

# RealTime Transcriptions

TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON  
MR TOKOTA SC  
MS HEMRAJ SC

#### HELD ON

DAY 111      15 JULY 2013      PAGES 11817 TO 11948



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<p style="text-align: right;">Page 11817</p> <p>1 [PROCEEDINGS ON DATE]  2 [09:48] CHAIRPERSON: The Commission resumes.  3 This morning before we began Mr Mpofu and the rest of his  4 team came to see the Commissioners in chambers and he  5 explained that he is awaiting instructions from his clients  6 as to the way forward as to what they will do until the  7 judgment of the High Court in their application for funding  8 is known, and he will be able to inform us in the course of  9 the morning what his instructions are. I indicated to him  10 that I didn't want to lose time, so my suggestion was that  11 the evidence should continue. He will have access to the  12 transcript and also to the TV feed, so he did not object to  13 our proceeding in his absence at this stage. I think I  14 should put all of that on the record, but the probability  15 is that after the tea adjournment he will be in a position  16 to inform us what his instructions are in the interim, as  17 to the way forward in the interim while they're awaiting  18 the judgment of the High Court. Major-General, you're  19 still under oath.  20 WILLIAM MPEMBE: s.u.o.  21 CHAIRPERSON: Mr Madlanga, I take it you  22 wish to proceed with your cross-examination?  23 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):  24 Yes, I do. Thank you, Mr Chairman. Good morning, General.  25 MAJOR-GENERAL MPEMBE: Good morning,</p>	<p style="text-align: right;">Page 11819</p> <p>1 that we've spent in recess were able to be used profitably.  2 MR MADLANGA SC: And Mr Chairman, two  3 things; I said protesters/strikers exactly because I know  4 you like referring to them as strikers, and then secondly,  5 may I say the T is inverted. The cross bar, as it were, is  6 at the bottom.  7 CHAIRPERSON: Yes.  8 MR MADLANGA SC: Now General, having  9 looked at my little sketch, I understood your evidence to  10 be that the, as the strikers were walking through the  11 field, the police formed a line, a line that would be  12 represented by the bottom bar of the inverted T, where I've  13 written "Police." Did I understand your evidence  14 correctly?  15 MAJOR-GENERAL MPEMBE: Chairperson, in my  16 evidence I did indicate that it's not directly going to be  17 a straight line, but it will be, it will have the curving  18 also, but at a reasonable distance from the protesters.  19 MR MADLANGA SC: Can I ask you to do your  20 own depiction then, please? There are two pieces of paper  21 here; very quickly, General, if you can.  22 CHAIRPERSON: I think you should put the  23 Major-General's depiction in as an exhibit so that those  24 who have to read the record in years to come will  25 understand what exactly is being covered.</p>
<p style="text-align: right;">Page 11818</p> <p>1 Advocate.  2 MR MADLANGA SC: General, I just want to  3 pass a piece of paper to you. It relates to, or at least  4 it's my attempt at depicting what I understood your  5 evidence to be when the strikers or protesters moved away  6 from the railway line onto the adjacent field. I  7 understood –  8 CHAIRPERSON: [Inaudible]  9 MR MADLANGA SC: Yes, from the General,  10 then ask that it be passed – I just scribbled it now, Mr  11 Chair –  12 CHAIRPERSON: [Inaudible]  13 MR MADLANGA SC: Yes, yes, yes.  14 CHAIRPERSON: [Inaudible] It looks like  15 a T-junction sideways with the, on the left-hand side the  16 top of the T, if one can call it that, with the word  17 "Police" next to it, and then the long section of the T  18 being the strikers/protesters. I prefer to call them the  19 strikers; other people prefer the other terminology. I  20 don't know whether any of your learned friends wish to see  21 this document, but I've endeavoured to describe –  22 MR MADLANGA SC: I drew a second one, Mr  23 Chairman, for circulating amongst my colleagues. Mr  24 Chairman, except that there perhaps should be –  25 CHAIRPERSON: I sense the three weeks</p>	<p style="text-align: right;">Page 11820</p> <p>1 MR MADLANGA SC: Perhaps we should start  2 with mine, Mr Chairman, FFF16 – I'm sorry, HHH16, Mr  3 Chairman.  4 CHAIRPERSON: That's Madlanga's depiction  5 of strikers and – of positions or directions, positions, I  6 suppose, of strikers and police. That's HHH16.  7 MR MADLANGA SC: Yes, Mr Chairman, and we  8 can – perhaps it should be 16.1 and the General's 16.2, Mr  9 Chairman.  10 CHAIRPERSON: While the General is giving  11 us his depiction of the positions of the strikers and the  12 police, during the recess Adv Hemraj pointed out to us that  13 in the transcription of the evidence-in-chief of this  14 witness, particularly when videos were being shown, it's  15 not very clear what exactly is being talked about. Without  16 someone knowing what the videos is and specific recording  17 of what was being pointed out, it's difficult to follow the  18 record. I take it that aspect has been attended to?  19 MS PILLAY: Chair, we have raised that  20 with the SAPS team and they've assured us that they're  21 working on it and they would report back.  22 CHAIRPERSON: Thank you, I'm pleased to  23 hear that.  24 MR MADLANGA SC: General, it doesn't have  25 to be artistic; like mine, it can just be squiggled.</p>

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1 CHAIRPERSON: Mr Madlanga set the  
2 standard that you have to follow. The bar, the cross bar  
3 is not very high. I've marked it – have you been given a  
4 copy of it?  
5 SPEAKER: Yes [inaudible] –  
6 CHAIRPERSON: Would you pass it around?  
7 What he's done is he's instituted a correction, which I  
8 think may help us, in regard to the position of the police.  
9 MR MADLANGA SC: Perhaps another little  
10 correction to mine, or the description you gave on record,  
11 Mr Chairman, on mine as well it's not as though the line  
12 representing the police is right against the line  
13 representing the – there's a gap there as well.  
14 CHAIRPERSON: The Major-General has  
15 actually written "reasonable distance" to indicate that –  
16 MR MADLANGA SC: Yes, yes, yes.  
17 CHAIRPERSON: - indicate that important  
18 point.  
19 MR MADLANGA SC: Yes, yes. Thank you, Mr  
20 Chairman. And these are quite similar, General, except  
21 that yours is curving and you indicate "reasonable  
22 distance." Would you accept that?  
23 MAJOR-GENERAL MPEMBE: Correct,  
24 Chairperson.  
25 MR MADLANGA SC: And did I understand you

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1 to say that in the line that represents the police, you  
2 were more to the right of that line and Warrant-Officer  
3 Kuhn as more to the left of that line? Did I understand  
4 you correctly?  
5 MAJOR-GENERAL MPEMBE: Correct,  
6 Chairperson, with an exception to say I didn't know exactly  
7 where, but on the left.  
8 MR MADLANGA SC: General, there's an SABC  
9 video footage that we circulated before the three-week  
10 adjournment. I would like that to be played and for you to  
11 watch it –  
12 CHAIRPERSON: Just give it an exhibit  
13 number. I take it, it will be HHH17.  
14 MR MADLANGA SC: Yes, Mr Chairman, thank  
15 you. Mr Chairman, Ms Pillay has offered to circulate  
16 computerised versions of the sketch by me and the one by  
17 the –  
18 CHAIRPERSON: I note the standard is  
19 going up at a steady rate of knots.  
20 MR MADLANGA SC: Yes, and the one by the  
21 General, yes, Mr Chairman. I hope that will be acceptable  
22 and that nobody will take the point that these are not the  
23 exact same or similar depictions.  
24 CHAIRPERSON: I would hope that those who  
25 are taking points can find better points than that to take.

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1 Anyway, who knows?  
2 [VIDEO RECORDING PLAYED]  
3 MR MADLANGA SC: Stop. General, is that  
4 not you? The tallest man there, police officer there.  
5 MAJOR-GENERAL MPEMBE: No, Chairperson.  
6 MR MADLANGA SC: Okay, please continue.  
7 [VIDEO RECORDING PLAYED]  
8 CHAIRPERSON: May I say this? The same  
9 problem is going to arise as arose with the video clips  
10 that Mr Ngalwana referred to. When you say "stop there," –  
11 MR MADLANGA SC: Yes.  
12 CHAIRPERSON: - we've got to find a way  
13 of recording the point or time, whatever it is, at which  
14 that stop takes place because otherwise when we read the  
15 record ourselves later on, we're going to have difficulty  
16 understanding it, and the historians of the future who are  
17 going to be studying all this will be totally baffled.  
18 MR MADLANGA SC: Yes, yes, yes. Thank  
19 you very much. Just there, I don't see there. Is that  
20 ? Mr Chairman, Commissioners, it's 03:16. I'm  
21 relying on Ms Pillay. I can't see that far.  
22 CHAIRPERSON: It looks to me like 15, but  
23 03, looks like a colon, 15.  
24 MR MADLANGA SC: Yes, on that video.  
25 CHAIRPERSON: That was the first point at

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1 which you paused.  
2 MR MADLANGA SC: Yes, yes.  
3 CHAIRPERSON: And there's someone whose  
4 back is to the camera, a rather tall policeman with a  
5 [inaudible].  
6 MR MADLANGA SC: Yes, and General, I'm  
7 referring to – you see there's one person, closest – no,  
8 no, no, this one, the one closest to the camera, I'm not  
9 referring to that one. Then there's the one that was being  
10 circles with a cursor, that one. General, that's who I was  
11 referring to. Is that not you, the one closest to the  
12 group, closest to the group of protesters, with another  
13 policeman facing him? Is that not you?  
14 MAJOR-GENERAL MPEMBE: It's just a  
15 question that the person is looking forward and forward,  
16 Chairperson, but by the time I remember when there were –  
17 MR MADLANGA SC: I think I would  
18 recognise myself even if I was looking the other way.  
19 MAJOR-GENERAL MPEMBE: No, I was just  
20 saying when I addressed the protesters when they were  
21 moving, I was still in the road. Now this one, this one is  
22 on the grass.  
23 MR MADLANGA SC: But they too are no  
24 longer on the road now, General. Did you not change  
25 positions? Did you not move on to the field once they had

<p style="text-align: right;">Page 11825</p> <p>1 started moving?</p> <p>2 MAJOR-GENERAL MPEMBE: I did change a</p> <p>3 position, but I don't know when.</p> <p>4 MR MADLANGA SC: Yes.</p> <p>5 CHAIRPERSON: If you're not sure that</p> <p>6 it's you, well then there's nothing we can do about it.</p> <p>7 MAJOR-GENERAL MPEMBE: Yes, okay.</p> <p>8 MR MADLANGA SC: Can you please –</p> <p>9 MAJOR-GENERAL MPEMBE: I'm sorry, Chair.</p> <p>10 MR MADLANGA SC: Yes.</p> <p>11 MAJOR-GENERAL MPEMBE: For the fact that</p> <p>12 the, I can see it's Colonel Merafe, it might be possible</p> <p>13 that it's me who was talking to Colonel Merafe.</p> <p>14 CHAIRPERSON: So are you saying that the</p> <p>15 policeman who is facing the camera, speaking to the person</p> <p>16 to whom we referred earlier, who's back is to the camera,</p> <p>17 that is Colonel Merafe, and it's possible therefore that</p> <p>18 the person to whom he was speaking, whose back we can see,</p> <p>19 is you?</p> <p>20 MAJOR-GENERAL MPEMBE: Yes, Chairperson,</p> <p>21 seeing that Colonel Merafe –</p> <p>22 MR MADLANGA SC: Please continue.</p> <p>23 [VIDEO RECORDING PLAYED]</p> <p>24 MR MADLANGA SC: Just go back to, go back</p> <p>25 just a little bit, please. Ja, stop, stop, stop right</p>	<p style="text-align: right;">Page 11827</p> <p>1 CHAIRPERSON: I'm sorry, it's not clear</p> <p>2 which line you're talking about. I take it you mean the</p> <p>3 curved line on his sketch –</p> <p>4 MR MADLANGA SC: The curved line –</p> <p>5 CHAIRPERSON: - HHH16.2.</p> <p>6 MR MADLANGA SC: Yes, the curved line.</p> <p>7 CHAIRPERSON: The curved line</p> <p>8 representing the police?</p> <p>9 MR MADLANGA SC: Yes, Chairperson.</p> <p>10 CHAIRPERSON: So that, Major-General,</p> <p>11 would I be correct in saying that if one looks at this,</p> <p>12 just beyond the middle towards the right there's a</p> <p>13 policeman standing under a tree, and then there are four</p> <p>14 other policemen to the left.</p> <p>15 [10:08] Would that be the extreme right-hand side of the</p> <p>16 curve that you put on your sketch, and presumably the curve</p> <p>17 then continued beyond what we can see in the frame, with</p> <p>18 further policemen. Is that correct?</p> <p>19 COMMISSIONER HEMRAJ: Just before you</p> <p>20 answer that, Mr Madlanga, is the answer to that question a</p> <p>21 good many frames before this frame? That curved formation</p> <p>22 of the police line, doesn't that appear a good many frames</p> <p>23 before this particular one on the video?</p> <p>24 MR MADLANGA SC: Is there a suggestion</p> <p>25 that we saw that just now, or –</p>
<p style="text-align: right;">Page 11826</p> <p>1 there. Stop right there.</p> <p>2 CHAIRPERSON: That's 4:16.</p> <p>3 MR MADLANGA SC: Yes. You can see there</p> <p>4 five police officers, they are closest to the camera,</p> <p>5 closest in contra distinction to where the strikers are,</p> <p>6 and there is one right at the back, apparently again taller</p> <p>7 than the rest. Is that not you?</p> <p>8 MAJOR-GENERAL MPEMBE: Chairperson, it</p> <p>9 looks like myself.</p> <p>10 CHAIRPERSON: - the extreme left of the</p> <p>11 video clip.</p> <p>12 MR MADLANGA SC: Yes, thank you. Thank</p> <p>13 you, Mr Chairman. Now –</p> <p>14 CHAIRPERSON: - of the frame, extreme</p> <p>15 left of the frame.</p> <p>16 MR MADLANGA SC: Thank you. Are you in a</p> <p>17 position to indicate where the line that you drew would be</p> <p>18 here? Because I do not see it, and even before this point,</p> <p>19 even before the point where this footage has been stopped,</p> <p>20 before I could see the police there was a gap between the</p> <p>21 strikers and one could see a few police officers on the</p> <p>22 side, and I didn't really see a line, and now there are</p> <p>23 these five police officers, you behind them, and you are</p> <p>24 not at all standing cross-wise, as it were, in relation to</p> <p>25 the protesters. Can you indicate where the line is?</p>	<p style="text-align: right;">Page 11828</p> <p>1 COMMISSIONER HEMRAJ: Yes, before we got</p> <p>2 to this point.</p> <p>3 MR MADLANGA SC: Can I asked it to be</p> <p>4 played backwards, and perhaps if I could ask the</p> <p>5 Commissioner to please then ask it to be stopped there?</p> <p>6 COMMISSIONER HEMRAJ: Yes.</p> <p>7 CHAIRPERSON: It's somewhere between 3:16</p> <p>8 and 4:16.</p> <p>9 [VIDEO RECORDING PLAYED]</p> <p>10 CHAIRPERSON: The video clip is now</p> <p>11 stopped at 3:46.</p> <p>12 MR MADLANGA SC: I don't see the curving</p> <p>13 line, no. And where would the protesters – you see the</p> <p>14 problem is one doesn't see where the protesters are, and if</p> <p>15 one is looking at the two police officers who are facing us</p> <p>16 directly, and one gets the impression that they must be</p> <p>17 following the protesters, and if they are, then what</p> <p>18 appears before them, the two police officers there at the</p> <p>19 front wouldn't really be the curving line.</p> <p>20 CHAIRPERSON: Let the witness help us,</p> <p>21 because he's the only one of us who was there at the time –</p> <p>22 MR MADLANGA SC: Ja, because the</p> <p>23 Commissioners see it; I don't. I was just trying to</p> <p>24 understand it from the perspective of the Commissioners,</p> <p>25 yes.</p>

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1 MR NGALWANA: Sorry, Mr Chairman, I think  
 2 the frame does not show the whole scene. That could be the  
 3 problem.  
 4 CHAIRPERSON: Right, let's carry on with  
 5 the clip, but I think the Major-General wants to say  
 6 something. He's the witness; it's his evidence and he was  
 7 the only one of us who was there, so perhaps he can help  
 8 us.  
 9 MAJOR-GENERAL MPEMBE: Chairperson, as it  
 10 can be depicted here, that's the curve that I'm talking  
 11 about, and I also want to indicate to Adv Madlanga is that  
 12 that was also part of my briefing to the officers, and  
 13 during the operation I expect that my officers who have  
 14 briefed members, should be keeping that line in the manner  
 15 in which I have briefed them.  
 16 MR MADLANGA SC: General, I understood  
 17 your evidence to be that besides your briefing of the  
 18 commanders, there wasn't any briefing of the rest of the  
 19 members. Did I misunderstand your evidence? And now I  
 20 hear you to be suggesting that there was actually a  
 21 briefing of the rest of the members by their commanders.  
 22 Did I misunderstand your evidence?  
 23 MAJOR-GENERAL MPEMBE: Chairperson, I did  
 24 say the commanders did not confirm with me whether they  
 25 briefed their members, but I did brief members.

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1 CHAIRPERSON: Perhaps the next question  
 2 that flows from that is you briefed the commanders; did  
 3 your commanders have the opportunity to brief their men?  
 4 Whether they did or not is something you can't tell us, but  
 5 did they have the opportunity after you'd briefed them, to  
 6 brief their men?  
 7 MAJOR-GENERAL MPEMBE: Chairperson,  
 8 looking at the time when I briefed them, yes I can say that  
 9 there was a time that they can brief their members.  
 10 MR MADLANGA SC: Mr Videographer, you can  
 11 get –  
 12 [VIDEO RECORDING PLAYED]  
 13 MR MADLANGA SC: No, you can please just  
 14 get rid of it. I wanted to get an understanding on the  
 15 line. It seems that because we don't see the entire frame,  
 16 see the police, see the protesters at the same time, it's  
 17 difficult to achieve that. So let's just get rid of that.  
 18 Now as I understand the scene of the 15th, as the protesters  
 19 or strikers were walking through the field, is it so that  
 20 the informal settlement was roughly to the right of the  
 21 protesters and the police following them? I say roughly.  
 22 MAJOR-GENERAL MPEMBE: Correct,  
 23 Chairperson, without referring to the distance.  
 24 MR MADLANGA SC: And if the aim of the  
 25 police was to prevent the protesters from getting onto or

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1 into the informal settlement, it would have made sense for  
 2 the police to flank the protesters on the right-hand side,  
 3 not so?  
 4 MAJOR-GENERAL MPEMBE: I did indicate  
 5 that there was a flank by using Nyalas.  
 6 CHAIRPERSON: I think we saw the Nyalas  
 7 actually on the TV footage. We didn't note the exact  
 8 frame, if that's necessary, but that certainly was visible  
 9 on the video clip, was it not?  
 10 MR MADLANGA SC: I'm aware of that. I'm  
 11 aware of that too, Mr Chairman, yes, but it's just one  
 12 particular Nyala that I'm interested in and I'm going to  
 13 lead to that just now. Can you please play the video which  
 14 is exhibit Z1?  
 15 [VIDEO RECORDING PLAYED]  
 16 MR MADLANGA SC: Can you please fast  
 17 forward it to where the footage started of the railway  
 18 line? I'm told the time is 19:18. 19:18. Or 23:11,  
 19 23:11.  
 20 [VIDEO RECORDING PLAYED]  
 21 CHAIRPERSON: There was a dead body  
 22 there. We didn't give, I don't know if there was a person  
 23 close to the deceased, sitting in the auditorium. If I'd  
 24 known that that was going to be seen, I would have given a  
 25 warning, but if there's any possibility of that in the

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1 future, I'd be grateful if I could be told –  
 2 MR MADLANGA SC: Mr Chairman, in fact  
 3 perhaps I failed in describing what I was looking for to Mr  
 4 Wesley. What I'm looking for is – in fact, the version  
 5 that I have in my hard drive, the protesters move past the  
 6 big rock and then my version changes, or switches onto the  
 7 CCTV footage and it just get onto this at all, at all. So  
 8 it's the part that has the CCTV footage that I would like  
 9 to see. Ja, let's try Z3, please. Z3. 14:22:55.  
 10 CHAIRPERSON: - where on this video clip  
 11 the frames that we're now seeing will be found, can be  
 12 found.  
 13 MR MADLANGA SC: There seems to be no  
 14 time, but – yes, but Mr Wesley tells me that it's from  
 15 14:22:55. 14:22:55.  
 16 [VIDEO RECORDING PLAYED]  
 17 Just stop there, stop there. Please stop there.  
 18 Yes, stop.  
 19 CHAIRPERSON: Just indicate what position  
 20 this frame is that we're now looking at.  
 21 MS PILLAY: Chair, it's at 1 minute and  
 22 36 seconds into the video.  
 23 CHAIRPERSON: 1 minute and 36 seconds  
 24 into the video?  
 25 MR MADLANGA SC: Yes. General, the Nyala

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1 that just appeared on the screen roughly behind the  
 2 protesters, do you have any idea who the occupants of that  
 3 were? Was Lieutenant Baloyi not one of the police who were  
 4 in that Nyala?  
 5 MAJOR-GENERAL MPEMBE: Correct,  
 6 Chairperson.  
 7 MR MADLANGA SC: As it is moving there,  
 8 do you have any idea where it was going to or what it was  
 9 going to do?  
 10 MAJOR-GENERAL MPEMBE: No, Chairperson.  
 11 The only identified point on the other hand, it was on the  
 12 extreme left-hand side. It was some, a shaft which we said  
 13 that maybe the protesters might not be going that side. So  
 14 but whether they were going there as they were moving now,  
 15 I really, that's the one that I don't know.  
 16 MR MADLANGA SC: Can you just repeat what  
 17 you said about the shaft? What about the shaft?  
 18 MAJOR-GENERAL MPEMBE: There is a point –  
 19 maybe I don't know whether it does appear on the video, a  
 20 shaft on the extreme left-hand side of that place, which of  
 21 course it was one of the points which we said that we  
 22 should check that the protesters might not move there.  
 23 CHAIRPERSON: Is this one of the Karee  
 24 shafts? Is this one of the Karee shafts?  
 25 MAJOR-GENERAL MPEMBE: Chairperson, I'm

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1 not quite sure about the name, but –  
 2 MR MADLANGA SC: But in the footage you  
 3 see the direction they are taking, and even from memory you  
 4 do recall which direction they were going. As they are  
 5 going now and as you see them, and as you recall from  
 6 memory, were they in any way proceeding towards that shaft?  
 7 MAJOR-GENERAL MPEMBE: No, I don't,  
 8 Chairperson.  
 9 MR MADLANGA SC: No, they were not  
 10 proceeding towards that shaft? Is that what you mean?  
 11 MAJOR-GENERAL MPEMBE: No, I'm saying now  
 12 I don't know whether they were proceeding there. Maybe  
 13 they might be the correct people to say that when they were  
 14 moving they were proceeding to that place.  
 15 CHAIRPERSON: Major-General, is it not  
 16 perhaps something slightly different? They were proceeding  
 17 in a direction which we can see on the video clip. There  
 18 was a possibility they might veer off to the right to the  
 19 informal settlement. You obviously didn't want that.  
 20 There was also a possibility, I take it, that they might  
 21 have veered off to the left and gone around to the shaft,  
 22 where there might have been further trouble as well. So  
 23 are you suggesting that what happened was that there were  
 24 Nyalas on the right, as we can see from the video. They  
 25 were there to stop them going into the informal settlement,

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1 and this other video, which is on the left, was presumably  
 2 going in that direction to stop them veering off to the  
 3 left, or some of them, and going to the shaft. Is that  
 4 what you're saying, or am I not understanding you  
 5 correctly?  
 6 MAJOR-GENERAL MPEMBE: Chairperson, it's  
 7 correct. The only reason is that why they drove so close  
 8 to the protesters, because I said they should keep a  
 9 reasonable distance, hence I mentioned also the extreme  
 10 shaft.  
 11 MR MADLANGA SC: General, you answered my  
 12 question based on what you see on the footage today, but  
 13 surely if there was a shaft that you were concerned with on  
 14 the day, you had an idea on the day which direction it was.  
 15 Is that so or not?  
 16 [10:28] MAJOR-GENERAL MPEMBE: Correct,  
 17 Chairperson, I did know where it is, and I also stated it  
 18 where now it is.  
 19 MR MADLANGA SC: Now as they were walking  
 20 through that field on the day, were they proceeding towards  
 21 that shaft? You knew where it was. You were looking at  
 22 them, seeing which direction they were going. Were they  
 23 proceeding towards that shaft?  
 24 MAJOR-GENERAL MPEMBE: I did indicate  
 25 that there is a possibility that they were going to the

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1 shaft, but in my briefing it was said that they should keep  
 2 a reasonable distance.  
 3 MR MADLANGA SC: General, you have not  
 4 indicated that they might have been proceeding to the  
 5 shaft. What you indicated rather in response to the  
 6 question by the Chairman is there was a possibility that  
 7 they might have proceeded towards the shaft, and that there  
 8 was also a possibility that they might have proceeded  
 9 towards the informal settlement, and that what you were  
 10 doing was to try to avert or prevent that.  
 11 CHAIRPERSON: Can I just clarify? What I  
 12 think I put was not that they were going towards –  
 13 MR MADLANGA SC: I'm correct him, Mr  
 14 Chairman, not you.  
 15 CHAIRPERSON: No, no, I understand. It's  
 16 really, the point that I stress is the future. They were  
 17 concerned that they might in the future move to the shaft,  
 18 i.e. to the left, or they might move to the informal  
 19 settlement, i.e. to the right, but it was all – they  
 20 weren't doing either of those things, but in order to  
 21 prevent them from doing it in the future, the Nyalas were  
 22 moved away. That's the point I was trying to make. I  
 23 don't know whether it came across clearly.  
 24 MR MADLANGA SC: Mr Chairman, I  
 25 understood you perfectly. You came across exactly as you

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1 are saying, but now the witness is saying what he said was  
 2 they might have been going there, and he says that he has  
 3 already said so, and what I'm saying is he has not said so.  
 4 In response to your answer the point he made is exactly  
 5 what the Chairman is now saying, because to your question  
 6 he said yes, which means that he exactly said what you are  
 7 now saying, Mr Chairman. But now in response to my  
 8 question he says that "I've already said that they might  
 9 have been proceeding there," and though it's maybe a subtle  
 10 difference, but a difference there is, and I'm saying he  
 11 has not as yet said so.  
 12 CHAIRPERSON: Just give him a chance to  
 13 say so if he wants to say so.  
 14 MAJOR-GENERAL MPEMBE: Chairperson, in my  
 15 earlier response to the question it was that there was a  
 16 shaft which was supposed to be protected. I was indicating  
 17 that the Nyala might have been going there, but for the  
 18 reason of coming closer, that's one that was, I was also  
 19 explaining. Maybe the Advocate did not understand me well,  
 20 otherwise I could not have included the shaft on the left.  
 21 CHAIRPERSON: I think that by, my  
 22 [inaudible] ambiguous. I think you meant to refer to the  
 23 future. Am I correct? Yes. Mr Mathibedi, you turned your  
 24 light on. Do you want to say something?  
 25 MR MATHIBEDI SC: Mr Chairman, I think he

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1 has given the answer because initially he said he did not  
 2 know where the Nyala was going, but it might be going  
 3 there, because you know, hearing that the protesters might  
 4 go to the side of the shaft.  
 5 CHAIRPERSON: Well, I think we've now got  
 6 clarity. So perhaps Mr Madlanga would like to proceed.  
 7 MR MADLANGA SC: Thank you, Mr Chairman.  
 8 Now General, what I would still like to get clarity on is  
 9 this; I understand your perfectly response to what you say  
 10 in response to the question by the Chairman, and it is  
 11 this. There was the possibility in future that they might  
 12 have gone to, or towards the shaft, as there was a  
 13 possibility that they might have gone to the informal  
 14 settlement, and you wanted to avert both those movements.  
 15 I understand that perfectly. I've understood it from,  
 16 right from the onset. I was never mistaken about it. Now  
 17 what I want to establish from you is simple, and it is  
 18 this; you knew, and you said so, where the shaft was. You  
 19 knew where the informal settlement was. From memory – I'm  
 20 not asking you about what you see here now, because you now  
 21 choose to say you don't quite recollect – from memory, or  
 22 rather you cannot relate it to what you see here now. From  
 23 memory, bearing in mind that you knew where the shaft was,  
 24 you knew where the informal settlement was, were the  
 25 protesters proceeding, as a matter of fact were they

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1 proceeding towards the shaft or not?  
 2 MAJOR-GENERAL MPEMBE: No, Chairperson.  
 3 We were acting on prevention, proactively.  
 4 MR MADLANGA SC: Thank you, General.  
 5 Please play the video.  
 6 [VIDEO RECORDING PLAYED]  
 7 MR MADLANGA SC: Stop it there. Stop it  
 8 there. Ms Pillay, I'm sorry, that's how many minutes now  
 9 into the video?  
 10 MS PILLAY: Chair, it's 2 minutes and 27  
 11 seconds into the video.  
 12 MR MADLANGA SC: Now General, is that –  
 13 to your recollection, is that the same Nyala that we saw  
 14 earlier?  
 15 MAJOR-GENERAL MPEMBE: Correct,  
 16 Chairperson.  
 17 MR MADLANGA SC: Please continue.  
 18 [VIDEO RECORDING PLAYED]  
 19 MR MADLANGA SC: Stop there.  
 20 MS PILLAY: That's 2 minutes and 58  
 21 seconds into the video.  
 22 MR MADLANGA SC: And General, is that  
 23 still the same Nyala?  
 24 MAJOR-GENERAL MPEMBE: Correct,  
 25 Chairperson.

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1 CHAIRPERSON: That's the Nyala on the  
 2 left, is it –  
 3 MR MADLANGA SC: Yes.  
 4 CHAIRPERSON: - of the crowd?  
 5 MR MADLANGA SC: Yes.  
 6 CHAIRPERSON: In the front of the crowd,  
 7 out to the left.  
 8 MR MADLANGA SC: Yes, yes, yes. Now  
 9 General, would I be correct, based on what I saw, even  
 10 though one doesn't see the Nyala throughout, it sometimes  
 11 disappears, but would it be a correct description to say it  
 12 seems to go past the protesters to their right, it cuts in  
 13 front of them, goes to the left, as the Chairman has  
 14 indicated, makes a turn and where we are now at the time  
 15 that was just given on record, it is now to their left. Do  
 16 you think I'm capturing what happened correctly?  
 17 MAJOR-GENERAL MPEMBE: Correct,  
 18 Chairperson.  
 19 MR MADLANGA SC: At that point, that is  
 20 where we are on that footage, are the protesters moving in  
 21 the direction of the shaft that you referred to? Or  
 22 rather, let me be careful again and not refer to what you  
 23 see here, because I encountered difficulties when I asked  
 24 you according to what you see here. On your recollection,  
 25 and at that point, bearing in mind your knowledge of where

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1 the shaft was, were the protesters moving in the direction  
 2 of the shaft?  
 3 MAJOR-GENERAL MPEMBE: No, Chairperson,  
 4 as I testified earlier on –  
 5 MR MADLANGA SC: Please continue.  
 6 [VIDEO RECORDING PLAYED]  
 7 MR MADLANGA SC: Stop there. Stop there.  
 8 Stop there. Ja, right there. Right there. Or just go  
 9 back a little bit, just a little bit. Keep going back.  
 10 Ja, stop right there. Stop right there. What's the time  
 11 now?  
 12 MS PILLAY: It's 3 minutes and 12 seconds  
 13 into the video.  
 14 MR MADLANGA SC: General, there's  
 15 somebody who emerged from the left-hand side of the Nyala,  
 16 and you can see him now, I would say in front of the Nyala.  
 17 Is that a policeman, or don't you know?  
 18 MAJOR-GENERAL MPEMBE: He alighted from  
 19 the Nyala, so it could be a police officer.  
 20 MR MADLANGA SC: Please continue.  
 21 [VIDEO RECORDING PLAYED]  
 22 MR MADLANGA SC: Stop there, right there.  
 23 Right there, ja. Just forward a little bit so that the  
 24 second person – just stop there, stop there. What's the  
 25 time now?

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1 MS PILLAY: That's 3 minutes and 17  
 2 seconds into the video.  
 3 MR MADLANGA SC: Two more people emerged  
 4 also from the left-hand side of the Nyala, General. Would  
 5 those be police officers as well?  
 6 MAJOR-GENERAL MPEMBE: Correct,  
 7 Chairperson.  
 8 MR MADLANGA SC: Please continue.  
 9 CHAIRPERSON: If we go back a little bit  
 10 – you see there's some smoke there. I'd like to see where  
 11 the smoke first becomes visible.  
 12 MR MADLANGA SC: Going back –  
 13 CHAIRPERSON: Yes, perhaps we can go back  
 14 a bit more. I'd like to see –  
 15 MR MADLANGA SC: Just before the smoke –  
 16 CHAIRPERSON: I'd like to see a frame  
 17 before we see any smoke, and then to work out at what point  
 18 we see the smoke the first time.  
 19 MR MADLANGA SC: Please continue.  
 20 [VIDEO RECORDING PLAYED]  
 21 MS PILLAY: 3 minutes and 14 seconds.  
 22 CHAIRPERSON: - a few frames earlier.  
 23 You understand I'm interested in when we can see the  
 24 teargas for the first time, and just before that,  
 25 particularly in relation to when these people had come from

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1 the Nyala. A little bit further back, please. When the  
 2 person first emerged – there we are – from the Nyala.  
 3 Perhaps we can be told what that reading is on the video.  
 4 MS PILLAY: 3 minutes and 11 seconds.  
 5 CHAIRPERSON: Thank you.  
 6 [VIDEO RECORDING PLAYED]  
 7 MR MADLANGA SC: There's the smoke.  
 8 CHAIRPERSON: - we can perhaps be told  
 9 what the reading is when we see the smoke for the first  
 10 time?  
 11 MS PILLAY: 3 minutes and 16 seconds.  
 12 CHAIRPERSON: Thank you.  
 13 [VIDEO RECORDING PLAYED]  
 14 MR MADLANGA SC: You can stop now. I  
 15 take it, General, you wouldn't know who those three police  
 16 officers are, and what they did? Or do you know what they  
 17 did after alighting from the Nyala, or do you know?  
 18 MAJOR-GENERAL MPEMBE: I don't know,  
 19 Chairperson.  
 20 MR MADLANGA SC: Now can we play the  
 21 other CCTV footage that also shows the protesters on the  
 22 field. Mr Wesley, the other Z something, and please select  
 23 the spot where they are on the field, not before.  
 24 MS PILLAY: That's exhibit Z2.  
 25 COMMISSIONER HEMRAJ: Before we get

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1 there, can I just ask you, General, do you know who would  
 2 have instructed Lieutenant Baloyi to go in any particular  
 3 direction?  
 4 MAJOR-GENERAL MPEMBE: No, Chairperson.  
 5 COMMISSIONER HEMRAJ: It could have been  
 6 his immediate commander?  
 7 MAJOR-GENERAL MPEMBE: Lieutenant-General  
 8 Tsiloane, not the Tsiloane I saw in the other – other  
 9 transcript, they said Tsiloane, but in my understand  
 10 Lieutenant Baloyi came with Lieutenant-Colonel Tsiloane,  
 11 who was also present.  
 12 [VIDEO RECORDING PLAYED]  
 13 MR MADLANGA SC: Just stop there. Even  
 14 though the protesters are not within view, is this the same  
 15 Nyala that we saw earlier, or don't you know?  
 16 CHAIRPERSON: I take it you're referring  
 17 to the one in the middle of the field, not the one fairly  
 18 close to the camera?  
 19 MR MADLANGA SC: This one which I think  
 20 is a Quantum, it's a Toyota Quantum –  
 21 CHAIRPERSON: Oh, I see.  
 22 MR MADLANGA SC: Yes, the Nyala is the  
 23 Nyala.  
 24 CHAIRPERSON: Your knowledge of this is  
 25 superior to mine.



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1 MR MADLANGA SC: What's the time –  
 2 MS PILLAY: For purpose of the record,  
 3 it's 42 seconds into the video.  
 4 MR MADLANGA SC: Are you able to tell, or  
 5 not, General?  
 6 MAJOR-GENERAL MPEMBE: Chairperson, I'm  
 7 not quite sure because that one was close to the  
 8 protesters.  
 9 MR MADLANGA SC: If I'm not mistaken,  
 10 they are going to emerge somewhere there at the front.  
 11 Perhaps we should play on. Please continue.  
 12 [VIDEO RECORDING PLAYED]  
 13 MR MADLANGA SC: Or behind, rather;  
 14 behind.  
 15 [VIDEO RECORDING PLAYED]  
 16 MR MADLANGA SC: Stop right there. Stop  
 17 right – there is the protesters that I mentioned, just –  
 18 [VIDEO RECORDING PLAYED]  
 19 MR MADLANGA SC: Ja, stop right there.  
 20 Right there. What's the time now?  
 21 MS PILLAY: 1 minute and 5 seconds.  
 22 MR MADLANGA SC: And may I just give a  
 23 description, as the protesters that are appearing at that  
 24 time, the Nyala is not quite at 90 degrees in relation to  
 25 them, but roughly at that and slightly at an angle, but it

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1 has sort of cut, or gone in front of them. Please  
 2 continue.  
 3 [VIDEO RECORDING PLAYED]  
 4 MR MADLANGA SC: Stop again. Stop again.  
 5 Stop again. Or perhaps just continue as the Nyala is  
 6 beginning to turn, turn to the right. Stop there. Stop  
 7 there. What's the time now?  
 8 MS PILLAY: 1 minute and 16 seconds.  
 9 MR MADLANGA SC: Now General, bearing in  
 10 mind the earlier description that I gave and with which you  
 11 agreed as to the movement of the Nyala proceeding to the  
 12 right of the protesters, cutting in front of them, then  
 13 turning to the right and ending up to their left, we've  
 14 just seen this Nyala go across in front of the protesters  
 15 and it's now beginning to turn to the right. Would you not  
 16 accept that it is the same Nyala that we saw in the earlier  
 17 video clip?  
 18 [10:48] MAJOR-GENERAL MPEMBE: I will agree,  
 19 Chairperson.  
 20 MR MADLANGA SC: Please – did we get the  
 21 time? I'm sorry. Oh, thank you. Thank you. Please  
 22 continue.  
 23 [VIDEO RECORDING PLAYED]  
 24 MR MADLANGA SC: Can you go back just a  
 25 bit and stop where the Nyala stops?

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1 CHAIRPERSON: - given that reading, are  
 2 we?  
 3 MS PILLAY: 1 minute and 42 seconds.  
 4 MR MADLANGA SC: Please continue.  
 5 [VIDEO RECORDING PLAYED]  
 6 MR MADLANGA SC: Stop when the smoke  
 7 starts coming out and give us the reading. Exactly there,  
 8 what's the time?  
 9 MS PILLAY: 2 minutes and 2 seconds.  
 10 MR MADLANGA SC: Continue.  
 11 [VIDEO RECORDING PLAYED]  
 12 MR MADLANGA SC: Just stop there. Just  
 13 stop there. Ja, now what's the time where we are now?  
 14 MS PILLAY: 2 minutes and 7 seconds.  
 15 MR MADLANGA SC: Yes, General, where we  
 16 are now, do you accept that the protesters are continuing  
 17 to walk, or go the same way as they were before, despite  
 18 the fact that there's already smoke around? Do you accept  
 19 so? And perhaps for you to see it better, let's just go  
 20 back to exactly the point where the smoke starts and then  
 21 we just continue watching, General.  
 22 [VIDEO RECORDING PLAYED]  
 23 MR MADLANGA SC: You see there's smoke  
 24 there, they are walking. They are walking. They are  
 25 walking. They are still walking. Stop there. Do you

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1 agree with me, General?  
 2 MAJOR-GENERAL MPEMBE: Chairperson, what  
 3 I see, I cannot – I agree, but I did also testify that I  
 4 saw them, they were moving in the direction of the informal  
 5 settlement.  
 6 MR MADLANGA SC: That's not what I'm  
 7 asking you. I'm just asking you are they just walking,  
 8 walking; they are not running around or they've not turned,  
 9 started to turn back and they attack the police. They are  
 10 just walking. That's all I'm asking you, General.  
 11 MAJOR-GENERAL MPEMBE: Yes, Chairperson.  
 12 MS PILLAY: Chair, the video is now at 2  
 13 minutes and 14 seconds.  
 14 MR MADLANGA SC: Please continue.  
 15 [VIDEO RECORDING PLAYED]  
 16 MR MADLANGA SC: Just stop. Stop, and  
 17 stop it where those two small clouds of smoke right at the  
 18 front there. There was a – I can't quite describe it.  
 19 That's when those come out, or the first one. Ja, there,  
 20 what's the time there? What's the time there?  
 21 MS PILLAY: 2 minutes and 25 seconds.  
 22 CHAIRPERSON: Perhaps you could just  
 23 explain for the benefit of those who are watching this on  
 24 the worldwide web what exactly it is that is recorded on  
 25 this particular frame that's significant?

<p style="text-align: right;">Page 11849</p> <p>1 MR MADLANGA SC: General, would that not 2 be a stun grenade what we just saw now? We'll go back a 3 bit maybe for you to see what happens exactly there. Just 4 go back before it starts and then – ja, now play forward. 5 Just stop there. Stop there. You saw there were two poofs 6 that were poof-poof – I don't know how to describe what I 7 think – 8 CHAIRPERSON: I think "puff" is a more 9 elegant pronunciation. 10 MR MADLANGA SC: Thank you. Thank you, 11 Mr Chairman. I'm a third language English speaker. Would 12 those two puffs there, quick ones, boof, would those not be 13 stun grenades perhaps? 14 MAJOR-GENERAL MPEMBE: Correct, 15 Chairperson. 16 MS PILLAY: Chair, the stun grenades 17 start at 2:26. 18 MR MADLANGA SC: Please continue. 19 [VIDEO RECORDING PLAYED] 20 MR MADLANGA SC: Just stop there. Stop. 21 The people are beginning to run. The people are beginning 22 to run around, and can you give us the time when they start 23 running? 24 MS PILLAY: It's 2:27. 25 MR MADLANGA SC: Now just continue. I'll</p>	<p style="text-align: right;">Page 11851</p> <p>1 Mathibedi's objection. How do you respond to it? 2 MR MADLANGA SC: Let me ask the question 3 this way. General, when there is – when one sees the smoke 4 that you say is teargas smoke, do we see any people 5 running? I'm not asking about whether or not there might 6 well be people running, but from what we see on the 7 footage, do you see any people running before the stun 8 grenades explode? 9 MAJOR-GENERAL MPEMBE: Chairperson, I'll 10 request that maybe it starts where the smoke was, what is 11 teargas was used until to the stun grenade. 12 MR MADLANGA SC: Can you please rewind to 13 a point just before we see any smoke, and then start 14 playing. 15 MS PILLAY: It's at 1:58, 1 minute and 58 16 seconds. 17 [VIDEO RECORDING PLAYED] 18 MR MADLANGA SC: Just stop – just go back 19 a bit; I think I see police, or people that I think, just 20 play; I want you to stop just before, on the extreme right- 21 hand side of the frame, more to the front, to the right of 22 the protesters there are some people there and they start 23 running. I want you to stop as those people begin to run, 24 or start running. 25 [VIDEO RECORDING PLAYED]</p>
<p style="text-align: right;">Page 11850</p> <p>1 tell you to stop shortly. 2 [VIDEO RECORDING PLAYED] 3 MR MADLANGA SC: Please stop. General, 4 the smoke that we saw earlier when I ask you and you agreed 5 that do you see that the people are continuing to walk, 6 despite the fact that there is smoke around, would that not 7 have been smoke from teargas canisters? 8 MAJOR-GENERAL MPEMBE: Correct, 9 Chairperson. 10 MR MADLANGA SC: And do you agree that 11 from what we see, people start running around after the 12 stun grenades have been thrown and exploded? It's only 13 then that people start running around. 14 MR MATHIBEDI SC: Chair, there's some 15 obstruction – 16 CHAIRPERSON: Mr Mathibedi? 17 MR MATHIBEDI SC: - that's caused by the 18 trees there, so we don't see what's happening that side in 19 the smoke. 20 CHAIRPERSON: Is that an objection? 21 MR MATHIBEDI SC: It's an objection, Mr 22 Chairman. So we cannot say we see the people are running 23 around at that stage when the stun grenades are being 24 thrown. 25 CHAIRPERSON: Mr Madlanga, you heard Mr</p>	<p style="text-align: right;">Page 11852</p> <p>1 MR MADLANGA SC: Right there. Right 2 there. Just before they start running. Is it there? And 3 what's the time? 4 MS PILLAY: 2 minutes and 7 seconds. 5 MR MADLANGA SC: General, the one, two, 6 three – I think it's about four people, they start running. 7 Are those not police officers? They are to the extreme 8 right-hand side of the frame, sort of above, at least as it 9 appears on the picture, sort of above the Quantum, the 10 Toyota Quantum on the road. 11 MAJOR-GENERAL MPEMBE: Correct, 12 Chairperson. 13 MR MADLANGA SC: Correct, it is police, 14 you say. 15 CHAIRPERSON: Perhaps we can take the 16 adjournment at this stage, unless you want to carry on for 17 a short while? But before we do so, Commissioner Hemraj 18 wants to ask a question. 19 COMMISSIONER HEMRAJ: General, are you 20 able to differentiate from the video which is CS smoke and 21 which is stun grenade smoke, or are you relying on what 22 you've been told or what you saw on the day and 23 reconstructing? 24 MAJOR-GENERAL MPEMBE: Chairperson, the 25 stun grenade does move twice. It does make also a sound.</p>

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1 It will, it will move twice, as it happened there.  
 2 CHAIRPERSON: That means you can  
 3 differentiate on the video between teargas smoke and smoke  
 4 from a stun grenade. Is that right?  
 5 MAJOR-GENERAL MPEMBE: Correct,  
 6 Chairperson.  
 7 CHAIRPERSON: We'll now take the tea  
 8 adjournment for 15 minutes.  
 9 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 10 [11:30] CHAIRPERSON: The Commission resumes.  
 11 Before I ask, before I remind the Major-General he's still  
 12 under oath I want to thank, I think it's Ms Pillay who has  
 13 kindly prepare artistically improved sketches, depictions  
 14 of the positions of the strikers and the police which have  
 15 handed in and made available to us, thank you. Mr Mpofo, I  
 16 understand you wish to make an announcement to us.  
 17 MR MPOFU: Thank you very much,  
 18 Chairperson, and I hope everyone had a good break. Some of  
 19 us didn't. Chairperson, if you remember the remarks I made  
 20 on the 21st of June regarding the then intended application  
 21 for the funding of the applicants or the victims as we  
 22 prefer to call them. What I want to do now is quickly just  
 23 to report back as to what happened and then to address what  
 24 - the position of our plans. Thank you, Chairperson.  
 25 Chairperson, indeed the matter was set down for the 9th of

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1 July, by agreement between the parties it was held on the  
 2 11th. The 11th, the 12th and the 13th, which is the Thursday,  
 3 the Friday and the Saturday of last week. On all those  
 4 three days the matter finished after dark so it was quite a  
 5 lot of argument and a lot of paper indeed. I think before  
 6 - I want to preface my remarks by thanking the Commission  
 7 for the support and understanding of the fact that we tried  
 8 as much as possible not to disrupt the work of the  
 9 commission by firstly setting the matter down. The reason  
 10 why it was set down on the Tuesday because we anticipated  
 11 the judge might want until about Friday so that by the  
 12 Monday there would be a judgement. But we do understand  
 13 because of the volume of work that the judge had to - he  
 14 needed more than just a day to make a judgement. And when  
 15 we thank the Commission we're not - the support doesn't  
 16 mean you supported the application, indeed what the  
 17 commission did was to file a notice that it would abide by  
 18 the decision but we think that even that speaks volumes.  
 19 And we also want to thank the other parties, some of the  
 20 parties supported, others also filed notices to abide.  
 21 Thankfully only one party represented here opposed the  
 22 application. Maybe understandably and that is the police  
 23 and the National Commissioner.  
 24 What we said at the court because obviously the  
 25 issue of the looming 15th was uppermost in everybody's mind.

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1 One of the ways in which we dealt with that was to adopt a  
 2 comprised position of not interdicting the commission but  
 3 asking for interim relief pending the final determination  
 4 of the rights of the parties. And that was always meant to  
 5 make sure that whatever happens the work should continue  
 6 and that's the order ultimately that we amended the notice  
 7 of motion to. If we get that order, Chairperson, from the  
 8 point of view of the commission at least we would have  
 9 achieved the intended result which is that while the big  
 10 constitutional issues are debated in good time, on an  
 11 expedited basis but at least that the commission is  
 12 insulated from that process.  
 13 So where are - and we made the remarks to the  
 14 judge to say irrespective of the outcome, even if the  
 15 outcome had come yesterday, as professionals we have a duty  
 16 to come here and explain to the Commission. We couldn't  
 17 just disappear, whatever the instructions would be which is  
 18 what we are doing, thank you, with your leave, Chairperson.  
 19 The position now is that while we are waiting or maybe  
 20 before, let me correct something that has been badly or  
 21 incorrectly reported in the media. They have said that the  
 22 judge said his judgment will be on Thursday. The judge did  
 23 not say that and we can understand how that confusion  
 24 arose. The judge simply said he'll his judgement during  
 25 this week. What the Thursday issue was about, the

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1 postponement of the separate application of Baloyi and I  
 2 think the media then conflicted the two things. So in  
 3 reality the judgment could be in the next two hours. It  
 4 could be tomorrow, it could be anytime this week, we don't  
 5 know, but that situation then left us with the problem of  
 6 what do we do now, between now and the time of the  
 7 judgment. And as we indicated and as you also indicated to  
 8 the forum, Chair, what then happened is that a small  
 9 delegation of the victims was sent to consult with us which  
 10 is what we have been doing now. We're still going to  
 11 consult with the larger groups and our instructions are to  
 12 await the judgment and at that point to receive further  
 13 instructions from them. In the meantime we'll not be  
 14 participating, the victims that are affected, at least  
 15 those that we represent and hopefully as the Chairperson's  
 16 remarks were, if we are back later in the week then  
 17 obviously we'll have to take the burden of catching up with  
 18 what has happened which is not a major crisis. I think, as  
 19 I was saying, the only difference is we are not here to be  
 20 able to object and so on but that's a minor inconvenience.  
 21 I'm sure Chairperson will allow us to raise belated  
 22 objections if need be.  
 23 CHAIRPERSON: - promise but we'll see  
 24 when that problem arises.  
 25 MR MPOFU: You can't promise up front,

<p style="text-align: right;">Page 11857</p> <p>1 thank you, Chairperson. So that seems to be an elegant way  2 to deal with the situation that we find ourselves in. We  3 do - well there's no need for me to reveal what our  4 instructions are if we don't come back but once again we'll  5 communicate that one way or the other. So that's the  6 situation, Chairperson, and we want to make it very clear  7 that this is what - all the steps that we are taking,  8 including this morning for which we are very grateful that  9 you gave us the time, is to make sure that the progress but  10 also the integrity of this commission is preserved. And  11 everything we did in court we made sure because it would  12 not make sense for us to be saying our client's rights are  13 in jeopardy and they need to be exercised here and yet  14 damage the very institution to which they are to exercise  15 those rights.</p> <p>16 So we were very careful about that and it's  17 important that even the media must be very clear that these  18 are positions that are taken as comprises because of a  19 situation that no-one could foresee but it doesn't reflect  20 anything whatsoever, if anything that they were grateful  21 that the commission took the view of not opposing the  22 application. As we say that speaks volumes on its one.  23 Thanks. Sorry, Chairperson, before you respond insofar as  24 the practical issue of what is happening at the commission  25 is concerned, the commission will be aware that we are</p>	<p style="text-align: right;">Page 11859</p> <p>1 Mpfu and his team an opportunity to leave before we  2 continue with the cross-examination. I should have said  3 before but let me say it now before you leave, we trust  4 that your recovery from the assault that you were the  5 victim of is continuing and that you are almost back to  6 100% condition.</p> <p>7 MR MPOFU: I -  8 CHAIRPERSON: So now that we have to  9 proceed without a response from Mr Mpfu to the state of  10 his health perhaps you can carry on with your cross-  11 examination.</p> <p>12 CROSS-EXAMINATION BY MR MADLANGA SC (CONT.):  13 Thank you, thank you, Mr Chairman. General just on the  14 last response you gave to Commissioner Hemraj, so it means  15 what I saw which was - or we all saw the two puffs which I  16 thought were two stun grenades, so you are saying that's  17 one stun grenade. I'm not suggesting that throughout there  18 was only one stun grenade but at the point to which I drew  19 your attention that was one stun grenade. Is that so?</p> <p>20 MAJOR-GENERAL MPEMBE: Chairperson, I was  21 not referring to the number but I was referring to the way  22 I could identify a difference between a stun grenade and a  23 CS teargas.</p> <p>24 COMMISSIONER HEMRAJ: The question you  25 put to him, Mr Madlanga, was in the plural, are those stun</p>
<p style="text-align: right;">Page 11858</p> <p>1 scheduled the next cross-examiner after Mr Madlanga. That  2 is a matter that we will be able to handle with our  3 colleagues, our various colleagues here, bearing in mind  4 that on Wednesday the commission is not sitting and so on  5 but we'll handle it outside here. We'll still be in touch  6 with the evidence leaders on those issues. Thank you.</p> <p>7 CHAIRPERSON: Thank you, Mr Mpfu. Thank  8 you for what you've told us and I think we're all much  9 better informed than we were before. And I also want to  10 say that we are appreciative of the fact that you and your  11 clients acted very responsibly in deciding not to proceed  12 with the application for an interdict because that would  13 have had unfortunate consequences if it had been  14 successful. Very well, thank you very much, Mr Mpfu.  15 Major-General it's now my duty to remind you again that  16 you're still under oath.</p> <p>17 WILLIAM MPEMBE: s.u.o.  18 CHAIRPERSON: Mr Madlanga -  19 MR MPOFU: Sorry Chairperson, can we  20 therefore be excused -  21 CHAIRPERSON: I don't say that you need  22 permission but you may be excused.</p> <p>23 MR MPOFU: In this case I think I do,  24 thank you, Chairperson.</p> <p>25 CHAIRPERSON: Perhaps we should give Mr</p>	<p style="text-align: right;">Page 11860</p> <p>1 grenades and he said yes.</p> <p>2 MR MADLANGA SC: Ag anyway, anyway he  3 stands by his response that it was stun grenades, thank  4 you, thank you very much, Commissioner Hemraj. Now back to  5 the question that I had been asking which was whether you  6 see any people running once there is smoke on the screen.  7 Do you see any people running? And you said you would  8 rather have the footage played all over again for you to be  9 able to tell and as it was being played we saw people that  10 you identified as police running. Now I want the footage  11 to continue and I want you to watch and see if you see  12 besides the police any other people running. As we see the  13 teargas smoke just before the stun grenade explodes. Can  14 you please rewind to just before the police start running  15 and play right up to the point where we see the stun  16 grenade exploding.</p> <p>17 [VIDEO SHOWN]  18 MR MADLANGA SC: General, what's your  19 response?  20 MAJOR-GENERAL MPEMBE: Chairperson, it's  21 true that the people run where the stun grenade is but  22 there is a point which I need just to put into right  23 context. If we look at the video now it's totally covered  24 with the smoke which one might not be in a position to  25 comment those that are within the smoke but those that are</p>

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1 visible yes it's true.

2 MR MADLANGA SC: So it's true those that

3 you can see are not running and they only start doing so

4 when the stun grenade goes off?

5 MAJOR-GENERAL MPEMBE: Chairperson, I

6 said it's correct except the point where there are a number

7 of people who were protestors or strikers that are covered

8 by tear smoke.

9 MR MADLANGA SC: General, the story that

10 the police also wanted to protect some shaft as I

11 understand it, somewhere to the left of the frame that if

12 I'm not mistaken, I'm hearing for the first time today is

13 that correct? Are you mentioning that for the first time

14 today

15 MAJOR-GENERAL MPEMBE: No, Chairperson.

16 MR MADLANGA SC: Where do you mention it

17 for the first time? I might be wrong altogether, General.

18 Just remind me.

19 MAJOR-GENERAL MPEMBE: I once spoke about

20 it and I think it was the day when we were on the scene

21 showing the shaft there. And also in my evidence in chief

22 I said that there were certain places which of course I was

23 briefed on my arrival that those places have been

24 identified. I mentioned informal settlement and also any

25 place that belongs to Lonmin mine that can be made to be

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1 disrupted.

2 [11:50] MR MADLANGA SC: General, you do not

3 mention this in your hand-written statement of the 13th of

4 August which is HHH13. Do you agree?

5 Do you agree?

6 MAJOR-GENERAL MPEMBE: I agree,

7 Chairperson.

8 MR MADLANGA SC: Now General, because it

9 took you a bit of time to go through that statement which

10 is relatively short I will not ask you to go through

11 exhibit GGG12 which is your earlier typed statement and

12 your supplementary statement, your more recent typed

13 statement which is exhibit HHH3. I will not ask you to go

14 through those because it would take us forever, at least

15 not now, but I want you, when you have time, to go through

16 those two statements and find out if you do make that

17 point. And General, when you do that exercise, I'm not

18 looking for a general statement that indicates what

19 premises, what property SAPS were generally protecting

20 during the events at Marikana, but specifically on whether

21 as the protestors were moving across the field, this field

22 that we see on this particular footage that's playing now,

23 SAPS or the police or you were concerned about the

24 protection of some shaft that was somewhere to the left of

25 the frame as we see it on this footage.

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1 CHAIRPERSON: As I see it your statement

2 which is GGG12 would deal with it if it were dealt with in

3 paragraph 18. It doesn't appear to be and in Colonel

4 Merafe's statement, Lieutenant-Colonel Merafe's statement,

5 I'm not sure what the exhibit number is, but oh sorry it's

6 GGG15, exhibit GGG15 Lieutenant-Colonel Merafe's statement,

7 he would deal with the matter if he dealt with it at all in

8 para 18 also. In neither of those statements is that is

9 that point mentioned at all.

10 MR MADLANGA SC: Yes, yes but if he were

11 to want to satisfy himself, thank you very much, Mr

12 Chairman. Perhaps we'll just give him time and maybe when

13 we resume even tomorrow morning the General can indicate

14 whether he has been able to find anywhere where he

15 pertinently deals with this issue, protestors walking

16 through this field and the General's concern or SAPS'

17 concern about some shaft somewhere to the left of the

18 frame. Will you please do that, General? Oh, you can stop

19 the footage now, thank you.

20 CHAIRPERSON: I think I must also point

21 that in the supplementary statement which is HHH3 I think,

22 you deal with what is said in para 18 of your original

23 statement in paragraph 8 of that statement and you also

24 don't mention the point there either.

25 MR MADLANGA SC: Thanks again, Mr

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1 Chairman. Now General, I want to take you to the SAPS

2 policy on public order policing and it is exhibit FFF1 and

3 there I want you to have a look at the third sentence of

4 clause or paragraph 4.3.3. At typed page 8 at the top of

5 the policy.

6 CHAIRPERSON: What paragraph must he look

7 at, or clause number?

8 MR MADLANGA SC: 4.3.2, Mr Chairman.

9 CHAIRPERSON: Thank you.

10 MR MADLANGA SC: Do you have it in front

11 of you now?

12 MAJOR-GENERAL MPEMBE: I have in front of

13 me I just wanted the page, Chairperson.

14 MR MADLANGA SC: 4.3.2 is the paragraph

15 number or clause that I'm referring you to, it's a typed

16 page 8 at the top.

17 MAJOR-GENERAL MPEMBE: Paragraph 4. -

18 MR MADLANGA SC: 3.2, 4.3.2.

19 MAJOR-GENERAL MPEMBE: I've got it,

20 Chairperson.

21 MR MADLANGA SC: Yes, the third sentence

22 starting "The planning and operational command" do you see

23 that now? Four lines down.

24 MAJOR-GENERAL MPEMBE: I see the one.

25 MR MADLANGA SC: Four lines down, the

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1 planning and - do you see that?  
 2 Do you see the line starting "however, at all  
 3 times?"  
 4 MAJOR-GENERAL MPEMBE: Yes, I see it.  
 5 MR MADLANGA SC: Yes, now the sentence  
 6 starting towards the right-hand margin. "The planning and  
 7 operational command of public order operations must always  
 8 be entrusted to commanders of POP units in consultation  
 9 with the Provincial Commissioner as they are trained and  
 10 usually experienced in such matters." Do you see that?  
 11 MAJOR-GENERAL MPEMBE: Correct,  
 12 Chairperson, I can see it.  
 13 MR MADLANGA SC: Mr Chairperson,  
 14 Commissioners, Ms Pillay has just drawn to my attention the  
 15 fact that the transcript of the inspection in loco is  
 16 available and the General will be given a copy for him to  
 17 have a look at where he refers to the shaft that needed to  
 18 be protected.  
 19 CHAIRPERSON: Thank you.  
 20 MR MADLANGA SC: Thank you. General,  
 21 what I read refers to the planning and operational command.  
 22 For now I will not bother about the planning. You said  
 23 because this was spontaneous and there was no time for  
 24 planning you would have - in the circumstances you would  
 25 have required three days to plan but I emphasise the part

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1 that says "operational command of public order operations  
 2 must always be entrusted to commanders of POP units in  
 3 consultation with the Provincial Commissioner as they are  
 4 trained and usually experienced in such matters." On the  
 5 date we adjourned you testified that Brigadier Calitz was  
 6 the operational commander but that as a matter of fact on  
 7 the day, on the 13th next to the railway line you assumed  
 8 the duties of an operational commander. You acted as or  
 9 you performed the duties of an operational commander. My  
 10 question is do you agree that your assumption of the  
 11 functions of an operational commander on that day -  
 12 CHAIRPERSON: Sorry to interrupt you. It  
 13 sounds as if someone's cell phone is going off. Will they  
 14 please turn it off and anyone else who has a cell phone  
 15 which is on must please turn it off. If a cell phone goes  
 16 off from now on I'm going to ask the person concerned to  
 17 leave the auditorium.  
 18 MR MADLANGA SC: Do you agree, General,  
 19 that your assumption of the functions of an operational  
 20 commander on the 13th was in fact in contravention of the  
 21 plain injunction contained in the third sentence of  
 22 paragraph 4.3.2 of the policy on public order policing, do  
 23 you agree with that? Or perhaps let me ask this question  
 24 first, I'm sorry Commissioners. Let me ask this question  
 25 first. Are you a commander of an POP unit?

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1 MAJOR-GENERAL MPEMBE: I am not a  
 2 commander of the POP unit but I am in charge of POP units  
 3 in the province. The commanders are reporting to me.  
 4 Chairperson, I need also maybe to say last time I said I  
 5 went there still as a CJOC and Brigadier Calitz was at the  
 6 JOC but I went there as a CJOC.  
 7 MR MADLANGA SC: General, this is not as  
 8 I read it, saying that a CJOC may also do this. It says  
 9 "because commanders of POP units are trained and usually  
 10 experienced in such matters." For that reason they must be  
 11 the one who are in charge of, or rather, yes in charge of  
 12 an operation. They must be operational commanders. It  
 13 says nothing about a CJOC who may not necessarily also be a  
 14 POP commander. So the simple question, General, is are you  
 15 a POP commander? Do I understand your answer to be that  
 16 you are not? Or rather a commander of a POP unit, do I  
 17 understand your answer to be that you are not?  
 18 MAJOR-GENERAL MPEMBE: Yes, Chairperson,  
 19 and I indicated that all POP commanders are reporting to  
 20 me. And, Chairperson, I need also to add that I did not go  
 21 on the 13th alone, I was surrounded by POP commanders.  
 22 MR MADLANGA SC: Are you suggesting an  
 23 exception to what 4.3.2 says which is that a person to whom  
 24 POP commanders report may, regardless of what 4.3.2 says be  
 25 in charge of a public order policing operation even if that

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1 person is not himself or herself a commander of a POP unit?  
 2 Are you suggesting that exception to 4.3.2?  
 3 MAJOR-GENERAL MPEMBE: Chairperson, as I  
 4 indicated previously and maybe I know the Chairperson has  
 5 given a ruling on that one in terms of standing order 11,  
 6 paragraph 5, I need to just state that outside there  
 7 operationally some of the policies will not be in -  
 8 directly applied. As I said it will depend on the  
 9 situational appropriateness, not that you are contravening  
 10 the policy but for the matter of practicability. One will  
 11 have to take those matters personally and I did indicate  
 12 that as a general I am expected to give guidance to the  
 13 members. I'm expected to do hands-on management and I am  
 14 not normally a general that sits in the office, I lead in  
 15 the front and I will ask the commission and Commissioners  
 16 to judge me on what happened that day, particularly me as a  
 17 CJOC commander.  
 18 MR MADLANGA SC: And I suggest to you  
 19 also, General, that you are saying there is yet another  
 20 exception and it is that a person who is not a commander of  
 21 a POP unit may exercise the functions of an operational  
 22 commander in a public order policing operation for as long  
 23 as there are around him or her commanders of POP units. Do  
 24 you agree with that as well, do you agree with that?  
 25 MAJOR-GENERAL MPEMBE: Chairperson, this

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1 is not what I'm saying. I'm saying that POP commanders as  
 2 a general they are reporting to me and on that day I was  
 3 with them but I'm also not saying that it's an exception.  
 4 But what I'm saying if Chairperson will allow me to  
 5 demonstrate with the previous policy that we also dealt  
 6 with, that is standing order 262, paragraph 11.5. And in  
 7 terms of that policy which I also admitted that what is  
 8 written there I cannot change but practically when you are  
 9 on the ground in answering this question, when an  
 10 operational commander is leading the forces of 600 or even  
 11 1000 on the 16th of - you could not be able maybe to give a  
 12 command of a teargas because of the varsity(?) of the  
 13 place, because of the number of people, and yet the policy  
 14 only depicts the two people, the operational commander as  
 15 well as the CJOC commander, and the CJOC, the same policy  
 16 expect them to be in the JOC.  
 17 [12:09] So at the end of the day it does – and this is  
 18 what I'm indicating to the Commission – it does have an  
 19 impact in the operation, and as a matter of fact, Brigadier  
 20 Calitz is coming as an operational commander, a POP  
 21 commander, that he will also say what did he experience on  
 22 the 16th of August.  
 23 MR MADLANGA SC: General, you did testify  
 24 how many commanders, or POP commanders, or commanders of  
 25 POP units there were on the 13th. Can you just –

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1 unfortunately I don't remember how many you said there  
 2 were. How many were they, if you remember?  
 3 MAJOR-GENERAL MPEMBE: Chairperson, I had  
 4 Lieutenant-Colonel Merafe.  
 5 MR MADLANGA SC: Yes?  
 6 MAJOR-GENERAL MPEMBE: I had Lieutenant-  
 7 Colonel Tsiloane.  
 8 MR MADLANGA SC: Yes?  
 9 MAJOR-GENERAL MPEMBE: Captain, it's,  
 10 Lieutenant Baloyi was also there.  
 11 MR MADLANGA SC: Yes?  
 12 MAJOR-GENERAL MPEMBE: And in the  
 13 chopper, which was also directing the operation, it was  
 14 Lieutenant-Colonel Vermaak.  
 15 MR MADLANGA SC: General, it would have  
 16 been a matter of relative ease for one of these commanders  
 17 of POP units to take command of the operation on the 13th,  
 18 would it not have been?  
 19 MAJOR-GENERAL MPEMBE: Correct,  
 20 Chairperson, but the person still reports to me.  
 21 CHAIRPERSON: - putting to you doesn't  
 22 seem to be decisive. If you look at this policy document,  
 23 page 8, the passage to which counsel has referred you,  
 24 paragraph 4.3.2, the third sentence gives the reason for  
 25 what is contained there. Let's read it again. "The

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1 planning and operational command of public order operations  
 2 must always be entrusted to commanders of POP units, in  
 3 consultation with the Provincial Commissioner" – and now  
 4 the reason is given – "as they are trained and usually  
 5 experienced in such matters." Now I've looked through your  
 6 CV, looked through the document that you put before us,  
 7 your record, and the work you've done at various stages in  
 8 your career. I couldn't see any evidence that you've been  
 9 trained and were experienced in public order operations.  
 10 If there is something that I did not see, or something  
 11 that's not there that I should have been told about, now is  
 12 your time to tell me, but the whole idea of this document  
 13 is that operation command for public order operations must  
 14 always be entrusted to people who are trained and  
 15 experienced in such matters. Now the question is, were you  
 16 trained and were you experienced in such matters, in public  
 17 order operations? I can understand being assistant  
 18 commissioner, the people, the Public Order Policing  
 19 commanders are under you and subject to your orders, and so  
 20 forth. I can understand that, but that's not the point.  
 21 The point is whether the reason given in the sentence I  
 22 read afforded justification for you being in charge of the  
 23 execution of this particular operation. I think that's the  
 24 question counsel is putting to you.  
 25 MAJOR-GENERAL MPEMBE: Chairperson, I

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1 would say I'm experienced in crowd management, in Public  
 2 Order Policing matters, and what I was trying to explain is  
 3 that as a General experienced in Public Order Policing, I'm  
 4 also expected to give guidance to the same Public Order  
 5 Policing commanders. And also in adding to that is that  
 6 the Commission should look exactly the conduct and the  
 7 guidance that I give on the same day, whether was it in  
 8 line with Public Order Policing policy or I guided the  
 9 commanders in a different way. That's what I was saying.  
 10 MR MADLANGA SC: General, yes, you have  
 11 testified that you consider yourself to be experienced in  
 12 Public Order Policing. Can I draw to your attention what I  
 13 recollect to have been the evidence of General Annandale on  
 14 this? But of course I accept that you know your training  
 15 and experience better than what General Annandale knows.  
 16 My recollection is that his evidence was that what you did  
 17 – I may be wrong altogether – what you did was in fact no  
 18 more than the basic training on Public Order Policing that  
 19 every policeman or policewoman or police officer undergoes  
 20 at basic training. I will not take it further at this  
 21 stage. I will try to find the evidence and even, as I  
 22 recollect, the document that General Annandale was looking  
 23 at, and I will give you - if I'm able to find that, I will  
 24 give you a copy of that for you to consider. Now can I –  
 25 MAJOR-GENERAL MPEMBE: I'm sorry,

<p style="text-align: right;">Page 11873</p> <p>1 Chairperson, may I please respond to this?</p> <p>2 CHAIRPERSON: You may.</p> <p>3 MAJOR-GENERAL MPEMBE: Chairperson, I</p> <p>4 don't dispute the fact that I'm trained in a basic Public</p> <p>5 Order Policing training, which I do agree with Adv</p> <p>6 Madlanga. The experience that I am talking about is an</p> <p>7 experience through that training and having a practical</p> <p>8 experience for 13 years of a deputy operations in the</p> <p>9 Northwest Province.</p> <p>10 MR MADLANGA SC: Can I now, General, take</p> <p>11 you to paragraph 5.3.4 of this same document, the policy on</p> <p>12 Public Order Policing. You testified that this was – what</p> <p>13 happened there was spontaneous and your reaction also</p> <p>14 therefore was a spontaneous reaction. Now if you look at</p> <p>15 paragraph 5.3.4, in fact if you look at 5.3, it deals with</p> <p>16 a spontaneous gathering, and then there's 5.3.1 all the way</p> <p>17 down to 5.3.4, and this appears after the policy has</p> <p>18 referred to what is expected of SAPS, that is all of the</p> <p>19 things that SAPS must do, including briefing, planning, and</p> <p>20 so on and so on. Now if you look at 5.3.4 it says, "The</p> <p>21 situation should be managed by applying the procedures</p> <p>22 indicated in this policy document." Would I be correct,</p> <p>23 General, if I suggest to you that even in circumstances</p> <p>24 where a gathering is a spontaneous one, SAPS must still do</p> <p>25 the best they can to strive for upholding the principles</p>	<p style="text-align: right;">Page 11875</p> <p>1 practicable, I'm at the level of interpretation purely. Do</p> <p>2 you agree that what I'm proffering as a possible</p> <p>3 interpretation is the correct interpretation, or don't you</p> <p>4 agree?</p> <p>5 MAJOR-GENERAL MPEMBE: Chairperson, yes I</p> <p>6 agree, and I see that it was done in terms of when I was</p> <p>7 there.</p> <p>8 MR BIZOS SC: Mr Chairman, I can't help</p> <p>9 noticing that there are less than six people in the</p> <p>10 audience. Should we not ask them, with respect, whether</p> <p>11 they understand English, and if so, we can dispense for the</p> <p>12 time being, if they don't want a translation and insist on</p> <p>13 it, that we may expedite matters if we give the interpreter</p> <p>14 a rest?</p> <p>15 CHAIRPERSON: - how do you react to that</p> <p>16 suggestion Mr Bizos has made?</p> <p>17 MR MADLANGA SC: I'm agreeable to that,</p> <p>18 if we may perhaps –</p> <p>19 CHAIRPERSON: Anyone who –</p> <p>20 MR MADLANGA SC: - the Commission to –</p> <p>21 CHAIRPERSON: Anyone representing the</p> <p>22 parties opposed to Mr Bizos' suggestion? Perhaps the</p> <p>23 sensible thing to do is to suggest that the parties are</p> <p>24 going to speak to their clients over the lunch adjournment,</p> <p>25 and depending on the feedback we get, we can then adopt Mr</p>
<p style="text-align: right;">Page 11874</p> <p>1 that are set out in this policy? Isn't that what 5.3.4</p> <p>2 means? As far as that would be practical, of course.</p> <p>3 CHAIRPERSON: - to be fair, you answered</p> <p>4 that last time when you referred us to paragraph 3.3 under</p> <p>5 the heading of "Situational appropriateness," and you</p> <p>6 explained to us that in deciding to do what you did, and</p> <p>7 differing in fact from the commanders who were working with</p> <p>8 you who took a different line, you thought that what you</p> <p>9 said should be done would be in accordance with the</p> <p>10 principles of situational appropriateness, and if they had</p> <p>11 done what – if they wanted done had been done, there would</p> <p>12 have been far more bloodshed than in fact there was. Is</p> <p>13 that what you said last time? I take it that's still your</p> <p>14 answer?</p> <p>15 MAJOR-GENERAL MPEMBE: Correct,</p> <p>16 Chairperson, and these confirms that as a General and the</p> <p>17 commanders reporting to me, I have to give them guidance.</p> <p>18 That's why I was asking the Commission to judge me by what</p> <p>19 I did on that day.</p> <p>20 MR MADLANGA SC: That is not my question,</p> <p>21 General. General, my question is purely at the level of</p> <p>22 interpretation. General, I'm asking you whether you agree</p> <p>23 with me that what 5.3.4 conveys is that SAPS should still</p> <p>24 strive for upholding all of the principles stated in this</p> <p>25 policy, but of course, insofar as that would be</p>	<p style="text-align: right;">Page 11876</p> <p>1 Bizos' suggestion in the light of the feedback. I think</p> <p>2 there are people watching on a screen, or screens,</p> <p>3 elsewhere in this building. Of course there are people</p> <p>4 watching through YouTube and so on, but it prima facie</p> <p>5 sounds a very good suggestion, but perhaps as I said the</p> <p>6 parties' representatives can consult their clients during</p> <p>7 the lunch adjournment, and depending on the feedback, we</p> <p>8 will implement Mr Bizos' suggestion, if it appears</p> <p>9 appropriate. Thank you for the suggestion, Mr Bizos.</p> <p>10 MR MADLANGA SC: Now General, I can</p> <p>11 already see what your likely answer to this is based on</p> <p>12 your response to the question that the Chairman asked, but</p> <p>13 I will asked the question nonetheless. Now General, going</p> <p>14 through the transcript on Friday night I saw that you say</p> <p>15 that from the time that you were requested by the</p> <p>16 Provincial Commissioner to attend to the gathering on the</p> <p>17 13th, you said you had about two hours. Yes, I'm not</p> <p>18 unmindful of the fact that you say that for proper</p> <p>19 planning, briefing, and so on, you would have required</p> <p>20 three days, but I will still ask you this. Bearing in</p> <p>21 mind, General, what clause 5.3.4 says, that is an attempt</p> <p>22 as far as possible to comply with the policy, and also</p> <p>23 bearing in mind, General, that the policy also specifies</p> <p>24 why there is a need for a proper briefing, and that reason</p> <p>25 being that all role players should know what is expected of</p>



<p style="text-align: right;">Page 11877</p> <p>1 them, within the two hours that you had, should you not at  2 the very least have had a very brief, very brief briefing  3 session at which you indicated what you required to be done  4 on the day, as opposed to simply just walking there and  5 only having a briefing once everything was unfolding, the  6 briefing being with the commanders, as you were talking to  7 the protesters gathered next to the railway line? Was the  8 proper thing to do, in the light of 5.3.4, and in the light  9 of the need for role players to know what is expected of  10 them, was the proper thing to do not at the very least to  11 have a very brief briefing session so that the role players  12 should be aware of what is expected of them?</p> <p>13 MAJOR-GENERAL MPEMBE: Chairperson, my  14 understanding of 5.3 does not only refer to the briefing.  15 It refers to the number of actions that the police should  16 take with regard to a spontaneous gathering. In answering  17 the question I will also state maybe the paragraph and  18 indicate the action that we did – identify the leadership  19 element in order to establish communication and  20 negotiation; Chairperson, the video is very clear, I was  21 personally talking to them.  22 [12:29] The only problem that we couldn't establish is  23 that what are their names, where are they staying, but the  24 follow-up action that I personally did, it was exactly to  25 do that. Coming to set up a mobile joint operational</p>	<p style="text-align: right;">Page 11879</p> <p>1 the meeting. It's the police that initiated the leaders to  2 go and address there, and Chairperson, that was also in  3 compliance with the policy.  4 With regard to establish the perpetrator,  5 Chairperson, you will also know that in terms of the  6 exhibit OO4 I repeatedly asked even those leaders who are  7 the people that they should help me to beat this elephant  8 bit by bit. I'm just also explaining in terms of the  9 actions that emanated from the 13th.  10 CHAIRPERSON: Yes, yes, I understand  11 that, but I think Mr Madlanga is more concerned not with  12 what you did on the 15th, which you've explained was  13 entirely in accordance with the policy document, but what  14 you did on the 13th. Am I correct, Mr Madlanga? That's  15 what he's focusing on at the moment, but anyway, we have  16 your answer in respect of the other points, which is on  17 record and we'll obviously bear it in mind, but perhaps  18 you'd like to proceed, Mr Madlanga, when the interpreter  19 has been given a chance to interpret the response.  20 COMMISSIONER HEMRAJ: Mr Madlanga, the  21 brief briefing that you referred to is his briefing the  22 other POP commanders and the police, not other role  23 players; it's the briefing of the police personnel present?  24 MR MADLANGA SC: Yes, but which then,  25 Commissioner Hemraj, should have led to those commanders in</p>
<p style="text-align: right;">Page 11878</p> <p>1 centre, Chairperson, I can confirm that it was set up.  2 Inform the local authority of the gathering and, if  3 possible, the reasons or purpose of the gathering;  4 Chairperson, that is the responsibility of the authorised  5 officer, that is Captain Govender of Marikana Police  6 Station, which he did confirm with me that he did inform  7 the local authority.  8 The situation should be managed by applying the  9 procedures indicated in this policy document. Chairperson,  10 I did testify a difference between a spontaneous gathering  11 and a gathering intended in section 3 of the Regulation of  12 Gatherings Act, that even though it is a spontaneous  13 gathering, we should manage it as if it is done in terms of  14 section 3 of – the video is clearly there; my negotiation,  15 the approach to the situation, we wanted really to legalise  16 it. The only issue that couldn't be of an assistance to us  17 is the protesters themselves and the other role players  18 maybe in anticipation to go further. The actions of myself  19 setting up the meetings with the mine management, the  20 unions, Chairperson, it was exactly to comply with the  21 policy.  22 Chairperson, to add, it is already before the  23 Commission that the involvement of Mr Mathunjwa, Mr Senzeni  24 Zokwana, is because of the police initiative. They did not  25 come there on their own. It's the police that initiated</p>	<p style="text-align: right;">Page 11880</p> <p>1 turn –  2 COMMISSIONER HEMRAJ: Yes.  3 MR MADLANGA SC: - briefing the other  4 role players.  5 COMMISSIONER HEMRAJ: Yes.  6 MR MADLANGA SC: Because as I suggest to  7 the witness, the policy expects all the role players to  8 know what is expected of them. That is the briefing.  9 COMMISSIONER HEMRAJ: That's how I  10 understand the question.  11 MR MADLANGA SC: Yes, yes, you're quite  12 correct, Commissioner.  13 CHAIRPERSON: It also might be relevant  14 to look at 5.1.1, which deals with ordinary crowd  15 gatherings. I take it in the case of spontaneous ones you  16 apply the ordinary principles insofar as you can, but  17 obviously sometimes the exigency of the moment prevent  18 that.  19 MR MADLANGA SC: Yes.  20 CHAIRPERSON: But if 5.1.1 could have  21 been implemented, and that's a matter which could usefully  22 be explored –  23 MR MADLANGA SC: Yes.  24 CHAIRPERSON: - but I'll leave it to you  25 to do what you want to do.</p>

<p style="text-align: right;">Page 11881</p> <p>1 MR MADLANGA SC: Yes, thank you, Mr  2 Chairman. That's why I took him to 5.3.4, saying within  3 reason, and insofar as practical, you must do your best to  4 comply, and indeed complying even with 5.1.1, as the  5 Chairman is saying, if practical. Now General, I do hear  6 your response, but as I understand them, all of the things  7 that you itemised seem to be matters that related to  8 planning on the Marikana events as a whole, and the manner  9 in which the police were approaching that the Marikana  10 events, as a whole, and what the police operation thereon  11 was, as a whole, all of the things that you itemised seem  12 to relate to that, and as the Chairman quite correctly  13 indicated, my focus is something pops up unexpectedly;  14 protesters go to Karee and you get an instruction, please  15 attend to that. It's something spontaneous, I agree with  16 you, 100%. You have two hours from the time that you are  17 instructed to attend to it, and I'm asking you now in the  18 face of 5.3.4, were you not at the very least, or was it  19 not incumbent upon you at the very least to have a very  20 short briefing session with the commanders, who in turn  21 should have had a very short briefing session with all the  22 role players, so that everyone should be in a position to  23 know what was expected of them, spontaneous as it was,  24 rather than what in fact happened, which is just you all  25 walked in there – and please excuse this – blind as it</p>	<p style="text-align: right;">Page 11883</p> <p>1 the video, it is with regard to the situation where I  2 expected how the police to respond.  3 MR MADLANGA SC: General, let me take you  4 to a different issue. I have touched on it, but from a  5 different angle, and it's –  6 CHAIRPERSON: Are you moving away from  7 the policy document?  8 MR MADLANGA SC: Yes, Mr Chairman.  9 CHAIRPERSON: Okay, I'd like to ask a  10 question about that before you do that, before you move  11 away. I take it 5.3.4 means you apply everything in the  12 policy document that you can in the time available.  13 Clearly if it's absolutely spontaneous, then you can't.  14 Now if you look at 5.1.1, this deals with an ordinary crowd  15 gathering. There it says, "Members of the SAPS POP are to  16 be structured, organised, well trained, and provided with  17 suitable protection and equipment before being deployed. A  18 detailed briefing, during which the line of demand is  19 clearly defined, must be given to all the members involved.  20 During this briefing," and now come words underlined, "the  21 level of force must be pre-determined and clearly explained  22 to all members, and that it can only be effected by  23 instruction of the operational commander." Now there was  24 time to give that briefing, I take it, on the 13th. Is that  25 correct?</p>
<p style="text-align: right;">Page 11882</p> <p>1 were, and the only briefing that takes place is when your  2 attempt at managing the process is already afoot. So  3 question is, would it not have been incumbent of you within  4 the two-hour period that you had to have this brief-brief  5 briefing session with the commanders, who in turn should  6 have had a very brief briefing session with all the other  7 role players, as opposed to walking in blind, as it were,  8 with nobody knowing what was expected of them, except  9 perhaps you only?  10 MAJOR-GENERAL MPEMBE: Chairperson, 5.3.4  11 refers to the itemised actions that are expected from the  12 police in the case of a spontaneous gathering. Hence I was  13 indicating that, and the policy says in that case, in  14 paragraph 3.4, in my understanding, Chairperson, says do  15 not just not police the spontaneous gathering. You do  16 police it as it is intended in section 3 of the Regulation  17 of Gatherings Act, and that is what I was referring to,  18 Chairperson, and on the 13th I did indicate that I did ask  19 Lieutenant-Colonel Merafe whether the people were briefed  20 about the situation of Marikana and he did confirm with me,  21 and he even said, "General, the continuous briefing and  22 also I mentioned to acclimatise those members that were  23 coming from the other provinces, will also be done on  24 ongoing basis because I am also personally." And the  25 second issue, the briefing that I was doing, which was on</p>	<p style="text-align: right;">Page 11884</p> <p>1 MAJOR-GENERAL MPEMBE: Yes, Chairperson.  2 CHAIRPERSON: Warrant-Office Kuhn could  3 have been told that force could only be effected by  4 instruction of the operational commander, who for practical  5 purposes that day was you. Is that right? He could have  6 been told that?  7 MAJOR-GENERAL MPEMBE: Correct,  8 Chairperson.  9 CHAIRPERSON: And yet he was not. Would  10 you agree with that?  11 MAJOR-GENERAL MPEMBE: No, Chairperson.  12 Warrant-Officer Kuhn, as far as my understanding is  13 concerned, even though he is not stationed in Northwest,  14 he's a member of POP.  15 CHAIRPERSON: Yes, I -  16 MAJOR-GENERAL MPEMBE: He does his work  17 on a daily basis and he is one of the members of the unit  18 in the POP.  19 CHAIRPERSON: I see. So you're saying it  20 wasn't necessary for him to be told that he couldn't fire  21 off a teargas canister unless instructed by the operational  22 commander, because he would have known that anyway? Is  23 that what you say about it?  24 MAJOR-GENERAL MPEMBE: No, Chairperson,  25 this is not what I'm saying, but –</p>

<p style="text-align: right;">Page 11885</p> <p>1 CHAIRPERSON: What are you saying?</p> <p>2 MAJOR-GENERAL MPEMBE: What I'm saying</p> <p>3 is, Chairperson, in any normal situation in a practical</p> <p>4 way, and this is what I'm explaining, even in the operation</p> <p>5 where the Chairperson, the paragraph is referring, if you</p> <p>6 have briefed the commanders, the commanders themselves are</p> <p>7 the ones that they go and brief their own members, and then</p> <p>8 they submit a certificate to you to say that the people are</p> <p>9 being briefed. So this is what I'm saying to say with</p> <p>10 regard to the normal operation and that one, I don't see</p> <p>11 myself having deviated because I did brief the commanders,</p> <p>12 and I did explain that the commanders should have briefed</p> <p>13 their members, and Warrant-Officer Kuhn as a member, he had</p> <p>14 that knowledge.</p> <p>15 CHAIRPERSON: - the point, he had the</p> <p>16 knowledge anyway. But despite that, on the material before</p> <p>17 us he appears to have fired off a teargas canister without</p> <p>18 having received an instruction from the operational</p> <p>19 commander. Is that correct? That's right, isn't it? He</p> <p>20 admitted to you that he didn't know – he said he got a</p> <p>21 command; whether that's true or not we don't know, but</p> <p>22 certainly he never suggested he got a command from you, and</p> <p>23 you were functioning as the operational commander that day.</p> <p>24 That's correct, isn't it?</p> <p>25 MAJOR-GENERAL MPEMBE: It's correct,</p>	<p style="text-align: right;">Page 11887</p> <p>1 CHAIRPERSON: - on the right.</p> <p>2 MAJOR-GENERAL MPEMBE: I was on the</p> <p>3 right, Chairperson.</p> <p>4 CHAIRPERSON: So couldn't you have seen</p> <p>5 whether - if it did happen is another matter we won't go</p> <p>6 into now, but if it was true that some of the strikers</p> <p>7 started veering towards the informal settlement, they would</p> <p>8 have done so on the right side; surely you could have seen</p> <p>9 that from where you were?</p> <p>10 MAJOR-GENERAL MPEMBE: Correct,</p> <p>11 Chairperson. With regard to this I was referring to the</p> <p>12 command that was given to Warrant-Officer Kuhn –</p> <p>13 CHAIRPERSON: If one was.</p> <p>14 MAJOR-GENERAL MPEMBE: - not the command</p> <p>15 that he heard.</p> <p>16 CHAIRPERSON: If one was. – like I</p> <p>17 thought this was relevant in this context. You said you</p> <p>18 were moving on to another point.</p> <p>19 MR MADLANGA SC: Thank you. Thank you,</p> <p>20 Mr Chairman. General, the subject of the protesters</p> <p>21 suddenly changing direction and veering towards the</p> <p>22 informal settlement, I've dealt with it in one context.</p> <p>23 Now what I would like to find out from you, you've already</p> <p>24 accepted that in your handwritten statement of the 13th of</p> <p>25 August you do not know this. Now what I would like to</p>
<p style="text-align: right;">Page 11886</p> <p>1 Chairperson, but Chairperson, I need also to add that based</p> <p>2 on paragraph 11.5, practically speaking, not deviating from</p> <p>3 the policy, practically speaking, if the operational</p> <p>4 commander could, operational commander will not be able to</p> <p>5 cover the whole area and in that case I indicated</p> <p>6 operational speaking, not policy wise, and that's,</p> <p>7 Chairperson, I did indicate to this Commission that in a</p> <p>8 very big and wide space the operational commander, will it</p> <p>9 be impossible to see everything and to give command in</p> <p>10 advance in order for the members to act.</p> <p>11 CHAIRPERSON: Would it have been possible</p> <p>12 for you to have – if it's true that the strikers veered off</p> <p>13 towards the informal settlement, if that's true, would it</p> <p>14 have been possible for you to have raised your voice and</p> <p>15 given the order not to someone who was on the extreme left,</p> <p>16 but somebody who was close to you on the right, close to</p> <p>17 the informal settlement, would it have been possible for</p> <p>18 you to have given such an order and it been heard by the</p> <p>19 person to whom you gave the order, who would have known</p> <p>20 that you're the appropriate person to give the order?</p> <p>21 MAJOR-GENERAL MPEMBE: Chairperson, on</p> <p>22 that day it could not have been impossible for me, but what</p> <p>23 I'm indicating is that it was clearly also depicted from</p> <p>24 the video that in some certain areas I could not have been</p> <p>25 seeing what was happening.</p>	<p style="text-align: right;">Page 11888</p> <p>1 establish from you is whether you are aware of any</p> <p>2 statement made before the Potchefstroom meeting that talks</p> <p>3 about a change of direction and heading towards the</p> <p>4 informal settlement.</p> <p>5 [12:49] Are you aware of any, prior to the Potchefstroom</p> <p>6 meeting? I am aware that after the Potchefstroom meeting</p> <p>7 there are a few statements, yours, GGG12 – is it 12? –</p> <p>8 being one of them, and another one by Lieutenant-Colonel</p> <p>9 Vermaak being one of them - I'm not sure if it's an exhibit</p> <p>10 – although Colonel Vermaak does have an earlier statement</p> <p>11 which does not say this, but after Potchefstroom he has one</p> <p>12 that does say this. You too, you earlier before the</p> <p>13 Potchefstroom meeting, you do not say this; after</p> <p>14 Potchefstroom you do say this, and are you aware of a</p> <p>15 single police statement that suggests the change of</p> <p>16 direction and veering towards the informal settlement,</p> <p>17 prior to the Potchefstroom meeting?</p> <p>18 MAJOR-GENERAL MPEMBE: Chairperson, I did</p> <p>19 not see any statement, but I was not able to read all the</p> <p>20 people's statements that submitted the statements on the</p> <p>21 13th.</p> <p>22 MR MADLANGA SC: Of those that you have</p> <p>23 seen, not a single person suggests this, correct?</p> <p>24 MAJOR-GENERAL MPEMBE: Correct,</p> <p>25 Chairperson. I did indicate that we wanted to escort the</p>

<p style="text-align: right;">Page 11889</p> <p>1 protesters not to go through the informal settlement, but 2 to go back to the koppie. 3 MR MADLANGA SC: I suggest, General, and 4 this is what we will argue, that when the police threw 5 teargas and stun grenades at the protesters, the protesters 6 were merely retracing their steps and going back to the 7 koppie and not at all intent on entering the informal 8 settlement. What do you say to that? 9 MAJOR-GENERAL MPEMBE: Chairperson, I 10 will not agree. 11 COMMISSIONER HEMRAJ: General, when did 12 you become aware that it was Warrant-Officer Kuhn who fired 13 the teargas? 14 MAJOR-GENERAL MPEMBE: It was on the same 15 day, Chairperson, when we were asked, when I was – but 16 after the incident, when I was asking who used the teargas. 17 COMMISSIONER HEMRAJ: Was any explanation 18 requested from him as to why he acted as he did? 19 MAJOR-GENERAL MPEMBE: Chairperson, as I 20 have indicated, when I said why did you – he did not give 21 the reasons for the explanation, but he only indicated to 22 me that he heard a command. He heard a command. Knowing 23 that I did brief them earlier, it's me who said that the 24 one that might have given that command which Warrant- 25 Officer Kuhn is referring to, he might have given it</p>	<p style="text-align: right;">Page 11891</p> <p>1 teargas, then he, then Brigadier Calitz came to me and 2 said, "General, it's Warrant-Officer Kuhn." 3 CHAIRPERSON: Was this before or after 4 you made your own statement? 5 MAJOR-GENERAL MPEMBE: Chairperson, my 6 statement that is being submitted here, which Adv Madlanga 7 is referring to, is a statement that Brigadier Van Zyl 8 requested to me to submit for the purpose of opening the 9 docket, and I'm not quite certain whether it was 10 immediately after I'd given to Brigadier Van Zyl or it was 11 after, but probably it is on the same date that I know it's 12 Brigadier, it was Warrant-Officer Kuhn, and at what time 13 did I submit a statement to Brigadier Van Zyl, I'm not 14 quite sure. 15 CHAIRPERSON: It appears to have been 6 16 o'clock according to the statement. According to the 17 statement it was 6 o'clock in the evening. Does that help 18 you to answer the other question I asked you? You see, if 19 you look at your statement, it's exhibit HHH13, it looks as 20 if it was – it's A16, I think, in the docket, which doesn't 21 sound like a statement that's made to open the docket. The 22 docket has got 15 statements in it already, but if you look 23 at the last page of the statement you'll see that under 24 your signature appear the words "Monday, 2012-08-13, 25 18:00." Your statement was made at 18:00. It doesn't</p>
<p style="text-align: right;">Page 11890</p> <p>1 according to my earlier briefing. 2 CHAIRPERSON: What time was it when you 3 discovered that it was Warrant-Officer Kuhn who fired off 4 the teargas canister? 5 MAJOR-GENERAL MPEMBE: Chairperson, it 6 was when they report off-duty on that day, the Chairperson 7 will recall that I was requested to leave the scene 8 immediately. 9 CHAIRPERSON: Yes, I understand. You 10 were taken off your post for reasons of personal safety, 11 but what I'm concerned about is at what time did you 12 discover that it was Warrant-Officer Kuhn who had fired off 13 the teargas canister? Was it before you left or later on 14 at the JOC or when was that? 15 MAJOR-GENERAL MPEMBE: Chairperson, it 16 was at the JOC, as I indicated that I was taken quickly 17 from the scene. 18 CHAIRPERSON: Okay, now my question is, 19 what time on that day on the 13th did you discover, or learn 20 that it was Warrant-Officer Kuhn who'd fired off the 21 teargas canister? 22 MAJOR-GENERAL MPEMBE: Chairperson, it 23 was during the evening when we, when I was getting various 24 briefing from the commanders, and particularly Brigadier 25 Calitz, and then I asked that I wanted to know who used the</p>	<p style="text-align: right;">Page 11892</p> <p>1 appear to have been one that opened the docket, but that's 2 another matter. What I want to know from you is did you 3 already know by them that it was Warrant-Officer Kuhn who'd 4 fired off the teargas canister? 5 MAJOR-GENERAL MPEMBE: Chairperson will 6 recall that on that day also the National Commissioner did 7 come, so probably I'm not in a position to say it was after 8 18:00, but there were many things that I was doing on that 9 day, but definitely it was in the evening on the 13th. 10 CHAIRPERSON: You see, the indications 11 are that you didn't know when you made your statement who 12 it was, because you just talked – if you look at paragraph 13 4 of your statement, second page, it reads, it looks like, 14 "The community members who were sitting, they became 15 agitated and they stood up and forced their way," I think 16 I'm reading correctly. "I instructed the police to walk 17 behind them, to escort, to avoid confrontation and 18 bloodshed. While they were walking, someone threw the 19 teargas." So you didn't know who it was because you 20 wouldn't have said "someone" if you'd known who it was. It 21 was quite clear you didn't know who it was when you made 22 your statement. Was it not important to find out? 23 MAJOR-GENERAL MPEMBE: It was important, 24 Chairperson, and I did find out, even though it is clear 25 that it was before I submit the statement.</p>

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1 COMMISSIONER HEMRAJ: General, of  
 2 Warrant-Officer Kuhn was unable to tell you, or did not  
 3 answer your question as to why that teargas was fired, were  
 4 any of the commanders that were reporting to you and  
 5 briefing you, able to answer that question as to why it was  
 6 fired and in that particular direction?  
 7 MAJOR-GENERAL MPEMBE: Chairperson, none  
 8 of the commanders was precise to me to say what was the  
 9 reason, and Warrant-Officer Kuhn only state that he heard  
 10 the command.  
 11 CHAIRPERSON: I take it we can assume  
 12 that none of the commanders told you that he had given the  
 13 order?  
 14 MAJOR-GENERAL MPEMBE: Correct,  
 15 Chairperson.  
 16 CHAIRPERSON: Wasn't it of any importance  
 17 to find out if what Warrant-Officer Kuhn had said was true,  
 18 who gave him the instruction that he claimed that he acted  
 19 on?  
 20 MAJOR-GENERAL MPEMBE: Chairperson, I  
 21 tried to ask him to say who gave the command, and he said,  
 22 "General, I did not see who, but I heard the instruction."  
 23 CHAIRPERSON: It's now 1 o'clock. I  
 24 think we can continue that discussion after the lunch  
 25 adjournment. I think this is a day for a half-hour lunch

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1 adjournment. I think we should in fact in future always  
 2 have a half-hour lunch adjournment in order to gain extra  
 3 time. So we'll adjourn now until 25 to 2.  
 4 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 5 [13:52] CHAIRPERSON: - resumes. I'm sorry we  
 6 didn't start at the time that I wanted us to start, but we  
 7 had to interview someone during the lunch adjournment and  
 8 that caused the delay, for which I apologise. You are  
 9 still under oath, Major-General.  
 10 WILLIAM MPEMBE: s.u.o.  
 11 CHAIRPERSON: Mr Madlanga?  
 12 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):  
 13 Thank you. Thank you, Mr Chairman. General, may I make  
 14 yet another suggestion to you, and it is this; General,  
 15 there are at least, maybe more, there are at least two  
 16 possible reasons why the teargas and stun grenades were  
 17 thrown, and the first one is your juniors disobeyed you and  
 18 decided to disarm the protesters. What is your response to  
 19 that suggestion?  
 20 COMMISSIONER HEMRAJ: Your juniors as in  
 21 the commanders, the POP commanders?  
 22 MR MADLANGA SC: Perhaps let me use it  
 23 more broadly; your juniors are many, because he was more  
 24 senior to everybody there, as I understand the position,  
 25 Commissioner Hemraj, yes. What is your response to that

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1 suggestion?  
 2 MAJOR-GENERAL MPEMBE: Chairperson, my  
 3 response will be no, and if Warrant-Officer Kuhn talks the  
 4 truth, because I did believe him that he heard an  
 5 instruction.  
 6 CHAIRPERSON: None of the commanders told  
 7 you that he had given the command, so Kuhn couldn't have  
 8 acted surely on just what somebody else said. It would  
 9 have to be from a commander, and none of the commanders  
 10 admit having given the instruction. In fact, somebody, you  
 11 told us, alleged that you had given the instruction and you  
 12 were quite emphatic that that was not true. So the  
 13 difficulty I've got with the statement you're making now is  
 14 Kuhn couldn't have just acted on what somebody else told  
 15 him. Surely he would have had to appreciate that that  
 16 person was a commander, although strictly speaking even  
 17 that wouldn't be enough, but we won't go there now. But  
 18 none of the commanders gave the order according to the  
 19 information that you have. So the whole thing is very  
 20 puzzling, isn't it?  
 21 MAJOR-GENERAL MPEMBE: It's correct,  
 22 Chairperson, because I couldn't establish to say maybe is  
 23 he having any other reason or is he hiding something, and  
 24 that's the reason why I believed him.  
 25 COMMISSIONER HEMRAJ: But then your

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1 answer to Mr Madlanga's question must be in the  
 2 affirmative, isn't it?  
 3 MAJOR-GENERAL MPEMBE: My question to Adv  
 4 Madlanga is based on the answer of Warrant-Officer Kuhn,  
 5 even though we, I'm not quite sure, or I don't know who  
 6 gave him that command.  
 7 CHAIRPERSON: - possibilities; the one is  
 8 he was the junior who disobeyed you and took it upon  
 9 himself to throw a teargas canister, or fire a teargas  
 10 canister without him being ordered to do so.  
 11 Alternatively, one of those subject to your command,  
 12 without your say-so, without any instruction from you -  
 13 although you were close to the informal settlement, you  
 14 could have given a instruction if you considered it  
 15 necessary - decided to take the initiative himself, without  
 16 authorisation from you, to give an order that you were not  
 17 giving, which you were the person who was authorised to  
 18 give. So either way the answer to what Mr Madlanga has put  
 19 to you must be yes. Isn't that right?  
 20 MAJOR-GENERAL MPEMBE: Chairperson, with  
 21 the explanation that you have given now, I would say my  
 22 answer will be yes.  
 23 MR MADLANGA SC: Thank you, General. Or  
 24 - and this is the second possible reason I want to suggest,  
 25 General - you were convinced by your juniors, possibly the

<p style="text-align: right;">Page 11897</p> <p>1 commanders, that the protesters should indeed be disarmed.  2 What's your response to that?  3 MAJOR-GENERAL MPEMBE: Chairperson, I'm  4 requesting the question to be clarified with more precise  5 who are the juniors, because there are many juniors that I  6 spoke to them.  7 MR MADLANGA SC: That is why I said, or  8 perhaps more precisely, the commanders. I said so in the  9 question, General. But let me ask the question again. Or,  10 the second possibility, General, is that the stun grenades  11 and teargas were thrown because, or as a result of you  12 having been convinced by your juniors, in particular the  13 commanders, that the protesters should be disarmed. Your  14 comment?  15 MAJOR-GENERAL MPEMBE: No, Chairperson.  16 MS BARNES: Chair, I'm sorry to  17 interrupt. I see that the translation has stopped. I do  18 have –  19 CHAIRPERSON: I beg your pardon. Thank  20 you for reminding me. I intended to – I was so embarrassed  21 about us starting late that I forgot to say what I was  22 supposed to say at the beginning, and that is to ask for  23 feedback from the representatives of the parties as to the  24 acceptability, at this stage anyway, of Mr Bizos'  25 suggestion, and I've failed to do that. You now have the</p>	<p style="text-align: right;">Page 11899</p> <p>1 given as it is now.  2 MR BIZOS SC: - at home watching it on  3 television. Can't we make arrangements that the  4 interpreter speaks to whoever is televising it and it can  5 go to the people that want to hear it? I don't want to be  6 thought trying, or asking the Commission to deprive them of  7 that right, but can't it mechanically be done? If we don't  8 need it here, it can be done –  9 CHAIRPERSON: Mr Bizos, I think I  10 understand what you're saying. The reason I said for the  11 moment we'll carry on as we are, is we obviously can't  12 organise that this afternoon.  13 MR BIZOS SC: No, obviously.  14 CHAIRPERSON: But I understand what you  15 have in mind. You're thinking for example of a sports  16 commentary; you can get the cricket in English, Afrikaans,  17 and Xhosa. So it's possible apparently in some way or  18 other for where there's simultaneous translation or  19 simultaneous commentary, for the viewer to choose the  20 channel. Now whether that's feasible in our situation, we  21 don't know at this stage, but your point is that's  22 something that we'll investigate and -0  23 MR BIZOS SC: Sure.  24 CHAIRPERSON: But anyway, the short point  25 is we can't do it this afternoon.</p>
<p style="text-align: right;">Page 11898</p> <p>1 opportunity. Have you got any feedback for us, Ms Barnes?  2 MS BARNES: Yes, we do, Chair, thank you.  3 We have taken instructions and it does appear that some of  4 the AMCU members as well as some of the family members do  5 watch the live feed and are watching it currently, and so  6 they would need the translation to continue. We're not  7 sure of the exact numbers in this regard, but if any of our  8 clients are watching –  9 CHAIRPERSON: Watching the live feed here  10 in the building?  11 MS BARNES: No, not in the building.  12 CHAIRPERSON: Oh, they're watching it on  13 YouTube or whatever?  14 MS BARNES: They're watching it out  15 there, yes, and family members and the AMCU members are  16 Xhosa-speaking and they would need the translation to  17 continue in order to enable them to continue watching. So  18 we would ask that it continues.  19 CHAIRPERSON: At this stage anyway, we  20 can –  21 MS BARNES: Yes.  22 CHAIRPERSON: Ja, alright. Any other  23 representative of any of the other parties who has any  24 feedback you wish to give us? No, well I think – for the  25 moment at least we'll continue with the translation being</p>	<p style="text-align: right;">Page 11900</p> <p>1 MR BIZOS SC: Obviously.  2 CHAIRPERSON: So this afternoon we'll  3 carry on as we were before.  4 MR BIZOS SC: Yes.  5 CHAIRPERSON: But we've already asked the  6 officials of the Commission to investigate the feasibility  7 of simultaneous translation and tenders have been obtained  8 and tests have been done, and so forth, but what will have  9 to be factored in, if that's the right word, is this  10 question of simultaneous translation in various languages  11 to be chosen by the viewer. That may in fact put it beyond  12 the bounds of feasibility, but certainly it's something we  13 must investigate.  14 MR BIZOS SC: Thank you, Mr Chair.  15 MR MADLANGA SC: May I ask Mr Mahlangu  16 perhaps to from memory try to summarise everything that has  17 gone on thus far?  18 COMMISSIONER HEMRAJ: Mr Madlanga, the  19 second possibility that the General was convinced by his  20 juniors, is the follow-up that he then gave the command.  21 Is that implicit in the question?  22 MR MADLANGA SC: Yes, it's implicit in  23 the question, yes, yes, yes. Thank you, Commissioner  24 Hemraj; this obviously founded on, amongst others, the  25 attempt at explaining why there's a Nyala that is on the</p>

<p style="text-align: right;">Page 11901</p> <p>1 other side if the people should really be planning from  2 this side, and we suddenly hear of some mine shaft that at  3 least thus far I thought we have not heard about, but  4 something on which the General is still to come back to us  5 on about, yes. Now General, subject to the homework that I  6 have asked you to kindly do, let us for now step off the  7 events of the 13th of August 2012. Can I take you to page  8 11370 of the transcript, lines 4 to 11, and 11370, day 106,  9 11370, lines 4 to 11, and it's your testimony, General, and  10 please tell me when you are there, General.</p> <p>11 MAJOR-GENERAL MPEMBE: Chairperson, I  12 will just, maybe if I can be reminded about the page?</p> <p>13 MR MADLANGA SC: 11370, lines 4 to 11.</p> <p>14 MAJOR-GENERAL MPEMBE: Yes, Chairperson,  15 I did find it.</p> <p>16 MR MADLANGA SC: There where I have  17 referred you to you are responding to a question by Mr  18 Ngalwana as to what in your estimation would have caused  19 bloodshed, and in this context you are dealing with the  20 debriefing session with the union leaders, in particular  21 here with NUM. Now, yes you are dealing with GGG4. Now  22 let's go to the part I referred you to, line 4 to 11, this  23 is what you say. "So the bloodshed that I was referring  24 to, it's what has happened and what is happening currently,  25 and what might also happen in what, in the future. By that</p>	<p style="text-align: right;">Page 11903</p> <p>1 relation to those individuals that might be carrying the  2 firearms illegally.</p> <p>3 MR MADLANGA SC: General, I don't follow  4 that. This is a question that flows from the answer that  5 you have just given relative to what the excerpt that I  6 read to you means. You agree that what you say there means  7 that you saw, because you say "I see, I also see," you saw  8 that – let me just look at this again. "I did also see  9 that if the dispersal has to take place, there might be  10 shooting taking place either from the police, or," and then  11 you go on, "or the protesters," and so on and so on. You  12 are saying this is something that you saw as a possibility,  13 and you've already agreed, not so?</p> <p>14 MAJOR-GENERAL MPEMBE: Chairperson,  15 seeing I was referring to the individuals on the side of  16 the protesters that might have been carrying the firearms,  17 and I did indicate how that risk which I said I foresee,  18 how it has been mitigated by the plan.</p> <p>19 MR MADLANGA SC: General, mitigated, but  20 not excluded, not so? Mitigated, but not completely  21 excluded.</p> <p>22 [14:12] MAJOR-GENERAL MPEMBE: Chairperson,  23 definitely excluded in the manner that that bloodshed  24 happened there, because that is not what one was referring  25 to. Yes, somebody shooting at the police yes, but that the</p>
<p style="text-align: right;">Page 11902</p> <p>1 time I did not know that the incident of the 16th will  2 happen, but I did," and I emphasise this part, General,  3 "but I did also see that if the dispersal has to take  4 place, there might be shooting taking place either from the  5 police, or either from the protesters, and also from the  6 police." Now General, my question on that is this; surely,  7 General, the part from this excerpt that says "but I did  8 also see that if the dispersal has to take place, there  9 might be shooting taking place either from the police, or  10 either from the protesters, and also from the police," must  11 mean that as a matter of fact you - you, General - saw the  12 possibility of shooting either by the police or protesters  13 or both if a dispersal took place. You agree that that is  14 what this means?</p> <p>15 MAJOR-GENERAL MPEMBE: Correct,  16 Chairperson, referring to the fact that the protesters,  17 there were firearms that, of the police that were taken and  18 that of the security companies.</p> <p>19 MR MADLANGA SC: Needless to say,  20 General, if you foresaw the possibility of shooting, you  21 must likewise have foreseen the possibility of injury or  22 even death, and thus bloodshed, not so?</p> <p>23 MAJOR-GENERAL MPEMBE: It is not correct,  24 Chairperson. I did also indicate the measures that we did  25 put in place and also the actions that we have done in</p>	<p style="text-align: right;">Page 11904</p> <p>1 protesters in that great number while the barbed wire or to  2 say the plan being interrupted, I did not foresee that.</p> <p>3 MR MADLANGA SC: General, you now seem to  4 be dealing with what in fact happened, the breaching of the  5 police line and so on, that is not what I am asking you. I  6 am asking about what you yourself are saying in this  7 excerpt and you've already agreed with my interpretation of  8 that excerpt and you agree that what it means is that what  9 you saw, you yourself as a matter of fact saw was the  10 possibility of shooting by the protesters and the  11 possibility of shooting back by the police. You've agreed  12 with that, haven't you? All I am asking you now is just to  13 establish, have you agreed with that interpretation? You  14 have, haven't you?</p> <p>15 MAJOR-GENERAL MPEMBE: Chairperson, I did  16 say that there were protesters that they had firearms, that  17 could shoot at the police, and the police could shoot in  18 retaliation but not with the bloodshed at it has happened  19 at Marikana.</p> <p>20 MR MADLANGA SC: Yes, General, it is  21 quite plain you are agreeing with me, and just so we are  22 exactly on the same page, I too am not asking you about how  23 the bloodshed that we eventually saw came about, I am not  24 asking you about that, I am exactly saying what you are  25 saying, and we seem to be in agreement on that. Now, and</p>

<p style="text-align: right;">Page 11905</p> <p>1 in fact, elsewhere in the transcript and you will say if I 2 am wrong, elsewhere in the transcript you say that you knew 3 about that because some media people had told you that some 4 of the protesters were hiding firearms beneath their 5 blankets, am I correct on that as well? 6 MAJOR-GENERAL MPEMBE: Correct, 7 Chairperson. 8 MR MADLANGA SC: And in fact you also 9 knew as a matter of fact that some of the protesters had 10 stolen firearms from the police and also from Lonmin 11 security officers. 12 MAJOR-GENERAL MPEMBE: Correct, 13 Chairperson. 14 MR MADLANGA SC: Now surely, if as you 15 say the protesters might have fired shots at the police, 16 they could not possibly have been doing that for fun, they 17 would have been firing directly at the police, not just 18 firing anywhere, that is what you foresaw, not so? And the 19 shots would be aimed at the police, is that not so? 20 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 21 and I did also explain how we address that risk. 22 MR MADLANGA SC: Addressed as it might 23 have been, but you still also foresaw the possibility that 24 the police might shoot back. You say so, not so? 25 MAJOR-GENERAL MPEMBE: Chairperson, I</p>	<p style="text-align: right;">Page 11907</p> <p>1 Chairperson, it might already have been said in the 2 Commission, either by General Annandale that we also had 3 the counters-snipers and those that will have the – what is 4 it, the binoculars to look at those that will have the 5 firearm. That is a shooting that I was speaking to. 6 Chairperson, in answer to Advocate Madlanga, it will be 7 saying if either of those people are not seen by the 8 police, and surely if they attack the police, that is what 9 we are speaking but the risk to address is the one that I 10 am talking about, but not that shooting which took place at 11 Marikana, that one I was not referring to. 12 CHAIRPERSON: Does it really matter? The 13 shooting that took place at Marikana was, as has been 14 described to us, as we've seen but the answer to the 15 question which has been put to you, is that there was a 16 distinct possibility that shooting of another kind would 17 take place, as a result of which people would be killed. 18 Isn't that right? Blood was going to be shed. 19 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 20 but the plan, the mitigation of the plan was actually 21 addressing precisely that risk. The Commission will recall 22 how we put the six Nyalas and what I have already explained 23 now. 24 MR MADLANGA SC: General, I will repeat 25 and say that, not that I am detracting from what the</p>
<p style="text-align: right;">Page 11906</p> <p>1 said if the police they see they are being shot at, they 2 will act in self or private defence. 3 MR MADLANGA SC: And that is exactly what 4 you say in this excerpt you foresaw, not so? 5 MAJOR-GENERAL MPEMBE: Not correct, 6 Chairperson, what I am saying is that is exactly what I 7 have already explained and also the mitigation of the plan 8 because as a police service we have to protect the lives of 9 the people, and the reasons as I have explained in my 10 supplementary statement why we have to disperse, they were 11 very clear, Chairperson. 12 MR MADLANGA SC: General, if you disagree 13 with me on my last question, I want to understand you then, 14 on what basis are you saying that the shooting by the 15 police that you are referring to in this excerpt, was not 16 the shooting in response to the shooting by the protesters 17 who as you say had firearms. How do you say that shooting 18 by the police was not the same shooting that you are 19 referring to in this excerpt? 20 MAJOR-GENERAL MPEMBE: Chairperson, my 21 explanation was very clear, to say amongst the protesters 22 there should have been somebody who is having a firearm and 23 surely, we had and General Annandale has already testified 24 that we had the observers that were looking those that 25 might produce a firearm amongst the protesters, and</p>	<p style="text-align: right;">Page 11908</p> <p>1 Chairperson said, but just to try to avoid what seems to be 2 some confusion in your mind, I too was purely at the level 3 of what you yourself are saying in the excerpt that I read 4 to you, which I read to say, and you have agreed, you 5 yourself saw the possibility of the protesters who 6 elsewhere in the transcript you say, and you have agreed 7 again, were hiding firearms beneath their blankets, you 8 foresaw the possibility of them firing at the police as 9 also you foresaw the possibility of police firing back and 10 you add that, but that was in self-defence. But what I am 11 trying to emphasise is that you do agree that that is 12 exactly what you say in this excerpt means, and my 13 understanding is that you have agreed with that. Am I 14 correct in that understanding? Regardless of the stage 15 when this might have been, whether it was a breaching or 16 even before the breaching, or at what, you foresaw, I do 17 not know at what stage you foresaw it, you foresaw the 18 possibility of the protesters shooting at the police and 19 the police shooting back in self-defence, you accepted 20 that, am I correct or not? 21 MAJOR-GENERAL MPEMBE: Chairperson, I 22 said that risk for the reason that I have explained, yes, 23 one foresaw it, but there were mitigations to address the 24 risk, the actions that addressed that risk. 25 CHAIRPERSON: I don't think "mitigation"</p>



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1 is the right word, but we won't debate that at the moment,  
 2 but what is clear I think is that whatever was done to try  
 3 to minimise the situation you did foresee bloodshed, people  
 4 being killed. Isn't that right, as a distinct possibility  
 5 of the action that was going to be taken. Isn't that  
 6 right? These people, according to the evidence that we  
 7 have had, the suggestion is that they had taken, that muti  
 8 had been administered to them. They believed they were  
 9 invincible, invulnerable, so they weren't scared of being  
 10 shot at by the police, if that evidence is correct.  
 11 Obviously we have to decide that later. If that is, that  
 12 weapons themselves, didn't think they could be hurt by the  
 13 police weapons, so did you – and you knew about the muti  
 14 didn't you?  
 15 MAJOR-GENERAL MPEMBE: Correct,  
 16 Chairperson, I knew about the muti but I did not believe in  
 17 what they are believing in.  
 18 CHAIRPERSON: I accept you did not  
 19 believe that they would be invincible or invulnerable, you  
 20 realised, that's the whole point, you realised they may  
 21 have proceeded under a false impression, that they were  
 22 invincible, you knew they weren't, and you knew if the  
 23 police fired at them, there would be fatal – there might  
 24 well be fatal consequences, isn't that so?  
 25 MAJOR-GENERAL MPEMBE: Chairperson, as I

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1 indicated, I was looking at the individuals and that is  
 2 really what I am - not the mass as it has happened at  
 3 Marikana, about that risk and that, and according to my  
 4 statement there.  
 5 CHAIRPERSON: Does that answer means that  
 6 you didn't foresee that 34 people would be killed and about  
 7 70, I think is the number of people would be injured, you  
 8 didn't foresee that? You didn't foresee bloodshed on that  
 9 scale. Is that right?  
 10 MAJOR-GENERAL MPEMBE: Correct,  
 11 Chairperson.  
 12 CHAIRPERSON: But the statement that's  
 13 been put to you, what does it mean in the context of the  
 14 foreseeability of bloodshed, at least affecting some  
 15 people?  
 16 MAJOR-GENERAL MPEMBE: The last  
 17 statement, correct, Chairperson and hence the plan had to  
 18 address that risk. I won't talk about mitigation, but what  
 19 the plan actually addresses that risk.  
 20 CHAIRPERSON: One of my commissioners has  
 21 asked me to take an adjournment for five minutes, which I  
 22 am prepared to do. So we will adjourn now for five  
 23 minutes.  
 24 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 25 [14:32] CHAIRPERSON: The Commission resumes.

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1 Major-General you're still under oath.  
 2 WILLIAM MPEMBE: s.u.o.  
 3 CHAIRPERSON: Mr Madlanga, you're still  
 4 cross-examining.  
 5 CROSS-EXAMINATION BY MR MADLANGA SC (CONT.):  
 6 Thank you, Mr Chairman.  
 7 COMMISSIONER HEMRAJ: General, your  
 8 answers do take into consideration that that excerpt that  
 9 was read out to you refers to that possibility in the event  
 10 of dispersal being taking place. Do you understand that,  
 11 that the excerpt that was read out to you it refers to what  
 12 you foresaw in the event of a dispersal action taking  
 13 place.  
 14 MAJOR-GENERAL MPEMBE: That will include  
 15 that, Chairperson, but I wanted also to state that when I  
 16 was speaking to Mr Senzeni Zokwana I was also speaking with  
 17 what has happened and also what was happening and that is  
 18 also in that excerpt.  
 19 MR MADLANGA SC: Can I now take you to,  
 20 still on the same page of your testimony, General, take you  
 21 to lines 12 to 24? Ms Pillay got off the relevant part on  
 22 her screen there Commissioner, apologies. The following  
 23 appears, General, "in other words the blood," and this is  
 24 the Chairperson asking you now, "in other words the blood  
 25 that you thought" mark the words "that you thought was

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1 going to be shed would be the blood of strikers or police  
 2 or both. Is that correct? That's because the strikers  
 3 were in possession of firearms which they had taken from  
 4 the security guards and the police and might use them. And  
 5 of course, the police in disarming them would use firearms  
 6 as well. Is that the way you saw it?" Again I emphasise  
 7 the last sentence or question. "Is that the way you saw  
 8 it?" And then you respond. "Chairperson, when a dispersal  
 9 process takes place we do not use sharp ammunition but what  
 10 I'm saying is that the individuals, those that had firearms  
 11 they might also shoot at the police and the police might  
 12 defend themselves, the individuals." My question on this,  
 13 General, is a simple one. Do you agree that even in  
 14 response to this question by the Chairperson you are yet  
 15 again referring to the situation as you, yourself saw it.  
 16 Do you agree?  
 17 MAJOR-GENERAL MPEMBE: Chairperson, this  
 18 isn't very clear here, it refers to the individual I have  
 19 referred at them. And that at Marikana at that same time  
 20 on the 16th I did not expect that in the scale that it has  
 21 happened it will be the same and as I indicated in  
 22 dispersal process we don't use sharp ammunition.  
 23 MR MADLANGA SC: Okay let me use your  
 24 language of individuals because I'm not sure I follow your  
 25 response. General, is it so that what you are referring to

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1 in response to the question by the Chairperson is the  
 2 situation regarding the individuals, as you refer to them,  
 3 or the shooting by individuals and the possible response by  
 4 the police, so you are referring to it as you yourself saw  
 5 it. Am I correct?  
 6 MAJOR-GENERAL MPEMBE: Correct,  
 7 Chairperson, and I even said that there were plans to  
 8 address the risk.  
 9 MR MADLANGA SC: Now let me take you to  
 10 the foot of this same page and from there to the top of the  
 11 next one and I will start reading at line 25,  
 12 Commissioners. And all the way through to line 11 at page  
 13 11371. Again the Chairperson, "that's why what you are  
 14 saying as I understand you, I just want to make sure I  
 15 understand you correctly, is that the strikers who are  
 16 being disarmed might use their firearms even, I suppose,  
 17 might use pangas and so forth and that would cause  
 18 bloodshed on the part of the police. Shed police blood.  
 19 Equally, the police in defending themselves would  
 20 presumably have to regard it necessary to fire back. In  
 21 which case some of the striker's blood could also be shed.  
 22 Is that the way you understand it?" Your response "that's  
 23 correct, Chairperson." And then you go on further. And  
 24 perhaps because you say but, maybe let me read that as  
 25 well. So that will take us all the way to line 14, one,

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1 four. "But I was not only referring on the following day  
 2 but what I was referring to and what that may be is what I  
 3 wanted that's why I was saying there, 'tomorrow or tonight  
 4 and people are dying' and the end of what you say there but  
 5 you do accept that you were referring to the following day  
 6 but just that you are not referring only to the following  
 7 day. Now, General, do you accept that this last excerpt  
 8 puts it beyond question that what you, yourself understood  
 9 was that police blood or the striker's blood might be shed.  
 10 That is what you, yourself said or saw or understood.  
 11 MAJOR-GENERAL MPEMBE: Chairperson, it is  
 12 also clear that I was not only saying tomorrow but what I  
 13 was saying still referring to the individual, not in the  
 14 large scale as Marikana. And I was also referring to what  
 15 has happened since Sunday and even some of the people that  
 16 died as a result where firearms were used.  
 17 MR MADLANGA SC: General, let's just  
 18 clear this up. At the time you were holding the de-  
 19 briefing session with NUM and you are addressing the  
 20 question, you did not know that the dispersal action would  
 21 take place the following day, that is on the 16th. Am I  
 22 correct?  
 23 MAJOR-GENERAL MPEMBE: That is correct,  
 24 Chairperson.  
 25 MR MADLANGA SC: It is understandable

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1 therefore that you could indeed, as you say, not have been  
 2 referring to the following day but what you definitely were  
 3 referring to was if a dispersal action were to take place  
 4 and you've already said yes to that in response to a  
 5 question by Commissioner Hemraj. Now let me take you to  
 6 page 11397 of the transcript, lines 5 to 23. And this is  
 7 examination in chief by Mr Ngalwana and this is what you  
 8 say. "At the evening meeting" or no that's him, my learned  
 9 friend, Mr Ngalwana. "At the evening meeting, the  
 10 debriefing meeting on the 15th you said to the trade union  
 11 leaders that if the police were to implement a dispersal  
 12 action there will be bloodshed. Did you convey that same  
 13 sentiment at the JOC?" Your response "Chairperson, no." Mr  
 14 Ngalwana "why didn't you?" Your response "Chairperson,  
 15 that was a strategy to - intended for the union leaders to  
 16 take the matter seriously when they communicate to their  
 17 members to lay down their weapons. I did not believe that  
 18 that will happen." Mr Ngalwana "when you say you did not  
 19 believe that that would happen what do you mean? What is  
 20 it that you did not believe will happen, General?" Major-  
 21 General Mpeembe "I did not believe that when the police go  
 22 there, there will be bloodshed but that's what I'm saying  
 23 is that it was a strategy intended to convince the union  
 24 leaders to take the matter seriously when they communicate  
 25 with the members."

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1 Now, General, I read this to suggest that you are  
 2 now saying that you did not foresee the risk of shooting  
 3 and therefore bloodshed and that you had merely said what  
 4 you said at the de-briefing session as a matter of  
 5 strategy. So no foresight of bloodshed. Am I correct in  
 6 that interpretation, General?  
 7 MAJOR-GENERAL MPEMBE: Correct,  
 8 Chairperson. Chairperson, I also want to indicate to say  
 9 there is also a point where I indicated that the most  
 10 preferred resolving of the matter it was the handing over  
 11 of the weapons. Hence, I indicated that it was a strategy  
 12 that they should take the matter seriously, that we should  
 13 not even go to a phase of dispersal. But, Chairperson, I  
 14 still have indicated that there were protestors that had  
 15 firearms and as he has already mentioned and the risk to  
 16 what is the plan to address that risk was also in place.  
 17 MR MADLANGA SC: General, you have said  
 18 quite a lot and the greater part of it I find quite  
 19 confusing, at least to me. Now what I want to focus on is  
 20 the part that I understood and the part that I understood  
 21 is that you actually agree with my interpretation of the  
 22 last excerpt that I have read and your agreement is that  
 23 what you mean there is that you in fact did not have  
 24 foresight of the risk of shooting by the protestors. And  
 25 the possibility of the police shooting back in self defence

<p style="text-align: right;">Page 11917</p> <p>1 and therefore as a result the possibility of bloodshed. I  2 understand you to be accepting that part and that instead  3 you had said what you had said about the shooting and  4 counter shooting and the risk of bloodshed purely as a  5 matter of strategy to convince the NUM leaders to talk to  6 their members and convince them to disarm. Purely a matter  7 of strategy but as a matter of fact you did not have  8 foresight of the risk of bloodshed. I'm repeating the  9 question because, as I said, I got confused by the long  10 answer you gave. I'm trying to establish if you agree with  11 that part, just that part. Am I interpreting what you are  12 saying correctly?</p> <p>13 MAJOR-GENERAL MPEMBE: Chairperson, the  14 context of what I was saying here and I think that is what  15 is more important in the sense of what I said to Mr Senzeni  16 Zokwana, Mr Ngalwana wanted to know if I believed in it so  17 why then I did not brief the police officers in the JOC.  18 And that's the context that I was saying but it does not  19 take away the issue of me raising the consent of the  20 protestors having firearms. The plan that had to be  21 specific in terms of addressing that risk.</p> <p>22 MR MADLANGA SC: General, in exactly that  23 context, the context that you give, exactly that context,  24 what I'm trying to establish is whether you agree with me  25 that what this means, in that context what this means is</p>	<p style="text-align: right;">Page 11919</p> <p>1 CHAIRPERSON: - about individuals being  2 killed, or injured? Individuals would be killed or injured  3 if you tried to disperse the parties. Is that what you  4 say? Individuals who according to your information, who  5 believed they were invincible, who, attempts being made to  6 disperse them, but you foresee they'd resist, did you not?  7 The individuals would, is that right?</p> <p>8 MAJOR-GENERAL MPEMBE: Chairperson, the  9 individual that I'm speaking about, those that would be  10 having the firearms, but not those that will be invincible,  11 but I'm –</p> <p>12 CHAIRPERSON: - they're invincible.  13 Right, so what would happen to these individuals then; you  14 go along, you try to disperse them. Some of them have got  15 firearms, some of them have got axes, some of them have got  16 assegais, some of them have got pangas. You try to  17 disperse them. You point firearms at them, presumably to  18 try to frighten them. On the basis of what you believed,  19 they thought that they were invincible because of the muti,  20 because you knew about the muti. Is that right?</p> <p>21 MAJOR-GENERAL MPEMBE: Chairperson, I  22 knew about the muti.</p> <p>23 CHAIRPERSON: Ja, you knew it would be  24 worthless. You thought, you believed that they thought it  25 would work. Is that right?</p>
<p style="text-align: right;">Page 11918</p> <p>1 that you are saying you in fact did not foresee the risk of  2 shooting by the protestors and counter shooting by the  3 police. And therefore the possibility of bloodshed if a  4 dispersal were to take place. That is what you are saying,  5 you only did this as a matter of strategy. Am I correct or  6 not?</p> <p>7 [14:52] MAJOR-GENERAL MPEMBE: Chairperson, the  8 strategy is very specific here, is to say let your members  9 disarm voluntarily, and that is purely the context which  10 I'm referring to, and there is a separation between a  11 strategy and a risk.</p> <p>12 COMMISSIONER HEMRAJ: General, did you or  13 did you not foresee that if there was dispersal action,  14 that there would be shooting between the parties and  15 bloodshed? Did you or did you not foresee that?</p> <p>16 MAJOR-GENERAL MPEMBE: Chairperson, my  17 answer is clear, is to say individually yes, and to disarm  18 them, it was a best strategy to let their own leaders  19 persuade their members and hand those weapons voluntarily.</p> <p>20 COMMISSIONER HEMRAJ: I'm afraid I don't  21 understand that. Did you or did you not foresee that in  22 the event of a dispersal, there would be shooting between  23 the parties?</p> <p>24 MAJOR-GENERAL MPEMBE: Chairperson, as I  25 said, individually, yes.</p>	<p style="text-align: right;">Page 11920</p> <p>1 MAJOR-GENERAL MPEMBE: Correct,  2 Chairperson.</p> <p>3 CHAIRPERSON: Right, so you come along  4 with your, or one of your men comes along with his R5 or  5 his R1 and he says to this man, "Give me your firearm," or  6 "Give me your panga, and disperse." Does he listen? Does  7 he respond to the demand, or command that he disperse, or  8 that he hand over his firearm, as you foresaw what would  9 happen?</p> <p>10 MAJOR-GENERAL MPEMBE: Chairperson, the  11 manner in which I foresaw, it was that the placing of the  12 barbed wire was precisely to prevent those that have got  13 pangas and spears to be on, to be –</p> <p>14 CHAIRPERSON: On the police side of the  15 line.</p> <p>16 MAJOR-GENERAL MPEMBE: Yes.</p> <p>17 CHAIRPERSON: Ja, you didn't go –</p> <p>18 MAJOR-GENERAL MPEMBE: And that will  19 mitigate – I'm sorry –</p> <p>20 CHAIRPERSON: Yes, carry on. No, I'm  21 interrupting you. You carry on, sorry.</p> <p>22 MAJOR-GENERAL MPEMBE: That would  23 mitigate – as I'm saying, I don't know whether I'm using  24 the right word of mitigating, that will –</p> <p>25 CHAIRPERSON: Prevent or minimise is</p>

<p style="text-align: right;">Page 11921</p> <p>1 probably the right word, but never mind, carry on.</p> <p>2 MAJOR-GENERAL MPEMBE: Yes, and those</p> <p>3 that they had firearms, that's the individual which I'm</p> <p>4 referring to, those that have been put by the way in the</p> <p>5 Nyalas, on top of the Nyalas with the binoculars and the</p> <p>6 counter snipers, they will actually only deal with those</p> <p>7 that will cause risk. That's the one that I'm referring</p> <p>8 to, and then when the dispersal process takes place,</p> <p>9 obviously the majority I did expect that they will leave</p> <p>10 the place, and those that shall have – what is it? –</p> <p>11 accepted the warnings will lay down their weapons, and</p> <p>12 Chairperson will recall I did refer to the group between 10</p> <p>13 and 20 that could be confronted by the police, and</p> <p>14 encircling them and disarming them. That's how the plan</p> <p>15 would –</p> <p>16 CHAIRPERSON: What it means is you put</p> <p>17 the barbed wire barrier up. You've got to leave a space to</p> <p>18 go, so you can go inside to disarm the people, don't you?</p> <p>19 MAJOR-GENERAL MPEMBE: Correct,</p> <p>20 Chairperson.</p> <p>21 CHAIRPERSON: So some police have to</p> <p>22 advance through the gap in the fence, the barbed wire,</p> <p>23 towards the strikers to make sure they either put their</p> <p>24 arms down or their arms are taken away from them. Isn't</p> <p>25 that right? Is that right? You can't disarm them by</p>	<p style="text-align: right;">Page 11923</p> <p>1 CHAIRPERSON: I'd like to talk about</p> <p>2 something else. We're talking about the POP members who</p> <p>3 are now advancing into the area where the strikers are, to</p> <p>4 disarm them. That's a matter which we'll debate in a</p> <p>5 moment. The Nyalas can't follow them into the area to</p> <p>6 provide a place for them to jump into, safe place for them</p> <p>7 to jump into if there's aggression or attack of some kind</p> <p>8 from the strikers. Isn't that right? That's the way I</p> <p>9 understand it, but if I'm misunderstanding it, you must</p> <p>10 help me. Mmm?</p> <p>11 MAJOR-GENERAL MPEMBE: Chairperson will</p> <p>12 recall when we said that, when Adv Madlanga asked me that</p> <p>13 why didn't we preposition the Nyalas for the informal</p> <p>14 settlement, I said that the resources that we had, and</p> <p>15 those are the Nyalas that I'm referring to, those could</p> <p>16 have been used as a safe house, will follow these members,</p> <p>17 will follow the ones that could enter there who are moving</p> <p>18 in groups, confront them, encircle, and confront them in</p> <p>19 terms of disarming them.</p> <p>20 CHAIRPERSON: The Nyalas can't go through</p> <p>21 the barbed wire, and presumably the gap in the barbed wire</p> <p>22 through which the POP members were going to go to disarm</p> <p>23 the strikers, that wasn't wide enough for a Nyala, was it?</p> <p>24 Was envisaged that Nyalas would go on the other side of the</p> <p>25 barbed wire?</p>
<p style="text-align: right;">Page 11922</p> <p>1 remote control, can you? There isn't a remote that you can</p> <p>2 use to get them to put down their arms, and you've got to</p> <p>3 go in and fetch the arms, if they don't voluntarily put</p> <p>4 them down?</p> <p>5 MAJOR-GENERAL MPEMBE: Correct,</p> <p>6 Chairperson.</p> <p>7 CHAIRPERSON: So you go inside, armed</p> <p>8 presumably; the police are armed with R1s or R5s, I take</p> <p>9 it, when they go in to disarm these people. Is that right?</p> <p>10 MAJOR-GENERAL MPEMBE: Chairperson will</p> <p>11 recall that those had R1s and R5s. According to the plan</p> <p>12 they were supposed to be 100 metres away from the POP</p> <p>13 members, and they will only come to the fore if the lives</p> <p>14 of the POP members was in danger.</p> <p>15 CHAIRPERSON: Yes well, that's the next</p> <p>16 question. If the POP man with his teargas, with his</p> <p>17 shotgun with the teargas canister, whatever it is, or stun</p> <p>18 grenade, if he proceeds into the area through the barbed</p> <p>19 wire to disarm someone who doesn't want to be disarmed,</p> <p>20 then what's going to happen? Won't the life of the POP</p> <p>21 person be endangered?</p> <p>22 MAJOR-GENERAL MPEMBE: Correct,</p> <p>23 Chairperson. Chairperson will recall that in the plan we</p> <p>24 said that the Nyalas will always be next to the POP members</p> <p>25 that the Chairperson is referring to, as a safe house.</p>	<p style="text-align: right;">Page 11924</p> <p>1 MAJOR-GENERAL MPEMBE: Chairperson, the</p> <p>2 Nyala is used when we disperse, and probably, I understand</p> <p>3 what the Chairperson is saying, that in whatever the</p> <p>4 picture that is there, Chairperson did not see where</p> <p>5 there's space the Nyalas could go, but the plan does</p> <p>6 address the risk the Chairperson is talking about, Nyalas</p> <p>7 to be used as a safe house for the POP members.</p> <p>8 CHAIRPERSON: Did the plan – sorry, Mr</p> <p>9 Interpreter. Did the plan provide for the Nyalas, or a</p> <p>10 Nyala, to go on the other side of the barbed wire?</p> <p>11 MAJOR-GENERAL MPEMBE: Chairperson,</p> <p>12 surely when you have to pursue –</p> <p>13 CHAIRPERSON: No, no, the answer is –</p> <p>14 simple question –</p> <p>15 MAJOR-GENERAL MPEMBE: Okay.</p> <p>16 CHAIRPERSON: Did the plan provide for a</p> <p>17 Nyala or some Nyalas to go beyond the barbed wire onto the</p> <p>18 koppie side of the barbed wire where the strikers were with</p> <p>19 their weapons?</p> <p>20 MAJOR-GENERAL MPEMBE: Correct,</p> <p>21 Chairperson.</p> <p>22 CHAIRPERSON: It did?</p> <p>23 MAJOR-GENERAL MPEMBE: Yes, Chairperson,</p> <p>24 as I'm referring to that the Nyala will be used as a safe</p> <p>25 house.</p>

<p style="text-align: right;">Page 11925</p> <p>1 CHAIRPERSON: No, I can understand the 2 Nyala being used as a safe house. The question is which 3 side of the barbed wire was it going to be. We have 4 photographs of the barbed wire in position. I couldn't see 5 any space of a Nyala to go through, unless the Nyala is 6 going to knock the barbed wire over on its way through, but 7 anyway, I don't think that was the plan either, was it? 8 Mmm? What's your answer to that? 9 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 10 the Nyala could go on the other side of the barbed wire for 11 those POP members that are supposed to do the dispersal 12 process. 13 CHAIRPERSON: But where was it going to 14 go through? 15 MAJOR-GENERAL MPEMBE: Chairperson, 16 probably Brigadier Calitz and those that implemented the 17 plan might be in a position to answer why they couldn't go 18 through. 19 CHAIRPERSON: Alright, I'll ask them that 20 question when they come to give evidence. Perhaps we can 21 take the tea adjournment at this stage. We've actually run 22 on. We'll take the tea adjournment for 15 minutes. 23 [COMMISSION ADJOURNS COMMISSION RESUMES] 24 [15:24] CHAIRPERSON: The Commission resumes. 25 You are still under oath, Major-General.</p>	<p style="text-align: right;">Page 11927</p> <p>1 differentiate when I was talking to Mr Senzeni Zokwana, in 2 the context of that, and also to respond to Adv Ngalwana 3 with regard to why I did not brief the police. 4 MR MADLANGA SC: General, I suggest to 5 you, and we will argue that the truth is that you in fact 6 foresaw the possibility of bloodshed and that it is a lie 7 or an untruth that you in fact did not have such foresight 8 and that you merely mentioned this at the debriefing 9 session with NUM, purely as a strategy. Comment? 10 MAJOR-GENERAL MPEMBE: No, I do not 11 agree, Chairperson, with the reasons mentioned. 12 MR MADLANGA SC: Let me take you to 13 paragraph 23 of your supplementary statement, your second 14 typed statement which is HHH3, paragraph 23. Now for 15 context, General, you will recall that there was the JOCCOM 16 meeting of 6AM on the 16th, and there it was decided that 17 SAPS would proceed to dispersal action, or stage 3, if 18 there was escalation. Now with that background in mind, in 19 paragraph 23 you deal with what appears to be your reasons 20 for motivating for the implementation of stage 3, and in 21 the introductory part of the paragraph you are indicating 22 that you were briefing General Mbombo on why stage 3 should 23 be implemented. You set out what you referred to as some 24 of the reasons why you so motivated, and you do that in 25 five bullet points. The first one you give is this,</p>
<p style="text-align: right;">Page 11926</p> <p>1 WILLIAM MPEMBE: s.u.o. 2 CHAIRPERSON: Mr Madlanga. 3 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.): 4 Thank you, Mr Chairman. General, let me take you back to 5 an earlier question that Commissioner Hemraj asked you and 6 to which there was a follow-up by the Chairman, and the 7 question was whether you foresaw that there would be, or 8 there might be bloodshed. Now your response you referred 9 to individuals, and so on, and so on. What I want – I 10 would like to get a response which is as brief as possible, 11 General, to that answer. Did you foresee that there might 12 be bloodshed? Even if precipitated by individuals; let me 13 speak in the individuals, because this is what seems to 14 cause confusion. 15 MAJOR-GENERAL MPEMBE: Correct, 16 Chairperson, and I even went on to say there were plans to 17 address that risk. 18 MR MADLANGA SC: In that case then, 19 General, what you say in response to Mr Ngalwana's question 20 cannot possibly be true, and which is that you had 21 mentioned the possibility of bloodshed purely as a 22 strategy. In the light of the last response you've just 23 given, surely that just cannot be the truth. What do you 24 say? 25 MAJOR-GENERAL MPEMBE: Chairperson, I did</p>	<p style="text-align: right;">Page 11928</p> <p>1 "Negotiations by the SAPS directly with them since Monday, 2 13 August 2012, had failed." Now do you agree, General, 3 that at the time that – in the morning at 6AM when it was 4 decided that stage 3 would be proceeded to if there was 5 escalation, SAPS was already aware that the protesters were 6 not cooperative on the question of disarming? Is that not 7 so? 8 MAJOR-GENERAL MPEMBE: Chairperson, I 9 need to say firstly, maybe I need to explain because the 10 meeting that Advocate is referring to is 6 o'clock. My 11 motivation is for 13:30. So I wanted maybe Advocate should 12 clarify to me whether should I proceed, because I see them 13 as two different documentations, and if the meeting of 6 14 o'clock in the morning, maybe we can go to the document. 15 There is also an indication of stage 3, but my motivation 16 here, Advocate, Chairperson, it was for 13:30 when I brief 17 the Provincial Commissioner before the meeting. 18 MR MADLANGA SC: I will explain myself, 19 General. The relevance of 6AM on the day is that at 6AM it 20 is said that "We proceed to stage 3 if there is an 21 escalation." At 13:30, or for purposes of a decision that 22 was to be taken at 13:30, you are motivating for the 23 implementation of stage 3. Now what I am about – let me be 24 open with you – what I am about now, is to try to 25 understand what escalation there had been from 6AM to</p>

<p style="text-align: right;">Page 11929</p> <p>1 13:30. That is the exercise I am about. I'm not saying  2 there wasn't, but all I'm trying to understand is what  3 escalation, if any, there had been from 6AM to 13:30. You  4 now understand the relevance of 6AM in the context of  5 13:30?  6 MAJOR-GENERAL MPEMBE: Correct,  7 Chairperson. Chairperson, I'm just requesting the  8 Advocate, maybe we go to the same minutes of 6 o'clock,  9 which I will request –  10 MR MADLANGA SC: That is the -  11 Commissioners, that's TT4.  12 MAJOR-GENERAL MPEMBE: TT4.  13 MR MADLANGA SC: Whilst you are looking  14 for your copy, General, may I in the meantime just read to  15 you what appears at 2.3 of TT4 under the heading "Input on  16 daily deployment." Close to the foot of the page the  17 following appears. This is just to focus your mind on the  18 escalation that I referred to. "If the situation  19 escalates," it's close to the foot of the page, "If the  20 situation escalates, stage 3 will be implemented, but  21 proper communication will be done with all commanders when  22 that decision is taken." Now you may take the Commission  23 to where you wanted to take it to.  24 MAJOR-GENERAL MPEMBE: Chairperson, I'm  25 requesting the Commission we should go to the next page of</p>	<p style="text-align: right;">Page 11931</p> <p>1 escalation we proceed to stage 3, that is a fact that  2 they're already aware of, that the protesters are not  3 cooperating; the protesters just will not disarm. Do you  4 agree that that was so? That was a fact that the police  5 were already aware of throughout?  6 MAJOR-GENERAL MPEMBE: Chairperson, my  7 reference here, it was also in line with the crowd  8 management policy, Standing Order 262. The reason was not  9 only the escalation, but that negotiation, as the, as it  10 stated by the Standing Order.  11 MR MADLANGA SC: General, because I'm  12 trying to understand in my own mind what escalation had  13 taken place as at 13:30 on the 16th, my question is a simple  14 one, and it is this; is it not so that the failure by the  15 strikers to cooperate on the question of disarming, that  16 was a fact that was known to the police throughout as at  17 6AM when the police said we will proceed to stage 3 if  18 there is escalation? Is it not so that this was a fact  19 that was known to the police as at 6AM? Simple question.  20 MR MATHIBEDI SC: Sorry, Mr Chairman. I  21 think the previous night there was a meeting with Mathunjwa  22 during the debriefing with the members of the police, where  23 there was an indication that, you know, Mr Mathunjwa  24 indicated that tomorrow morning we'll be all happy.  25 CHAIRPERSON: - rather ambiguous, he –</p>
<p style="text-align: right;">Page 11930</p> <p>1 the same TT4. The last paragraph, it's the sentence that,  2 which starts with "If." "If the negotiations are not  3 successful and the protesters refuse to leave the koppie  4 and lay down their weapons, the police must be in a  5 position to act accordingly."  6 MR MADLANGA SC: Meaning what, General?  7 Are you reading that to suggest that stage 3 could well  8 have been proceeded to even if there had not been any  9 escalation? Is that what you are reading that, to indicate  10 that?  11 MAJOR-GENERAL MPEMBE: Chairperson, I'll  12 request the Advocate to ask the original question, because  13 this is precisely in response to the question that the  14 Advocate asked me.  15 MR MADLANGA SC: Alright, General, let me  16 take you to what led to that question. In the first bullet  17 under paragraph 23, and it reads, "Negotiations by the SAPS  18 directly with them since Monday, 13 August 2012, had  19 failed." Now what I put to you, or suggested to you, was  20 that that had been the situation throughout. The  21 protesters had not cooperated when the police were doing  22 all they could to try to disarm them. They had,  23 Lieutenant-Colonel McIntosh and them tried, negotiated, and  24 there was no cooperation at all from the police. So as at  25 6 o'clock when the police are saying if there is an</p>	<p style="text-align: right;">Page 11932</p> <p>1 MR MADLANGA SC: That is suggesting an  2 answer to the witness.  3 CHAIRPERSON: No, no, but apart from  4 that, it's a bad answer because Mathunjwa seemed confident  5 that the problem could be solved the next morning. He was  6 going to go and speak to them at 9 o'clock, but only went  7 to speak to them at 12 o'clock, for reasons we'll not go  8 into. He was urged by the Provincial Commissioner to go  9 and speak to them. So before he even had come back, while  10 he was still talking to the people, tried to persuade them  11 to lay down their arms, the decision was taken at 1:30, if  12 it was not taken before. So apart from the fact that it's  13 suggesting an answer, it's a bad answer, so shall we carry  14 on with the case?  15 MR MADLANGA SC: Thank you, Mr Chairman.  16 I'm being discourteous to Mr Mathibedi. I know, and I'm  17 sure you're endeavouring to be of assistance, but I'm  18 afraid I think this particular case you're not, but next  19 time perhaps you will be. So let's carry on -  20 MR MATHIBEDI SC: Well, the question was  21 that the General or the members of the police knew about  22 that, knew at 6 in the morning.  23 [15:44] CHAIRPERSON: No, what they knew was, I  24 mean you and I are now debating something that Mr Madlanga  25 should be debating with the witness. What they knew at 6</p>

<p style="text-align: right;">Page 11933</p> <p>1 was that Mr Mathunjwa had indicated that he thought that he 2 could persuade them to lay down their arms. He was going 3 back to see them at 9 o'clock, and that's what they knew. 4 In fact he didn't go back at 9, for reasons we don't have 5 to go into. He went back after 12 and in fact he was still 6 with them when the decision was taken at the meeting, if it 7 had not been taken before. So with respect, it doesn't 8 help us, but I don't want to be discourteous. I'm sure 9 next time you will help us, but anyway, carry on, Mr 10 Madlanga. 11 MR MADLANGA SC: General, just to avoid 12 possible confusion of issues, point is regardless of what 13 possible outcome might have come of Mr Mathunjwa's attempts 14 at disarming the protesters, point is as at that point what 15 the police knew was that the protesters would not arm – 16 that is what they knew as at 6AM – 17 CHAIRPERSON: Would not disarm. 18 MR MADLANGA SC: Would not disarm. Thank 19 you. Thank you, Mr Chairman. 20 CHAIRPERSON: I don't think that question 21 is entirely correct. The fact is the intelligence report 22 which came before the meeting at 6 o'clock indicated that 23 they wouldn't disarm, but those at the meeting kept their 24 options open, as it were, and did consider the possibility 25 that they might disarm. So I think that question requires</p>	<p style="text-align: right;">Page 11935</p> <p>1 property, particularly life is in danger, and this is what 2 I wanted to bring afore. 3 MR MADLANGA SC: Now if that was what 4 SAPS understood in the morning at 6AM when they say "We 5 proceed to stage 3 if there is escalation," this fact that 6 was already known to SAPS when they took that decision, "We 7 proceed to stage 3 if there is escalation," it could not 8 possibly have been an escalation. It could not possibly, 9 or sensibly have been considered to be an escalation. 10 Could it? 11 MAJOR-GENERAL MPEMBE: Chairperson, what 12 I'm trying to say is not the escalation alone that has to 13 be taken into account, and hence I refer the Commission to 14 the same TT4, to the following page, to indicate that SAPS 15 will go to stage 3 in terms of Standing Order 262. That's 16 the paragraph that I'm referring to, and secondly, maybe 17 Advocate, Chairperson, would be clarified here; escalation 18 of violence, how it's being interpreted in this case. 19 Maybe then we'll also have to indicate on the basis of that 20 the escalation of violence. 21 MR MADLANGA SC: General, I was not at 22 the meeting of 6AM on the 16th, nor did I come up with the 23 concept of escalation, and I'm happy that you refer to, or 24 rather you make plain that the escalation was in fact 25 escalation of violence. So I was not there; this is not my</p>
<p style="text-align: right;">Page 11934</p> <p>1 some formulation – 2 MR MADLANGA SC: Mr Chairman, thank you 3 very much. I lost reference to negotiations, which is what 4 the bullet actually says. Thank you, you're quite correct, 5 Mr Chairman. But the point I'm making, General, is that 6 regardless of what possible outcome there might have been 7 on attempts by Mr Mathunjwa to disarm the protesters, as at 8 6AM negotiations by SAPS directly – that is what the first 9 bullet says – negotiations by the SAPS directly with them 10 since Monday 13 August had failed, that the police already 11 knew as at the meeting of 6AM. Is that not so? It's a 12 very simple question. 13 MAJOR-GENERAL MPEMBE: Chairperson, as I 14 said, I referred Commission to SS2, paragraph 11. Standing 15 Order, Chairperson. 16 CHAIRPERSON: I understand that 17 [inaudible] – 18 MAJOR-GENERAL MPEMBE: Thank you. 19 COMMISSIONER HEMRAJ: But General, the 20 factual position is that as at 6 o'clock that morning none 21 of the negotiations were successful in getting the strikers 22 to disarm. That's correct, isn't it? That's the factual 23 position. 24 MAJOR-GENERAL MPEMBE: Correct, 25 Chairperson, but Standing Order also add that when life and</p>	<p style="text-align: right;">Page 11936</p> <p>1 concept. It's SAPS' own concept, and it's SAPS' own 2 decision to proceed to stage 3 if there is escalation, and 3 as I understand you, escalation of violence. So I will not 4 give the explanation that you are asking for. Now – 5 MAJOR-GENERAL MPEMBE: Chairperson – 6 CHAIRPERSON: Are you getting off 7 escalation now? Are you getting off the escalator? Can I 8 put a question dealing still with escalation? I didn't 9 understand an answer you gave a few minutes ago. You 10 talked about escalation, then you talked about something 11 else, and what I want to know from you is this; according 12 to the minutes it appears that the decision taken was that 13 stage 3 would be implemented if the situation escalated. 14 That's what it says on page 1. Unless there's a change of 15 intention by the time we get to page 2, we can accept that 16 what the meeting at 6 o'clock decided was that stage 3 17 would be implemented if there was escalation. Now are you 18 telling – now there are two possibilities. Either it was 19 decided to implement stage 3 because there was escalation, 20 and what Mr Madlanga is investigating is whether there 21 truly was escalation. Alternatively, there was a change of 22 intention, and it was decided even though there isn't 23 escalation, it's clearly decided at 6 o'clock that we will 24 implement stage 3 if there is escalation. There isn't 25 escalation, but never mind, we still implement it. So</p>

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1 there are two possibilities; either stage 3 because of  
 2 escalation, or stage 3 even though there isn't escalation.  
 3 Do you understand the difference?  
 4 MAJOR-GENERAL MPEMBE: Correct,  
 5 Chairperson, but what I wanted to –  
 6 CHAIRPERSON: Was the decision taken to  
 7 implement stage 3 because there was escalation, or was the  
 8 decision taken to implement stage 3 even though there  
 9 wasn't escalation? Which of the two was it?  
 10 MAJOR-GENERAL MPEMBE: Chairperson, in my  
 11 understanding stage 3 was implemented, as I indicated to  
 12 you, to the next page.  
 13 CHAIRPERSON: Yes, but we've gone through  
 14 that. The next page is part of the minutes of the JOCCOM  
 15 meeting at 6 o'clock.  
 16 MAJOR-GENERAL MPEMBE: Correct,  
 17 Chairperson.  
 18 CHAIRPERSON: And on page 1 it says that  
 19 if there's escalation, stage 3 will be implemented. Now  
 20 unless those at the meeting changed their minds between  
 21 what was recorded at the foot of page 1 and what's reported  
 22 on page 2, then the result of the deliberations at 6  
 23 o'clock at the JOCCOM meeting was there will be  
 24 implementation of stage 3 with escalation. But anyway,  
 25 that must be so, surely, unless, it's not suggested

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1 anywhere in the minutes that those at the meeting changed  
 2 their mind between the foot of page 1 and the foot of page  
 3 2. Isn't that right? In fact the passage that you  
 4 referred to on page 2 doesn't say that there will be a  
 5 stage 3 implementation if there isn't escalation. What it  
 6 says is something different. It says if the negotiation is  
 7 not successful and the protesters refuse to leave the  
 8 koppie and lay down their weapons, the police must be in a  
 9 position to act accordingly, not that stage 3 will be  
 10 implemented. They will have to be in a position to act  
 11 accordingly, and in fact the very next sentence says there  
 12 will be again talked to the unions at 9 o'clock, and the  
 13 outcome thereof will have an influence on the decision  
 14 taken. But all commanders will be informed accordingly.  
 15 So it's not possible, I would think, subject to what you're  
 16 going to tell me, to read the sentence starting "If  
 17 negotiations are not successful" as meaning that stage 3  
 18 was going to be implemented even if there wasn't  
 19 escalation. I would have thought the next sentence makes  
 20 it clear that no decision had been taken because the  
 21 outcome of the talk to the unions will have an influence on  
 22 the decision taken. So it looks to me, I mean again this  
 23 is the prima facie view – you can help me if I'm wrong, but  
 24 it looks to me as if at the end of the 6 o'clock meeting  
 25 one could be clear that the decision was if there's

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1 escalation, stage 3 will be implemented. So that's why I  
 2 asked you the question. What happened eventually when it  
 3 was decided to proceed with the implementation of stage 3  
 4 at the 1:30 meeting was that because there was escalation,  
 5 or was it decided because there was, despite the fact that  
 6 there wasn't escalation, you were still going ahead with  
 7 stage 3? One or the other. You were at the 1:30 meeting,  
 8 weren't you?  
 9 MAJOR-GENERAL MPEMBE: Correct,  
 10 Chairperson.  
 11 CHAIRPERSON: According to your  
 12 supplementary statement, but not your original statement,  
 13 you were the one who made the decision to implement stage 3  
 14 before the 1:30 meeting, as I understand you, some time  
 15 around 12 o'clock, and you then briefed the Provincial  
 16 Commissioner accordingly. Now if that's correct and the  
 17 decision was really yours, was the decision to implement  
 18 because there had been – sorry, was the decision to  
 19 implement stage 3 because there had been escalation, or was  
 20 the decision to implement stage 3 even though there hadn't  
 21 been escalation? Which of the two was it?  
 22 MAJOR-GENERAL MPEMBE: Chairperson, to  
 23 explain what Chairperson is saying, to act accordingly in  
 24 my interpretation it was that we comply with Standing Order  
 25 262.

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1 CHAIRPERSON: No, the next sentence says  
 2 that there would be talks with the unions at 9 o'clock and  
 3 the result of those, the outcome of those talks would then  
 4 determine the decision to be taken. So quite clearly there  
 5 is no separate decision according to the foot of page 2 at  
 6 that stage. But anyway, that's a sideshow. Let's  
 7 concentrate on the main point. The main point is the  
 8 decision to implement stage 3, which you say you took,  
 9 according to your supplementary statement, which you  
 10 conveyed to the Provincial Commissioner, was that decision  
 11 a decision to implement stage 3 because there had been  
 12 escalation, or even though there hadn't been escalation?  
 13 Which of the two was it?  
 14 MAJOR-GENERAL MPEMBE: Chairperson,  
 15 according to my supplementary statement is the negotiations  
 16 and the fear that whatever happened since Sunday, it is  
 17 going to happen, and that since the mood of the protesters  
 18 coming to the issue of now that negotiations are not  
 19 continuing, referring to the assistance that we could have  
 20 got from Mr Mathunjwa, couldn't possibly have resulted in  
 21 protesters handing, them handing weapons voluntarily. This  
 22 is actually what paragraph 23 is addressing.  
 23 CHAIRPERSON: I'm sorry, I still don't  
 24 understand your answer because you haven't answered the  
 25 question directly. So I'll have to ask it again. The



<p style="text-align: right;">Page 11941</p> <p>1 question I ask you is this; the decision that you say you 2 took to implement stage 3, which was taken before the 1:30 3 meeting, was that decision taken because there had been an 4 escalation, or was it taken even though there hadn't been 5 an escalation? That's the question. What's the answer to 6 that?</p> <p>7 MAJOR-GENERAL MPEMBE: Chairperson, it is 8 in terms of paragraph 23. According to paragraph 23, no 9 escalation, but what had –</p> <p>10 CHAIRPERSON: So your answer is the - I 11 understand the answer. The answer is the decision to 12 implement stage 3, which you say you took and conveyed to 13 the Provincial Commissioner, was taken not because of 14 escalation, but even though there wasn't escalation. Is 15 that right? You see, one of the points is, you remember Mr 16 Mathunjwa was supposed to speak to the people at 9 o'clock 17 and for various reasons we don't have to go into now, he 18 only got around to seeing them after 12. In fact the 19 Provincial Commissioner urged him to go and speak to the 20 people on the koppie, berated him for not having kept his 21 promise to speak to them, and she urged him to go and 22 persuade the people to lay down their arms. So eventually 23 he went and before he came back, and before you received a 24 report as to whether he'd been successful, the 1:30 meeting 25 was taken, but it's even more complicated than that because</p>	<p style="text-align: right;">Page 11943</p> <p>1 [16:03] CHAIRPERSON: Clearly until Mr Mathunjwa 2 came back and said I negotiated with them, as I was obliged 3 to do, as the Provincial Commissioner urged me to; 4 unfortunately I failed and they won't listen, until that 5 had happened, was that statement true?</p> <p>6 MAJOR-GENERAL MPEMBE: Chairperson, what 7 I was saying here is that I expected that when Mr Mathunjwa 8 addressed them they will listen to him, and –</p> <p>9 CHAIRPERSON: - perfect. You said "had 10 failed." Now how could something, how can one say that 11 negotiations had failed if Mr Mathunjwa was still busy with 12 his negotiations, he was, at the time the statement was 13 made, he was on his way to resume the negotiations with the 14 strikers on the koppie. I don't understand your answer. 15 You must forgive me if I'm putting it strongly to you, but 16 do you understand I have to keep an open mind and I'm 17 trying my best to do so, but it's difficult in the face of 18 statements which I don't understand how they can be 19 correct, but if I'm misunderstanding, if there's something 20 that I'm not appreciating, then now is your chance to put 21 me on the right track.</p> <p>22 MAJOR-GENERAL MPEMBE: Chairperson, in my 23 indicating is that of the mood and the mood does include 24 when Mr Mathunjwa was there, but surely if there could have 25 been any other change –</p>
<p style="text-align: right;">Page 11942</p> <p>1 according to you, you decided that stage 3 should be 2 implemented earlier than that, round about 12 o'clock or 3 12:15 or something like that. I think it was even before 4 Mr Mathunjwa had gone, or possibly while he was on the way. 5 Now the evidence, unchallenged, is the Provincial 6 Commissioner berated him for not going to the koppie, said 7 he'd promised to go, he had an obligation to go to persuade 8 the people to lay down their arms. Eventually he went and 9 did that, went to try, and before he reported back, before 10 it was known whether he was successful – and there's a long 11 and passionate speech he made, remember, and he got on his 12 knees and so forth – before any of that was, the result of 13 any of that was known, you say that you decided that stage 14 3 should be implemented. Now how does one explain that?</p> <p>15 MAJOR-GENERAL MPEMBE: Chairperson, I 16 said that I briefed the Provincial Commissioner before 17 13:30 meeting, whereby the meeting is still going to take 18 place. Yes, and by that time Mr Mathunjwa was also on the 19 way of addressing the protesters.</p> <p>20 CHAIRPERSON: The difficulty with that 21 answer is your second bullet point in para 23. Would you 22 like to read it to us?</p> <p>23 MAJOR-GENERAL MPEMBE: Chairperson, it 24 says that, "Negotiations with them through the presidents 25 of the two trade unions, AMCU and NUM, had failed."</p>	<p style="text-align: right;">Page 11944</p> <p>1 CHAIRPERSON: No, no, no, sorry, I don't 2 understand that either. He hadn't been there yet that day. 3 He went twice, remember, but he went once after 12, then he 4 went again after that, about half past 3, but before he 5 went the first time there was no question of their mood in 6 responding to him because he hadn't been there yet. So I 7 don't understand how the reference to the mood at the top 8 of the next page helps us in relation to the statement 9 which appears to be incorrect, anyway, difficult to 10 understand, at the foot of page 9 of your statement, the 11 second bullet in paragraph 23.</p> <p>12 MAJOR-GENERAL MPEMBE: Chairperson will 13 recall Colonel McIntosh, what he said about the protesters, 14 and also when Mr Mathunjwa went and knelt and pleaded with 15 them –</p> <p>16 CHAIRPERSON: That was after you made the 17 statement to the Provincial Commissioner, you see. We're 18 concerned with the statement you claim you made to the 19 Provincial Commissioner, in your supplementary statement, 20 not in your main statement. We're concerned whether, (a), 21 you did make the statement, and if you made it, whether 22 what you said was correct. Now I don't see how you could 23 have talked about negotiations having failed if Mathunjwa 24 wasn't finished with is negotiations. I don't see how you 25 can talk about their mood when Mathunjwa spoke to them if</p>

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1 he hadn't spoken to them yet. So I can understand what you  
 2 say about Lieutenant-Colonel McIntosh's statement about  
 3 their mood before that. I understand that answer, and I'm  
 4 not criticising you for that answer at all. I think it  
 5 appears to be perfectly understandable and correct, but  
 6 we're busy really with the second bullet at the foot of  
 7 page 9, you see, and I'm just putting it to you that prima  
 8 facie as I see it at the moment, it doesn't appear to be  
 9 correct, but if I'm misunderstanding it or not appreciating  
 10 something, then you must please help me.

11 MAJOR-GENERAL MPEMBE: Chairperson, that  
 12 bullet is in relation to say that while we were also going  
 13 to have the meeting, at that time this was the position,  
 14 but if there could have been any changes on the ground,  
 15 Chairperson, since we were still going to the meeting,  
 16 maybe then the bullet could not have been like this. But  
 17 probably if there could have been any other change to the  
 18 statement, then surely the weapons could have been handed,  
 19 but at the time when I was briefing the Provincial  
 20 Commissioner, after Mr Mathunjwa came, we didn't hear what  
 21 he's saying, there was no indication to say that he's  
 22 succeeding, but I do take into account that he was still  
 23 going again back to the protesters and there was still  
 24 time, Chairperson, that if Mr Mathunjwa could have  
 25 convinced the protesters, the situation could have changed.

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1 CHAIRPERSON: The difficulty with that  
 2 answer is – well, first difficulty is it hasn't been  
 3 interpreted yet. The difficulty with that answer is, as  
 4 far as I can remember – I haven't got the transcript of  
 5 what you said last time before me, but as far as I can  
 6 remember your evidence was that you made the decision; the  
 7 Provincial Commissioner didn't. You made the decision.  
 8 You then put it to her at about 12 o'clock and she approved  
 9 it, and it was then decided to call the meeting at 130.  
 10 Now I may have recollected that incorrectly, but Mr  
 11 Madlanga nods his head, so he understands it the same way  
 12 as I did. Now if that's so, then what you told us when you  
 13 gave evidence last time was that you made the decision, and  
 14 you made the decision at 12 o'clock, and you gave your  
 15 reasons. I'm examining the reasons with you to see whether  
 16 they could have been your reasons because it seems to me  
 17 that one of them at least didn't exist yet, but those are  
 18 my difficulties, you see. You understand?

19 MAJOR-GENERAL MPEMBE: I understand the  
 20 difficulty the Chairperson is having.

21 CHAIRPERSON: - to resolve it?

22 MAJOR-GENERAL MPEMBE: If we could go to  
 23 where I said I made a decision; I said I made a decision to  
 24 go the Provincial Commissioner and that decision is the one  
 25 that briefed her, and I think the Judge Hemraj also asked

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1 me many questions, and to say it's you who made the  
 2 decision to go to stage 3. Then I said I briefed the  
 3 Provincial Commissioner. The decision that the Chairperson  
 4 should understand is that, it's the one that I made to go  
 5 to the Provincial Commissioner to say the situation has  
 6 come to this and my fear is this one, taking into account  
 7 that we are still going to have a meeting, and if there  
 8 could be any other changes or any member in the meeting  
 9 opposing what I have already briefed the Provincial  
 10 Commissioner about, the situation could have changed.

11 CHAIRPERSON: Sorry, I see in my  
 12 endeavour to understand your answer I've gone over the time  
 13 I intended to adjourn. So we've been working overtime. So  
 14 we'll adjourn now until – is that convenient for you, Mr  
 15 Madlanga?

16 MR MADLANGA SC: It is, Mr Chairman.

17 CHAIRPERSON: And we'll resume at 9  
 18 o'clock – please note, 9 o'clock tomorrow. From now on I  
 19 want us to start at 9 o'clock, if we can, in the morning,  
 20 half an hour lunch hour, which will extend the time that we  
 21 sit and we will not be sitting, as I think has been  
 22 indicated, on Wednesday, as Mr Mpofo mentioned. We won't  
 23 sit here because the premises aren't available on the first  
 24 Monday and the first and third Wednesdays of the month, and  
 25 this will be the third Wednesday, but we will have a

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1 meeting at the Momentum Buildings in Pretoria of the  
 2 Commissioners and the parties and their representatives to  
 3 discuss ways of expediting the proceedings, and also we  
 4 hope to have a meeting between the Human Rights Commission  
 5 and the police. I understand from senior counsel for the  
 6 police that they will be available. So we'll start the  
 7 police Human Rights meeting at quarter to 10, and if it's  
 8 finished within quarter of an hour, that's imposing a time  
 9 limit which I will do flexibly if I have to extend it, and  
 10 thereafter at 10 o'clock or as soon thereafter as we can  
 11 start, we'll have the plenary meeting, as it were,  
 12 discussing ways of hopefully expediting the proceedings.  
 13 So we'll now adjourn till 9 o'clock tomorrow morning.

14 [COMMISSION ADJOURNED]

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