Moretlwe could not have known on her own.

51.3 Furthermore, the complainant tried to cast Ms Moretlwe, who had no interest in the matter and who had assisted her in compiling her complaint, as not only lying but as someone with a nefarious agenda against her; this is apparent from questions put by the complainant's counsel to Ms Moretlwe¹³, who could only have been acting on the complainant's instructions. It is clear that an attempt was made to create an impression that Ms Moretlwe was less than candid.

52. The complainant lied when she said she did not have a copy of the Gauteng Statement when she compiled the Eastern Cape Statement and therefore that the fact that they are identical in many respects, word for word and even

¹³ Transcript of 8 May 2025 pages 2 *et seq*

punctuation wise, mistakes included, was coincidental. There is no known reward for lying. The inevitable consequence is loss of credibility. It is important in matters of this nature, with potential serious damage and stigmatising implications – which is why the default position is an in-camera hearing – for a complainant to tell the truth. The fight against sexual harassment requires no less; else the efforts would be undermined.

(ii) Flirtatious and/or salacious messages by the complainant herself, which she had **omitted** out of her statement of complaint.

53. The respondent argues that there was a number of flirtatious or positive messages, some even salacious, sent by the complainant herself, but which, to use respondent's language, she contrived to leave out of her statement of complaint; not only failing to attach them, but also not even referencing them in the statement. They were, firstly, left out of the Gauteng Statement and, secondly, out of the Eastern Cape statement. As it will appear below, these messages are many. The third occasion she left out those messages was before the JCC. The omitted messages were only revealed later after being downloaded from her cell phone by one of the expert witnesses, Mr Moller, who had been requested to examine the cell phones of the two parties. As these messages were revealed only after the matter had already served before the JCC, it is not known what its decision would have been had they been placed before it. They have since been placed before us, and we must deal with them.
54. The respondent's argument is, firstly, as already stated, that the messages belie the complainant's argument that respondent's messages were not welcome; secondly, that she deliberately omitted the messages and that she therefore

acted dishonestly. The complainant was cross-examined extensively on these, an important part of the record of proceedings which Dr Vettel – an expert witness for the complainant’s case – admitted she had not read either prior to her evidence or to compiling her expert report, a report which the respondent’s counsel argued was biased; more about this later.

55. The complainant did not deny leaving out such messages, but denied that she did so with an ulterior motive. It was argued on her part that she was not legally represented when she made her statement of complaint. But of course the record shows that she got legal representation prior to the matter being heard by the JCC; in fact submissions to the JCC were made on her behalf by her legal representatives. At that time she was of course aware that she had omitted those flirtatious, some salacious, messages that had been initiated by herself. It was submitted on her behalf that had she wanted to act dishonestly, she would have deleted those messages from her cell phone. That of course raises the question why, since they were there, she omitted them. Whether or not there was an ulterior motive, the real issue is this: were those flirtatious and salacious messages indeed sent by the complainant herself? If so, this would belie her claim that she was an unwilling participant in the exchange of the flirtatious messages. It is therefore imperative to look at those messages. They are many and will be found in “**Annexure E**” to this Report, being “ Messages Omitted by the Complainant”.¹⁴ For the convenience of the Tribunal, the respondent’s lawyers, as the party that had alleged the omission, were directed to tabulate them again, verbatim and without any comment; the result was Annexure E,

¹⁴ These messages were originally filed of record by the respondent’s attorneys in Respondent’s Supplementary Bundle (Respondent’s Vol 5?) pages 1539 to 1590

which has been checked for accuracy. To avoid burdening the Report, we therefore only tabulate a few as examples:

Complainant: Foreplay kindles

Complainant: (responding to earlier message of Half insertion)

Before ihlati litshe kuqala kancinci **Translation: Before a bush burns to the ground a small part of the bush starts to burn)**

Vol. 3 p 1257; Translations Vol 3 p 1326

Complainant: Uyabona ndiyenzile obuyifuna (3 laughing emojis)

Translation: You see that I did what you wanted. Vol 3 p 1168,

Translation Vol 3 p 1287.

Complainant: Yazba mna xa ndifunaimali uzandinika (emoji covering face) **Translation: I wonder when I want money would you give?**

Respondent: Life is not about money ma'am **Vol 3 p 1170**

Translation Vol 3 p 1288

.....

.....

Respondent: Usacinga **Translation: Are you still thinking**

Complainant: No ...am cooking on the side

Complainant: Oven temperature

Vol 3 p 1191 Translation Vol 3 p 1296

.....
.....

Complainant: Xala undixelele lostep (First tell me about the first step) one tht you are talking about ...

Respondent: Position one

Complainant: Being? Stop riddles (one laughing face emoji)

Respondent: Whichever position might come first???

Complainant: I'll go with whichever but there's a word I like "Surprise"

Vol 3 p 1200 Translation Vol 3 p 1297

56. Given the importance of the point raised that the complainant deliberately omitted some messages belying her case, we did not want to paraphrase her relevant evidence under x-examination, but preferred to present it as it is.¹⁵ Her evidence shows that she did deliberately omitted flirtatious and salacious messages that came from her.

"ADV SIKHAKHANE SC: Before we get to the paragraph can I ask your honest view on this, and I am not accusing you. I am saying in this statement that you filed what you talk about are messages from the respondent.

¹⁵ 21-01-2025 Transcript, pages 41- 48 top

MS MENGÖ: Yes.

ADV SIKHAKHANE SC: *In fact you do not talk much about your own, what you said or what you sent.*

MS MENGÖ: Yes.

ADV SIKHAKHANE SC: *And what that means is that you do not completely set out the entire context of your conversations.*

MS MENGÖ: Yes.

ADV SIKHAKHANE SC: *You say less about what I think are your own graphic statements that you made.*

MS MENGÖ: Yes.

ADV SIKHAKHANE SC: *In fact there is nothing as graphic as what you have told us that gives the impression you also sent salacious messages.*

MS MENGÖ: Yes.

ADV SIKHAKHANE SC: *Is there a reason, before I put my proposition to you, is there a reason you conceal those salacious statements from you.*

MS MENGÖ: *No, I have no reason.*

ADV SIKHAKHANE SC: *Can I put it to you that the reason is that you did not want those determining the Panel at that point to know that you too sent things what were disgusting.*

MS MENGÖ: No, that is not true.

ADV SIKHAKHANE SC: Then tell me why did you conceal the salacious things you said and you say the salacious things that the respondent said?

MS MENGÖ: I have no reason

ADV SIKHAKHANE SC: I will argue in the end ma'am that you did not put those because it was they were not in accordance with the image you want to show that you were not saying disgusting things.

MS MENGÖ: I am not going to dispute that.

ADV SIKHAKHANE SC: Do you agree with me then that when you do that, when you make such omissions you become untruthful?

MS MENGÖ: I do not agree.

ADV SIKHAKHANE SC: Ma'am, when you omit important points in a serious complaint like this, I am not calling you a liar yet, I am saying when you do not put the entire picture, when you omit important statements you deceive, whether you intend or not, but you deceive.

MS MENGÖ: Yes

ADV SIKHAKHANE SC: In fact ma'am in the statement we are going to go through you do not write that at some point in these discussions you wanted half insertion. It means, as I understand your poetry with the respondent, the insertion of the penis halfway.

MS MENGÖ: Okay.

ADV SIKHAKHANE SC: I am saying you do not, we would not know reading here, you do not mention those here.

MS MENGÖ: Okay.

ADV SIKHAKHANE SC: In fact we do not know when we read here that at some point you said you have no particular sex position but you like to be surprised.

MS MENGÖ: Yes, I remember.

ADV SIKHAKHANE SC: In fact you do not write that in these conversations the objectification of women as stoves to be warmed for lustful men, as meat to be marinated comes from you.

MS MENGÖ: Yes.

ADV SIKHAKHANE SC: You do not mention here the sexual innuendo in our own talk in the chats between you and the respondent.

MS MENGÖ: Okay

ADV SIKHAKHANE SC: Is that a yes?

MS MENGÖ: I will, because I still I have not seen what you are talking about and then I would say I agree with what you saying. I am noting it. I think that is the right word.

ADV SIKHAKHANE SC: *No ma'am, you are not going to be [indistinct] with me, you are not going to do that to me. I am saying to you those details about you ... [intervenes].*

MS MENGÖ: Yes

ADV SIKHAKHANE SC: *That poetry where you objectify women as stoves to be warmed and meat to be marinated for lustful men come from you. You do not write that in this statement.*

MS MENGÖ: Yes

JUDGE PRESIDENT NGOEPE: Ms Sikhakhane sorry to interrupt.

ADV SIKHAKHANE SC: Thanks Chair.

JUDGE PRESIDENT NGOEPE: Which statement are you ...
[intervenes]

ADV SIKHAKANE SC: *I am not, it is here. I am reminding her of her own evidence.*

JUDGE PRESIDENT NGOEPE: *It is the complaint itself?*

ADV SIKHAKHANE SC: *The complaint itself.*

JUDGE PRESIDENT NGOEPE: *Okay.*

ADV SIKHAKHANE SC: *I am talking about what is not in the complaint.*

JUDGE PRESIDENT NGOEPE: *Okay.*

ADV SIKHAKHANE SC: *Volume 1.*

JUDGE PRESIDENT NGOEPE: Alright. For a moment I thought you were talking about the missing statement.

ADV SIKHAKHANE SC: No.

JUDGE PRESIDENT NGOEPE: It is this one in volume 1.

ADV SIKHAKHANE SC: Yes

JUDGE PRESIDENT NGOEPE: Thanks

ADV SIKHAKHANE SC: I am saying to you Ms Mengo you omit these details that show you poetically objectifying women or talking about your sexual positions that you prefer or you do not prefer, that you prefer a surprise as a sex position, you do not mention them here.

MS MENGO: Yes.

ADV SIKHAKHANE SC: You do not put them because you want to communicate that only the respondent was saying or making salacious statements to you.

MS MENGO: Yes.

ADV SIKHAKHANE SC: And ma'am you will agree with me that without those being put one does not know that you were also reciprocating in the disgusting objectification messages.

MS MENGO: Yes.

ADV SIKHAKHANE SC: *And I put it to you that in keeping with our discussion about truthfulness, omitting those essential parts is not being truthful.*

MS MENGO: Yes.

ADV SIKHAKHANE SC: *We agreed that a person who lies is not a liar is it not?*

MS MENGO: Yes.

ADV SIKHAKHANE SC: *And we agreed that a person who lied under oath whether it is your or the respondent is guilty of perjury.*

MS MENGO: Yes.

ADV SIKHAKHANE SC: *You agree with me that at some point you actually yourself, and let me put the version of my client right now to you because, just to be fair to you is that certain chats and some of them, yes, are salacious took place between the two of you. Right?*

MS MENGO: Yes.

ADV SIKHAKHANE SC: *Do you agree with me now that at some point you were exchanging equally salacious messages?*

MS MENGO: Yes.

ADV SIKHAKHANE SC: *You agree with me that at some point as we will go to your statements probably tomorrow it is you who says*

[speaking in vernacular], sorry, I want you lusting, sorry ma'am, I want you lusting to that you will be energised.

MR JONASE: *I want you, the last word?*

ADV SIKHAKHANE SC: *Lusting, desiring.*

MR JONASE: *Okay.*

MS MENGO: *Yes.*

ADV SIKHAKHANE SC: *Lastly, I put it to you, you did not put these statements because they are not in line with the image of an innocent person you want to present.*

MS MENGO: *Yes.*

ADV SIKHAKHANE SC: *And you have agreed with me that you were doing this in order to conceal the fact that you too sent salacious messages?*

MS MENGO: *Yes.*

57. On behalf of the complainant, we were referred to the Constitutional Court judgment in the McGregor matter.¹⁶ The court stated, amongst others:

“[43] Furthermore, we know that...sexual harassment is concerned with the exercise of power and in the main reflects power

¹⁶ McGregor v Public Health and Social Development Sectoral Bargaining Council and Others 2021 (5) SA 425 (CC) paragraphs [43-45]

relations that exist both in society generally and specifically within a particular workplace

[44] *Courts have in the past emphasised the importance of considering such power dynamics in sexual harassment matters. In Campbell Scientific Africa the court was dealing with unwelcome and inappropriate advances directed at a young woman twenty years the perpetrator's junior, whose employment had placed her alone in his company.*“ (Own emphasis).

The court too points to the matter of power relations and deplores what we all must deplore, namely, sexual harassment flowing from that. That said, and because each case depends on its own facts, the case is distinguishable from the present. It was dealing with a case in which the respondent had denied the alleged sexual advances, which were rejected by the complainant; and, as the emphasis shows, the court was referring to unwelcome advances. The court was therefore not dealing with a defence that the conduct was welcome, as in the present case. Moreover, in the present case, we are dealing with written WhatsApp messages, which speak for themselves, some of which, as already indicated, came from the complainant herself and were flirtatious and salacious, and which, importantly, she did not deny authoring and sending.

58. On the other hand, we were, on behalf of the respondent, referred to a judgment of the Labour Appeal Court¹⁷ in the Amathole District Municipality case the facts

¹⁷ Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others (PA9/2018) [2022] ZALAC 119; (2023) 44 ILJ 109 LAC; [2023] 2 BLLR 103 (LAC) (10 November 2022).

of which are almost on all fours with the present; that is, regarding the sending of flirtatious and salacious messages initiated by a complainant herself in a sexual harassment case. A female employee lodged a case of sexual harassment against her employer (the Municipality), the harassment having been allegedly perpetrated by a fellow employee, a Mr Fredericks, who was the senior to the complainant in the work place. The complainant succeeded before the Conciliation Commission and the Labour Court, after which the employer appealed to the Labour Appeal Court. The appeal succeeded. The court noted that the complainant argued that she “*did not resist because she feared dismissal or because Mr Fredericks was her boss. She testified that ‘maybe because of his authority over me I then would give him some latitude’*”.¹⁸ Para [4] The court found that there was no sexual harassment in that the interaction was consensual; it found that there were flirtatious and salacious messages from the complainant herself. For convenience, we take the liberty of quoting generously from the judgment:

“[47] Almost concurrently with these events, the employee (complainant) wrote to Mr Fredericks, on 24 March 2015, stating that ‘U knw what I m hungry for u nw serious sweety, what’s ur plans for today’. This text message is impossible to reconcile with the harassment that the employee was supposedly experiencing at the hands of Mr Frederick during this same timeframe. Why would the victim of such conduct communicate with her tormentor at a level seemingly unrelated to work? And, more

¹⁸ Amathole District Municipality case, *supra*, para [4]

particularly, why would she use the affectionate term 'sweety' when addressing him in a message?

[48] *What's more damning, is that when the employee was confronted with this SMS, she deliberately misread it in the following manner 'You know what I am hungry for ('u' omitted) news, ('nw' interpreted as news) serious, ('sweety' omitted) what is your plan for today?'. She sought to explain that the SMS was about the news of two ladies who were fighting about one of the senior managers. It turned out that, that incident took place in June and therefore, the SMS composed nearly three months earlier in March of that year could not have had a bearing on the incident. This was completely fatal to the employee's credibility as were her attempts to put an innocent slant to her message of 24 March 2015 as it was patently untruthful. Ms van Staden who represented the employee in the appeal, read the contents of the SMS, correctly in my opinion, as follows: '[y]ou know what I am hungry for you now serious sweety what's your plans for today'.*

[49] *What's even more telling is that in her response to emails from Mr Fredericks the employee used affectionate expressions like 'ok my love' 'honey' and 'sweetie'. When confronted with these affectionate words which she used, she stated that she used them because it was the language of Mr Fredericks. These written conversations, in my view, are inconsistent with the*

response of a party who is being subjected to unwelcome sexual advances by her manager.” (Own emphasis).

59. An objective reading of Ms Mengo’s messages referred to above, as well as her above evidence, belie her version that she was an unwilling participant. She was of course entitled at any time, and for whatever reason, to terminate the flirtation, but that could not be done with retrospective effect; one cannot undo what consensually happened in the past. The complainant had the choice to ignore the respondent’s messages; she could have blocked him or could have told him directly that she was not interested in him and that he should leave her alone; after all, as she herself later said, there was a time when she claims she asked the respondent to meet her in East London so that she could tell him in person that his messages were not welcome – more about this later.

Nobody expects Ms Mengo to remember and set out every single WhatsApp message; but what is noteworthy and worrisome is that she omitted, on three separate occasions, a number of messages of a particular pattern, namely, those which were flirtatious and salacious and initiated by herself. Moreover, her conduct in doing so showed lack of honesty. This detracts from the weight of her evidence that the respondent’s WhatsApp messages were unwelcome to her.

(iii) Complainant’s flirtatious and/or sensual responses to respondent’s messages

60. It was argued on behalf of the respondent that instead of responding dismissively or not responding at all, there are instead instances where the complainant responded flirtatiously to the respondent’s messages. Here too the

Amathole District Municipality judgment is apposite. Such responses are also many, but not all were omitted. They are yet another category of messages which, it is argued, belie the complainant's claim that the respondent's flirtatious messages were not welcome. The complainant was also extensively cross-examined on them, which, of course, she did not deny sending. As examples, we reproduce verbatim below some of them (with translations where applicable); others are to be found in Vol I of the record, and still more in **Annexure E** hereto (as messages that were omitted by the complainant in her statement of complaint).

Complainant to Respondent's complementary message that she was keeping herself well: *I maintain myself well....exercises keep me younger*

Respondent: *Keep it that way*

Respondent: *Ndzaukhe ndiyijonge. Translation: I will look at it*

Complainant: Responds with five laughing face emojis

Respondent: *How would you prove it?*

Complainant: *Nguwe ofuna uyijonga my part would be giving you a task* **Translation: You are the one who wants to look at it** *my part would be giving you a task*

Respondent: *Come out clear! How*

Complainant: *A chance for you uba uyijonge. Translation: Chance for you to look at it*

Complainant: *Then you determine what you are looking for*

Respondent: *Not easy hey*

Complainant: Responds with one face covering monkey emoji

Respondent: *Truth be told I have no reason to doubt your word*

Complainant: *That means a lot...its hard to trust these days*

Messages: See Vol.1 pages 25 – 26: Translations Vol 3 p 1286

Respondent: *And long Tom is ok for you?*

Complainant: *Ofcoz*

See Vol. 1 page 34

Respondent: *I will be happy (smiling emoji)..... and give you a ... (hugging emoji)*

Complainant: Two laughing emojis and: *How is that possible*

Respondent: *It could*

Respondent: *Depends*

Respondent: *Please declare upfront*

Respondent: *Is not a shame*

Complainant: *Somethings are better when not said...sawubona*
(Translation: we will see)

See Vol. 1 page 40; Translation Vol 3 p 1296

Respondent: *Ungathi ufunu ku bethwe phezulu wena* **Translation: It seems as if you do not want us to go in depth into things**
Translations: Vol 3 p 1326 ; [NB: also see later below]

Respondent: *Half insertion*

Respondent: *Ewe* **Translation: Yes**

Respondent: *I mean eventually*

Respondent: *Slowly?*

Complainant: *Please*

See Vol. 1 page 43

Respondent: *Vaccine*

Respondent: *If you wanna overtake you may do so*

Respondent: *Or score more points*

Complainant: *Will do ONLY when it is safe to do so (three emojis covering faces)*

See Vol. 1 page 45

Respondent: *Position one*

Complainant: *Being??*

Stop riddles (one laughing face emoji)

Respondent: *Assuming melting occurs evenly*

Complainant: *That is not disputed*

Respondent: *So position one for action*

Complainant: *Everything has a name*

See Vol. 3 pages 658-659

Respondent: *Whichever position might come first?*

Complainant: *I will go with whichever....but there's a word I like "Surprise"*

Respondent: *Lol*

Respondent: *But you can't not have a favorite position*

Respondent: *Clearly at the level of nauthy talk/chat*

See Vol. 3 page 660

Respondent: *Maybe a few pics you send may serve as halfway proof*

Complainant: *Earn it*

Respondent: *You are tricky*

Complainant: *Part of the task*

Respondent: *Go halfway now, then leave the rest for another day*

Complainant: *Will do*

See Vol. 3 page 674-675

Respondent: *Are you quick to melt*

Respondent: *Talk to me*

Complainant: *Depends*

Respondent: *On ...*

Complainant: *Noam cooking on the side*

Complainant: *Oven temperature*

Respondent: *If you happen to have melted step one?*

Complainant: *It wud mean the marinade worked before the heat*

Respondent: *True*

See Vol. 3 page 695-696

Respondent: *If you wanna overtake u may do so*

Complainant: *Will do ONLY when it's safe to do so*

Complainant: *Hay*

Complainant: *Uyandiphazamisa...and igazi lam liyatshisa ngok mandiqale ndgqibele* **Translation: You are disturbing me...and now I am getting heated up. Let me finish this first.**

Three messages deleted

Respondent: *Before you focus on your studies yithi qhwiii*

Translation: Before you focus on your studies make a quicky

Complainant: Responds with three monkey covering faces... *hlala ubawa...I Like it like that kwenzele ufile unomdlaaaaaa*

Translation: You always want to be intimate...I like that because when you come here you will be interested/ Keep on drooling ... I like that so that when you arrive you will still be interested

See Vol. 3 pages 1228 – 1229; Translations Vol 3 p 1312

Respondent: *Half insertion*

Respondent: *Ungathi ufunu ku bethwe phezulu wena* **Translation: It seems as if you do not want us to go in depth into things)**

Complainant: *Foreplay kindles* [NB: this was one of the messages omitted in the complaint statement; see “**Annexure E**” to the Report about others]

Respondent: Responds with five monkeys covering face emojis)

Respondent: *Ewe*

Respondent: *I mean eventually*

Complainant: responding to earlier message of half insertion:

Before ihlati litshe kuqala kancinci **Translation: Before a bush burns to the ground a small part of the bush starts to burn.** [NB: this was one of the omitted messages]

See Vol. 3 p 1257; Translations Vol 3 p 1326

Respondent: *I must come and give you a boost*

Complainant: *When I am strong to stand on my feet*

See Vol. 3 p 1259

The above messages, and others, indicate that the exchanges were not unwelcome. Apart from them, the following piece of evidence by the complainant, which was with reference to her queries to the respondent why he deleted before she could read it, is fatal to her argument:¹⁹

SIKHAKHANE SC: *Now that you know that he sends things you do not like Things that hurt you why do you care (if he deleted before you read)*

Ms Mengo: *I have no response, I have no answer.*” One of the messages in this respect was: *bhale ucime ... kodwa uyayaz ndibusy*
Translation: You are writing and deleting but you know I am busy. Translation Vol 3 p 1300

¹⁹ Transcript 21/01/2025 page 97 bottom to page 98 top

Yet a similar one: *Cimelan ndingekafundi* **Translation: Why are you deleting texts before I read them? Vol 3 p 1319**

The above shows that the complainant was willing and eager to read and curious as to the contents of the deleted messages; this was totally irreconcilable with the attitude of someone to whom the messages, which she knew were flirtatious, were unwelcome.

(iv) Reference to emojis

61. The exchange of WhatsApp messages occurred over a period of time. It was argued for the respondent that the exchange was littered with a number of emojis rolling with laughter, sent by the complainant as responses to respondent's flirtatious messages. Such a reaction, it is argued, is not consistent with a rebuff and does not show unwillingness to participate in the exchange of emojis. One counts no less than 40 such emojis as one goes through the WhatsApp messages in Volume I of the record; they are easy to pick out.

Conclusion: Whether the WhatsApp messages admitted by the respondent were unwelcome

62. The complainant's version that the flirtatious messages sent and admitted by the respondent were not welcome – barring the rejected one referred to in the next paragraph – is not credible and falls to be rejected for the reasons extensively discussed above. We briefly, for convenience, sum up the reasons:

- 62.1 The complainant clearly lied, with severely damaged her credibility.
- 62.2 The fact that the complainant herself sent some flirtatious and/or salacious messages; this belies the fact that the respondent's messages were not welcome.
- 62.3 The fact that the complainant deliberately left out of her statement of complaint several flirtatious and salacious messages she had sent; this too belies the fact that the respondent's flirtatious messages were not welcome. She conceded in her evidence referred to above that she deliberately left them out. Secondly, leaving out messages damaging to her case showed lack of honesty.
- 62.4 At one point she actually queried the respondent why he deleted a message before she could read, knowing that she was too busy.
- 62.5 The fact that there is throughout a very large number of emojis from the complainant rolling with laughter in response to the respondent's flirtatious messages similarly belies the fact that the respondent's messages were not welcome.

As indicated, individually each one of the above points, let alone cumulatively, is fatal to the complainant's contention that respondent's flirtatious messages were not welcome to her. This brings us to the respondent's message, to be sexually intimate, that was not welcome to the complainant.

THE WHATSAPP MESSAGE (TO BE SEXUALLY INTIMATE) THAT WAS NOT WELCOMED BY THE COMPLAINANT.

63. It is common cause that respondent's WhatsApp message suggesting that the parties could be sexually intimate in East London was politely rebuffed by the complainant, a rebuff which the respondent said he accepted and did not press that aspect further.

64. It is necessary to set out at least some of the relevant WhatsApp messages exchanged for context.

Complainant: *NdiseMontikungangcono sijongane* **Translation: I am in East London it would be better if we could meet to face**
Translation can be tmrw or the other day

Respondent: *Khuko ntoni ... Emonti (Why are you there ...in East London)* (and sends a picture)

Complainant responding to the picture: *Ucute lonto (You are so cute indeed)*. (Asked during cross-examination what she meant by this compliment, the complainant said the respondent looked different to now; he did not have blemishes like now, and looked young, with a clear complexion. Asked why she responded to him that way, she said she had no answer).

The above messages are found in **Vol 3 p 1206; Translations Vol 3 p1302**

Thereafter other messages followed, and then:

Respondent: *You reckon kungancazelwana (we can be intimate)*

Complainant: Responds with 3 emojis covering faces (shyness or embarrassment)

Respondent: *Sendibuza nje (I was just asking)*

Complainant: *Indumiso (.....) 1 v 1 just the first word xhosa bible iyibeka kakuhle (.....);* also responds with an emoji of shyness or embarrassment.

The messages are found in **Vol 3 p 1208, Translation: Vol 3 p 1303**

*Respondent (in answer to the Bible reference): Ithini (**what does it say**) plz remind me*

A discussion followed about the Bible verse, and other messages followed:

Complainant: *Sijonkane not Ncazelana (**We should look at each other not be intimate**)*

Respondent: *What if we melt, which is not impossible*

Complainant: *Wena undenza shy (with a shy emoji) (**you make me shy**)*

Respondent: *Lol (according to Dr Docrat this stands for laugh out loud)
..It is not impossible (to melt)*

Complainant: *It is impossible.*

Messages found in **Vol 3 pp1210 to 1211; Translations pp 1305 et seq**

A message was deleted which the complainant said she could not remember, and then the following:

Complainant: *Sowubila kwangok kuseEarly (**Interpretation: Are you already sweating so early**)*

Respondent: *Uyabilisa (**Interpretation: do you make one to sweat?**)*

Messages found in **Vol 3 pp 1212**

After some exchange of messages, the following ensued:

Respondent: *Ok ke (**Ok then**) we may meet ang just converse without going the intimate (**) route (** = two emojis symbolizing sexual intimacy)*

Respondent: *Ufuna nje ubuhlobo? (**Do you want mere friendship?**)*

Complainant in response: *Five emojis expressing embarrassment*

Respondent: *Cwaka (with a corresponding emoji) (**Silence**)*

Complainant: *Three laughing emojis and aziko mpendulo (**No answer**)*

Respondent: *Never this?*

Complainant: *Ndinezenzo kuphela (I only have actions)*

Respondent: *Uyenza qha and kubonwe ngoko (Do you just act then will see then)*

Complainant: *Finish*

The messages are found in **Vol 3 pp 1215 Translation Vol 3 p 1307**

After some discussion, this followed:

Respondent: *Fikela phi (Where will you be)*

Complainant: *My house*

Respondent: *Any privacy*

Complainant: *No*

Respondent: *Or sauncokolela e ofising (Or will we have the conversation at the office?)*

Complainant: *Better*

The messages are found in **Vol 3 pp 1216 to 1218; translations pp 1308 to 1309**

With reference to possibly meeting at the complainant's house Cambridge area:

Respondent: *What if kuyanyibilikwa (What if something happens)*

Complainant: *Haaay uzazibamba (No you will control yourself)*

Respondent: *Wena? (You?)*

Complainant: *Ndiyakwazi (I can) Interpretation*

Messages found in **Vol 3 pp 1218 to 1219. Translations p 1309**

Respondent: *Okke (Ok then) Interpretation*

Respondent: *Let me oblige*

Complainant: *Lemme iron my uniform.*

The messages are found in **Vol 3 pp 1219**

65. It seems the respondent, buoyed by the flirtatious and salacious messages exchanged with the complainant over a period of time, wanted to take matters to the next level, namely, to be intimate with her, particularly after she had asked to meet with him in person in East London. It seems he misread the situation; the fact that the complainant did not disclose what the purpose of meeting in person was, did not help. Yet as the meeting was being discussed, both parties kept on exchanging highly flirtatious and salacious messages (see above) and, when the complainant finally told the respondent that he would have to control himself, the respondent accepted that there was no chance of becoming intimate in East London: “*Ok I will oblige*”; and the complainant shut the door: “*Lemme iron my uniform.*” With all that, that particular issue was closed.

66. In his evidence, the respondent admitted being desirous of being intimate with the complainant in East London, but said he accepted the rejection of that idea by the complainant. In his evidence, he described that rejection or rebuff as being specifically in relation to being sexually intimate, but not as a rejection of a flirtatious relationship. The gist of the complainant’s evidence was that the purpose of meeting with the respondent in East London was to confront him and tell him that his flirtatious messages were not welcome. She was, however, under cross-examination, not able to satisfactorily explain why she did not simply send a message; moreover, why she chose to meet in person someone she said she was scared of dismissing, and how she suddenly found that courage.

67. The respondent’s continuance with the flirtatious messages post the East London episode, was in line with his understanding that the rebuff was only in

relation to sexual intimacy, in respect of which he had accepted the rejection. Of course, the complainant's rejection of intimacy had to be respected and accepted, notwithstanding her flirtatious and salacious messages; she owed no explanation to anybody for the rejection. However, two issues of credibility arise.

67.1 Firstly, although she said the reason for the meeting was to tell the respondent where to get off, she admitted that that could have been more easily done by phone:

"ADV SIKHAKHANE SC: Telling him off on the phone would be much easier

MS MENGO: I hear you

ADV SIKHAKHANE SC: I will assume that is a yes

MS MENGO: Okay

ADV SIKHAKHANE SC: And that okay is a yes, therefore instead of, with the courage you had amassed and I believe you, you say you had been fed-up, you were tired of disgusting things, as you called them, some of which were said by you but you were tired of those from him.

MS MENGO: Yes

ADV SIKHAKHANE: That courage was not used to tell him when he is not even in front of you.

MS MENGO: Okay.²⁰

This belies her argument that she was afraid of telling the respondent all along that his flirtatious messages were not welcome.

67.2 Secondly, the hollowness of her evidence that flirtatious messages were not welcome (as opposed to sexual intimacy) was laid even more bare by her continued practice, beyond the East London episode, to send flirtatious and salacious messages to the respondent. Without burdening the record, some of those messages will be found in Vol 3 pages 1226 et seq, after 22 June 2021, such as this one by the complainant on 23 June 2021: “*Uyandiphazamisa....and igazi lam liyatshisa ngok mandiqale ndgqibele le* (You are disturbing me nowand now I am getting heated up. Let me finish this first”; one other message being the well-known drooling message. As further examples, we tabulate below a few more flirtatious messages exchanged after the East London episode:

Vol 3 pages 1242 to 1243 (7 July 2021):

Respondent: “*Please share. Helicoper ntoi*”

Complainant: Video shared

“*Evening*”

Respondent: “*Hello sisi. Thanks.*”

Complainant: “*Plsr (pleasure) Daddy*”

Respondent: Halo emoji, Shy/Blushing emoji

“*Biza Kamnandi*” **Page 1318 of Translation – “you say it nicely”**

²⁰ Transcript 22 - 01 – 2025 line 13 to p 18 line 1

Complainant: Responds with laughing emoji and blushing/shy emoji

Respondent: Responds with heart drop emoji. “*Reciprocate Pls*” (emoji)

Vol 3 – page 1252 (15 July 2021):

Respondent: Message deleted.

Complainant: Responding 3 laughing emojis to respondent’s drooling message.

Other messages followed, and then:

Vol 3 – page 1257 – 1258 (18 July 2021):

Respondent: “*Ingathi ufunu kubethwa phezulu wena*” plus thinking and shy emoji

Translation “*Its seems as if you do not want us to go in depth into things*” **p 1326**

“*Half insertion*”.

Complainant: “*foreplay kindles*” plus 2 laughing emojis

Respondent: Responds with 5 eye hiding monkey emojis

“*Ewe*” “*I mean eventually*”

Complainant: Responding to JP’s “*half insertion*” message says:

“*Before ihlati litshe kuqala kancinci*” **Translation page 1326:**

“*Before a bush burns to the ground a small part of the bush starts to burn*”

Complainant: Responding to respondent’s “*I mean eventually*” message:

“*I understand*”.

Respondent: “*Slowly?*”

Complainant: “*Please*”

Some messages were deleted, and then the below followed:

Complainant: (To respondent’s message of “*And long Tom is ok for you*”): “*Ofcoz*”

Respondent: 3 tongue out emojis.

68. In light of the aforesgoing, it is our view, firstly, that there was a rebuff of the respondent’s request for intimacy in East London, which he accepted; secondly, that consensual flirtatious messages continued to be exchanged thereafter.
69. It is therefore our finding in this PART II that:

69.1 the WhatsApp messages admitted and sent by the respondent to the complainant, barring the one for intimacy in East London, were not unwelcome to the complainant;

69.2 the WhatsApp message sent by the respondent to the complainant for sexually intimacy in East London was rejected by the complainant, but that the respondent accepted the rebuff, and that thereafter a consensual exchange of flirtatious and salacious messages continued from both sides.

Having made the above findings, we now proceed to PART III to deal with the rest of the issues raised in the complainant's statement of complaint, namely:

- The alleged office incident
- The disputed pictures
- The disputed WhatsApp messages.

PART III

THE ALLEGED OFFICE INCIDENT, THE DISPUTED PICTURES AND THE DISPUTED WHATSAPP MESSAGES

The alleged incident of 14/15 November 2022 in respondent's office.

70. There was an allegation by the complainant that an incident took place in the respondent's office. At one point it was unclear whether it was alleged to have

happened on the 14th or the 15th November 2022. It is best to reproduce the relevant part of the complainant's statement of complaint:

"[20] It was on Monday, 14 November(2022) he called me to his chambers and asked me why am I wearing colourful clothing when it is a working day, I told him I am not going to court but my colleague is. He said he was concerned about the decorum and not saying my clothes were not appropriate. That was not offensive I must say and I was not the only one present on the day. A day later he sees me walking down the corridor and imitates how I walk, didn't comment I walked past instead. On my way back (Court's floor in Mthatha is tiled so you ought to hear who walks past if you know footsteps). He knew my footsteps and he stood at the door and calls me in. I noticed that his secretary was not in the office, got in, and he showed me his trouser and said 'do you see the effect that you have on me.' The question that followed was 'awufun' uyimunca' loosely translated as ('don't you wanna suck it'). He unzipped his pants and attempted to draw his erect penis and I ran out of the office. I went home and thought about what had happened then decided that on the following morning I will tell him where to get off and if needs be I'll request footage that showed me getting in his office and going out.

[21] When I got to work on the day, Matrix system was no longer working and we were told that everything was wiped out. I lost

hope then as I was not going to have any evidence that I went to his office.”

It will be recalled that this statement was deposed to on 12 January 2023. Regarding the issue that everything was wiped out, the affidavit by Judge B R Tokota dated 19 February 2023²¹ is apposite. He was appointed to act as a Deputy Judge President at that court for the period 14 to 18 November 2022; that is, during the period of the alleged incident. He was again appointed to that acting position for the period 1 December 2022 to 31 March 2023. It was in this period that he received rumours about the above allegation. He then decided to act, as a concerned judge and an Acting Deputy Judge President. He confronted the respondent, who denied the allegation. Thereafter he took steps, after securing the required permission, to watch the footage of both the 14th and 15th November 2022 together with the court’s security officer. He says there was nothing worth mentioning about the footage of the 14th (typing error “March”); the 15th November available footage did not at any stage show the complainant entering the respondent’s chambers; more about the recording later.

71. The respondent denied the above allegation. In his affidavit deposed to on 24 March 2023, he said the following after first setting out the events of 14 November 2022:

²¹ Copy of the affidavit is found in Vol 1 pp 132 to 134

“37.5 On 15 November 2022, from the time I arrived in my chambers around 09h00 until I left around noon, I had no interaction whatsoever with Ms Mengo.

37.6 It should be possible for the CCTV footage of 14 and 15 November 2022 which I believe, will bear me out, to be obtained.”

The footage was indeed obtained in due course, and did not show the complainant entering the respondent’s office; more about this later.

Regarding 15 November 2022

72. The impression that the incident happened on 15 November 2022 arose from the fact that, the complainant, in her statement, after narrating the events she said happened on the 14th, went on to say that the incident happened a day “later”, which could of course only have been 15 November.
73. As mentioned above, the respondent denied the allegation and, as part of his defence, said that he left that court around noon and could not have been there in the afternoon at the time the complainant alleged the incident had happened. To bolster his defence, the respondent extracted and submitted a Tracker Report on the movements of his vehicle of that day. It indicated that on 15 November 2022 he arrived at the Mthatha High Court at 8:35:45 and left at 12:00:32.²² It was pointed out that the respondent accounted for his above movements already approximately a year even before the Tracker Report was generated. Respondent tendered to call as witness the person who had

²² Respondent’s Consolidated Bundle, p 201, and Respondent’s Bundle Vol 1 pp 199 - 201

generated the Tracker Report; this was not done as the report was not in dispute and, in any event, as will appear below, the complainant later moved from 15 to 14 November.

74. Given the above objective and real (recorded) evidence, and the fact that the complainant later said she was uncertain whether the alleged incident happened on the 15th or on the 14th, the 15th November 2022 falls out of the picture; however, the 14th remains as a possible date.

14th November 2022

75. On 8 October 2024 complainant's legal representatives wrote a letter to the Secretariat of the Tribunal, advising that the alleged incident could have happened either on 14 or 15 November 2022. Later, in her affidavit deposited to on 8 October 2024, paragraph 11 thereof, the complainant stated:

*"I instructed my legal representative to note that to the best of my recollection the incident of gesture toward the pants happened **either on the 14th or 15th November 2022, during the course of the afternoon.** (Complainant's own emphasis). I provided the approximate time, as I recalled that while the respondent's secretary was in her office the morning when he made a comment of my dress code and court decorum, she had left for the day and was not in her office when he called me into his office and gestured towards his pants."*²³

²³ Respondent's Bundle, Vo1 p 184

76. Both parties testified and were extensively cross-examined; their evidence is on record. A point came when the complainant's version settled for the 14th of November, and no longer for the 15th of November.

77. Apart from the oral evidence tendered, there are also certain objective facts on which this dispute can be resolved.

78. Ms Zintle Nkqayi, then respondent's secretary, was called as a witness for the respondent. As stated earlier, in her affidavit of 8 October 2024, the complainant states that while Ms Nkqayi was present in the morning during a remark about her dress code, "she had left for the day and was not in the office when (the respondent) *called me into his office and gestured toward his pants.*" (Our own emphasis). On the other hand, Ms Nkqayi's evidence was that the respondent returned to his office from lunch and other errands at about 15:20 that afternoon. Some lawyers, whom the respondent had to address that afternoon, then came in to see the respondent, after which they left the office. At about 16:15 she accompanied the respondent to the lecture venue, which was a courtroom, and returned to her office. From the respondent's return to his office at about 15:30 until he went into the lecture, the witness was in her office. The only brief time she left was to check if the audience was ready for the respondent, which was too brief a period and too close. She left for home only after ushering the respondent into the venue. She said had the complainant come into the respondent's office as she says she did, she would have seen her as she had to go past her office.²⁴ She was cross-examined in detail about her own movements, but insisted she was in her office, adjacent to the

²⁴ See 02 - 07 – 2025 Transcript page 13 line 21, to page 17 line 6,

respondent's, at all material times. Importantly, the Visitors Laptop Register, which recorded the arrival and departure of staff at the Court, shows that on that day the complainant left at 16:30, while the witness left later at 16:41;²⁵ in other words, it was not correct of the complainant to say the witness "*had already left for the day*" when she (complainant) went into the respondent's office that afternoon; on the contrary, it was the complainant who left before the witness, and not the other way round. The accuracy of the Laptop Register recording was not challenged; it therefore stands both as objective and real evidence. For ease of reference, a copy of the Visitors Laptop Register is attached to this Report as "**Annexure F**".

79. It was put to Ms Nkqayi that she might have gone to the toilet between the respondent's return to his office at about 15:20 and taking him into the venue, during which time the complainant could have come into respondent's office; the witness denied this. This hypothesis is based on the weird assumption that the witness must have gone to the toilet that afternoon, and at a particular moment in time!
80. Mr Prabagaran Naidoo: Director of Facilities and Security in the OCJ was called as witness by the leader of evidence. He is a security expert. In his capacity as such, he received a sealed video footage of the movements at the court on the relevant corridors for the 14th. The footage was watched by the evidence leader, Mr Naidoo and the legal representatives of the parties after which a joint minute was drawn up describing the movements; the minute was handed in as **Exhibit 5**, to be found in the Bundle of Exhibits. It showed no recording of the

²⁵ Copy of the Visitors Laptop Register is found i.a. in Respondent's Vol 1, p 171

complainant's movement entering the respondent's office that day. The following was Mr Naidoo's oral evidence in that regard:

"ADV MADONSELA SC: And there is no point where we see Ms Mengo being called, or rather, moving as though he (sic) was moving from 1, the direction of the JP's chambers, passing through JP's chambers, going to a chamber next door to chamber 1 and going to JP's chamber. No so:

*MR NAIDOO: That is correct.*²⁶

81. Mr Naidoo explained that the recording would be triggered once there was a movement, otherwise it would stop. Where it appeared it stopped, it meant there was no movement to trigger it into recording; the recording is triggered by a movement:

"ADV SCHEEPERS: And just for clarity. During the viewing of the footage, it looked like it skipped some parts or it paused for some parts of the video footage. Just for clarity that everyone understands, what is the reason for that.

*MR NAIDOO: As I stated earlier on, when there is no person or any movement, the footage would stop. It would stop recording and as soon as somebody comes into the frame and there is motion, it starts again. So it seems like there is a jump in the footage, or it was tempered with, but it is not the case.*²⁷

²⁶ 12-05-2025 Transcript p 57

²⁷ 12-05-2025 Transcript p 7

Reference has already been made to the uncontested affidavit of Judge Tokota.

It is clear that the evidence, the records, the video recording and the minute, all militate against the complainant having gone into the respondent's office, and therefore that the alleged incident took place.

The allegation that the respondent sent the picture of a man muffing a woman:

"H1-H2"

82. As already indicated, the respondent denied sending the complainant "*an image of a man muffing a woman*", being annexures "*H1 – H2*" to the complainant's affidavit. In his affidavit, later confirmed in evidence, the respondent, having analysed the annexures, went into details to support his denial, and submitted that the annexures appeared to be screenshots "*which were not sent to or received by (the complainant) they appear to be stickers/memes which she attempted to upload onto the message.*" Of course the respondent is not an expert on that. However, the evidence of Dr Vincent Mello, an expert with a doctorate degree in Information Communication Technology called by the respondent, was that the pictures were screenshots; this was not disputed by the leader of evidence, except that there was no agreement as to how the pictures ended up being screenshots; nor could one tell by whom or to whom were the stickers sent.²⁸

The allegation that respondent sent a picture of a penis: "K8"

83. In paragraph 17 of her statement of complaint, the complainant says that the respondent sent her "*an image of his penis but swiftly deleted after I had a*

²⁸ 04 – 07 – 2025 Transcript pp 4 to 5 top.

glimpse. My reply was ‘uyanya’ (you are shitting)”, with the respondent allegedly responding “uggiba kwam uchama” (‘once I finish urinating’). I never said anything thereafter” The complainant attached the two messages as annexure “K12” to her affidavit on page 51 of Vol I of the record. The respondent denied sending the alleged picture, or exchanging the messages contained in “K12” with the complainant. Several points were raised on behalf of the respondent to show that no such exchange took place between the parties. We do not intend to go into those details, but to mention only a few.

- 83.1 It is pointed out that “K12” is a screenshot without details as to by whom and to whom and when it was sent and received; a chat of an unknown date, no profile picture of the sender or the recipient depicted on the page.
- 83.2 It is also pointed out that there is a yearlong gap between the alleged exchange referred to in “K12” (which was on 27 June 2021) and the next message, also on “K12”, but which was issued a year later on 28 June 2022; and there are no threads between them. This is an obvious problem for the complainant’s version.
- 83.3 Twice under cross-examination, the complainant conceded that there were no conversations between the parties on 27 and 28 June 2021:²⁹

“ADV SIKHAKANE SC: Let me stick to the dates for now. You testified that on 27 and 28 June 2021, if I am right, there were no conversations, right?

²⁹ 22 – 01 – 2025 Transcript, p.20

MS MENGÖ: Yes

ADV SIKHAKHANE SC: And I am saying ma'am, help me, it was your testimony that on 27 June 2021 and 28 June 2021 there were no conversations between you.

MS MENGÖ: Yes, I remember."

This was also the respondent's evidence. The evidence of Dr Mello was that it could not be confirmed if annexure "K8" was from a WhatsApp as it was not consistent with the WhatsApp template or format; no name, or the typing space.³⁰ He had earlier given a detailed explanation for this conclusion.³¹ We were also referred to the affidavit of Captain Malcolm Greg Botha of the SAPS³² where, in paragraph 5.3.1 thereof it is said that the images H, H1 H2, K8, K12 and annexure N were not located in the respondent's mobile phone. Captain Botha described himself as functioning as a Digital Forensic Investigator at the Directorate for Priority Crime Investigation (DPCI). Counsel for the complainant incorrectly state, in their heads of argument, that Mr Moller's evidence supported the complainant's version; that is not correct. His evidence was that he could not tell whether "K8" came from the respondent's cell phone.

Regarding Annexure "K13" to complainant's affidavit

84. The complainant said that after the respondent had sent her the picture of a fit lady at 21:15 on 28 June 2021, she later sent the following WhatsApp to the

³⁰ 03 – 07 – 2025 Transcript, pp 37 to 38

³¹ 03 – 07 – 2025 Transcript p 35 line 9, to page 36

³² Found i.a. in Vol 5 pp 143 et seq. (A more legible copy is in Respondent's Bundle Vol 1 pp 436 to 458)

respondent [that is later but still on 28 June 2021] at 19:21, being annexure “K13” to her complaint: “*Ndicela uyeke undinyela Tata please. Andifani nabanye mna, I respect myself so ungakwazi for one undihlonipe ndingekapambani. Undikupa isimilo ngalento uyenzayo umdala nobamdala*” translated as: “*Please stop talking shit Sir, I am not like the others, I respect myself so can you for one (sic) respect me before I loose (sic) it. You make me loose morals with your behaviour being old as you are.*”³³ The respondent denied receiving such a message. He pointed out, amongst others, that it is a chat of an unknown date, has no picture of the recipient, and shows one tick indicating that it had not been received by the intended recipient. Furthermore, had “K13” been sent as alleged, it would have been placed differently. Moreover, as indicated in the evidence cited earlier and referenced, there was no communication between the parties on 27 and 28 June 2021. Dr Mello said that it showed the message “*was sent but it does not indicate that it was delivered or read*”.³⁴ Mr Moller, a cell phone expert, said he could not tell if this message came from the respondent’s cell phone.

The allegation that Annexure “N” (picture of a covered leg) was sent by the respondent to the complainant

85. The complainant said in paragraph 19 of her statement that on 27 May 2022 the respondent sent her the picture of his covered leg “*whilst in his Mthatha Division Chambers*”. The respondent denied doing so. In his affidavit, the respondent raised technical issues to show that that was not the case, and that the picture was screen grabbed by the complainant from his WhatsApp status

³³ Translation Vol 3 p 1277

³⁴ 03 – 07 – 2025 Transcript p 42

and sent to an unknown recipient. Dr Mello also questioned the authenticity of the alleged transmission. We have already also referred to Sgt Botha's affidavit. The issue is settle in favour of the respondent that he did not send the picture from his chambers to the respondent as on that day he was not in his chambers in Mthatha; he was not even in the Eastern Cape. He was in Johannesburg already on 26 May 2022 attending a meeting of the National Efficiency Enhancement Committee (a meeting of the Heads of Courts) that was held under the auspices of the OCJ; a copy of the attendance register signed by the respondent was attached to his papers and was not disputed. He flew back to East London on 27 May 2022; not to Mthatha.

The allegation that the respondent sent the complainant "Annexure P" the picture of a naked leg

86. In the same paragraph 19 of her statement, the complainant proceeded to say that also on 27 May 2022, the respondent sent her the picture of a naked leg, "Annexure P". Apart from the fact that it was pointed out that it was not consistent with the WhatsApp screen, respondent could not have done so as he had been in Johannesburg for a meeting, returning to the East London the 27th. Mr Moller was not able to support that the respondent sent the picture.
87. For the reasons given in this PART III, it is our view that *there isn't sufficient evidence to find, on a balance of probabilities, that:*
 - 87.1 the alleged office incident of 14 November 2022 took place;
 - 87.2 the disputed pictures and messages were sent by the respondent;

87.3 the disputed messages were either sent to or received by the respondent.

PART IV

CONCLUSION

88. In coming to our conclusion, we took into account the below.

88.1 The complainant clearly lied, which inevitably severely compromised her credibility; this was demonstrated when we dealt with the issue of the two statements, and in other areas such as why she would have wanted to meet with the respondent in East London to tell him to stop sending flirtatious messages only for her to thereafter still continue sending such messages (PART II). We make it clear that we did not disbelieve her simply because she was a woman. The finding that she did lie did immeasurable damage to her case.

88.2 For the reasons already fully canvassed, a finding has been made that in her statement of complaint, she omitted flirtatious and salacious messages that she herself had written and sent to the respondent – a point she conceded under cross-examination. Regrettably, this indicated lack of honesty on her part in formulating and pursuing her complaint (PART II); again, her gender was irrelevant. Her proven dishonesty also did immeasurable harm to her case.

88.3 Regarding the respondent's suggestion for sexual intimacy in East London: we find that, an objective reading of the messages exchanged

shows that the advance was ultimately rejected by the complainant, and that the respondent accepted the rebuff (PART II).

88.4 Regarding the allegations in PART III, namely, (i) the disputed office incident, (ii) the disputed pictures and (iii) the disputed WhatsApp messages: we have found no credible evidence to sustain the allegations against the respondent on a balance of probabilities in light of the technical, objective and real evidence canvassed, as well as given the complainant's demonstrated compromised credibility and lack of honesty.

89. It is therefore our view that:

90.1 As the respondent's admitted WhatsApp messages were not unwelcome to the complainant, the said messages did not constitute sexual harassment (PART II);

90.2 There is no evidence establishing on a balance of probabilities that the alleged office incident of 14 or 15 November 2022 took place (PART III);

90.3 There is no evidence on a balance of probabilities that the disputed pictures were sent by the respondent to the complainant (PART III);

90.4 There is no evidence on a balance of probabilities that the disputed messages were either sent to or received by the respondent (PART III).

We therefore conclude that the respondent is not guilty of gross misconduct, gross incompetence and/or gross incapacity under section 177 of the Constitution.

90. Despite our above findings, this does not dispose of the matter. On the respondent's own version and the evidence before us, there is a need to determine whether or not there is a contravention by the respondent of Article 5.1 of the Code of Judicial Conduct adopted in terms of section 12 of the JSC Act, and whether or not such contravention, if any, amounts to gross misconduct. This point was canvassed in the respondent's heads of argument and was also raised with the parties during oral argument.

91. It was, in effect, argued on behalf of the respondent that once a finding is made that there is no sexual harassment and therefore no gross misconduct, we should end there, notwithstanding clear evidence of, for example, misconduct. The argument is couched as follows in the respondent's heads of argument, dated 16 September 2025, paragraph 40 thereof: "*The attempt to broaden the case to treat article 5.1 as a competent verdict would offend the 'principle of legality' and undermine the Respondent's 'right to procedural fairness' by introducing issues that he has not been charged with.*"

92. The above argument is based on a wrong reading of the relevant provisions of section 33 (1) of the Act in terms of which the Tribunal is to execute its mandate, and of section 20 (4) and (5) of the Act in terms of which the Tribunal's Report should be dealt with by the JSC.

92.1 Section 33 (1) (b) (i), of the Act reads: "*Upon the conclusion of a hearing, the Tribunal must submit a report to the Judicial Service Commission, containingits findings and the reasons for them....*" (Own emphasis). The findings must be based on the recorded (**findings of**) facts etc. as per sub-section (1), something we have extensively

done. There is no basis to limit the findings to only whether or not there is gross misconduct, since a finding of guilty of misconduct *simpliciter* (i.e. misconduct not amounting to gross misconduct) is also included as one of the possible “*findings*” – note the plural – and it is therefore a competent finding.

92.2 In terms of section 20(4), if “*the Commission finds that the respondent is..... guilty of gross misconduct*” the matter is referred to the Speaker of the National Assembly and, in terms of section 20(5)(b) if the Commission finds that the respondent “*is guilty of a degree of misconduct not amounting to gross misconduct*” there is also a mechanism provided on how to deal with the matter. We are therefore strengthened in our view by the fact that in the event the JSC accepts any of the two alternative findings, the Act provides for how in each case the JSC should deal with the matter. It would be illogical to enable the JSC to derive benefit from a Tribunal’s Report in the event of a finding of gross misconduct, but deprive it of any benefit from the Report in the event of a misconduct *simpliciter*.

93. Finally, as long as any finding in terms of article 5.1 of the Code does not stray outside of the charges levelled against the respondent and the evidence canvassed, it would not be correct that a finding of misconduct in terms of article 5.1 of the Code would have broadened the case, resulting in undermining the “*Respondent’s ‘right to procedural fairness’ by introducing issues that he has not been charged with.*” It is our view that there would not be any procedural unfairness:

93.1 From the beginning and throughout the proceedings, the respondent's accusation of sexual harassment was based on largely the WhatsApp messages he sent to the complainant; all these messages were extensively and individually dealt with, both in-chief and during x-examination of the witnesses, including the parties. There is therefore no substance in arguing that there would be any issues that he would not have been charged with.

93.2 As it will appear later, a finding in respect of article 5.1 of the Code would be based on the respondent's own version of the flirtatious discussions he admitted initiating with the complainant as well as the subsequent WhatsApp messages he admitted sending.

94. In any case, whichever finding, our Report stands to be accepted or rejected by the JSC after due consideration. Furthermore, in terms of the Act, the JSC is required to give the parties the opportunity to make submissions before it takes its decision.

95. We therefore proceed to consider whether the respondent is guilty of contravening section 5.1 of the Code of Judicial Conduct, and if so, whether that amounts to gross misconduct or misconduct not amounting to gross misconduct.

96. Article 5 .1 reads: "*A judge must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office.*" We believe that the Article must be considered together with Note 5 (iii) to it, which reads : "*A judge does not engage in conduct that is prejudicial to the effective and expeditious administration of the business of the court.*"

97. Part of paragraph 7 of the complainant's statement of complaint reads: "*It was business as usual on the 08th June 2021, JP came to see the Senior Judge I was working with at the time. On his exit, he saw my child sitting on the couch and asked how old she was and I told him. He further asked (about) the whereabouts of the father again I told him that he was no longer in our lives. He looked shocked and asked 'such a beautiful woman without a man' I laughed, he then left before I could answer. The conversation continued later in the afternoon on WhatsApp.*" Indeed, it is common cause that the conversation continued into the afternoon. The conversation quoted above was not denied by the respondent; it must therefore stand. It is clear from it that the respondent was exploring, and laying down the foundations, for a flirtatious relationship with the complainant. The rest is history. The questions he asked the complainant were personal and had nothing to do with work. Yet they were asked at the place of work and during working hours, while both were expected to be working. On top of that, while it is true that by far the majority of the WhatsApp messages were exchanged outside working hours, some were exchanged during that time, which is ordinarily from 08:00 to 16:00. This is apparent from the time of such messages.

98. It is our view that the respondent's above conduct amounts to a contravention of Article 5.1 of the Code of Judicial Conduct, read together with Note 5 (iii) thereto; his conduct, carried out at a place of work and also during working hours when both of them were supposed to be working, was "*prejudicial to the effective and expeditious administration of the business of the court.*" However, we see no basis for a finding that the conduct constitutes "gross misconduct"; we find that it amounts to "misconduct." The following are some of the

considerations leading to a finding of “misconduct” as opposed to “gross misconduct:”

- 98.1 Our finding that there was no sexual harassment.
- 98.2 Our finding that the exchange of WhatsApp messages was consensual.
- 98.3 The finding made that there was an objective reasonable belief on the part of the respondent that the flirtatious exchange of the messages was not unwelcome; in this respect, we point to the established fact that a number of flirtatious – others very salacious – messages were by the complainant herself; this aspect has been fully dealt with.
- 98.4 The flirtation took place between adults; both of whom were parents in their own right and therefore conversant with matters of the heart.
- 98.5 As we have seen, the messages were not for public consumption; the parties agreed to deleting them, thereby intending to keep them between themselves.
- 98.6 As already indicated, the majority of the messages exchanged were outside working hours.
- 98.7 Although this Tribunal was not bound by the findings of the JCC, we point out that when they considered the matter, they were not aware of the flirtatious and salacious messages that came from the complaint herself as she had omitted them out of her statement of complaint; those messages were only revealed later to this Tribunal by an expert from her cell phone; this aspect has likewise been dealt with in detail.

99. In the circumstances, after investigating the matter in line with the Tribunal's mandate as formulated by the Judicial Service Commission, this Tribunal reports as follows:

Having investigated the allegations against JP Mbenenge set out in Ms Mengo's complaint, the report by this Judicial Tribunal is that:

- (i) It is its finding that JP Mbenenge is not guilty of gross misconduct, gross incompetence and/or gross incapacity under section 177 of the Constitution.**
- (ii) It is its finding that JP Mbenenge is guilty of a degree of misconduct not amounting to gross misconduct in that he contravened Article 5.1 of the Code of Judicial Conduct, read with Note 5 (iii) thereto in that he, at a place of work and during working hours, initiated, and subsequently conducted, a flirtatious relationship with Ms A Mengo through a series of WhatsApp messages exchanged between them.**

Dated this 21st day of January 2026



Judge B M Ngoepe (Retired Judge President), President of the Tribunal



Judge C Pretorius (Retired), Member of the Tribunal

A handwritten signature in black ink, appearing to read "M G Mashaba".

Adv M G Mashaba SC, Member of the Tribunal

ANNEXURE A

BEFORE THE JUDICIAL TRIBUNAL OF THE JUDICIAL SERVICE COMMISSION

CASE NO: JSC 1059/2022

In the matter of

Ms A Mengo

Complainant

And

Judge President S M Mbenenge

Respondent

Ruling on the respondent's request for a judge to be part of his legal team at the Hearing

1. In their letter dated 18 November 2024, the respondent's legal representatives, KMNS Attorneys, addressed a letter to the Tribunal which reads as follows: *"Our client hereby requests leave of the Tribunal for Justice Phillip Zilwa, a judge of the Eastern Cape Division of the High Court of South Africa, to be present at the Tribunal hearing as part of the legal team."* No further motivation was given, except that it was stated that the judge has consented to this arrangement. He is a judge of the court of which the respondent is the Judge President.
2. The request is strenuously opposed on behalf of the complainant. A number of grounds are advanced, such as the issue of the inequality of arms, that this would amount to a bullying and intimidation tactic, that a mistrust of the system may occur, and that potential sex harassment complainants at the courts may be caused to stay silent. In his reply, the respondent devoted its response to these points. Frankly, we do not find the arguments raised on behalf of the complainant

to be helpful, except the one about a possible mistrust of the system. However, this does not mean that we should necessarily accede to the respondent's request.

3. In support of his request, the respondent referred to the Tribunal proceedings which had involved another judge where, he points out, that judge was represented by one of her colleagues. These were proceedings involving Judge Mngqibisa-Thusi. The complainant says that the facts were different, mainly because, she says, in that case the complainant (Judge President Mlambo) was a judge, as compared to the present case where the complainant is not a judge, but a junior person at the court. Not much may turn on this, but both parties are wrong; Judge President Mlambo was actually not the complainant; the real complainants were the people whose judgments had long been overdue by Judge Mngqibisa-Thusi. Judge Mlambo was a mere conduit pipe; he had no personal interest in the matter. Apart from the facts being different, we don't know the reasons why the Tribunal allowed such a representation; we don't even know whether there was any objection. We therefore do not see what happened in the Judge Mngqibisa-Thusi tribunal as a precedent, let alone a binding one.
4. The respondent argues that there is no legal basis for turning down his request; but he does not indicate its legal basis either. For as comprehensive a consideration of the matter as possible, we look at the provisions of the Judicial Service Commission Act 9 of 1994 (the Act) in terms of which these proceedings are held and regulated.

Section 29(1)

5. Section 29(1) of the Act says a respondent is entitled to have legal representation. However, the question is whether the respondent should be represented by a judge on active service.
6. We understand the respondent's request that Judge Zilwa be part of his legal team to mean that the judge should be his legal representative. As said earlier, section 29(1)(c) allows for a party to have a "*legal representative*." In our view though, in ordinary language, a "*legal representative*" does not include a judge, let alone one on active service. In a definition that accords with this ordinary understanding of the phrase, Google defines "*legal representative*" as "*a person who is given the authority to represent another person in a court of law or at a court process.*" None of these can be done by a judge on active service. It is significant that item 3(b) of Article 14 of the Code of Conduct Adopted In Terms of Section 12 of the Act says a judge on active service "*must not act as an advocate, attorney, or legal adviser....*" It is therefore inconceivable that the Legislature, by "*legal representative*" intended to include a judge on active service.
7. There are difficulties that would arise if a judge were to appear and act as legal representative.
 - 7.1 A legal representative owes an obligation to act objectively in the proceedings; where necessary to bring out points that are not favourable to the person represented. Given the fact that Judge Zilwa works under the respondent, doubts may arise in the mind of a reasonable person whether he would carry out his tasks objectively. This may compromise the credibility of the proceedings, as the complainant says. We are not saying that Judge

Zilwa would not act objectively; the test is that of a reasonable person given his relationship with the respondent.

7.2 As indicated, the respondent relies on what happened in the Judge Mngqibisa-Thusi tribunal where a respondent was represented by a judge on active service. Equally, section 29(1) allows for a complainant to be legally represented. By parity of reasoning, she/he too would be entitled to be represented by a judge on active service. Again by parity of reasoning we could, God forbid, have the following scenario: one judge representing a complainant judge (who is thus the second judge), the third judge representing the respondent (who is now the fourth judge); thus already you have four judges; add the fifth and sixth judges being members of the Tribunal (the Act prescribes that there be two judges as members). The only non-judge would be the third member of the Tribunal as *per* the Act. This would look like a perfect judicial show, and would be inimical to the spirit of the Act which prescribes the inclusion of a non-judge in an attempt to inspire public confidence in the process. In their objection, the complainant's attorneys raised this point, although in the context of sexual harassment. They say the way this matter is dealt with "*will send a message to complainants (non-judge females) about whether they should trust the system and whether they are likely to obtain a fair hearing in proceedings of this nature*" (if dominated by judges).

8. For the reasons given in paragraphs 6 and 7 above, individually and cumulatively, we are of the view that the Legislature, in using the phrase "*legal representative*" in section 29(1) could not have intended to, and did not, include a judge on active

service. It would be fair to surmise that the respondent's own understanding of the section is that a serving judge is not included. There are two indicators for this. The firstly one is the very fact that he perceived the need to file a request to bring into his legal team a serving judge; after all, nobody would feel the need to request leave to be represented by an advocate or an attorney (real "*legal representatives*"). The second indicator is that he merely argued that there was no legal basis for denying the request, without mentioning the legal basis for the request; in particular, he did not invoke this section, not even after the opposing papers were filed.

Section 25(4)

9. A question arises whether the request can be granted in terms of section 25(4) of the Act. The section says that subject to the provisions of the Act, "*a Tribunal has the power to regulate and protect its proceedings.*" (Own underlining) The respondent's request cannot be granted under this provision for two reasons:
 - 9.1 We would be going against a provision of this Act, namely, section 29(1) which, as shown above, excludes a serving judge from a "*legal representative*."
 - 9.2 As demonstrated in paragraph 7, we would be failing to protect the credibility of the proceedings.

Conclusion

10. The request that Judge Phillip Zilwa be present at the Tribunal hearing as part of the respondent's legal team is accordingly declined.

Dated this 12th day of December 2024

Signed for the Tribunal:



Judge B M Ngoepe, President of the Tribunal.

Members of the Tribunal:

Judge B M Ngoepe, Retired JP, President of the Tribunal

Judge C Pretorius, Retired,

Adv M G Mashaba SC

ANNEXURE B

BEFORE THE JUDICIAL TRIBUNAL IN TERMS OF SECTION 21(1) OF THE
JUDICIAL SERVICE COMMISSION ACT 1994

In the matter between

Ms A MENGÖ

Complainant

and

JUDGE PRESIDENT S M MBENENGE

Respondent

RULING ON THE CROSS-EXAMINATION OF RESPONDENT BY COMPLAINT'S
COUNSEL

INTRODUCTION

1. On 30 June 2025 the complainant's legal team launched a formal application for counsel, representing the complainant, to be able to cross-examine the respondent and witnesses called on his behalf and in his defence. This application was brought as a result of correspondence between the legal teams of the complainant and the respondent during the last week of June 2025.
2. The application was brought after the Tribunal indicated that the matter could only be dealt with if a formal application was launched.

On 1 July 2025 we handed down an *ex tempore* ruling, dismissing the application. We indicated that full reasons would be furnished in due course.

Page 1 of 5

These are the reasons.

LEGISLATIVE PROVISIONS

3. This Tribunal was established in terms of section 19 of the Judicial Service Commission Act of 1994 (the Act). Section 25 (4) provides: "*Subject to this Act, a Tribunal has the power to regulate and protect its own proceedings.*" Section 26 sets out the objects and nature of the Tribunal, which is to inquire into the allegations of incapacity, gross incompetence or gross misconduct against a judge.

Section 26(2) provides: "*A Tribunal conduct its inquiry in an inquisitorial manner and there is no onus on any person to prove or disprove any fact before a Tribunal.*"

4. The Rules made in terms of section 25 (1) of the Act, regulate the procedures before a Tribunal. Rule 7(9)(a) and (c) respectively provide, amongst others, for the evidence leader to cross-examine any witness called on behalf of the respondent or called by the Tribunal. Rule 7(10) (a) and (c) provide, respectively, for the respondent to cross-examine any witness called by the evidence leader or by the Tribunal. As can be seen, there is no provision for the complainant or complainant's legal representative to cross-examine the respondent or any witness called by the respondent, the leader of evidence or by the Tribunal. This is not surprising as there is in the first place no provision for a complainant to be legally represented. Section 28 (2) only provides for a respondent "*to be assisted by a legal representative*" even though we did allow the complainant to be legally represented with some limitations, as indicated in our *ex tempore* Ruling of 1 July 2025.

5. The Rules provide for the evidence-leader and the respondent to address the Tribunal and furnish written submissions to the Tribunal. In the present case, we did allow the complainant's legal representative to submit written and oral submissions.
6. The Act, as well as the Rules, do not deal with the case where a complainant is legally represented. In the present matter counsel for the complainant was allowed by the Tribunal to participate in the proceedings. The participation was curtailed by the Tribunal as counsel was allowed to ask questions of the witnesses called by the evidence leader, after the evidence leader had led the witnesses' evidence, to clarify certain aspects of their evidence.
7. The question arose whether counsel for the complainant could cross-examine the respondent and any witnesses testifying on his behalf. There was an objection by counsel for the respondent on the basis that at the commencement of the hearing on 13 January 2025 senior counsel for the complainant had stated : "...*I will not be cross-examining witnesses.*" It was clear from the outset that cross-examination of the respondent and his witnesses would be done by the evidence leader.
8. The main argument by the respondent's legal representatives was that neither the Act, nor the Rules, made provision for the complainant to be legally represented. Counsel for the respondent had accepted that senior counsel could represent the complainant as the Tribunal had decided on the first day of the hearing that counsel for the complainant could participate in the limited manner as set out above. It was also decided that counsel for the complainant

could submit Heads of Argument and argue the matter orally as well. **That** ruling by the Tribunal was agreed to by the respondent's legal representatives.

9. The Tribunal was referred to the decision of the Judicial Conduct Tribunal of Justices of the Constitutional Court and Judge President M J Hlophe of 9 April 2021. In that matter the complainants' counsel did cross-examine the respondent. This was so as the respondent, Judge President Hlophe, had accepted the participation of the complainants' counsel from 2009 until December 2020 without raising objections to their participation.
10. In the matter before us, the question of cross-examination was raised **at** the commencement of the hearing on 13 January 2025 and dealt with by the complainant's legal representative.
11. Although the Tribunal may regulate its own proceedings in terms of section 25 (4) of the JSC Act, it is not criminal proceedings and the evidence leader does not fulfil the role of a prosecutor. The evidence leader must place all the facts before the Tribunal and cross-examine the respondent and the witnesses testifying on the respondent's behalf.
12. The Tribunal read the Act, as well as the Rules and considered the arguments. The Tribunal concluded that the present matter could be differentiated from the Hlophe decision as from the outset it had been made clear that the complainant's legal representative would not cross-examine the respondent or any of the witnesses called on his behalf, whereas in the Hlophe matter the respondent had for years accepted that the complainants' legal representatives could cross-examine him.

13. The Tribunal concluded that there was no scope in the Act or the Rules for a complainant's legal representative to cross-examine respondent or his witnesses.
14. Therefore the ruling was made that the complainant's legal representative could not cross-examine the respondent or witnesses on his behalf.

Dated this 20th day of January 2026.

By Members of the Tribunal

Judge B M Ngoepe (Retired Judge President), President of the Tribunal

Judge C Pretorius (Retired), Member of the Tribunal

Adv W G Mashaba SC, Member of the Tribunal

ANNEXURE C

14124



OFFICE OF THE CHIEF JUSTICE
41 Fox Street, 14th Floor, Edura House, Johannesburg, 2000
Private Bag X10, Marshalltown, 2000
Tel: (010) 493 2652

JUDICIAL CONDUCT COMMITTEE

COMPLAINT FORM:

Note: 1. Documentary evidence in support of the complaint must be attached.

[If the space provided is inadequate, information may be submitted as an Annexure to this form and must be signed on each page]

Particulars of complainant

Name: Andiswa

Surname: Mengo

Address: Makhana High Court
104-106 High Street
Makhana

Contact details: 0793014270

Particulars of Judge (s) complained against:

Name of Judge: Judge President Mbenenge

Division: Eastern Cape Division of the High Court

Particulars of complaint:

Affidavit/ Affirmed statement:

I'm lodging a complaint of sexual harassment against Judge President Mbenenge of the Eastern Cape Division of the High Court. I have been working at the Makhanda High Court for the past eleven years as a Judge's secretary and I'm currently a secretary to Judge Govindjee. On 25 May 2021 I received a phone call from the JP Mbenenge and informed me that the attorneys had advised him that I'm the one who is reliable and can assist Acting Judge Ngcukaitobi for motion court to be held virtually. Acting Judge Ngcukaitobi at the time came with a secretary from Mthatha but she was not familiar with Teams and did not have a laptop. I then agreed to assist the JP while talking to JP, Adv Bodlani SC called me and informed me that his the one that actually gave the JP my name.

I then received a called from Adv Sephton while to Adv Bodlani and she informed to come and fetch me from my home. I then agreed for Adv Sephton to fetch me. I then prepared myself for work it was now 09h00 and motion court is supposed to start at 09h30. I then received a call from Adv Mtimka who was my supervisor at the time and asked whether I was available to assist because he heard that I was asked to come and assist. I indicated that I'm available and I was preparing myself. Adv Sephton then informed me that she was unable to drive through where I stay because of the protests and asked if I could meet her half way. I agreed and left my car at home, then walked and met her half way. I met Adv Sephton and proceed to the court where she dropped me off. I circulated the link and motion court started very late, everything went well and the roll was finalized.

Throughout while I was working Adv Mtimka kept calling and sending me text messages that he will make sure that I arrived home safely. He then spoke to the then court manager Ms Tambodala, I'm not sure what Adv Mtimka said to her but apparently she refused to provide me with a car to take me home. I had informed Adv Mtimka that if I'm provided with a car and the are protests along the way I will turn back. I further mentioned that I will use the road we used with Adv Sephton when she fetched me. Adv Mtimka informed me that Ms Tambodala said she will not release a car to take me home as she heard that the protests were severe and she is protecting the assets of the court. I then decided to walk back home without telling Adv Mtimka that I was walking back home. Adv Mtimka kept calling and I only responded to his call when he called me for the third time.

He asked me where I was and I told him that I was walking back home, it had already started getting dark.

Adv Mtimka told me to stop wherever I was and he will organize a cab to take me home. I stopped and found a bench where I could sit at the nearest school. The cab took within less than six minutes. Adv Mtimka paid for the cab as he wanted to see me safely home. I arrived home safely and notified Adv Mtimka. On 27 May 2021 I called Mr Kroqwana asking for a meeting because of the treatment I received from the court manager and Mr Kroqwana requested if we could have the meeting without him. If we don't reach a resolution, then we can include him.

I then sent an email to Ms Tambodala and Adv Mtimka requested a meeting. I then enquired from them what time while I be available and we all agreed to meet at 15h00 that day. At 15h00 we went to a meeting, it was the three of us and I started the meeting by requesting the parties if we can speak isi-Xhosa as it's the language we all understood. I relayed the events of the 25th and phone calls that you received from Adv Mtimka and the court at some point before I blocked her. In the middle of my relaying the events the court manager then insulted me by saying "futsek" and "fock off" and asked if that is what we have called her the for. As she was standing up I stood up and went straight to the door. She came closer to me and grabbed me her as I was holding the doorknob. She managed to grab the door-knob and I moved away from the door. I was crying and shouted while asking her how can she insulted me while she is still new and the umbilical cord has not been cut as it had only been working for five months at the court. As the was that commotion, one Judge came to see what was happening as the Judge's chamber was not far. Then Judge then checked inside and left. I then decided to leave the boardroom with Adv Mtimka still inside.

On Friday JP Mbenenge was around the building and asked his secretary for an appointment. She told me that JP was available immediately after consulting with him and I got inside the chambers. JP offered me a sit and told him what I had been sworn at and which words were used. JP promised to have a word with the court manager, he did not tell me when will he speak to the court manager. I left the chambers.

After 30 minutes I left my office, I saw the court manager from the other side when I was walking entering the Judge President's office. Before I passed JP's office something inside me said I must enter which I did. The secretary was not in her chair I then looked through JP's office as the door was slightly open and I saw him hugging the court manager. I then pulled the door to close it. As I wanted them to notice me that I saw them and I moved back. I continued to go wherever I was going with the hope that I will be called to the JP's office and none of that happened. Then it was business as usual. The following day on 8 June 2021, when JP came to see the senior judge I was working with and on his exit he saw my child sitting on the couch. He asked how old was my child and I then told him he was 12. He then asked where was there father and I told him

that he was no longer in our lives it was only me and my daughter. He said really as if he was shocked they way he looked and said such a beautiful woman without a man. JP then left.

The conversation continued later in the afternoon on WhatsApp, he asked me again how old was my child and how old I was. I responded to his questions on text and that I was 37 years. He first apologized for asking me questions in front of my daughter. I responded to his message and said "Thank you Judge, but she didn't understand what we talked about and I'm grateful for the fact that you respect my child. He then replied by saying he respects everyone and I responded by saying much obliged me. In my mind that was the end of the conversation but to my surprise he continued chatting to me asking me about my personal life to which I responded. The JP said he was surprised of how old I was because of my voice and age, I told him I exercise and take care of myself. He then said he will observe me exercising and carrying myself well. JP then asked how will you proof that I carry myself well, he then asked me to come out clear how as I did not want to answer. I was getting tired of his questions and getting uncomfortable and I responded by saying I will give him a chance for him to observe. I did not know what he might when he said he will observe and JP said truth be told I have reason to doubt your word. I responded by saying this means a lot and it is hard to trust these days. Around 19h27 then JP said maybe a few pics you send may serve as half way proof and I did not respond. He sent me emoji's of eyes and said he was kidding. I responded by saying cool.

Then he later said I'm quite he then commented on the status on WhatsApp, he spoke in Xhosa but he said I must take off clothes in the upper body (*Khulula umntla*). I said they were not there, as I wanted to get him off my back. He said "please" and I kept quiet. He then responded by saying he will wait and I kept quiet. He then sent me a text saying "robbed" as I had kept quiet. I sent emoji's of a monkey hiding its face and he sent me a text saying he was being cheated on (*ndiqhathiwe*). He also said I was full of tricks and I responded to a text which he deleted which he said "go halfway now then leave the rest for another day", which I said I will do and kept quiet. I never sent him that picture. He kept on deleting messages and he asked me if I am still taking a picture, he was getting impatient. On the same day he sent me a video which I don't recall what it was and I did not respond and he asked if I was sleeping.

During the evening JP kept chatting with me and asked me if I was a night rider and I did not answer. He then told me that I must remember to delete the messages and I did not respond. I really did not feel like having this conversation with him. I ignored my phone and slept.

On the 9 June I uploaded my status on WhatsApp and JP commented on my status by saying he thought I was going to show him the bottom part of the body. That was around half past 5 in the morning. I did not respond and he kept saying

"cwaka" and I kept quiet. He then sent me a message saying I must have woken up late as he did not receive any message from him.

I uploaded a second picture in the evening with the caption that "I'm still beautiful even at sunset" and JP sent me a laughing emoji.....

On 16 June I uploaded a picture where I went Ziplining and he commented "wow" and I replied "stress reliever"

he responded in Xhosa that he was not coming (*Andizi*). Then at 17h00 then JP asked what stress am I experiencing and I then responded "*I act strong but after been insulted by the court manager I am no longer myself*".

JP continued to chat and at some point he said he could give me a hug and asked how is that possible?

I didn't respond and JP kept asking me to speak. He sent me a picture which had different sex position styles which he deleted and asked "*Step one or position one?*" (I must concede, I don't recall what style was depicted as position one)

On 17 June 2021, JP asked me whether we were warming up? I must also mention that when he was talking about work I would respond and he changes topic slightly as soon as he realizes he has my attention. He sent me pictures which he kept deleting and there is one that he sent, took a screenshot before he deleted, I kept quiet

He then sent me a text saying "*BJ=?*" and I did not respond. He then sent me an image of a man muffing a woman. I was quiet and decided not to respond as he was sending me these messages and pictures

On 18 June 2021, He asked me to finish what we were talking about and asked if he was wrong? and I said No.

I asked why does he keep on sending me stuff and deletes before I could even read because I told him earlier that I was busy. He said he did not want to distract me.

Uploaded on WhatsApp status a picture of me wearing a black skirt, white shirt, a black jersey, yellow and a touch of black newspaper shoes: He said "wow"

On 20 June he commented on the video where I was sitting with my sister's kids at Spur and he sent me an emoji of tongue sticking out. He told me we had not finished our conversation the last time and I meant to say I could no longer communicate and he asked me why. He sent me a video of a woman lying on her back with a man on top.

On the same day I sent a text that I'm around East London if we can meet and talk, He asked me if it would be possible for us to get intimate. I responded by referring him to a bible verse (psalms 1 vs 1 just the first word). At this stage I thought I was brave enough to tell him exactly how I feel about his inappropriate texts.

We continued talking and said "*what if we melt? its not impossible?*". I responded by saying it is impossible.

He sent me an emoji of a half peeled banana... in reply I then sent an image with words "*honorable member don't do that*".

"Ok we may meet and just converse without going to the intimate route" to which he deleted. He asked me if I only wanted to be friends with him, I did not respond.

"heee ingathi ufuna kubethwe pezule wena,Half insertion"

He asked me where I was staying in East London, will there be any privacy or we will talk in the office?

What if we melt? I replied "You will hold yourself" then he asked "what about you".

All the time he says something he wanted me to reciprocate which I found as being clingy and turn off for me.

He said let me oblige as he could see I was not playing along.

JP sent me an image of private parts and asked me "*yours please*" and I replied with "*Jeso*" He said why? Does it look delicious? I did not respond.

He sent an image of two people having sexual intercourse.

"If it must be a friendly chat I will oblige".

He kept on nagging me to send a picture of my private parts and I did not say anything until 23h15 when he said please reply. I did not reply.

On 21st June I uploaded another picture of myself that was taken at Bisho High Court during the day. He kept asking about the meeting which then was out of my schedule as I was not interested to meet with him.

23 June he sent me a text asking "If I wanted to share videos with him"

On 29 June we met in person at work, I wanted to show and tell him that I'm not comfortable with the conversations. I did not smile at him and he sent me a text:

"Your mood was so pensive, ndakoyika, please keep a song in your heart that you always bear"

Sent me heart' emoji and said I must reciprocate

"Python?" -another image of a private part he sent to me but deleted.

I asked him to write an introduction about GBV which I pretended to be my assignment. I was keen to know how does he feel about the topic in general.

I must come and give you a boost, I kept quiet.

18 July 2021, "please send a juicy picture before you sleep" and I never responded. JP contacted me when He heard that I have escalated my complaint against the then Court Manager to Labour Relations and Mr Paseka was at the office to take statements and JP sent me a message.

27 January 2022, I uploaded a tattoo which I recently did on my back, JP asked who it was? If he could see the bottom part of my body inclusive of the face.

From 31 May 2022, JP made a comment pertaining my walk, dress code and work ethics which made me uncomfortable. I ignored him and I kept on sharing everything with my former Judge who has now retired.

It was on Monday, 14 November he called me to his chambers and asked me why I'm wearing colorful clothes when it is a court day, I told him I'm not going to court but my colleague is. He said he was concerned about the decorum and not saying that my clothes were note appropriate.

He invited me to come to his office and I went inside. He showed me his trouser and said "do you see the effect that you have on me". He unzipped his pants and took out his erect penis and I ran out of the office. I went home and thought about what had happened then I decided that on the following morning I will tell him where to get off and if needs be I'll request footage that showed me getting inside his office and going out.

When I got to work on the day, Matrix system was no longer working and we were told that everything was wiped out. I lost hope then as I was not going to have any evidence that I went to his office.

I did not have time to meet with him again until I left Mthatha High Court. Flashbacks kept on coming and I realized late that what happened affects me. I decided to tell the Director Of Court Operations but briefly.

I confirm that I have never been in a relationship with the JP nor flirt with him at any stage.

I asked for a round table and he must organize one Judge from each Division so we may sit and I wanted to hear the JP deny ever having such conversation, then I would produce evidence.

The meeting never happened because he declined the invite and he further cited I was lying, and he has been accused of everything and he made an example about a penis picture he was shown saying that it was not his penis and he doesn't even have a red underwear. I was perturbed hearing that and decided to provide the DCO with a few screenshots as proof. I requested him to share them with the JP thereafter I'll hear from him. The DCO phoned gain to say that JP's story changed, now he wants to meet but on his terms and conditions that: the group of people who were initially going to be part, it is no longer necessary but proposed that I meet with him and the DCO or he be given a chance to sit with me alone, which I declined to say that an accused person can never be with the complainant under any circumstance, in essence I declined his proposal. I did not want to meet with him anymore because of what he said earlier.

I kept on thinking about what was said on that phone call. The more I thought about it, the more I got angrier. I then decided to upload the evidence I have on my WhatsApp status with aim to expose him and showing that I have been telling the truth all along.

Later in the evening of the 03 December 2022, I answered a call from Judge Rusi. Amongst the things we conversed about she asked three questions "what would you like to see happening?", what can be done for you? Where do you need help? "*Utata uthi (father said) he was averse to honor your proposal of having a round table with the group of people you intended to call*". She further said I must get professional help to deal with the situation and I must look after my girl child.

Shortly after talking to her I swiftly recorded a VN (voice note) with a message that I wanted her to send to the JP. I then phoned the DCO to alert him of the phone call, and forwarded texts which were shared inclusive of the VN. I would like to put it on record that as I was talking to the DCO which I even mentioned to him that the JP is calling me and I am not going to answer his call instead I blocked his number. He tried several times but he was already blocked on my phone.

I have suffered emotionally having to relive the ordeal of what happened over again. I cried for help but I believe it was never loud enough. I do not feel safe around him altogether. I am willing to move to another province if time permits but I will let the processes of the organization to run on its rails.

I propose that the JP must be referred to a professional assistance as I regard his conduct as a sickness.

I considered the sexual harassment policy that we have as Officials of the Organization but I had no luck in finding a similar document for members of the Judiciary.

I have approached the JSC to lay a formal complaint against the JP. I would further request the JSC to investigate this matter. I have attached screenshots of conversations between myself and the JP as evidence marked "Annexure A".

ANNEXURE D

THE JUDICIAL CONDUCT COMMITTEE

Ms Andiswa Mengo

Complainant

and

Judge President S M Mbenenge

Respondent

COMPLAINT

I, the undersigned

Andiswa Mengo

Do hereby make an oath and state and say:

1.

I am a 39-year-old female employed at Makhanda High Court as a Judges' Secretary. I have been working within the organization for the past eleven years, five (5) of which I have been a Judge's Secretary. I currently work as a Secretary for Judge Govindjee.

2.

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In the years that I have been working with Judges, I have been exposed to a lot of things which made me to feed my thirst of becoming an Advocate one day. The pressure, working in awkward times, congested schedule pruned me to be a better servant. My work ethic and the quality of work produced swiftly took a positive turn. Stakeholders picked that inclusive of my colleagues and Judges. If you give me a task or a message, one knows that it will be done according to instruction and beyond and I will give feedback promptly.

3.

On the 25th of May 2021 I received a phone call from the Judge President Mbenenge(JP) of the Eastern Cape Division, informed me that Legal Practitioners advised him that I am the one who is reliable and can assist the then Acting Judge Ngcukaltobi for motion court to be held virtually. The Acting Judge was appointed for the Mthatha Division and travelled to Makhanda with his Then Secretary Ms Noluthando Kona who was not familiar with Teams and did not have a Laptop. I then agreed to assist the JP and while I was on the line with him, a call from Adv Bodlani SC came through. I finished my call with JP and attended to the incoming call. "I am the one who provided the JP with your number and name to assist us" Adv Bodlani SC said, indeed I affirmed that I will assist.

4.

I then received a call from Adv Sephton after talking to Adv Bodlani SC. She offered to come and fetch me as there were protests in Makhanda. Got up and prepared to leave for work. It was at 09h00 and motion court starts at 09h30. Whilst I was busy getting ready, got a call from Adv Msimka who was my then supervisor, who asked if I was available to assist because he heard that I was approached to assist the Division. I had to leave my car where I stay and had to walk for +-45 minutes because Adv Sephton could not get through as roads were closed by protesters. She further requested to meet me halfway but she will constantly be on the phone with me to

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check if I am still Ok. Eventually we made it safely to the Precinct and the link was circulated, motion court resumed later than expected and everything went well. I was never treated fairly instead I was insulted when I tried to address issues around the 25 May 2021 and the 27th. (report attached for ease as Annexure B)

5.

On the Whatsapp screenshots you will see the profile pic of the JP that he had then. When a text has blue ticks it means that it is from me.

On the 28th May 2021 the JP was around the building and I decided to visit him pertaining the utterances by the Court Manager(CM). I met with his Secretary and asked for an appointment, she did not hesitate but allowed me to make my way to the JP's Chambers immediately. JP offered me a seat. I narrated what occurred on the 27th and told him the exact words uttered to me whilst I was crying. JP looked at me throughout the time and he said he will have a word with the Court Manager and did not disclose when their meeting will take place and whether will I be a part of it or not. I left his Chambers.

6.

After 30 minutes I walked out of my office, down the corridor I saw the CM walking towards the JP's Chamber and she entered. When I approached the door of the JP's Chamber something inside me said I must walk inside, then I noticed that the Secretary was on her desk. I looked through the JP's office door as it was not properly closed and I saw him hugging with the CM. I pulled the door to close and wanted them to notice that I saw them. I left his office with the hope that I will be called to his office to resolve the issue but none of that happened.

7.

MS

It was business as usual on the 08th June 2021, JP came to see the Senior Judge I was working with at the time. On his exit, he saw my child sitting on the couch and asked how old she was and I told him. He further asked the whereabouts of the father again told him that he was no longer in our lives. He looked shocked and said "such a beautiful woman without a man" I laughed, he then left before I could answer.

The conversation continued later in the afternoon on WhatsApp. He asked me again how old was my child and how old I was. I responded to his questions on text and that I was 37 years. He first apologized for asking me questions in front of my daughter. I responded to his message and said "Thank you Judge, but she didn't understand what we talked about and I'm grateful for the fact that you respect my child. He then replied by saying he respects everyone and I responded by saying much obliged me. In my mind that was the end of the conversation but to my surprise he continued chatting to me asking me about my personal life to which I responded. The JP said he was surprised of how old I was because of my voice and age, I told him I exercise and take care of myself. He then said he will observe me exercising and carrying myself well. JP then asked how will you proof that I carry myself well, he then asked me to come out clear how as I did not want to answer. I was getting tired of his questions and getting uncomfortable and I responded by saying I will give him a chance for him to observe. I did not know what he might when he said he will observe and JP said truth be told I have reason to doubt your word. I responded by saying this means a lot and it is hard to trust these days. Around 19h27 then JP said maybe a few pics you send may serve as half way proof and I did not respond. He sent me emoji's of eyes and said he was kidding. I responded by saying cool. (see Annexure B1,B2,B3).

8.

Then later said I'm quiet he then commented on the status on WhatsApp, he spoke in Xhosa but he said I must take off clothes in the upper body (*Khulula umntu*). I said they were not there, as I wanted to get him off my back. He said "please" and I kept quiet. He then responded by saying

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he will wait and I kept quiet. He then sent me a text saying "robbed" as I had kept quiet. I sent emoji's of a monkey hiding its face and he sent me a text saying he was being cheated on (ndiqhehlhwe). He also said I was full of tricks and I responded to a text which he deleted which he said "go halfway now then leave the rest for another day", which I said I will do and kept quiet. I never sent him that picture. He kept on deleting messages and he asked me if I am still taking a picture, he was getting impatient. On the same day he sent me a video which I don't recall what it was and I did not respond and he asked if I was sleeping. (see Annexure "C")

9.

During the evening JP kept chatting with me and asked me if I was a night rider and I did not answer. He then told me that I must remember to delete the messages and I did not respond. I really did not feel like having this conversation with him. I ignored my phone and slept. (see Annexure "D").

10.

On the 9 June I uploaded my status on WhatsApp and JP commented on my status by saying he thought I was going to show him the bottom part of the body. That was around half past 5 in the morning. I did not respond and he kept saying "owaka" and I kept quiet. He then sent me a message saying I must have woken up late as he did not receive any message from him.

I uploaded a second picture in the evening with the caption that "I'm still beautiful even at sunset" and JP sent me a laughing emoji.....(see Annexure "E").

11.

On 16 June I uploaded a picture where I went Ziplining and he commented "wow" and I replied "stress reliever"

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he responded in Xhosa that he was not coming (Andizi). Then at 17h00 then JP asked what stress am I experiencing and I then responded "I act strong but after been insulted by the cari manager I am no longer myself".(See Annexure 'F,F1").

12.

JP continued to chat and at some point he said he could give me a hug and asked how is that possible?.

I didn't respond and JP kept asking me to speak. He sent me a picture which had different sex position styles which he deleted and asked "Step one or position one?" (I must concede, I don't recall what style was depicted as position one) (See Annexure 'G')

13.

On 17 June 2021, JP asked me whether we were warming up?

I must also mention that when he was talking about work I would respond and he changes topic slightly as soon as he realizes he has my attention. He sent me pictures which he kept deleting and there is one that he sent, took a screenshot before he deleted, I kept quiet. He then sent me a text saying "BJ=??" and I did not respond. He then sent me an image of a man muffing a woman. I was quiet and decided not to respond as he was sending me these messages and pictures (See Annexure 'H,H1').

14.

On 18 June 2021, He asked me to finish what we were talking about and asked if he was wrong? and I said No.

I asked why does he keep on sending me stuff and deletes before I could even read because I told him earlier that I was busy. He said he did not want to distract me. Uploaded on WhatsApp

status a picture of me wearing a black skirt, white shirt, a black jersey, yellow and a touch of black newspaper shoes. He said "wow" (See Annexure "I,II,")

15.

On 20 June he commented on the video where I was sitting with my sister's kids at Spur and he sent me an emoji of tongue sticking out. He told me we had not finished our conversation the last time and I meant to say I could no longer communicate and he asked me why. He sent me a video of a woman lying on her back with a man on top.

On the same day I sent a text that I'm around East London if we can meet and talk. He asked me if it would be possible for us to get intimate. I responded by referring him to a bible verse (psalms 1 vs 1 just the first word). At this stage I thought I was brave enough to tell him exactly how I feel about his inappropriate texts. (See annexure K1,K2")

We continued talking and said "what if we melt? its not impossible". I responded by saying it is impossible.

He sent me an emoji of a half peeled banana... in reply I then sent an image with words "honorable member don't do that".

"Ok we may meet and just converse without going to the intimate route" to which he deleted (see Annexure "K3"). He asked me if I only wanted to be friends with him. I did not respond. "heee ingathu uluna kubethwe pezulu wene, Half insertion" (See Annexure "K4")

He asked me where I was staying in East London, will there be any privacy or we will talk in the office? (See Annexure "(K5")

What if we melt? I replied "You will hold yourself" then he asked "what about you".

All the time he says something he wanted me to reciprocate which I found as being clingy and turn off for me.(See Annexure ("K6,K7,K10")

He said let me oblige as he could see I was not playing along.

JP sent me an image of private parts and asked me 'yours please' and I replied with "Jeso" He said why? Does it look delicious? I did not respond.(See Annexure "K8")

He sent an image of two people having sexual intercourse. (See Annexure "K9")

"If it must be a friendly chat I will oblige".

16.

On 21st June I uploaded another picture of myself that was taken at Bisho High Court during the day. He kept asking about the meeting which then was out of my schedule as I was not interested to meet with him. (See Annexure "K10",bottom)

23 June he sent me a text asking "If I wanted to share videos with him"

17.

On the 27 June 2021 he sent an image of his penis but swiftly deleted after I had a glimpse. My reply was "uyanya" then his reply was "uggiba kwam uchama". I never said anything after. On the 28 June he sent me a picture of a fit lady only wearing a t-shirt on covering private parts and in reply I sent an image of a person hanging himself with tissue paper. I further uploaded the leg

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that was sent to me on my status. I was extremely perturbed. (See Annexure "K11,K12) Later I sent a text (see Annexure "K13")

On 29 June we met in person at work, I wanted to show and tell him that I'm not comfortable with the conversations. I did not smile at him and he sent me a text:

"Your mood was so pensive, ndakoyika, please keep a song in your heart that you always bear"
(See Annexure "L")

Sent me heart emoji and said I must reciprocate

"Python?" -another image of a private part he sent to me but deleted.(See Annexure "L1")

I asked him to write an introduction about GBV which I pretended to be my assignment. I was keen to know how does he feel about the topic in general.

I must come and give you a boost, I kept quiet.

18.

On the 18 July 2021, "please send a juicy picture before you sleep" and I never responded. He sent me an image of different penis sizes and captions written next to each penis. Before I could finish he did what he does best, "deleted" and he asked if I would love it. Then I replied "*mandigale ndiyigqibezele zakpendula*" though I could not finish or take a screenshot. When I said "*umoya oyingawele mawungene*" I wanted him to realise that I do not like his conduct .(See Annexure JP contacted me via WhatsApp, I believe he heard that I have escalated my complaint against the then Court Manager to Labour Relations and Mr Paseka was at the office to take statements. JP sent me a message. (See Annexure "M,M1")

27 January 2022, I uploaded a tattoo which I recently did on my back, JP asked who it was? If he could see the bottom part of my body inclusive of the face. (clearer on Annexure "C")

19.

On the 27th May 2022 the JP sent his leg whilst in his Mthatha Division Chambers (See Annexure "N") and I replied "No comment" he later sent a picture of an African lady that carried a hoe. Whilst replying I was starting to be annoyed and I was shocked to learn that he doesn't pick that up throughout the conversation (See Annexure "O,O1")

He later sent me his naked leg (see Annexure "P").

From 31 May 2022, JP made a comment (in person) pertaining my walk, dress code and work ethics which made me uncomfortable. I ignored him and I kept on sharing everything with my former Judge who has now retired.

20.

It was on Monday, 14 November he called me to his chambers and asked me why am I wearing colourful clothes when it is a court day, I told him I'm not going to court but my colleague is. He said he was concerned about the decorum and not saying that my clothes were not appropriate. That was not offensive I must say and I was not the only one present on the day. A day later he sees me walking down the corridor and imitates how I walk, didn't comment I walked past instead. On my way back (Court's floor in Mthatha is tiled so you ought to hear who walks past if you know footsteps). He knew my footsteps and he stood at the door and calls me in. I noticed that his Secretary was not in her office, got in and he showed me his trouser and said "do you see the effect that you have on me". The question that followed was "awufun'uyimunca" (loosely translated as ("don't you wanna suck it"). He unzipped his pants and attempted to draw his erect penis and I ran out of the office. I went home and thought about what had happened then decided that on

the following morning I will tell him where to get off and if needs be I'll request footage that showed me getting inside his office and going out.

21.

When I got to work on the day, Matrix system was no longer working and we were told that everything was wiped out. I lost hope then as I was not going to have any evidence that I went to his office.

22.

I did not have time to meet with him again until I left Mithatha High Court. Flashbacks kept on coming and I realized late that what happened affects me. On the week of the 21 November 2022 I realized that I'm experiencing blackouts, I confided to my Colleague that I was travelling with, Mr Monwabisi Nyiliika who supported me since and suggested that he drives the car throughout the week I'll be a passenger. Later in the week I decided to tell the Director Of Court Operations, Mr Denim Krogwana but briefly promising to talk in detail.

23.

I asked for a round table and he must organize one Judge from each Division so we may resolve the issue and more than anything I wanted to hear the JP deny ever having such conversation, because it happened to some of my colleagues and he always denied. I wanted a strategy to deal with the problem with the intention to stop the trend so I may produce evidence.

24.

The meeting never happened because he declined the invite and he further cited I was lying, and that was not the first time he's been accused of such and he made an example about a penis picture he was shown saying that it was not his penis and he doesn't even have a red underwear. I was perturbed hearing that and decided to provide the DCO with a few screenshots as proof



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which are part of the annexures. I requested him to share them with the JP thereafter I'll hear from him. The DCO phoned again to say that JP's story changed, now he wants to meet but on his terms and conditions that: the group of people who were initially going to be part, it is no longer necessary but proposed that I meet with him and the DCO or he be given a chance to sit with me alone, which I declined to say that an accused person can never be with the complainant under any circumstance, in essence I declined his proposal. I did not want to meet with him anymore because of what he said earlier.

25.

I kept on thinking about what was said on that phone call. The more I thought about it, the more I got livid. I then decided to upload the evidence I have on my WhatsApp status with the aim to expose him and showing that I have been telling the truth all along.

I confirm that I have never been in a relationship with the JP nor flirt with him at any stage.

26.

Later in the evening of the 03 December 2022, I answered a call from Judge Rusi. Amongst the things we conversed about she asked three questions "what would you like to see happening?, what can be done for you? Where do you need help? "Utaia ulhi (father said) he was averse to honor your proposal of having a round table with the group of people you intended to call". She further said I must get professional help to deal with the situation and I must look after my girl child. Conversation started on WhatsApp (See Annexure "Q,Q1-4")

Shortly after talking to her I swiftly recorded a VN (voice note) with a message that I wanted her to send to the JP. I then phoned the DCO to alert him of the phone call, and forwarded texts which were shared inclusive of the VN. I would like to put it on record that as I was talking to the DCO which I even mentioned to him that the JP is calling me and I am not going to answer his call instead I blocked his number. He tried several times but he was already blocked on my phone.

7/8

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27.

I have suffered emotionally having to relive the ordeal of what happened over again. I cried for help but I believe it was never loud enough. I do not feel safe around him altogether. I am willing to move to another province if time permits but I will let the processes of the organization run on its rails.

28.

I considered the sexual harassment policy that we have as Officials of the Organization but I had no luck in finding a similar document for members of the Judiciary. I have had sight of the Code of Good Practice document which is attached for ease on this bundle as Annexures "R, R1") Paragraph 2 of the Code of Good Practice deals with the scope of the code. 2.2.12 is relevant. Also, paragraph 5.2 of the OCJ Policy which is attached is relevant.

29.

I have approached the JSC to lay a formal complaint against the JP. I would further request the JSC to investigate this matter.

I propose that the JP must be referred to an institution for professional assistance as I regard his conduct as a sickness.

The JP should he be found guilty must apologize to all Women in the Eastern Cape High Courts for disrespecting and treating them like objects to suppress his promiscuity.

I have attached screenshots of conversations between myself and the JP as evidence.

30.

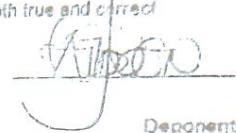
2/2

38

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14

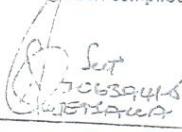
The contents of this affidavit fall within my personal knowledge, except where contrary is indicated, and are, to the best of my personal knowledge and are both true and correct.



Deponent

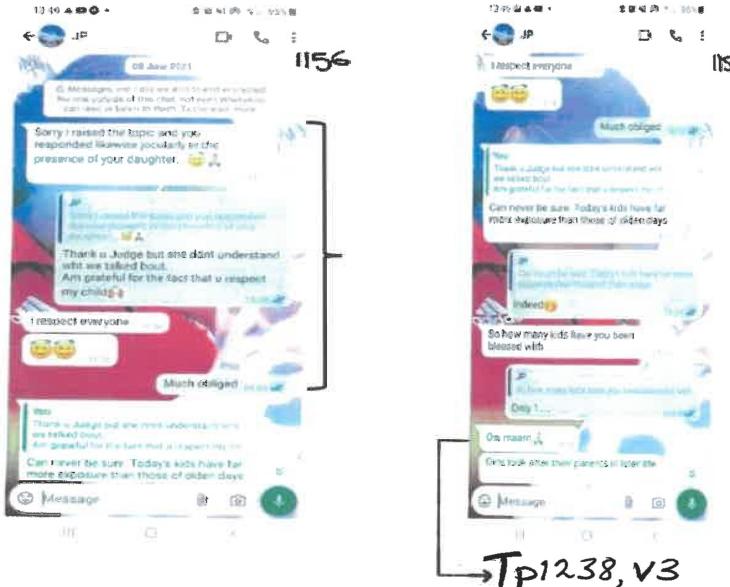
The deponent has acknowledged that she knows and understands the contents of the affidavit, which was signed and sworn before me at Makhanda on this the 12 day of January 2023, the Regulations contained in Government Notice No R1258 of 21 July 1972 as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

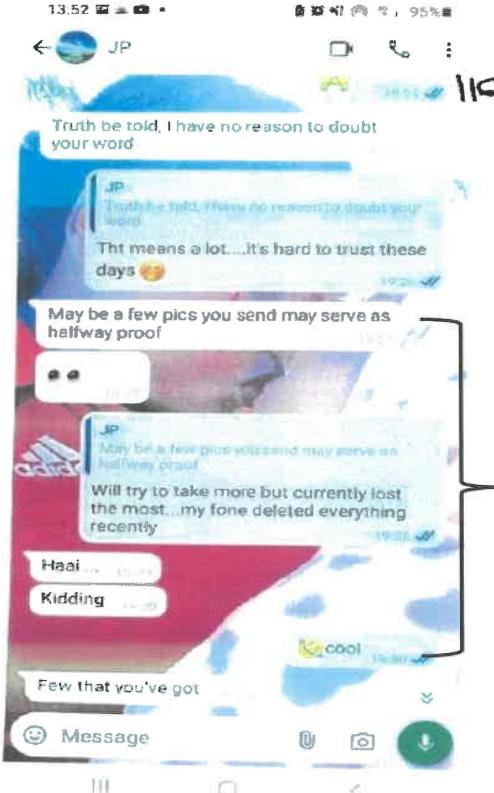
140711 12012023
VISITORS
2023-01-12
GRAHAMSTOWN POLICE STATION

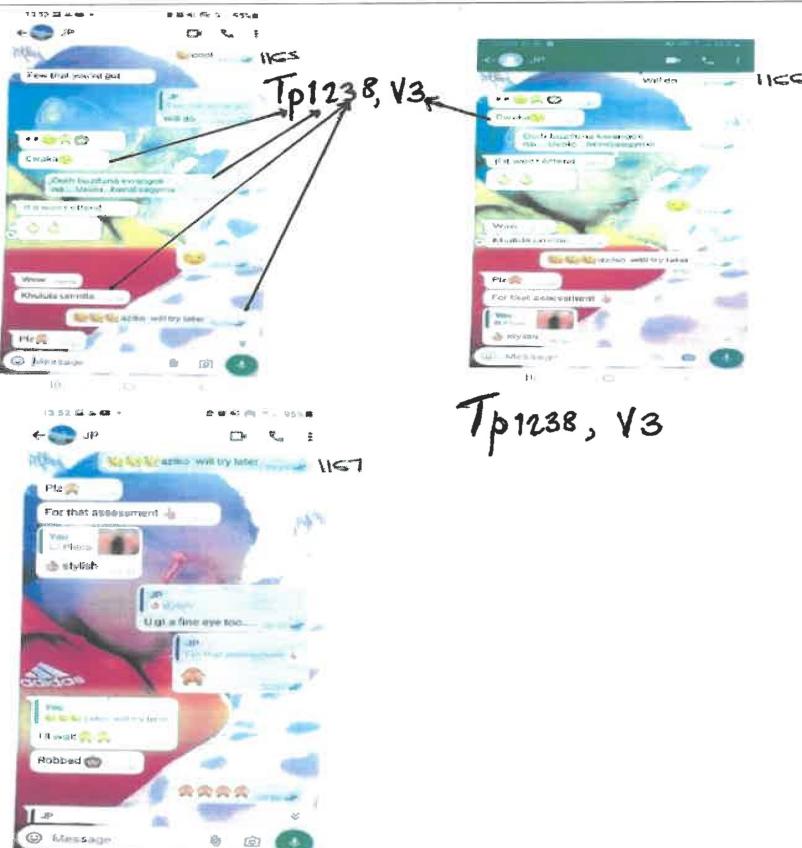

R. S.
140630416
C. O. O.
COMMISISONER OF OATHS

ANNEXURE E

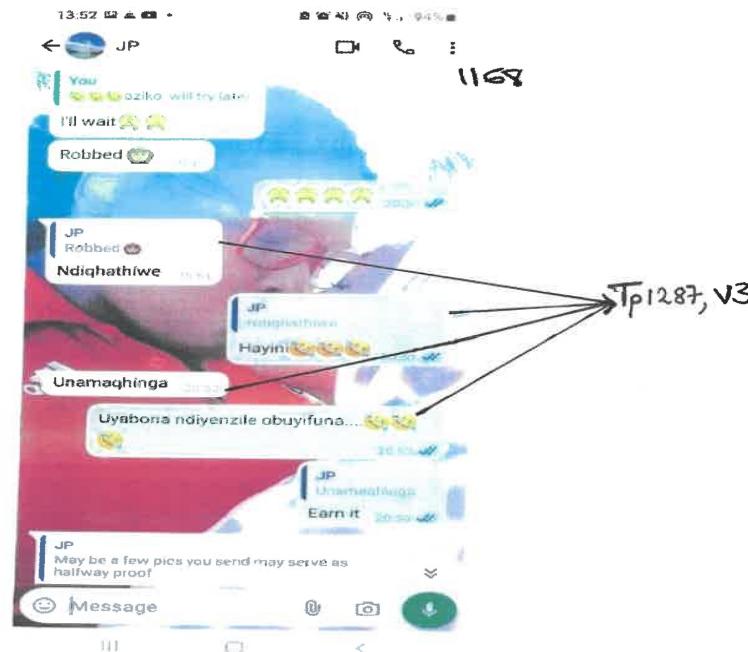
1539

SCHEDULE OF WHATSAPP MESSAGES OMITTED FROM THE COMPLAINT BUT DOWNLOADED BY MÖLLER		
DATES AND ALLEGATIONS IN COMPLAINT	OMMITTED MESSAGES	COMMENT
<p>08 June 2021</p> <p>In vol 1 page 5 para 7, the Complainant alleges that on 08 June 2021, the JP came to see a senior judge she was working with at the time and on his exit, he saw the Complainant's child and they had a conversation about the child's age. The conversation about her age and that of her daughter later continued on WhatsApp etc.</p> <p>She relies on annexure "B1" on vol 1, page 24 to support her allegation</p>		<p>Although in para 7 of the complaint the Complainant narrates the conversation on page 1156 at 18:54 to 18:58, the text messages that were exchanged from 18:54 to 18:58 are omitted from the screenshot marked annexure "B1" (vol 1 page 24) to the complaint.</p>

<p>In vol 1, page 5 para 8 of the complaint, the Complainant states that the JP commented on her status on WhatsApp in Xhosa, stating that she must take off her clothes in the upper body (<i>khulula umntla</i>), to which she responded that there were not there as she wanted to get him off his back. Further that he said "please" and she kept quiet.</p> <p>Further, in vol 1, page 6 para 8, the Complainant states that the JP responded by saying he will wait and that she kept quiet and then he sent a text saying "robbed" as she had kept quiet.</p> <p>She relies on annexure "B3" vol 1, page 26 to support the allegation</p>		<p>Although in paragraph 7, vol 1, page 5 (line 19) of the complaint, the Complainant states that at around 19:27, The JP said maybe a few pics you send may serve as halfway proof and that she did not respond, the chats exchanged from 19:27pm to 19:30pm have <u>been omitted</u> from annexure "B3" (vol 1 p26)</p> <p>Her allegation that she did not respond is also incorrect, the Complainant responded and entertained the messages as seen at 19:27 and 19:30 at page 1164</p>
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<p>In vol 1, page 6 para 8, line 2, the Complainant states that she sent emojis of a monkey hiding its face and the JP sent a text message saying he was cheated on (ndiqhathiwe), he also said that she was full of tricks.</p>		<p>The conversation which the Complainant is referring to herein is the conversation depicted in pages 1165, 1166 and 1167 of the record, which conversations have been <u>completely omitted</u> by the Complainant.</p> <p>NB* As seen in pages 1165, 1166 and 1167, the Complainant reciprocated to the messages and at some point, during the conversation, the Complainant sent the JP a picture of herself to which the JP at page 1166 responded at 20:32 "<i>stylish</i>", not a status as alleged by the Complainant in the complaint.</p> <p>Following the JP's "<i>stylish</i>" comment, the Complainant at page 1167 at 20:33 responded "<i>you got a fine eye too</i>" and the conversation continued.</p>
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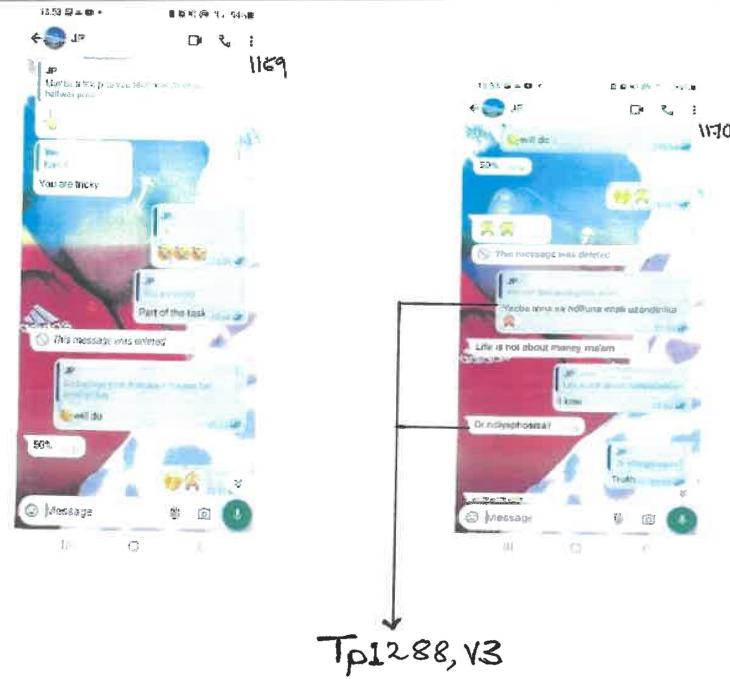
Vol 1 page 6 para 8 in line 3, the Complainant states that she responded to a text which the JP had deleted that said, "go halfway now and leave the rest for another day", to which she said, "will do" and kept quiet.



The conversation which the Complainant is referring to herein is the conversation depicted in page 1168 of the record. The Complainant omitted the entire conversation contained

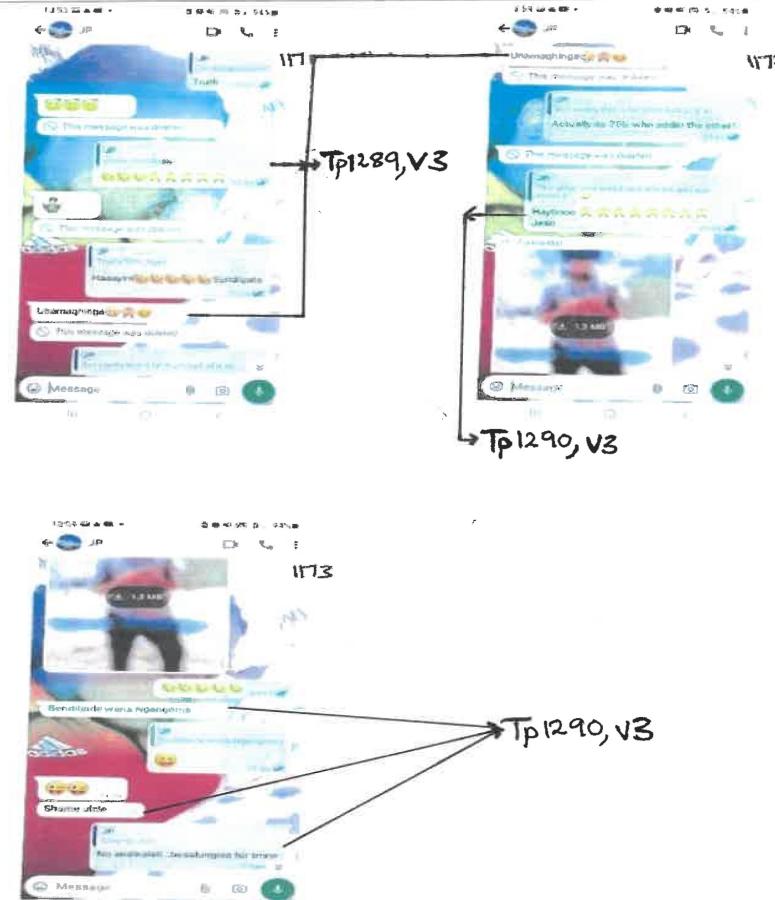
NB * At 20:51, the Complainant replies "Hayini" to the JP's "ndighathiwe" text and at 20:52, she replies "uyabona ndiyenzi obuyifuna" to the JP's "unamaqhinga" text, and most importantly, replies to the same "unamaqhinga" text at 20:53 to say, "earn it".

In vol 1 page 6 para 8 from line 5, the Complainant alleges that the JP kept on deleting messages and asked her if she was still taking a picture and that he was getting impatient. Further, she states that on the same day, he sent a video which she does not recall and that she did not respond and he asked if she was sleeping



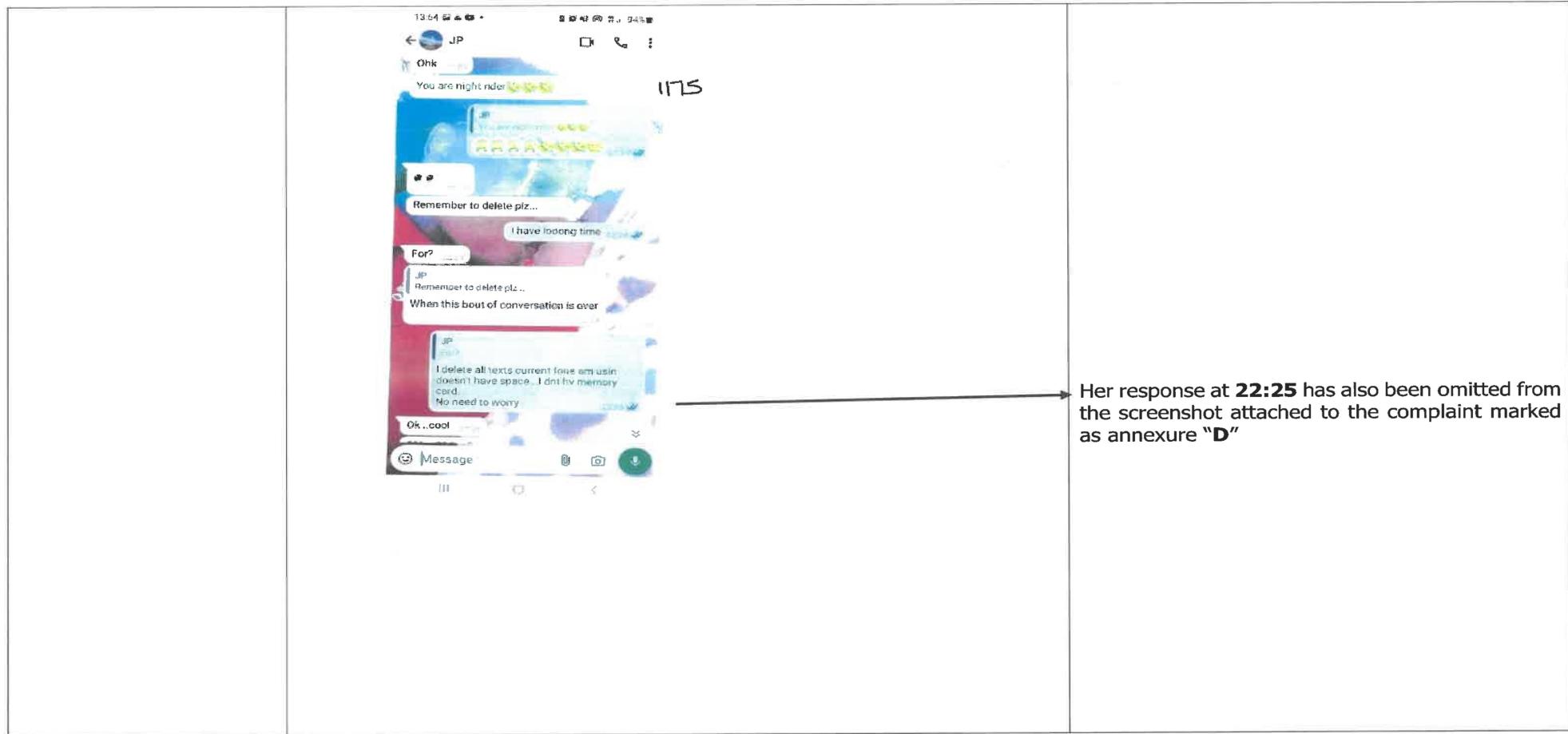
The Complainant omitted to attach the screenshot of this conversation to her compliant as per pages 1169 and 1170, where in fact she entertained the conversation and at 21:10 on page 1170, the Complainant says "**Yazba mna xa ndifuna imali uzandinika**" to the JP's text of 21:09 which stated, "*I am not demanding too much*" and the conversation proceeded. The complainant did not keep quiet as alleged in the complaint.

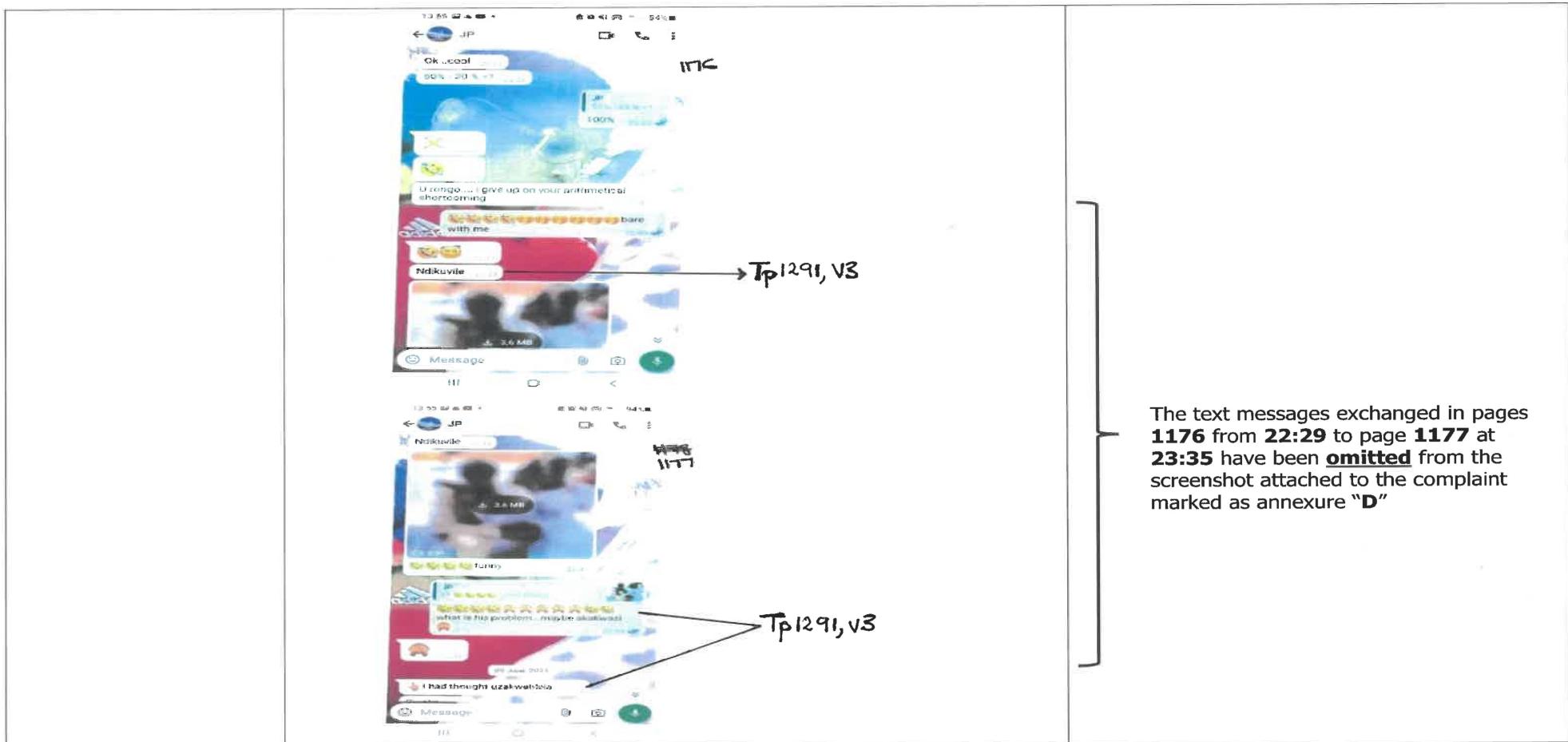
In vol 1 page 6 para 9, the Complainant alleges that the JP kept chatting to her during the evening and asked if she was a night rider, to which she did not respond. She then alleges that he told her to delete the messages, and she did not respond. She thereafter ignored her phone and slept. She annexes the below screenshot marked "D" to support this allegation



The Complainant omits the screenshots of the conversations contained in **pages 1171, 1172 and 1173**, wherein she reciprocates and engages in the chats. It is incorrect that she did not respond as she alleges in the complaint.

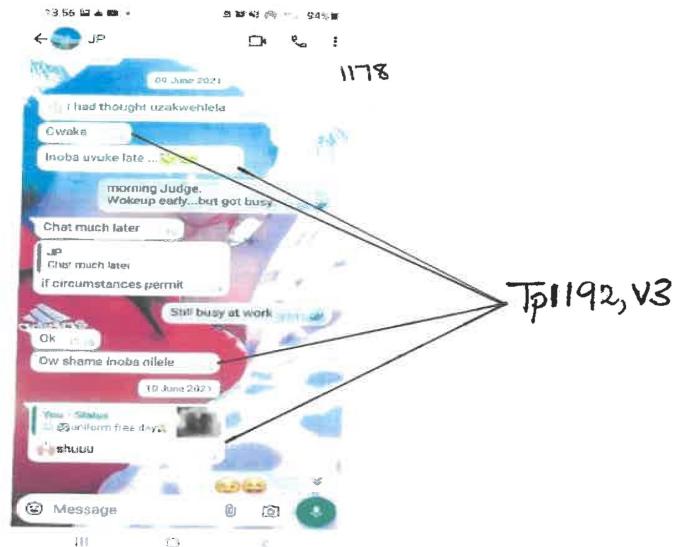
		<p>The Complainant deleted the following messages, which as a result, <u>do not appear</u> in her screenshot annexed in annexure "D" above:</p> <p>Her response at 22:09 has been omitted from the screenshot attached to the complaint marked as annexure "D"</p> <p>Her response at 22:24 has also been omitted from the screenshot attached to the complaint marked as annexure "D"</p>
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09 June 2021

Vol 1 page 6 para 10, the Complainant alleges that she uploaded a status on WhatsApp and the JP commented on her status saying he thought she was going to show him the bottom part of her body (I had thought uzakwehlela) and that this was around half past five in the morning. She attaches annexure "E" at vol 1, page 31 to support this allegation.



Tp1192, v3

The Complainant deleted the following messages, which as a result, do not appear in her screenshot annexed in annexure "E":

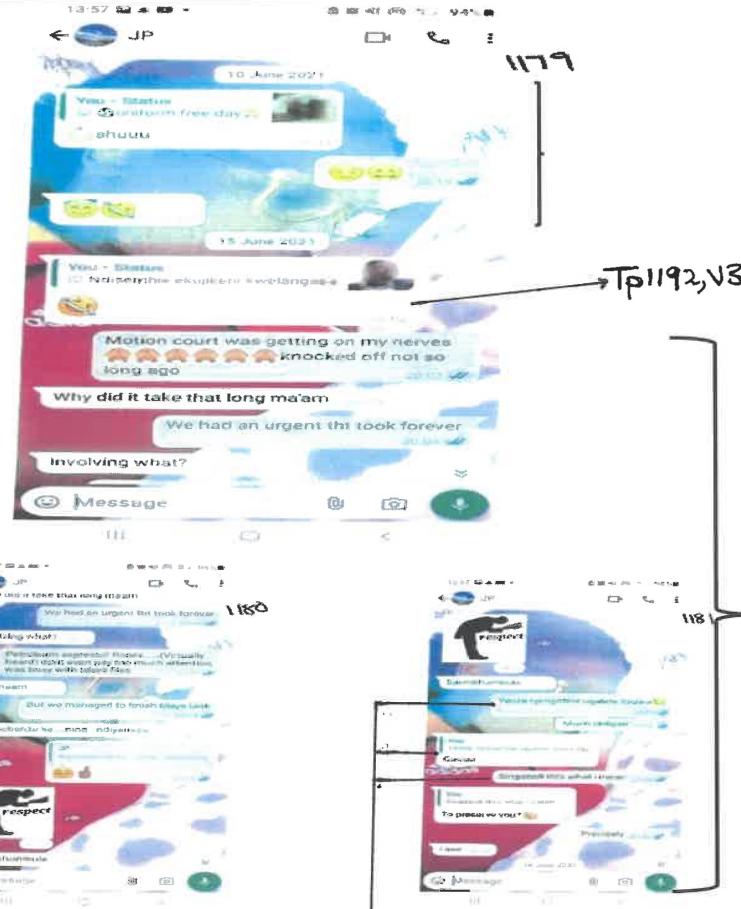
← the JP's message at 05:33 is omitted (important to note that the message was not in response to a status as alleged by the complainant).

10 June 2021

15 June 2021
Vol 1 page 6 para 10
line 5, the Complainant alleges that she uploaded a status of a 2nd picture in the evening with the caption "*I am still beautiful even at sunset*" and the JP sent her a laughing emoji. Annexure "E" is annexed to support the allegation



Tp1293, v3



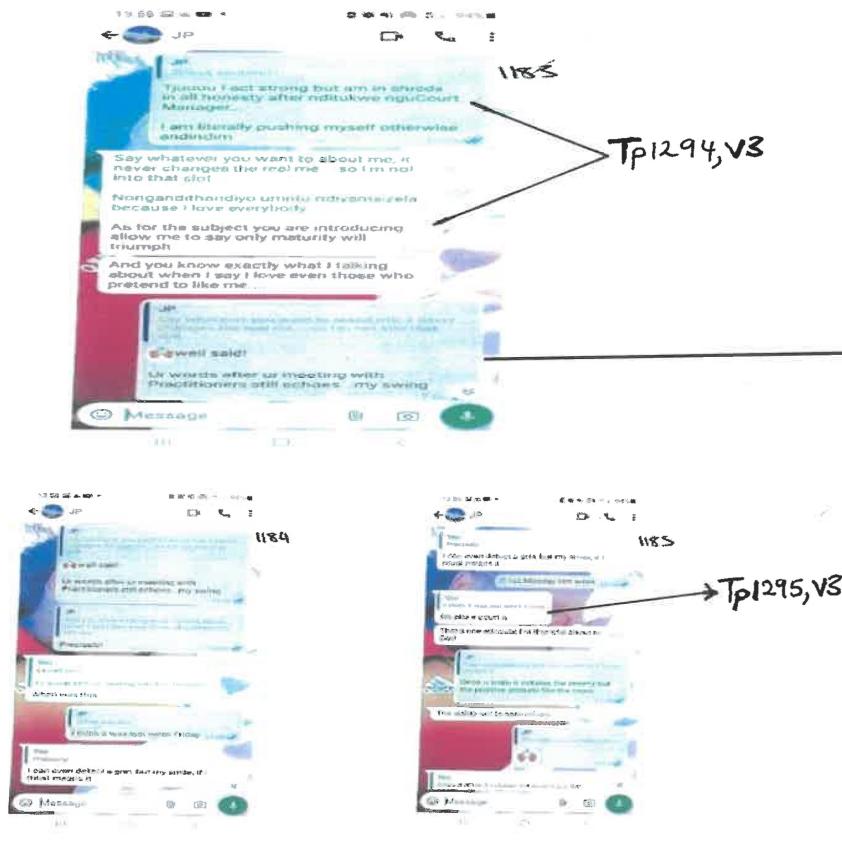
The text messages exchanged in **pages 1179** on **10 June 2021 at 20:04 to 21:25** have been omitted from the complaint.

The text messages exchanged in **pages 1179** on 15 June 2021 at **20:02** to **1181** at **20:52** have been omitted in the complaint, wherein the Complainant reciprocates the conversation

16 June 2021

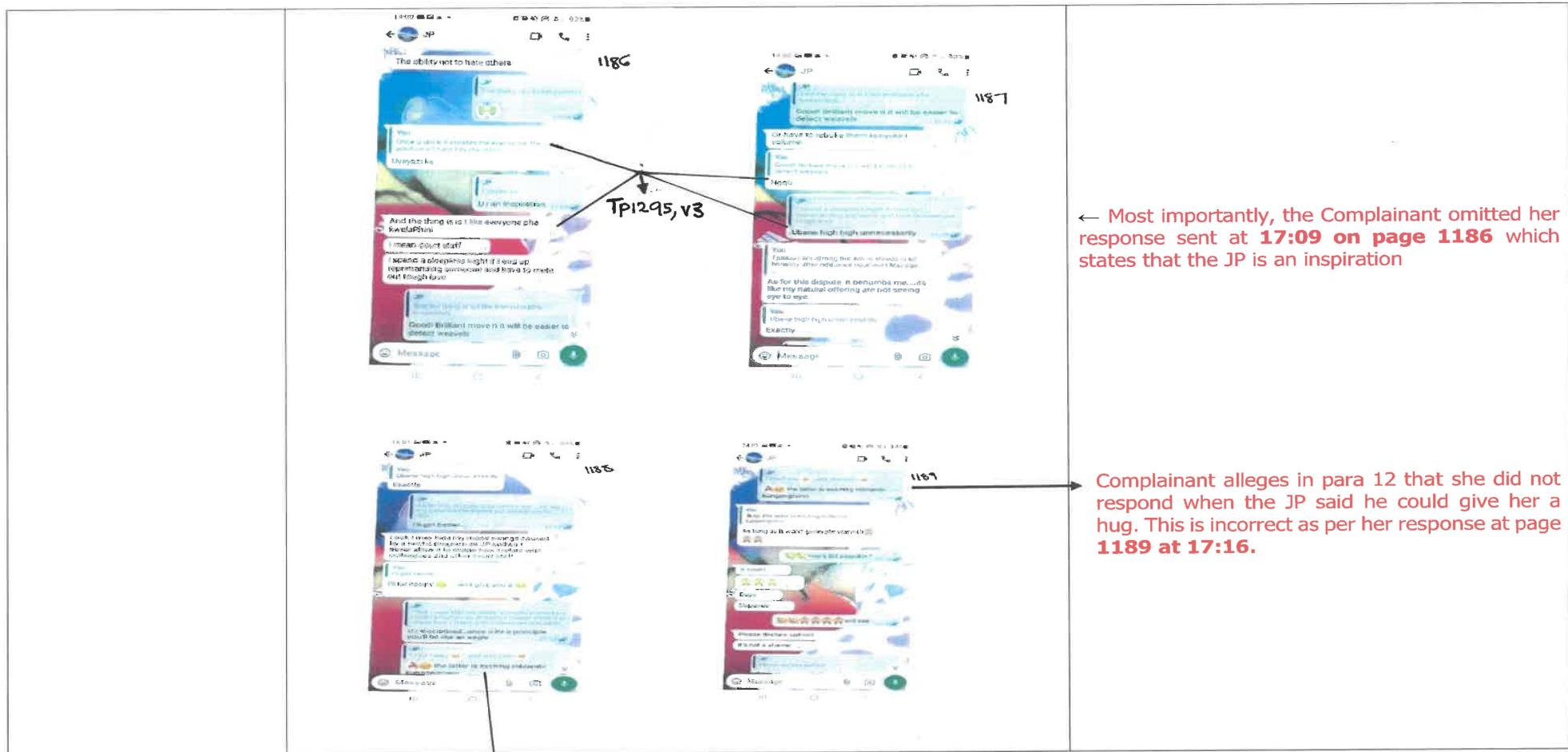
In vol 1 page 7 para 12, the Complainant alleges *inter alia* the following:

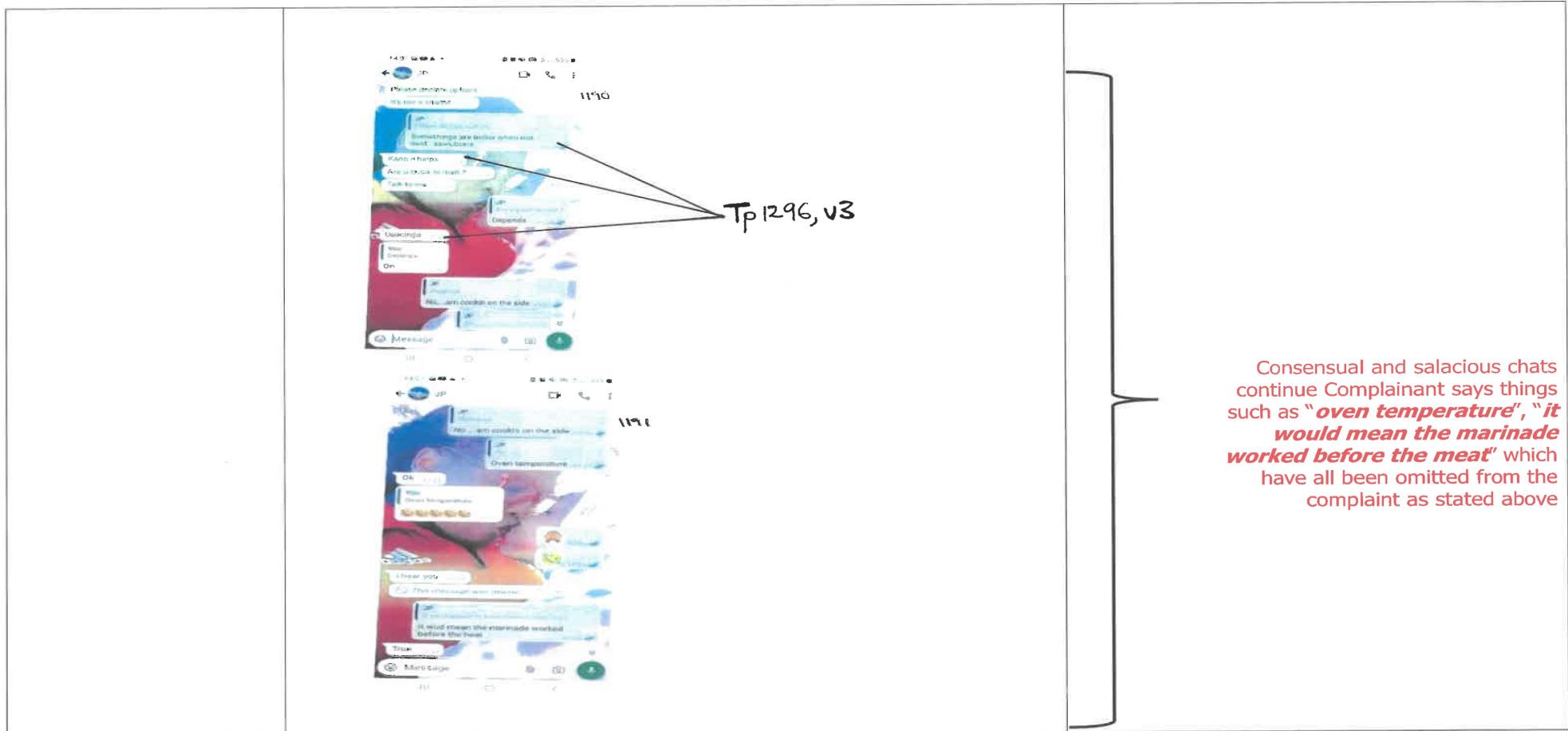
- that the JP said that he could give her a hug, to which she did not respond. Further, JP sent her a picture which had different sex position styles which he deleted and asked, "Step one or position one?"

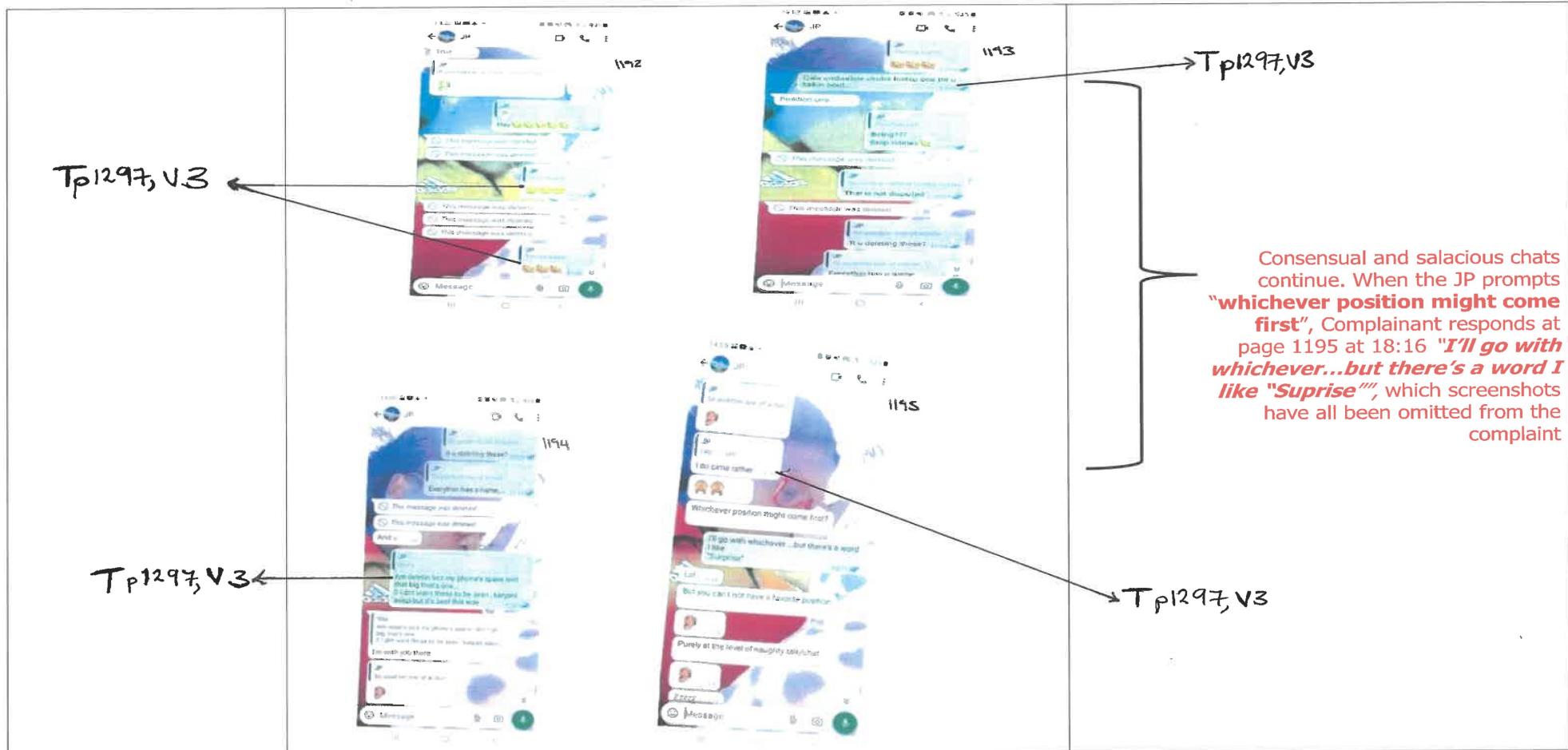


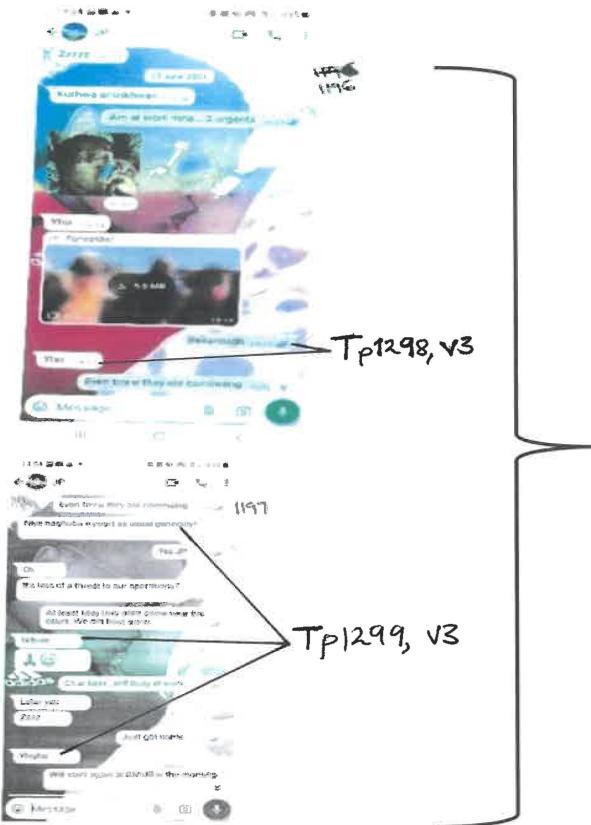
The conversation which the Complainant is referring to herein is the conversation depicted in pages **1183 to 1195** of the record, which conversations have been **completely omitted** by the Complainant

The text messages exchanged from **pages 1183** on 16 June 2021 at **17:06** to **page 1195** at **23:19** have been omitted which reflect consensual and flirtatious exchanges between the parties.







<p>17 June 2021</p> <p>In vol, page 7, para 13 The complainant alleges <i>inter alia</i> that on 17 June 2021, the JP asked whether they were warming up and that the JP sent her pictures which he kept deleting and there was one that he sent, and she took a screenshot of before he deleted. She kept quiet and he then sent a text saying BJ=? to which she did not respond. He then sent a picture of a man muffing a woman, to which she remained quiet and decided not to respond.</p> <p>The Complainant relies on the annexure "H" and "H1" below to support the allegation</p>		<p>The conversation which the Complainant is referring to herein is the conversation depicted in pages 1196 to 1200 of the record, which the below mentioned messages have been deleted</p> <p>The complainant paints a picture in para 13 that the conversation with the JP commenced with him asking whether they were warming up. This is incorrect, the actual conversation starts at 19:38 as per page 1196 to 1197, which screenshots have been omitted from the complaint.</p>
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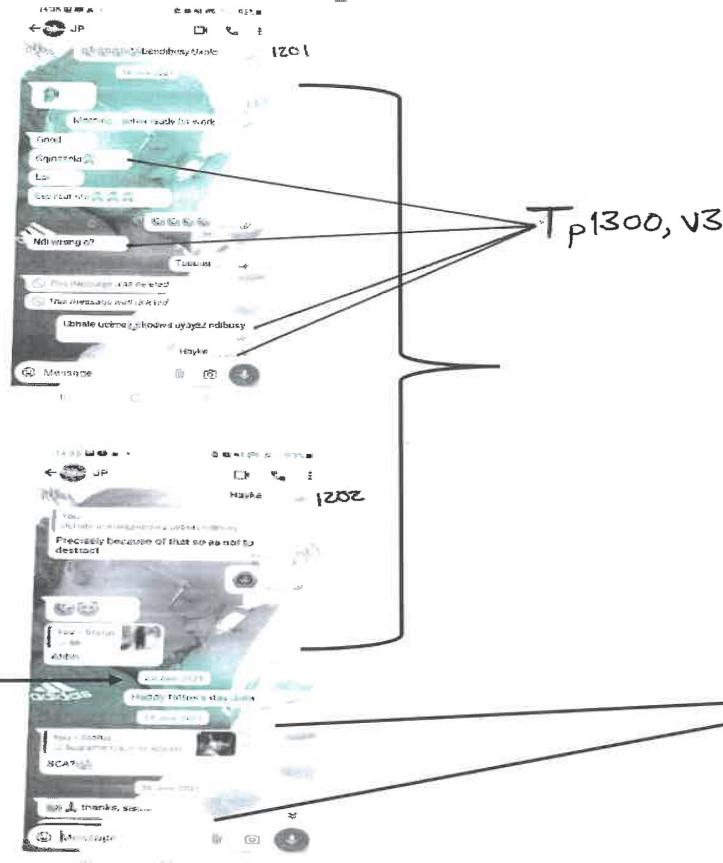
As per annexure "H", it is clear that the Complainant has deleted the following messages from pages 1198 to 1200:-

The screenshots show a messaging conversation. In message 1198, the Complainant deletes a message at 21:27. In message 1198, the Complainant deletes a message at 21:28. In message 1199, the entire conversation from 21:28 to 21:30 is deleted. In message 1200, the Complainant deletes a message at 21:34 and a message at 21:35. In message 1200, the Complainant deletes a message at 21:55.

***Page 1198 at 21:27, she deletes her response "Haybo usabuyela apho"**
***Page 1198 at 21:28, she deletes her response "Purely because we were about to land"**
***Page 1199 from 21:28 to 21:30, entire conversations have been deleted from annexure "H"**
***Page 1200 at 21:34, she deletes her response "Not to worry about that..."**
***Page 1200 at 21:35, she deletes her response "length"**
***Page 1200 at 21:55, she deletes her response "bendibusy uxolo"**

18 June 2021

In Vol 1, page 7, para 14, the Complainant alleges that on 18 June 2021, the JP asked her to finish what they were talking about and asked if he was wrong, to which she responded "No"



20 June 2021

In Vol 1 page 8 para 15, the Complainant alleges the following and relies on K1, page 39 , vol 1:

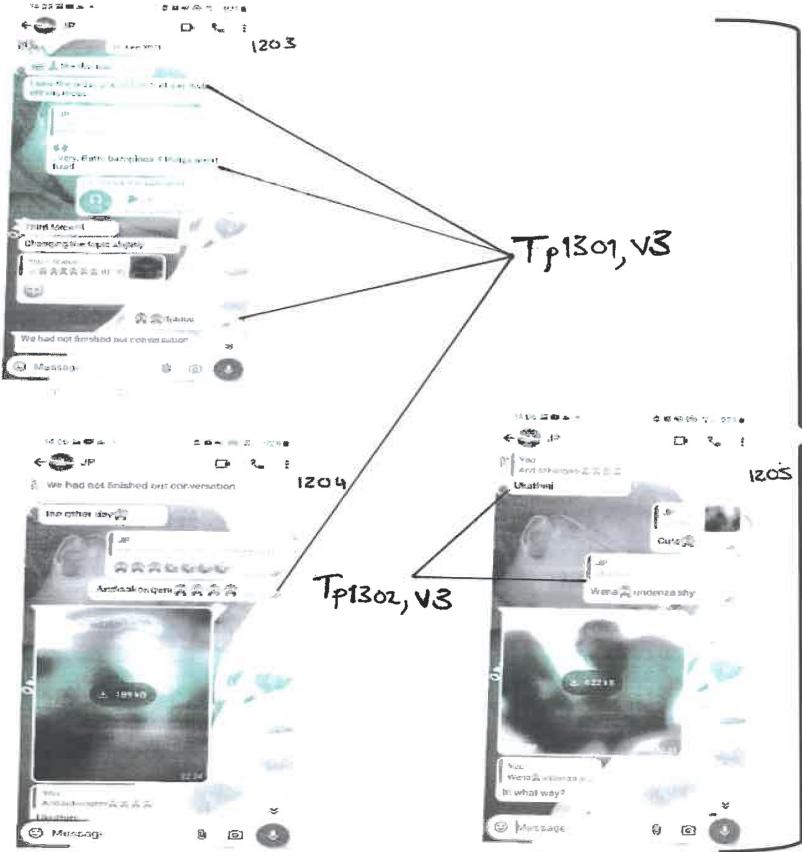
- JP commented on a video where she was

The conversation which the Complainant is referring to herein is the conversation depicted in pages 1201 and the top part of 1202

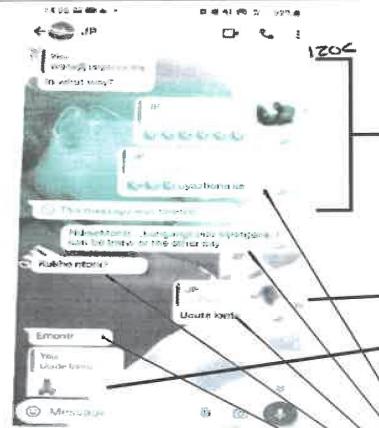
Although the Complainant narrates some of the conversation of 18 June 2021 in para 14 of the complaint, the screenshot of the entire conversation is omitted. Including the message from the JP at 04:05, which states that "esp rear into" to which she responds to with 4 (four) laughing emojis at 04:06

The following messages have also been omitted from the complaint

The "Happy Father's Day Jola" message from the Complainant has been omitted from the complaint as well as the response thereto at 06:05.

<p>sitting with her sister's kids at Spur and he told her that they had not finished the conversation and the JP sent her a video of a woman lying on her back with a man on top.</p> <ul style="list-style-type: none"> She sent a text that she is around East London and if it was possible for them to meet and talk, and he asked if it would be possible that they get intimate, and she responded with a bible verse He asked, "what if we melt? it's not impossible". She responded by saying "it is impossible" He sent an emoji of a half-peeled banana. In reply, she sent an emoji with the words "Honourable member, don't do that" 		<p>The conversations contained in pages 1203, 1204 and 1205 have been omitted from the complaint.</p> <p>Most importantly, she omits the messages where she refers to the JP as cute and says he makes her shy</p>
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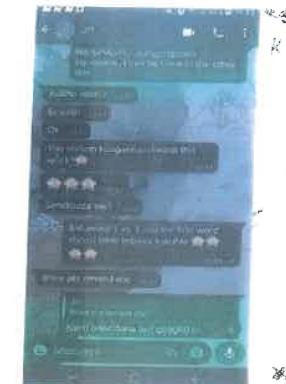
- He asked if she only wanted to be friends, she did not respond

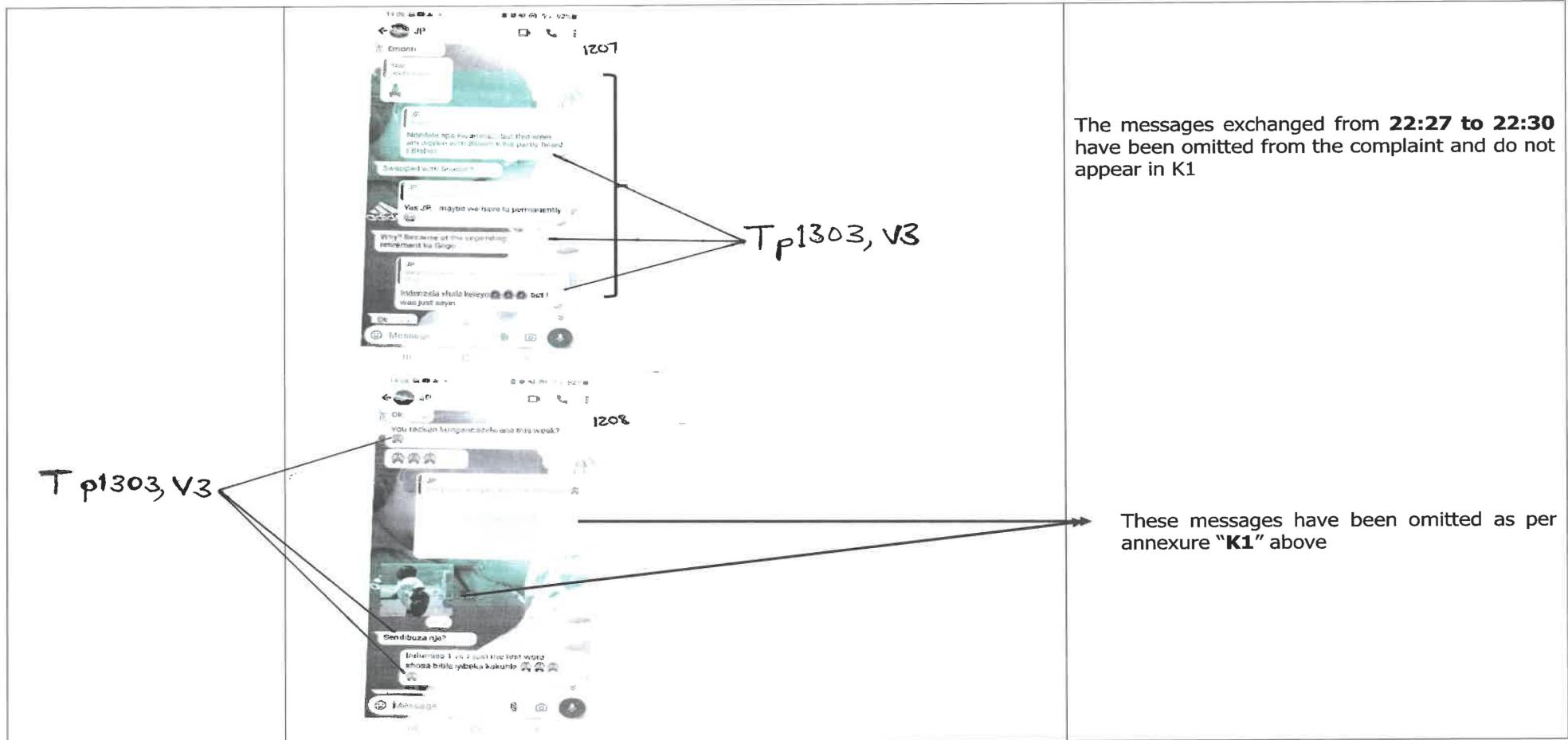


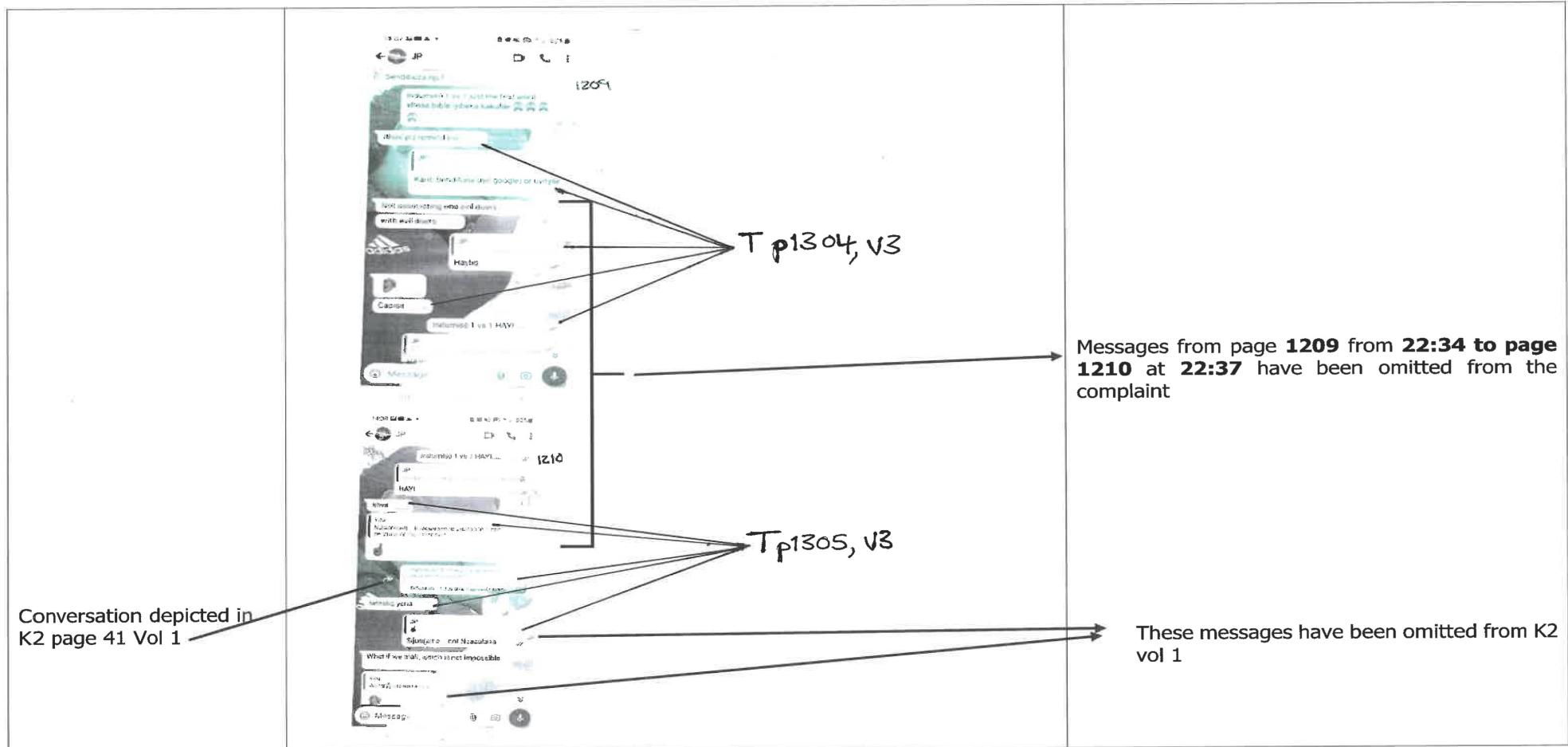
Tp1302, v3

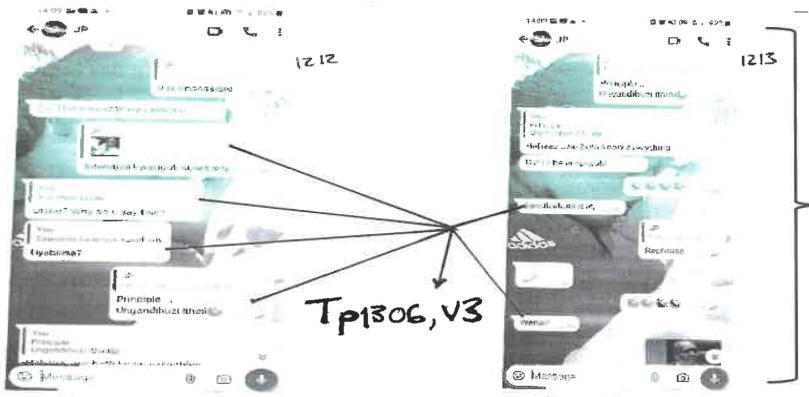
Messages from **22:25 to 22:26** at page **1206** have been omitted as per annexure "**K1**" below

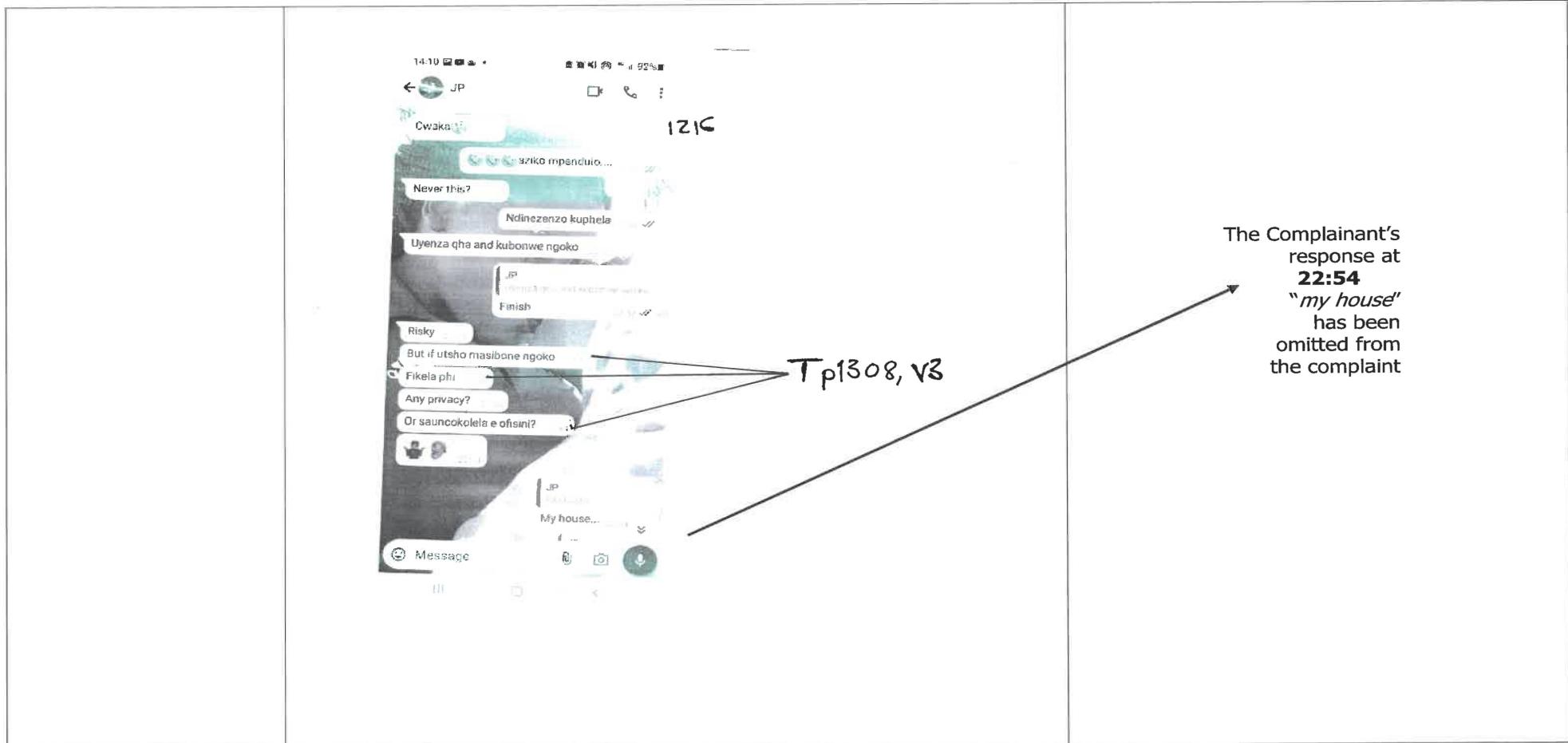
These messages have been omitted as per annexure "**K1**" below

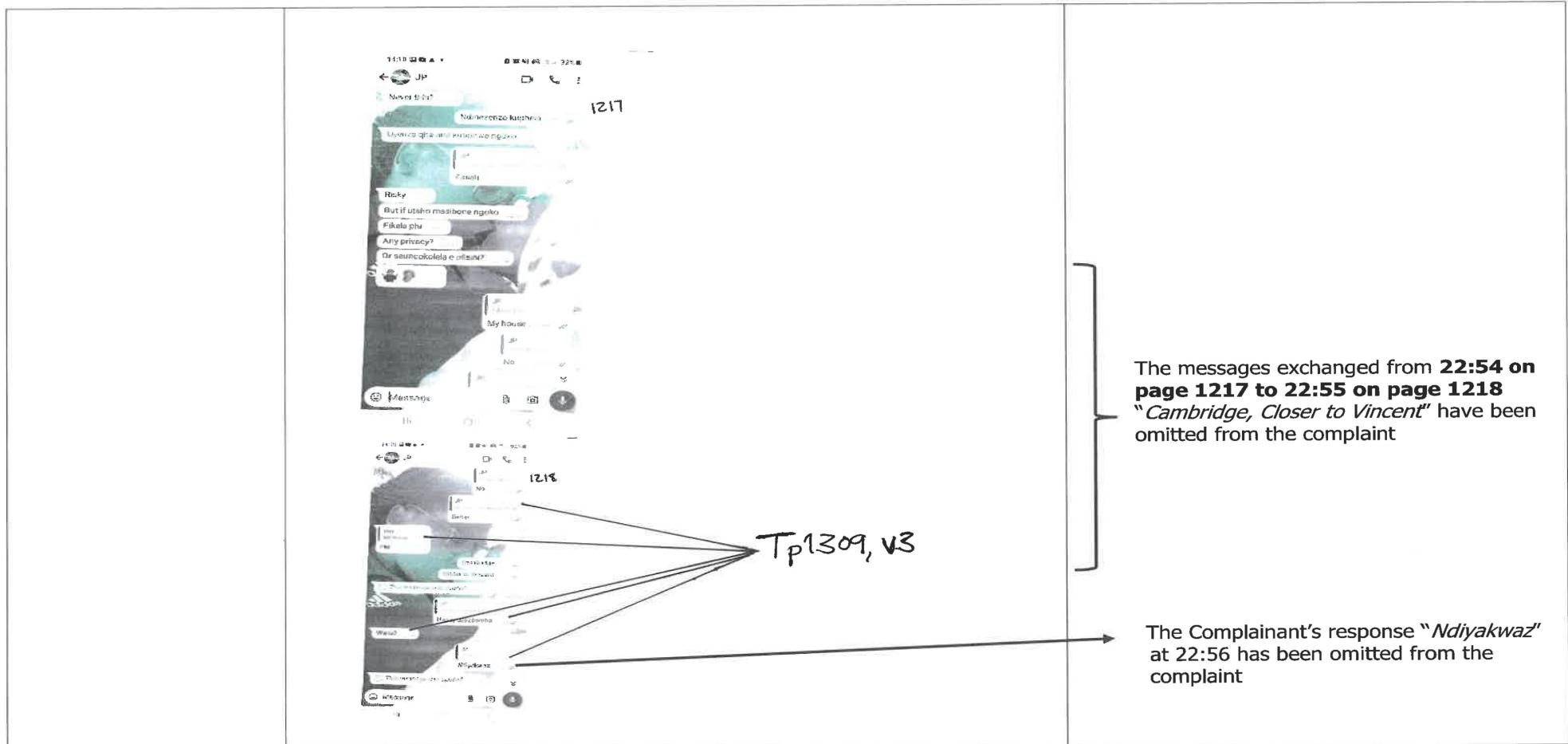


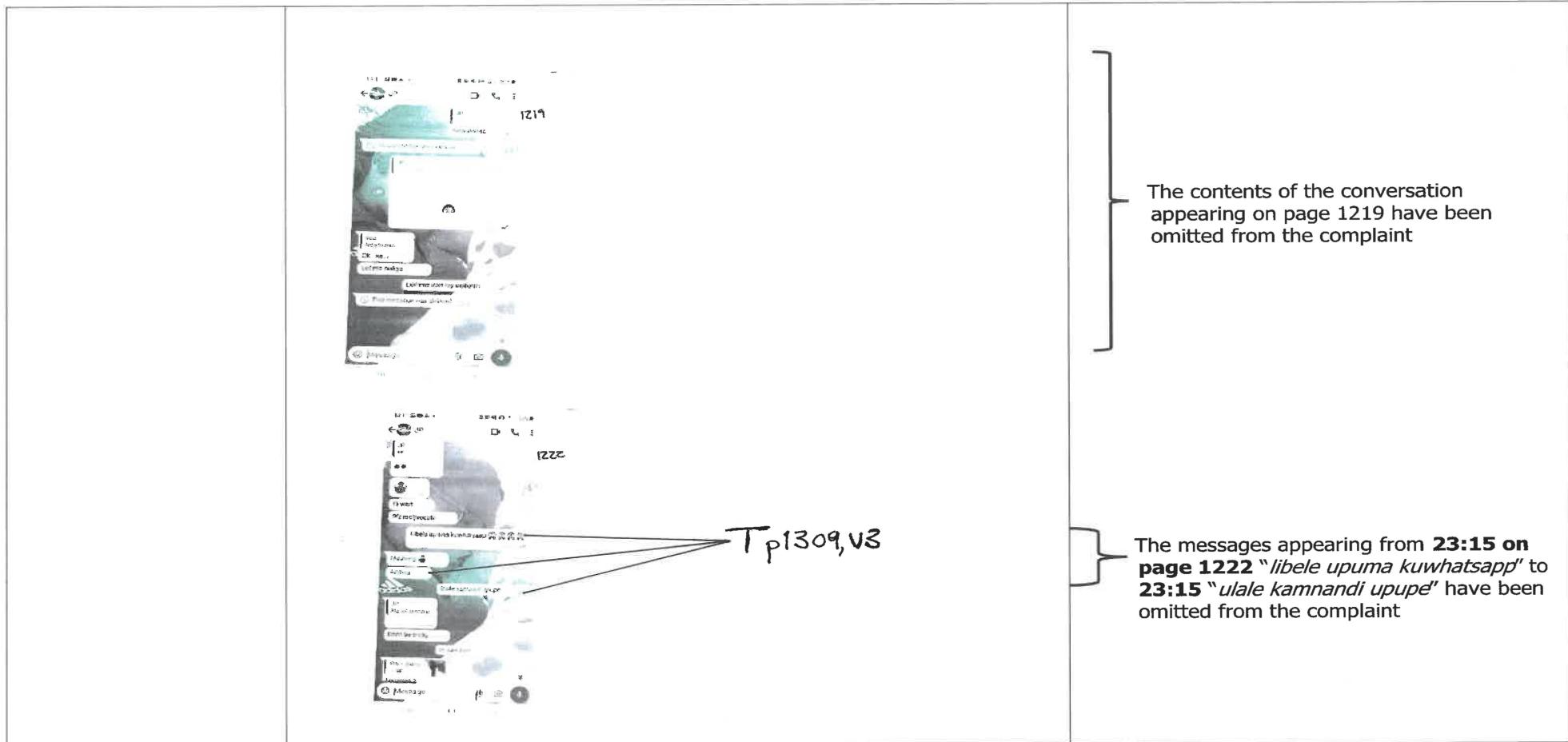




		<p>The messages appearing in pages 1212 – 1213 of vol 3 have been <u>omitted</u> from the complaint</p>
<p>Annexure K3, vol 1 page 42</p> <p>Tp1307 v3</p>		<p>The complainant omits her response at 22:49 with the 5 monkey emojis to JPs question of whether she just wants friendship. It is not correct that she did not respond to the message</p> <p>Her response at 22:52 "<i>Ndinezenzo kuphela</i>" has been omitted</p>







21 June 2021

In Vol 1 page 9 para 16, the Complainant alleges that on that day she uploaded another picture of herself on her status, that was taken at Bisho High Court during that day and the JP kept asking her about the meeting which was then out of her schedule as she was not interested to meet with him.

She relies on annexure "K10" at page 49 Vol 1



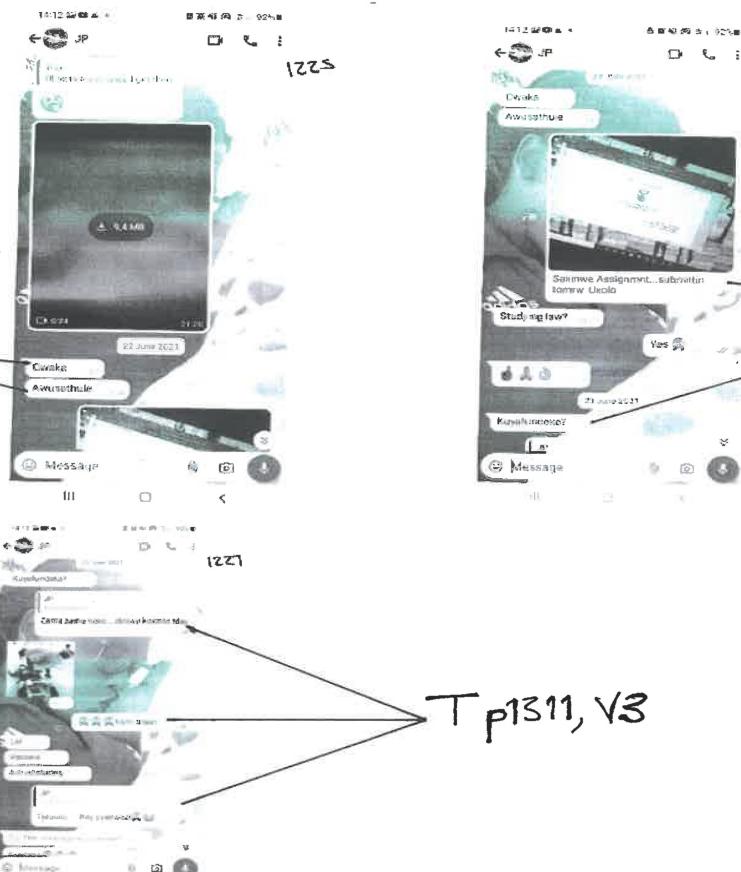
Tp1310, v3



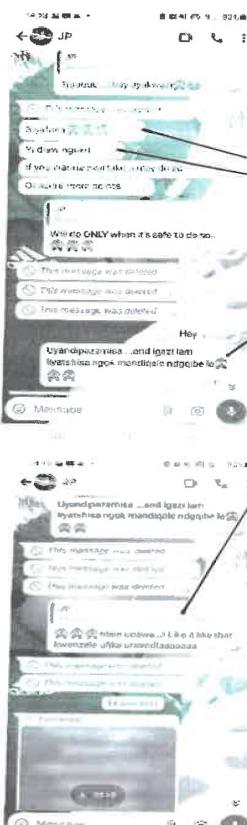
Tp1310, v3

The Complainant omitted her response at 17:56 which states "Bisho" as it does not appear in annexure "K10"

She further omits the messages contained in **page 1223 from 18:02 to 18:03 to page 1226 at 23:37** as they do not appear in annexure "K10"

<p>T p1310, v3</p> <p>23 June 2021</p> <p>The Complainant alleges that the JP sent her a message asking if she wanted to share videos with him</p>		<p>The conversation of 23 June 2021 is actually contained in annexure "K6" to the complaint even though she attributes the conversation to a different day (20 June 2021)(para 15 of the complaint in Vol 1 page 9)</p> <p>The complainant has omitted the following messages, and they do not appear on annexure "K6" :</p> <p>*Page 1227 from 19:17 "kuyafundeka" to 19:31 "kanti unjar"</p>
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Tp1312, v3

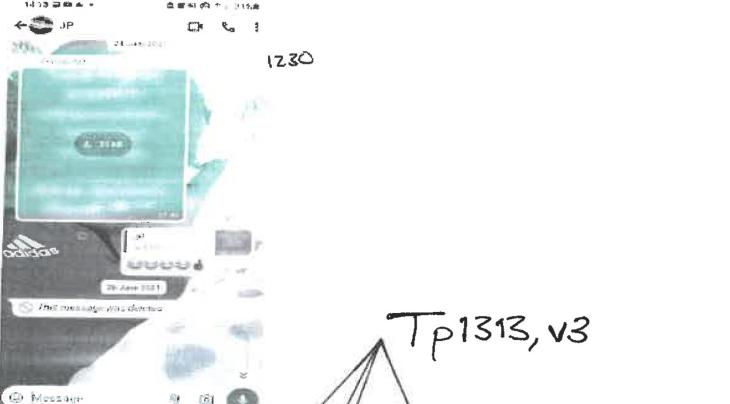
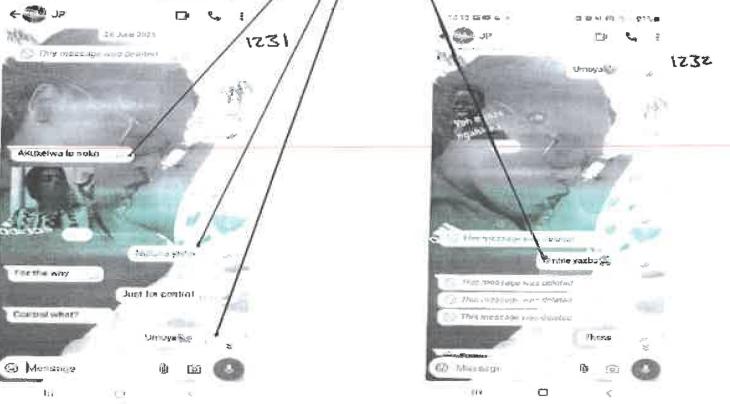


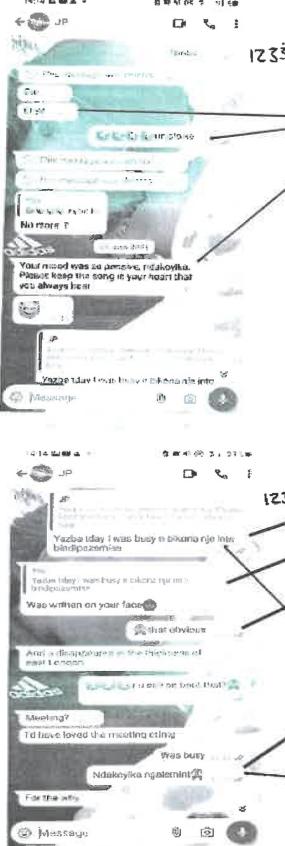
***Page 1227** – She omits her response "tjuuuuu....hay uyakwazi" at 19:35

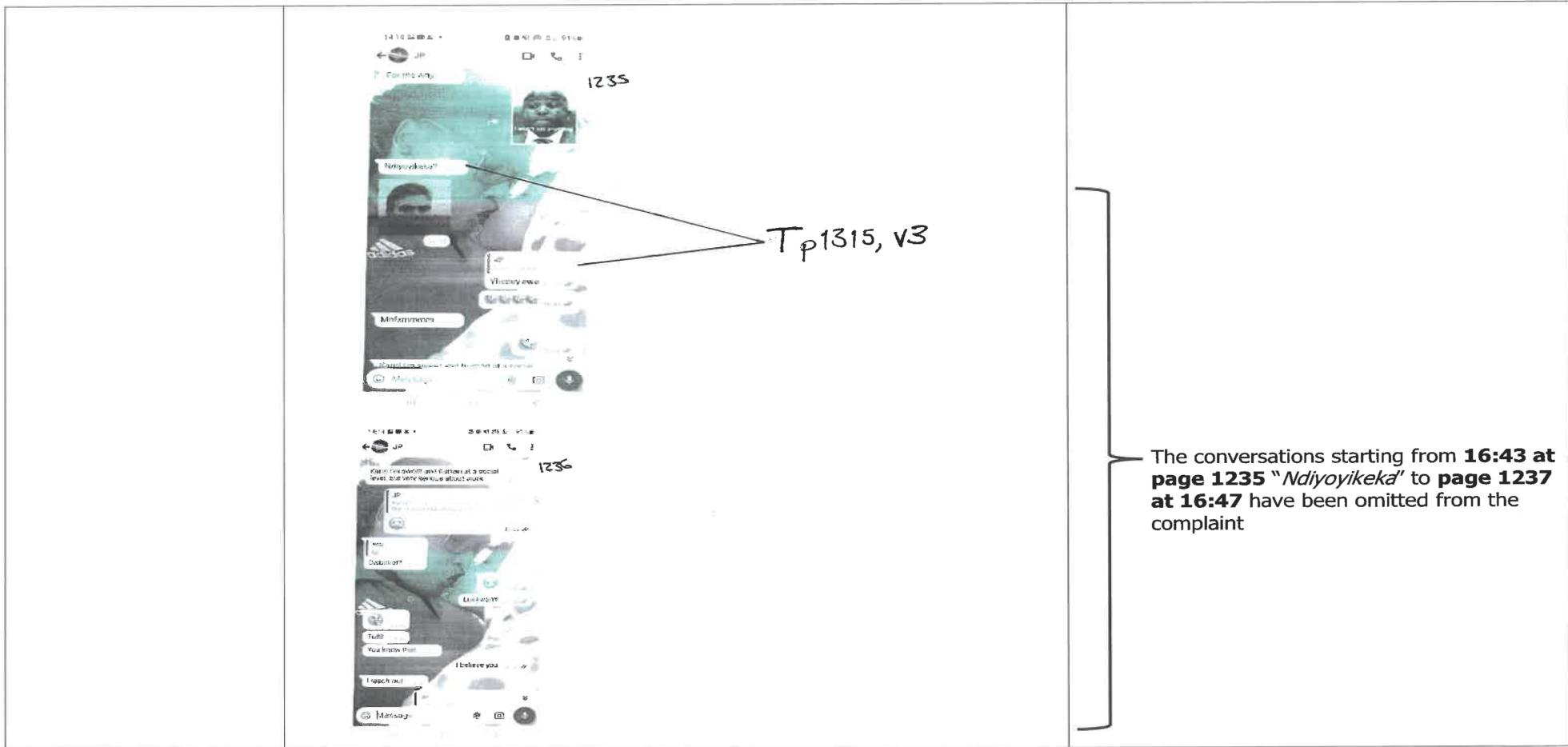
***Page 1228** – she omits "siyafana" at 19:38

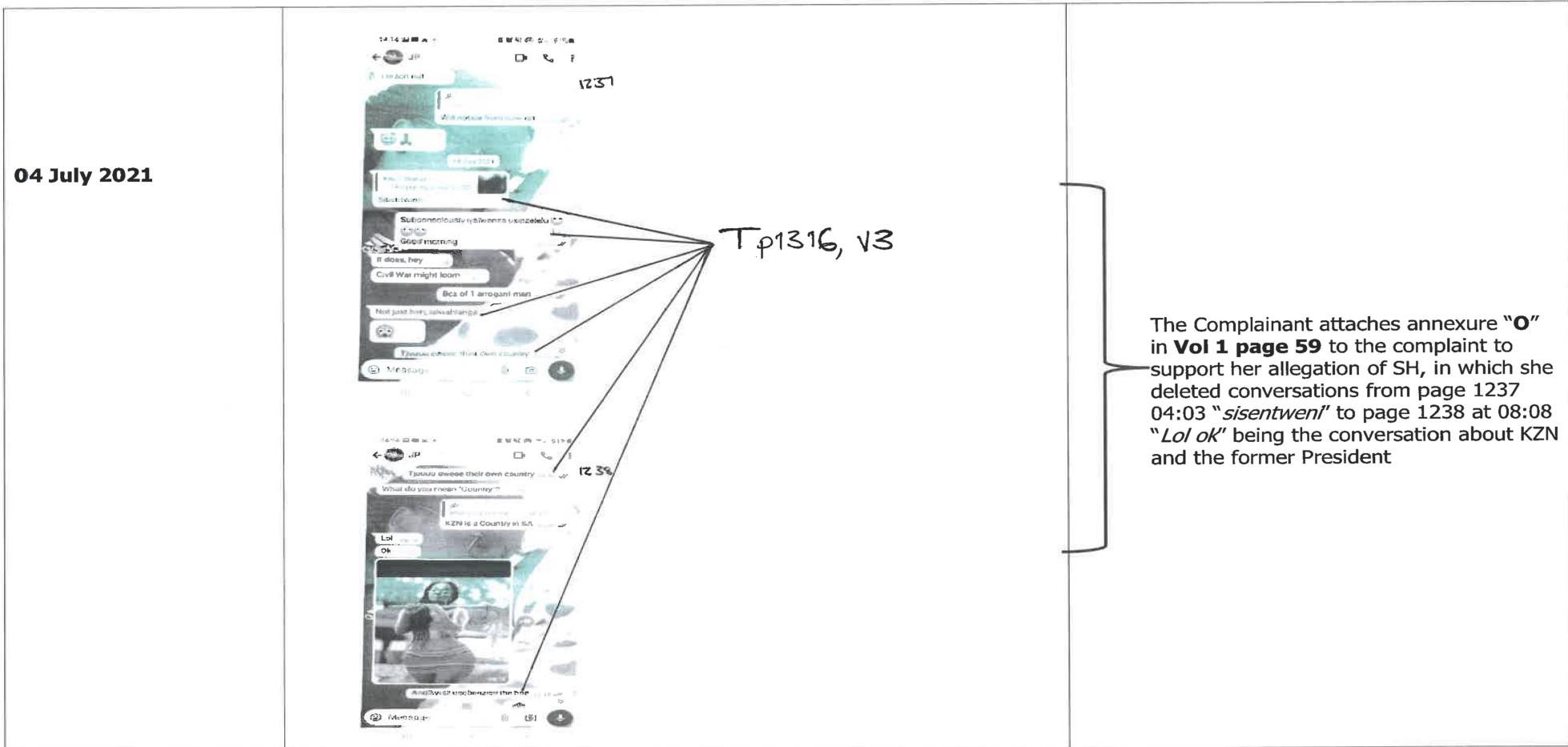
***Most importantly at page 1228 at 19:46 she deleted her response "uyandiphazamisa... and igazi lam iyatshesa ngok mandigale ndiggibe le** **████████**"

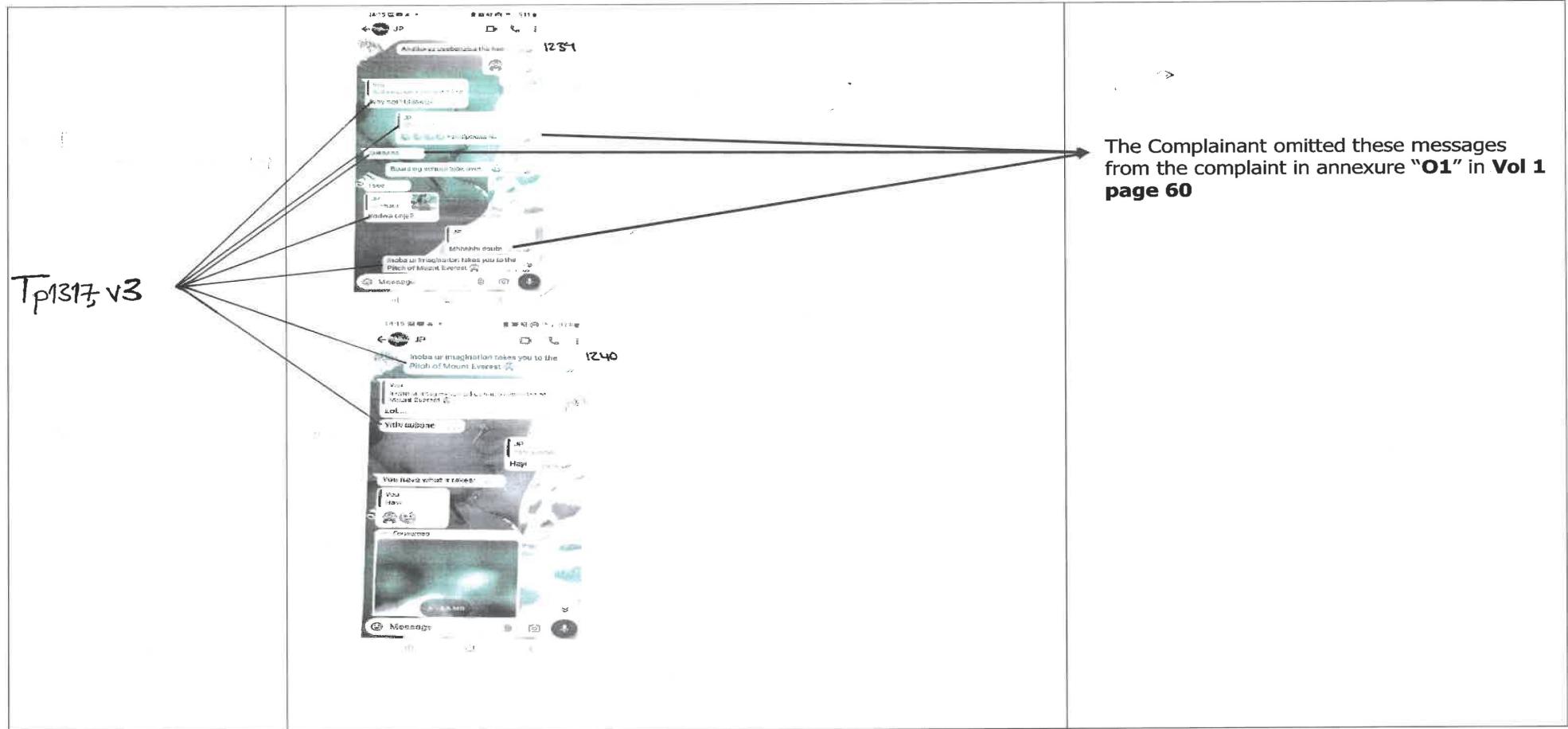
The screenshot of the entire conversation in **page 1229** is omitted. Most importantly, the Complainant omits her response at **19:48** "████████ **hala ubawaa...I like that kwenzele ufile unomdlaaaaaa**"

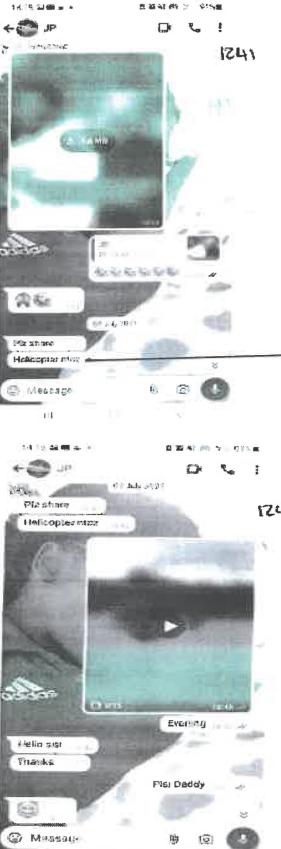
<p>24 June 2021</p> <p>No reference to 24 June 2021 conversations on the complaint</p>	 <p>1230</p> <p>TP1313, v3</p>	<p>Although not specifically referenced in the complaint, the screenshot was downloaded by Moller from Complainant's phone and the entire conversation appearing on page 1230 is omitted from the complaint</p>
<p>26 June 2021</p> <p>No reference to 26 June 2021 conversations on the complaint</p>	 <p>1231</p> <p>1232</p>	<p>Although not specifically referenced in the complaint, the screenshot was downloaded by Moller from Complainant's phone and the entire conversation appearing on pages 1231 to 1233 at 19:49 "no more ?" is omitted from the complaint.</p> <p>Most importantly, she omits her message to the JP at 19:28 at page 1232 "umhle yazba" </p>

<p>29 June 2021</p> <p>In Vol 1 page 10 para 17, the Complainant alleges that she met the JP in person at work and that she wanted to show and tell him that she is not comfortable with the conversations. She did not smile at him and she sent her a text "your mood was so pensive, ndakoyika, please keep a song in your heart that you always bear"</p>		<p>The Complainant attached annexure "L" at page 53 Vol 1 to support the allegation in the complaint, in which she deleted these messages</p>
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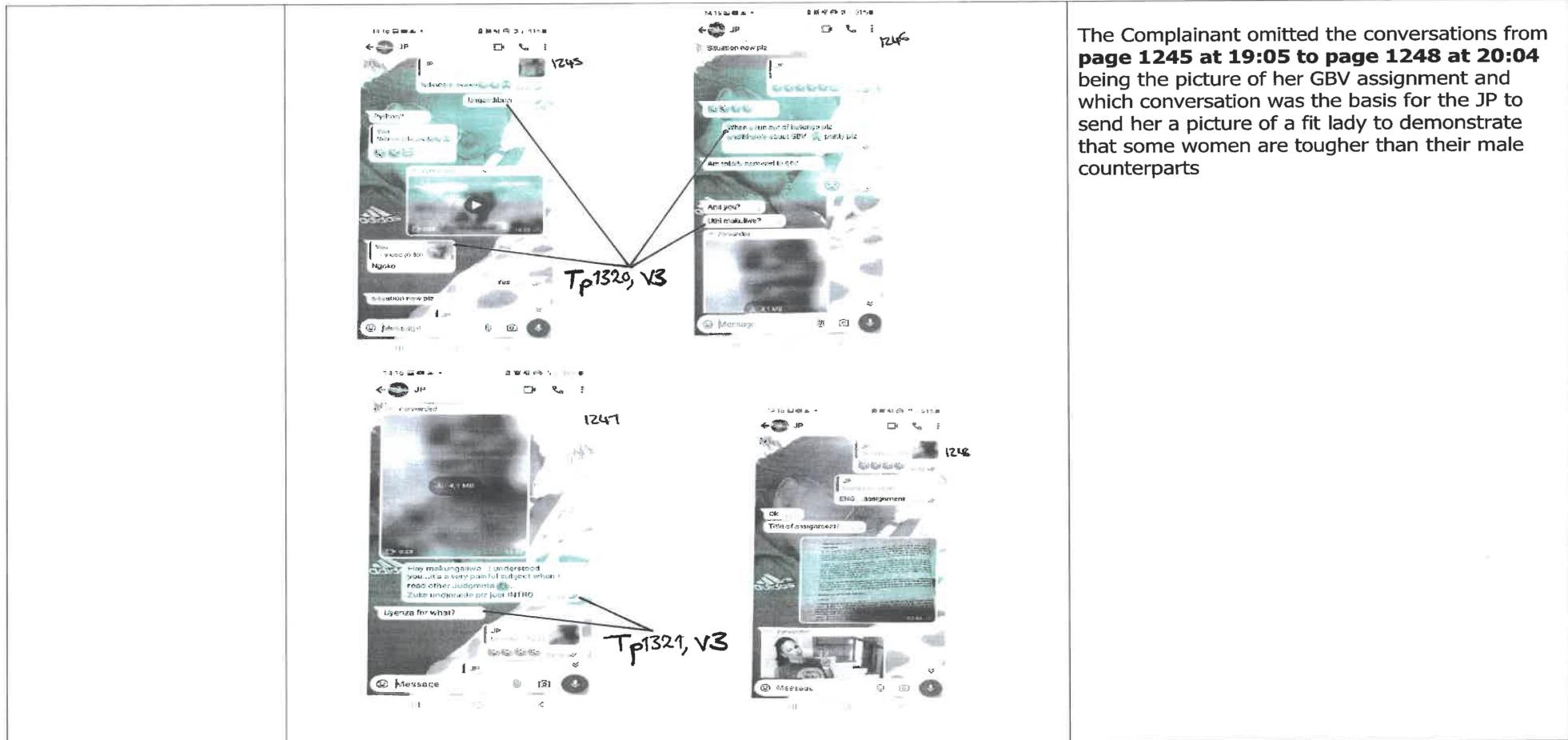






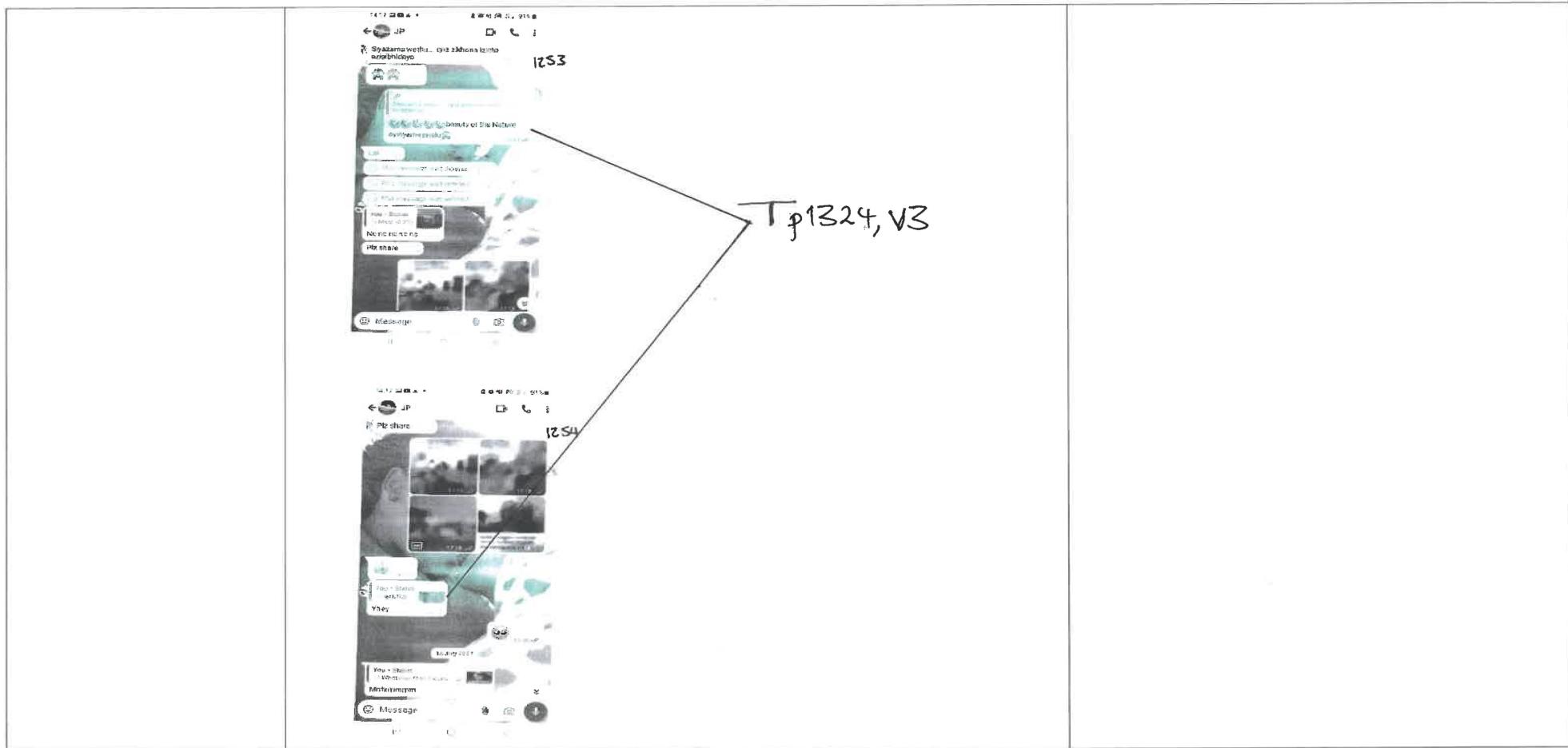
07 July 2021		<p>The Complainant omitted the entire conversation on page 1241 from the complaint</p> <p>The conversations starting from 18:43 at page 1242 "plz share" to page 1243 at 18:52 " ❤ " have been omitted from the complaint</p>
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08 July 2021		Complainant deletes JP's message on 19:19 and her response thereto, as these messages are not contained in annexure "K11" (Vol 1 page 50 of her complaint)
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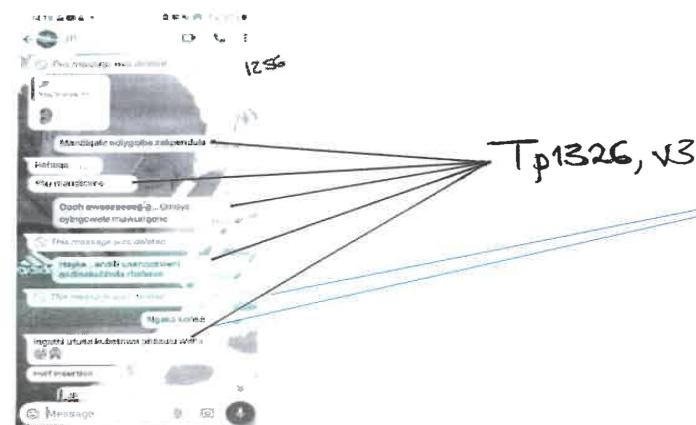
12 July 2021	 	<p>Complainant omitted JP's message on page 1251 at 06:56 from the complaint</p> <p>The Complainant omitted the conversations from page 1251 at 20:00 to page 1254 at 20:56. Most importantly the Complainant omits her message to the JP at page 1251 at 20:02 "hayini...support structure yam le... ayondoda so chill" and "(skhwеле)" on page 1252 at 20:03</p> <p>P 1323, v3</p>
18 July 2021		



The conversation supporting the allegation in para 18 Vol 1 page 10 of the complaint of the JP having sent the Complainant images of the penis sizes is contained in annexure "K4" in page 43 Vol 1



Tp1325, v3



Tp1326, v3

When we have regard to annexure "K4" and the download from **pages 1255 to 1258**, it is clear that the following messages have been omitted from the complaint: -

*The entire conversation in **page 1255** has been omitted, most importantly her response at 19:26 "semanti" and "uyicime ndingekaggibi.... Uyacaca uphela esithuben!" at **19:27**

Wherein she engages in the salacious conversation

The conversation on **page 1256** is contained in annexure "L2" **Vol 1 page 55** and these messages have been omitted from the complaint



T p1326, v3

She importantly omits her response foreplay kindles at 19:32 to the JP's text "ingathi ufuna kubethive phezulu iwenza"

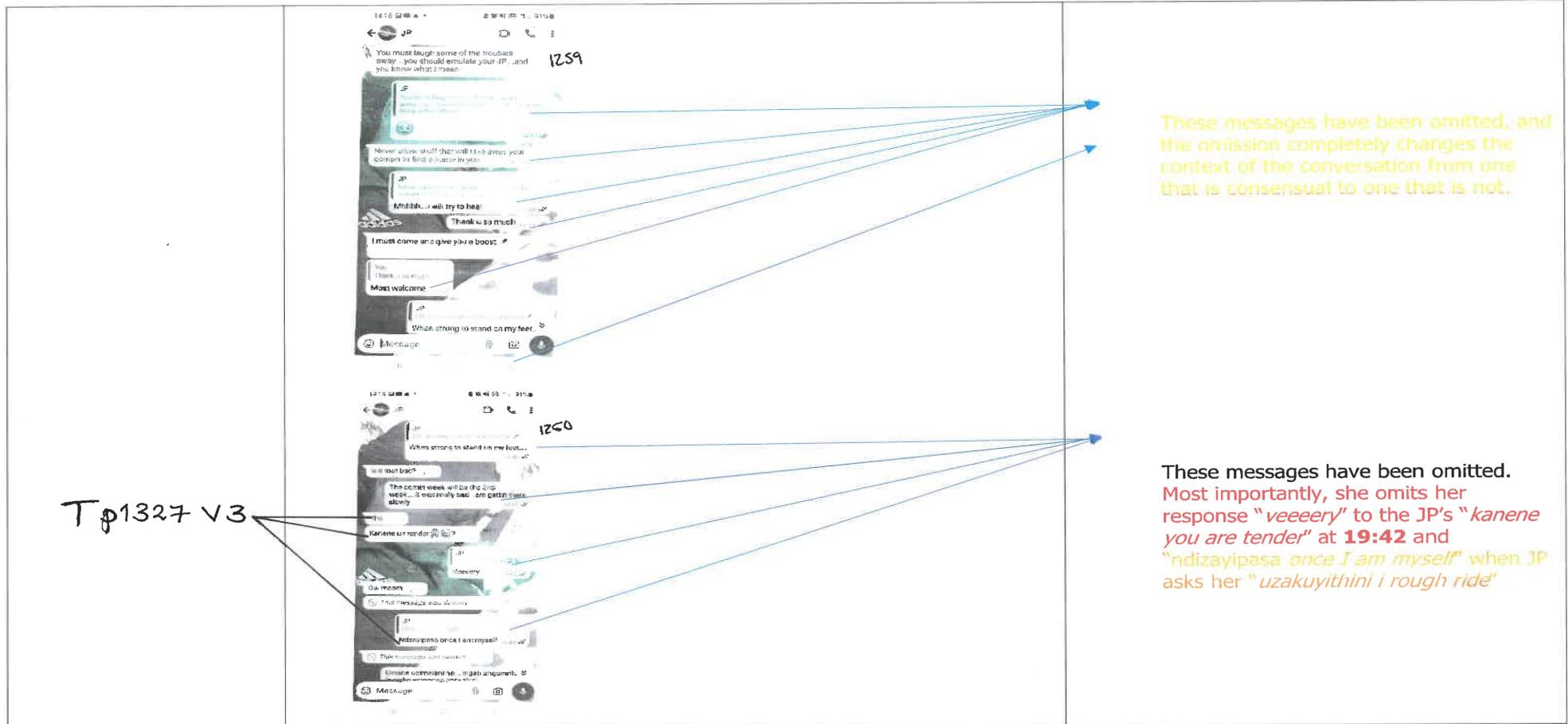
She further omits these salacious responses to the JP's messages

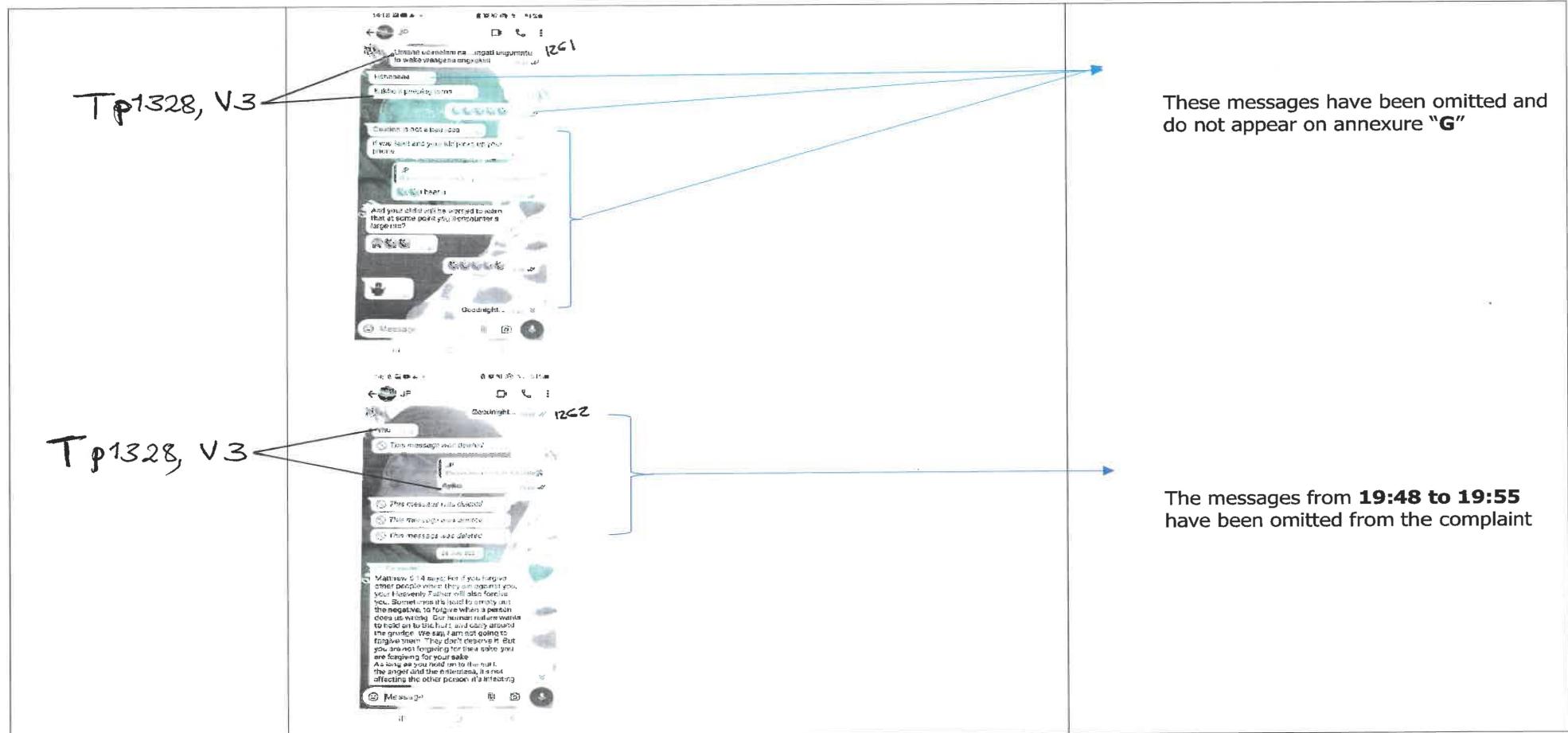


T p1327, v3

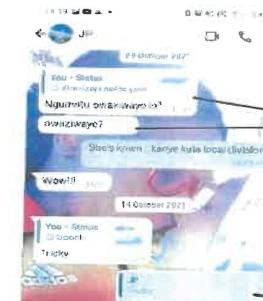
The conversation in 1258 is contained in annexure "G" of the complaint, and when considering annexure "G" vis-à-vis 1258, it is clear that she has omitted the following messages

These messages have been omitted, and the omission completely changes the context of the conversation from one that is consensual to one that is not.



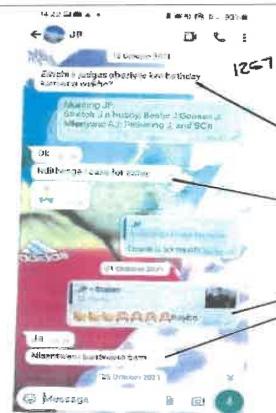


30 July 2021		
12 August 2021		<p>The entire conversations on pages 1263A to 1263B have been omitted from the complaint</p>
23 September 2021		
03 October 2021		

		<p>The entire conversations on pages 1263C to 1264 have been omitted from the complaint</p>
08 October 2021		Tp1330, v3
09 October 2021		Tp1330, v3
14 October 2021		Tp1331, v3

15 October 2021	 	<p>The entire conversations on pages 1265 to 1266 have been omitted from the complaint</p>
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18 October 2021

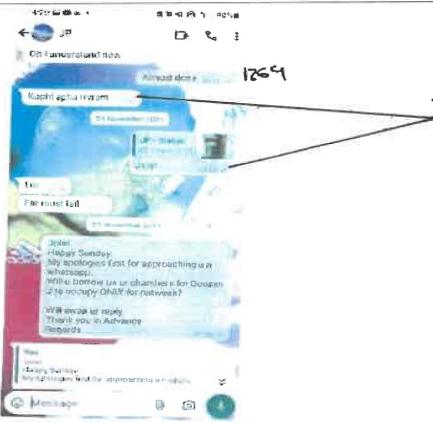
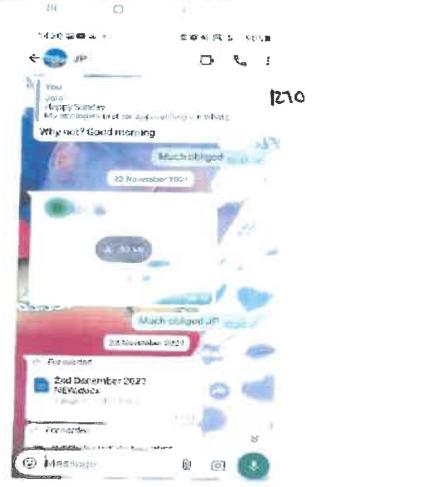


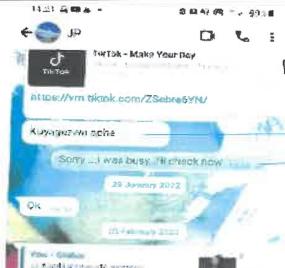
21 October 2021



25 October 2021

The entire conversations on **pages 1267 to 1268** have been omitted from the complaint

<p>21 November 2021</p>  <p>TP1336, v3</p>	<p>22 November 2021</p> 	<p>The entire conversations on pages 1269 to 1270 have been omitted from the complaint</p>

29 January 2022		<p>These messages have been omitted from annexure "C" page 29 Vol 1 of the complaint</p>
05 February 2022		
18 February 2022		<p>TP 1339, v3</p>

ANNEXURE F

17
17



OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

59 Western Avenue, 2nd Floor, Sandton Park Building, Vincent, E651
London, 5247
Private Bag X13012, Johannesburg, 5247
Tel: +27 11 786 5217 (Switchboard) | e-mail: NMatlaza@judiciary.org.za
www.judiciary.org.za

VISITORS LAPTOP REGISTER
OFFICE NAME: OCJ EASTERN CAPE REGION/COURTS

DATE	INITIALS AND SURNAME	DEPARTMENT/ INSTITUTION/ COMPANY	MODEL	BARCODE	TIME		OWNER'S SIGNATURE	SIGNATURE: SECURITY OFFICER
					IN	OUT		
08/04/2022	C.P. Ximondile	OCJ	Lenovo	97340	08:48	12W84		
08/04/2022	N.P. Shange	OCJ	HP	24140	08:49	12:35		
08/04/2022	Z. Cele	OCJ	Asus	0710	08:49	0:35		
14/04/2022	A. Mfundo	OCJ	HP	100031665	08:50	16:30		
14/04/2022	Z. Nkqayi	OCJ	DELL	0000440	08:50	16:41		
14/04/2022	L. Komonzi	OCJ	HP	100031667	08:51	16:30		
15/04/2022	A. Mfundo	OCJ	HP	100031668	08:52	16:30		
16/04/2022	A. Mfundo	OCJ	HP	100031669	08:53	11:25		
16/04/2022	A. Mfundo	OCJ	HP	100031670	08:54	11:25		
17/04/2022	B. Mfundo	OCJ	HP	100031671	08:55	11:26		
18/04/2022	A. Mfundo	OCJ	HP	100031672	08:56	11:26		