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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 121 22 AUGUST 2013 PAGES 12416 TO 12547



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1 [PROCEEDINGS ON 22 AUGUST 2013]
 2 [10:11] CHAIRPERSON: The Commission resumes. We
 3 resumed late this morning; we had intended, you will
 4 recall, to start at half past 9 this morning, but
 5 unfortunately the aeroplane on which, or the flight on
 6 which one of the Commissioners was returning to Pretoria
 7 was delayed and so that's why we're starting late. I
 8 apologise for that. It's something that was unforeseeable.
 9 Major-General, before you continue with your evidence, I
 10 understand that Mr Budlender is going to report to us the
 11 results of a meeting that was held yesterday of the parties
 12 who are currently present before the Commission.
 13 MR BUDLENDER SC: Chair, thank you. Yes,
 14 it's correct that yesterday we had a meeting of the legal
 15 representatives of all of the parties who are currently
 16 before the Commission. We had a very constructive meeting.
 17 There was strong support for enabling the Commission to do
 18 what it needs to do within a reasonable time period, and
 19 the parties committed to cooperating to make that possible.
 20 We think, and I think I speak for everyone, or
 21 virtually everyone who was there, that this is a watershed
 22 moment for the Commission. It's now a year since the
 23 events of August 2012, and there is a need, we believe, for
 24 decisive steps forward to ensure that the Commission is
 25 enabled to perform its very important function and to

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1 complete it within a reasonable time.
 2 If one takes a step back, Chair, where we are at
 3 the moment is that we have had the evidence tendered by
 4 AMCU; we have had the evidence tendered by the NUM; we've
 5 had a significant amount of evidence tendered by the South
 6 African Police Service. We are currently in the midst of
 7 the –
 8 CHAIRPERSON: I'm sorry to interrupt.
 9 We've also had evidence tendered by some of the non-
 10 unionised miners, or some of the injured miners.
 11 MR BUDLENDER SC: Yes, yes, I –
 12 CHAIRPERSON: Full statements have been
 13 filed in respect of the two others who it was intended
 14 would be called.
 15 MR BUDLENDER SC: Yes. Yes, we've had –
 16 I omitted that; we have had four witnesses in fact tendered
 17 by the representatives of the injured and arrested persons,
 18 and we have had evidence tendered by the South African
 19 Police Service. We have had evidence from the
 20 investigators. We have had evidence from the overall
 21 command structure of the police. We are currently hearing
 22 the evidence of the overall commander of what happened
 23 during that week.
 24 The next person we will have evidence from is the
 25 key planner in the operations of that week. We will

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1 shortly thereafter have evidence from the operational
 2 commander, namely the person who was in charge of the
 3 operations on the ground. There have been questions raised
 4 as to where are the people who were on the ground. Well,
 5 we will have the evidence from the person who was in charge
 6 on the ground of what was going on, and there will be a
 7 number of other witnesses from the police. We still have
 8 to have evidence from, expert evidence from witnesses as to
 9 the planning and implementation of the operation by the
 10 police. We still have to have evidence from Lonmin, and
 11 there are certain other witnesses that are still to come.
 12 The evidence leaders have listed, and have
 13 distributed to the parties a list of those people who we
 14 consider still are required to give oral evidence. We have
 15 identified 31 further witnesses. The parties have been
 16 invited to identify any further people who they consider
 17 should give oral evidence, and they have listed another 22.
 18 That's a total of 53. We may be able to cut that back to
 19 some extent. We hope that it will be possibly to do so,
 20 but there is still a substantial number of witnesses to
 21 come.
 22 As the Commissioners are aware, more chiefly than
 23 the rest of us, I'm sure, the current position is that the
 24 term of the Commission ends on the 31st of October of this
 25 year. It's not yet known whether the President will extend

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1 that date, but assuming that he will, the evidence leaders
 2 make the statement, which is not a prediction, it's a
 3 statement we believe of fact, that at the current rate of
 4 progress we will not – given the amount of evidence that is
 5 still to be led, we will not complete the task within any
 6 time limit which we reasonably anticipate the President may
 7 provide us an extension.
 8 The reports in the electronic and print media
 9 over the last week have shown what we know to be true, that
 10 the public of South Africa want answers as to what happened
 11 during that week. They want to know what happened. They
 12 want to know why it happened. They want to know who was
 13 responsible, and they want to know who should be held
 14 accountable, and they depend and rely upon this Commission
 15 to give them those answers. It's a matter of the greatest
 16 public interest, we submit, that those answers should be
 17 provided without any unnecessary delay and within a time
 18 which makes the answers relevant, that they're no longer
 19 simply a matter of history.
 20 So that I think fairly reflects the views of all
 21 of the parties who met yesterday and the parties discussed
 22 and reached agreement as to how the work should be taken
 23 forward in order to make it possible for the Commission to
 24 conclude its work within a reasonable time, and it was
 25 agreed that the evidence leaders would make an application

<p style="text-align: right;">Page 12420</p> <p>1 to the Commission on that basis for rulings as to the 2 procedure going forward, to enable the Commission to 3 perform its critical function, to complete it within a 4 reasonable time, and so we have an application and I'd like 5 to move that now, Chair. Copies will be distributed. If I 6 can take the members of the Commission through our 7 application –</p> <p>8 CHAIRPERSON: Have copies been made 9 available to representatives of the press?</p> <p>10 MR BUDLENDER SC: I've just asked that 11 that be done right now, Chair.</p> <p>12 CHAIRPERSON: When I said the press, I 13 obviously meant the electronic media as well.</p> <p>14 MR BUDLENDER SC: The media. The press 15 and non-press media. Can I ask whether the media have been 16 given copies? Chair, then if I can proceed; this is an 17 application which the evidence leaders make –</p> <p>18 CHAIRPERSON: I'm sorry, Mr Budlender, I 19 see the television cameras are working. Perhaps a copy 20 could be given to the cameraman so that he can actually 21 cause the text to be available on the television screens 22 for a short while so that those who are watching on 23 television can also have an opportunity to –</p> <p>24 MR BUDLENDER SC: Yes, that would be 25 helpful. Mr Wesley will attempt to arrange that, Chair, if</p>	<p style="text-align: right;">Page 12422</p> <p>1 be responsible for ensuring that each witness is properly 2 cross-examined. In the ordinary course this will be done 3 by one of the evidence leaders. The evidence leaders may 4 nominate the legal representatives of one of the interested 5 parties to conduct a specified part or all of the cross- 6 examination. I may interject to say that this seems to us 7 to be consistent with what is contemplated in the 8 regulations, that there is cross-examination only with the 9 consent of the Commission. I'm sorry, I didn't stop to 10 allow interpretation.</p> <p>11 Third, we propose, as provided in the 12 regulations, that any party which wishes to cross-examine a 13 witness may apply to the Commission for leave to cross- 14 examine. We propose that any such application should 15 indicate the reasons why the party wishes to cross-examine, 16 for example in order to put the version of that party. It 17 should indicate the matters on which the party wishes to 18 cross-examine. It should indicate the documentary or other 19 evidence on which it intends to rely during the proposed 20 cross-examination, and it should indicate the anticipated 21 length of the cross-examination.</p> <p>22 Chair, the fourth proposal deals with the fact 23 that although we all hope that it will still be possible 24 for all interested parties to be represented before you, 25 it's possible that that may not be the situation and the</p>
<p style="text-align: right;">Page 12421</p> <p>1 he has a copy.</p> <p>2 CHAIRPERSON: The simultaneous 3 translation is apparently not yet working, but I take it – 4 I don't know whether everything you say has to be 5 interpreted, but certainly it's desirable, I think, that 6 this also be interpreted. If the cameraman needs a copy, 7 he can have mine for the time being. While you're reading 8 it in English, it could perhaps be televised at the same 9 time. We wouldn't presume to give instructions to the 10 cameraman, but I take it he'll see favourably what I've now 11 said and then the interpreter can then interpret it into 12 Xhosa.</p> <p>13 MR BUDLENDER SC: Shall I proceed, Chair? 14 Chair, as members know, we are presently busy with the 15 evidence of Major-General Mpembe and the proposal that we 16 make for a ruling is for a ruling which will apply in 17 respect of witnesses who follow on General Mpembe, and we 18 ask the Commission rule that until further notice the 19 procedure in respect of witnesses who follow on Major- 20 General Mpembe will be as follows; first, a witness who is 21 called to testify will give evidence-in-chief by confirming 22 a written statement which sets out in detail the evidence 23 of the witness, and by then giving short oral evidence 24 referring only to the main points of that evidence. 25 Second, we propose that the evidence leaders will</p>	<p style="text-align: right;">Page 12423</p> <p>1 proposed fourth ruling is the following; that if any 2 interested party is not represented before the Commission, 3 the evidence leaders will seek to ensure that where 4 relevant the version of that party is put to a witness who 5 gives evidence. I could perhaps add that the parties all 6 accept and the evidence leaders accept that if any party is 7 not represented, the evidence leaders will have a 8 particular burden to ensure that the case of that party is 9 properly placed before the Commission.</p> <p>10 Fifthly, we propose that you rule that where 11 appropriate, evidence may be submitted by affidavit and not 12 by oral evidence.</p> <p>13 Chair, these proposed rulings are the result of a 14 cooperative effort by the parties who are before you. It 15 involves all of the parties giving some ground in order to 16 enable the Commission to perform its very important task in 17 time, within a reasonable time. It also involves the 18 evidence leaders taking on a greater burden than they have 19 had to shoulder thus far. It's the view of the evidence 20 leaders, based on the consensus which was arrived at 21 yesterday's meeting, that if these rulings are adopted, it 22 will be possible with very hard work for the Commission to 23 complete its work within a reasonable period and to report 24 to the public of South Africa within the sort of time which 25 the public expect and require of us, and it shouldn't be</p>

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1 necessary to add it, but perhaps I should in case I'm
2 misunderstood; the report is of course in the formal sense
3 a report to the President, and it's directed to the
4 President in two capacities, I suggest. First in his
5 capacity as head of the National Executive, and secondly he
6 will receive it in his capacity as President on behalf of
7 the public, and I'm sure will make it available to the
8 public. Thank you, Chair.

9 CHAIRPERSON: Thank you, Mr Budlender.
10 Do any of the parties wish to make any comments in relation
11 to what Mr Budlender has said? Ms Le Roux?

12 MS LE ROUX: Thank you, Chair. As Mr
13 Budlender reported, the parties met yesterday and there was
14 consensus within the room that a decisive procedural change
15 needs to be made in order to enable the Commission to
16 fulfil its terms of reference –

17 CHAIRPERSON: I'm sorry, Ms Le Roux –

18 MS LE ROUX: Yes.

19 CHAIRPERSON: Mr Tokota makes the point
20 that I should ask you to indicate for which party you are
21 speaking, or on behalf of which party you are speaking.

22 MS LE ROUX: Thank you, Chair, for the
23 South African Human Rights Commission. As Mr Budlender
24 indicated, all the parties that met yesterday are firmly in
25 agreement that a decisive procedural change would enable

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1 the Commission to fulfil its terms of reference in a
2 reasonable period of time, and at reasonable cost, and the
3 looming October deadline is one reason why this change is
4 necessary at the moment.

5 [10:31] But there are two further reasons that I would
6 like to highlight. The first is that in terms of the
7 regulations that govern the work of the Commission this
8 shift to a more inquisitorial process led by the team of
9 evidence leaders is entirely appropriate. The right of the
10 parties before you to confront witnesses through cross-
11 examination is not eliminated, it merely happens with the
12 leave of the Commission where a particular issue has been
13 identified that requires that cross-examination.

14 So the South African Human Rights Commission
15 submits that this procedural change is needed for those
16 reasons. It's also needed to address the impact on the
17 fairness and inclusiveness of this process for so long as
18 there are five important parties who cannot participate at
19 the moment. As the Constitutional Court recognised in its
20 judgment, the fairness of this process and therefore the
21 purpose of the Commission should not be comprised because
22 parties' interests are not protected here. For that reason
23 the South African Human Rights Commission again calls for
24 the parties involved to come to a decision to provide
25 funding so that all parties can return and participate in

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1 the Commission's process. And the procedural change
2 proposed today, while it will not eliminate the unfairness
3 that arises from the fact that important parties cannot
4 participate and have chosen not to participate in the
5 Commission's processes, such a move would mitigate the
6 unfairness that arises.

7 The South African Human Rights Commission
8 therefore calls on the Commission to not only reconsider
9 the process that has been followed to date and adopt the
10 proposal of the evidence leaders, but also calls on all the
11 parties that remain as participants in the Commission to
12 co-operate fully with the evidence leaders so that the new
13 more inquisitorial process can ensure that the Commission
14 fulfils its important work.

15 Finally, given the recent delays in the
16 proceedings of the Commission the South African Human
17 Rights Commission also called on the President to extend
18 the October 2013 deadline in order to enable the Commission
19 to fulfil its important work. Thank you, Chair.

20 CHAIRPERSON: [Inaudible, microphone
21 off].

22 MR NGALWANA: Yes, I did indeed, Chair,
23 thank you. Thank you. I see the resemblance must be
24 striking. Chair, members of the Commission, it's a welcome
25 development. We just wish to make some recommendations in

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1 relation to paragraph 4 and in relation to the introductory
2 part which is the unnumbered second paragraph. Let me
3 start with paragraph 4. The suggestion, well it's not a
4 suggestion, it plainly says that a party who's not
5 interested, sorry who's not represented before the
6 Commission may have his version presented at the instance
7 or by the evidence leaders here. There's nothing, though
8 that says what happens if another interested party wishes
9 to cross-examine that witness. So you can't have a version
10 of a non-represented witness presented and that witness is
11 not subjected to cross-examination in the event of another
12 party wishing to cross-examine that witness. I'll make an
13 example, Chair, there's a witness Nzuzza and Booi and other
14 witnesses, who are Mr Mpofu's clients, who made and
15 submitted statements here. It would be patently unfair if
16 for example SAPS were not allowed to cross-examine those
17 people. So I would suggest the following wording and this
18 is just rough, perhaps it can be done more clinically
19 later. We would add that at the end of paragraph 4
20 something to the following effect, "Where this is done, the
21 witness in question may on reasonable notice be called for
22 cross-examination at the instance of the party reasonably
23 seeking to cross-examine such a witness."

24 CHAIRPERSON: I don't think "witness" is
25 the right word in the context of 4, it's party really.

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1 Yes, I didn't mean to interrupt you, I would have thought
 2 that the matter's already provided for, to some extent at
 3 least, in the Regulations because the way it would work, I
 4 would imagine, is that if there's a version of a party
 5 who's not represented were put in this fashion another
 6 party wishes to cross-examine the party whose version is
 7 being put, would be entitled to apply for the witness
 8 concerned, the potential witness concerned, to be
 9 subpoenaed to give evidence. And in that way the obvious
 10 prejudice which otherwise results to the party who is
 11 attacked in a version put in the manner suggested in the
 12 rule would be eliminated. But that, I think, is really the
 13 gist of the suggestion you make. We will consider the
 14 application, we won't make the ruling today, we'll think
 15 about it and if other parties have suggestions as to
 16 improvements we will also consider those. But the point
 17 you make is clearly a valid one and will have to be
 18 addressed.

19 MR NGALWANA: Yes, the Chairperson is,
 20 with respect, quite correct with regards what the
 21 regulations say, we just thought it might, for the sake of
 22 completion, if you like do a belt and braces job by
 23 including it here, in this -

24 CHAIRPERSON: No, certainly we will
 25 consider and I'd be grateful if you could perhaps give us,

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1 slightly reformulated, the gist of your proposal so that we
 2 can consider it and perhaps give it to the other parties
 3 too so they can think about it also. But it sounds, if I
 4 may say so, prima facie, to be an excellent suggestion
 5 which should certainly be very carefully considered. Both
 6 Mr Budlender and Ms Le Roux stressed the importance of
 7 consideration to fairness continuing to operate and if what
 8 you suggest were not done then there would actually be a
 9 potential unfairness to the party who is attacked, as it
 10 were, in the version put in the manner envisaged in sub-
 11 ruling 4.

12 MR NGALWANA: With regards to the second
 13 unnumbered paragraph, Chair, perhaps this is just a matter
 14 of style but we thought we should err on caution's side.
 15 As the Chairperson and other members know the word "until
 16 further notice" seems to us to have very elastic meaning.
 17 We know what subject to, for example, connotes because that
 18 has been the body of case law that it decided what subject
 19 to, means. So we would rather suggest that instead of
 20 "until further notice" we use, we say "the Commission rules
 21 that subject to such reasonable objection as may from time
 22 to time arise, on which the Commission may rule the
 23 procedure in respect of the witnesses who follow or the
 24 present witness, Major-General Mpembe will be as follows."
 25 So that leaves - it doesn't leave the reconsideration of

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1 what has been agreed upon simply to "further notice" but
 2 rather to "such reasonable objection." As from case to
 3 case these things - we don't have a crystal ball to see
 4 what difficulties may arise. One doesn't say that one
 5 would raise an objection just for the sake of raising an
 6 objection and that is why the final decision is left to the
 7 Commission to decide whether such objection is so
 8 reasonable as to warrant a reconsideration of the
 9 paragraphs that then follow. We'll suggest that wording to
 10 the evidence leaders, then it can be considered in due
 11 course.

12 CHAIRPERSON: I suggested to you that you
 13 give us a draft in respect of your proposed amendment to
 14 sub-ruling 4 and in your draft please incorporate your
 15 proposals in respect of the second unnumbered paragraph so
 16 we can also give consideration to that. Anything further
 17 you wish to say?

18 MR NGALWANA: I'm told there's nothing
 19 more, Chairperson, thank you.

20 CHAIRPERSON: Thank you. Do any of the
 21 other parties wish to make statements or recommendations or
 22 submissions in respect of the proposed rulings? There
 23 don't appear to be any other contributions. Is there
 24 anything you wish to say by way of a reply to the points
 25 made, Mr Budlender?

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1 MR BUDLENDER: Chair, just very briefly,
 2 clearly the rulings should ensure that there's no untested
 3 evidence placed before the Commission, that's really what
 4 the first matter goes to and we would accept that.
 5 Secondly the intention of that word maybe of the phrase in
 6 paragraph 2 was to convey that this is a procedural ruling,
 7 like all procedural rulings it's subject to amendment from
 8 time to time in the discretion of the commissioners and
 9 we'll adjust accordingly to reflect that.

10 CHAIRPERSON: May I suggest that you and
 11 Mr Ngalwana get together and possibly produce a draft in
 12 relation to the amendments you wish us to consider. We'd
 13 like to think about the proposals that have been made and
 14 in particularly in the light of the amendments suggested
 15 and we won't make the ruling today but we will make it as
 16 soon as we reasonably can in ordinary circumstances. Thank
 17 you. We now then proceed with the hearing of the evidence
 18 of the Major-General. Major-General, you're still under
 19 oath. Before you proceed with your cross-examination, Mr
 20 Gumbi, Advocate Hemraj wishes just to make a correction to
 21 something which she said on Tuesday.

22 COMMISSIONER HEMRAJ: Mr Gumbi, I put to
 23 you that Lieutenant Baloyi was in possession of a firearm
 24 and 15 rounds, that's actually incorrect because the
 25 documents you've handed in show 30 rounds. I just wanted

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1 to correct that on the record.

2 MR GUMBI: Yes, Commissioner, we noted

3 that, we are going to take instruction on that. I was

4 going to correct that point.

5 CHAIRPERSON: Yes, we started late for

6 the reasons which I mentioned, so we'll take our tea

7 adjournment at 11:15 but I don't know whether you need as

8 long as that, Mr Gumbi, for the rest of your cross-

9 examination, but please proceed with your cross-

10 examination.

11 MR GUMBI: Thank you very much,

12 Chairperson and the Commissioners. Good morning, General.

13 MAJOR-GENERAL MPEMBE: Good morning,

14 Advocate.

15 MR GUMBI: General, before we adjourned

16 on Tuesday we were still busy dealing with this point that

17 you briefed the commanders that now the police they were

18 escorting protesters from the railway line to their way to

19 the koppie, do you remember that?

20 MAJOR-GENERAL MPEMBE: I do remember,

21 Advocate.

22 MR GUMBI: So on that particular aspect,

23 if I can take it from there, did you personally observe the

24 commanders briefing the other police that the police now

25 they were escorting the miners from the railway line to the

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1 koppie?

2 MAJOR-GENERAL MPEMBE: Chairperson, I

3 request that the question be repeated.

4 MR GUMBI: So I'm saying you, as an

5 Operational Commander, did you observe the commanders

6 briefing their members that now the decision has been taken

7 the police are escorting miners from the railway line to

8 the koppie?

9 MAJOR-GENERAL MPEMBE: I did indicate

10 that the commanders did not report all, or I did not even

11 see them but what I know is that I did brief the

12 commanders, I did expect that the commanders should brief

13 their members because there were different commanders with

14 different units. And there was also time that could have

15 been done.

16 COMMISSIONER HEMRAJ: So is that you did

17 not see it happen or it did not happen?

18 MAJOR-GENERAL MPEMBE: I did not see it

19 happen because I was also busy communicating to the

20 protesters.

21 MR GUMBI: Okay, so the police line that

22 is exhibit HHH16.1 and exhibit HHH16.2, I've made the

23 referrals before we adjourned, the instruction to form that

24 police line, was it your instruction, did you instruct

25 commanders that the police must form the police line behind

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1 these marchers?

2 MAJOR-GENERAL MPEMBE: I did say the

3 police should escort and then we should escort them in a

4 manner that the distance is reasonable and that we do not

5 antagonise the protesters. But I did not precisely say how

6 but I did say that we should escort them.

7 MR GUMBI: Okay, so the police Nyalas

8 that they were there, that they were going to be used to

9 escort these marchers, any instruction to inform the

10 commanders the position of the police Nyalas while

11 escorting the marchers?

12 [10:51] MAJOR-GENERAL MPEMBE: There were key

13 areas which I indicated before that we should check in

14 terms of the marchers not to enter with regard to that

15 sensitivity, that is the informal settlement and also the

16 shaft on the left-hand side. Then I did indicate that the

17 vehicles can be utilised, particularly the armoured

18 vehicles, the Nyalas.

19 MR GUMBI: But my question, did you

20 instruct the commanders where to position their Nyalas

21 while escorting the marchers?

22 MAJOR-GENERAL MPEMBE: Chairperson, I

23 didn't say here or there, but I says they should be put in

24 such a manner that we do protect the areas that are

25 sensitive and in terms of the earlier briefing that I give

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1 them, why the sensitivity of those areas.

2 MR GUMBI: So will I be correct, General,

3 that it was up to their decision how are they going to

4 position those Nyalas while escorting the protesters? It

5 was up to them, the commanders?

6 MAJOR-GENERAL MPEMBE: Correct,

7 Chairperson.

8 MR GUMBI: So instruction not to go near

9 the informal settlement, did you inform the police

10 officers, all of them, that they must try as much as they

11 can to prevent the marchers from going to a nearby

12 settlement?

13 MR NGALWANA: Chairperson, members of the

14 Commission, I did caution my learned friend this morning

15 about traversing ground that's already been traversed by Mr

16 Madlanga in cross-examination. The Chairperson will recall

17 a ruling that he made not so long ago that the Chairperson

18 will not allow re-cross-examination on matters that have

19 already been traversed. I was very patient on Tuesday; I

20 didn't raise these objections, but I did caution my learned

21 friend this morning that I shall not do as I did on –

22 CHAIRPERSON: Mr Gumbi, what do you say

23 about the point that's being raised?

24 MR GUMBI: If my learned friend –

25 CHAIRPERSON: It's not necessary for you

<p style="text-align: right;">Page 12436</p> <p>1 to cover ground that's already been covered by Mr Madlanga, 2 or anybody else for that matter.</p> <p>3 MR GUMBI: I am fully aware about that, 4 Chairperson. If my learned colleagues can refer me from 5 the record wherein Mr Madlanga asked this witness that did 6 he give any instruction to commanders not to go, to prevent 7 informal settlement if the protesters go to informal 8 settlement, then I will be happy.</p> <p>9 MR NGALWANA: Is my learned friend 10 disputing that Mr Madlanga covered this ground?</p> <p>11 MR GUMBI: I'm inviting my learned 12 colleagues to show me from the record.</p> <p>13 CHAIRPERSON: No, that's a simple point. 14 Either you say no, Mr Madlanga never asked the question, 15 therefore I'm entitled to ask it, or you say yes, he did 16 ask it, but I'm approaching it from a different angle, or 17 something in that line, but it doesn't help to answer an 18 objection by putting the other side to the proof of an 19 allegation. Either it was raised already, or it wasn't. 20 If you say it wasn't raised then you can carry on, in which 21 case Mr Ngalwana will have to show that you're wrong, but 22 he's entitled to ask do you say that this has been asked 23 already, or do you not. What's your answer to that?</p> <p>24 MR GUMBI: As far as I know, I haven't 25 seen that question. I'm open if my learned colleagues can</p>	<p style="text-align: right;">Page 12438</p> <p>1 place there was suddenly a new command issued by the 2 General, dealing with the point? Because that point I 3 think wasn't dealt with in the cross-examination, but what 4 exactly is your point?</p> <p>5 MR GUMBI: Chairperson, I am going to put 6 my client's version after this particular point of 7 instruction, so I don't want to –</p> <p>8 CHAIRPERSON: Explain to me what exactly 9 does your question relate to? You know, let's not waste 10 time unnecessarily on the point. What exactly are you 11 asking the witness in relation to this point? Are you 12 dealing with what happened at the briefing stage, or are 13 you dealing with something that happened subsequently while 14 the people were already marching away and police were 15 following?</p> <p>16 MR GUMBI: I'm dealing with the 17 situation, you still remember, Chairperson, that the 18 General testified that they escorted the protesters, they 19 followed the protesters. So while they were following the 20 protesters, then all of a sudden the protesters changed the 21 direction and they go to the squatter camp. Fair enough, 22 we understand that. I'm dealing with this aspect that 23 while they were escorting them, was there any instruction 24 issued to any commanders and the members to say if the 25 protesters divert from their route and go to a nearby</p>
<p style="text-align: right;">Page 12437</p> <p>1 show me from the record.</p> <p>2 CHAIRPERSON: I must confess, I don't 3 recall it being put as crisply as Mr Gumbi is putting it, 4 so I propose to allow him to put it. Anyway it will 5 probably be quicker just to let – it's a simple question, 6 which I hope will elicit a simple answer, so let's carry on 7 for the moment.</p> <p>8 MR GUMBI: Thanks very much, Chair –</p> <p>9 MR NGALWANA: I can do it. Page 11729 of 10 the transcript, Chair. I think it's day 111 or 109 – 109, 11 I think it is.</p> <p>12 CHAIRPERSON: I haven't got the 13 transcript in front of me. Read the passage quickly to me.</p> <p>14 MR NGALWANA: "Is it correct also that 15 there was no briefing whatsoever with regard to how the 16 police were to prevent protesters from entering the 17 informal settlement close to the railway line? Is that 18 correct or not?" and Major-General Mpeembe answered the 19 question, and I'm sure that's not the only passage in which 20 this issue is raised. I will find others.</p> <p>21 CHAIRPERSON: Mr Gumbi, let's get clarity 22 on this. It's quite clear that the General said it was 23 asked and answered in relation to the absence of briefing 24 on the point, but does your question relate to that, or do 25 you suggest that at some stage after the briefings took</p>	<p style="text-align: right;">Page 12439</p> <p>1 squatter camp, what measures that ought to be put into 2 place. That's the aspect I'm canvassing with the witness.</p> <p>3 CHAIRPERSON: Mr Ngalwana, is there 4 anything you wish to say further? I'm proposing to allow 5 him to ask the question. I think it will actually save 6 time in the end, but the point you make about avoiding 7 repetition is a good one, which I trust will be borne in 8 mind in what follows. Please proceed, Mr Gumbi.</p> <p>9 MR GUMBI: Thanks very much.</p> <p>10 CHAIRPERSON: The questions you're asking 11 are far more specific than the question Mr Madlanga asked, 12 and this is quite a crucial part of the case, so I'll allow 13 you to carry on, but please be careful not to repeat what's 14 been done already.</p> <p>15 MR GUMBI: I've noted that, Chairperson. 16 Thank you very much. General, you heard my question, or 17 must I repeat it?</p> <p>18 MAJOR-GENERAL MPEEMBE: Chairperson, I did 19 brief the members and after that I did not brief the 20 members, the commanders again, and I anticipated that the 21 commanders will brief the members.</p> <p>22 MR GUMBI: So if I understand your 23 answer, you briefed the commanders, then you were expecting 24 the commanders to brief their members?</p> <p>25 MAJOR-GENERAL MPEEMBE: I've said it many</p>

<p style="text-align: right;">Page 12440</p> <p>1 times, Chairperson.</p> <p>2 CHAIRPERSON: He's said that a number of</p> <p>3 times already.</p> <p>4 MR GUMBI: Thanks very much, Chairperson.</p> <p>5 CHAIRPERSON: That's clearly repetition.</p> <p>6 MR GUMBI: Yes. Let us focus now,</p> <p>7 General, while you are following these marchers, forming a</p> <p>8 police line behind them, let us focus on the marchers</p> <p>9 themselves now. Did you inform them that now the police</p> <p>10 have acceded to their demand, now you are escorting them on</p> <p>11 their way to the koppie?</p> <p>12 MAJOR-GENERAL MPEMBE: Chairperson, I did</p> <p>13 answer on Tuesday that there was no time to tell them</p> <p>14 because they moved when I was still going to count, but I</p> <p>15 did inform them that we are going to the mountain after I</p> <p>16 have addressed them, and it was also in the video, and</p> <p>17 several marchers and protesters did indicate that we should</p> <p>18 escort them.</p> <p>19 MR GUMBI: The Nyalas that you were using</p> <p>20 on that day, General, while escorting these miners on their</p> <p>21 way to the koppie, I wanted to check, because Brigadier</p> <p>22 Mkhwanazi had testified about the issues of tactical</p> <p>23 communication, were they mounted with loudhailers that can</p> <p>24 be used to convey any information to the miners?</p> <p>25 MAJOR-GENERAL MPEMBE: Chairperson, that</p>	<p style="text-align: right;">Page 12442</p> <p>1 officer, so if he could not understand or any other thing,</p> <p>2 because he was also a section commander, he could have come</p> <p>3 to me personally as an officer to say, General, can you</p> <p>4 explain, maybe I did not understand what Colonel Tsiloane</p> <p>5 is saying, I could have done that. But in general terms in</p> <p>6 any operation of such big magnitude you brief the</p> <p>7 commanders; the commanders do brief their members, because</p> <p>8 in that respect their role and responsibilities is not the</p> <p>9 same.</p> <p>10 MR GUMBI: Furthermore it is his version</p> <p>11 that when you made a decision as an operational commander</p> <p>12 you also instruct the members personally, you don't</p> <p>13 delegate to unit commanders. You instruct the members</p> <p>14 themselves that how are they going to escort the</p> <p>15 protesters, the formation, the platoon formation and the</p> <p>16 techniques, whatever that they are going to be used while</p> <p>17 escorting, you don't delegate that. You do that as an</p> <p>18 operational commander.</p> <p>19 MAJOR-GENERAL MPEMBE: Chairperson, in</p> <p>20 any police operation the members and the commanders they do</p> <p>21 have a discretion to exercise. You cannot instruct the</p> <p>22 members because the situation changes from time to time.</p> <p>23 So you do also allow the commanders and the members</p> <p>24 themselves to utilise their discretion in accordance with</p> <p>25 the training, but there was a clear indication of how the</p>
<p style="text-align: right;">Page 12441</p> <p>1 maybe I can be given chance to go and check whether they</p> <p>2 were mounted because that I expect it should have been done</p> <p>3 by the commanders on the ground, but when I speak to the</p> <p>4 protesters, the protesters did hear what I was talking to</p> <p>5 and they also understand in terms of what I was talking</p> <p>6 about and they could hear me.</p> <p>7 MR GUMBI: You know I'm asking this</p> <p>8 question, General, because according to Lieutenant Baloyi,</p> <p>9 who's an experienced POP member, his version is that if the</p> <p>10 decision is made to escort miners from the railway line</p> <p>11 towards the koppie, it is important first of all, the</p> <p>12 operational commander himself, he mustn't delegate his</p> <p>13 responsibility to unit commanders. The operational</p> <p>14 commander must inform the members clearly that now the</p> <p>15 decision has been made, the police now are escorting the</p> <p>16 miners from the railway line towards the koppie. What is</p> <p>17 your comment on that?</p> <p>18 MAJOR-GENERAL MPEMBE: Chairperson, I did</p> <p>19 indicate with the vast number of the place and the bigger</p> <p>20 operations, the different units that were there, I did</p> <p>21 expect that commanders will brief their own commanders, and</p> <p>22 in this case I did expect Lieutenant-Colonel Tsiloane, and</p> <p>23 Lieutenant-Colonel Tsiloane was always near me when I was</p> <p>24 briefing and when I was talking, so I expected that it</p> <p>25 should happen. But Chairperson, Lieutenant Baloyi is an</p>	<p style="text-align: right;">Page 12443</p> <p>1 escorting has to take place and how the safety measures</p> <p>2 should be applied in terms of while we are escorting the</p> <p>3 protesters.</p> <p>4 CHAIRPERSON: The Standing Order is clear</p> <p>5 though that where force is to be used, even non-lethal</p> <p>6 force, that order has to come from the operational</p> <p>7 commander. The Standing Order doesn't envisage anybody</p> <p>8 who's junior or subordinate to the operational commander</p> <p>9 exercising a discretion to authorise the use of force.</p> <p>10 Isn't that correct?</p> <p>11 MAJOR-GENERAL MPEMBE: Correct,</p> <p>12 Chairperson.</p> <p>13 MR GUMBI: And it is his contention</p> <p>14 that –</p> <p>15 CHAIRPERSON: I think the interpreter</p> <p>16 must get a chance to interpret, Mr Gumbi.</p> <p>17 MR GUMBI: Yes, I do apologise,</p> <p>18 Chairperson. I was not aware that today we are using an</p> <p>19 interpreter.</p> <p>20 MR MAHLANGU: Do I have to interpret</p> <p>21 everything?</p> <p>22 CHAIRPERSON: The people in the</p> <p>23 auditorium would like the, what is the evidence to be</p> <p>24 interpreted. The simultaneous translation facilities are</p> <p>25 not yet in operation. There are a lot of people watching</p>

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1 this on television as well who are dependent, so we were
 2 told at the previous hearing, on the translation. So I
 3 think you should interpret it.
 4 MR MAHLANGU: Thanks, Chairperson.
 5 CHAIRPERSON: In the interest of everyone
 6 being able to follow what's happening.
 7 MR GUMBI: So according to Lieutenant
 8 Baloyi it is also again his version that on that day as a
 9 General any communication about the operation mustn't be
 10 delegated to any commander. The operational commander must
 11 make sure that all the members, including their commanders,
 12 they are on same par with him in regard to any operation
 13 that's about to be executed.
 14 CHAIRPERSON: Do you agree with that,
 15 Major-General?
 16 MAJOR-GENERAL MPEMBE: No, Chairperson.
 17 MR GUMBI: So you testified before this
 18 Commission, General, that there was a police line following
 19 these marchers on their way to the koppie. You still
 20 remember that? That's why I even referred you to exhibit
 21 HHH16.1 and HHH16.2.
 22 MAJOR-GENERAL MPEMBE: In terms of this
 23 16.2.
 24 MR GUMBI: Yes. Any instruction you
 25 issued to the police with regard to the distance between

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1 the marchers and the police officers that day who were
 2 following those marchers on foot. Did you issue any
 3 instruction?
 4 MAJOR-GENERAL MPEMBE: Chairperson, the
 5 exhibit indicates that yes, I spoke about reasonable
 6 distance, and it is in that respect that I say the
 7 commanders in terms of how the role and responsibilities
 8 take place, they will determine what will be reasonable.
 9 MR GUMBI: Those police officers that
 10 they were in that police line, were you expecting them to
 11 follow the marchers from the railway line on their way to
 12 the koppie on foot?
 13 MAJOR-GENERAL MPEMBE: Chairperson, I
 14 expected that whenever any situation changes, the police
 15 official will change according to the circumstance, not to
 16 give them strict instructions because the situation will
 17 not be the same. Chairperson, I was not the operational
 18 commander in the JOC. I was also present with that at the
 19 scene itself. If there could have been any other changes
 20 that were necessary, I could have given that command, or,
 21 and the officers could have also indicated to me while I
 22 was there to give such a command in terms of how should we
 23 change.
 24 MR GUMBI: So it was up to them whether
 25 they made a decision to follow the miners from the railway

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1 line until the koppie? You leave up to them to decide?
 2 MAJOR-GENERAL MPEMBE: Chairperson, I
 3 said it will be according to the circumstances, not
 4 according to the commanders.
 5 CHAIRPERSON: I understand that you gave
 6 the instruction that they be escorted. That was the
 7 instruction you gave and you never changed that
 8 instruction. Is that correct?
 9 MAJOR-GENERAL MPEMBE: Correct,
 10 Chairperson.
 11 [11:11] CHAIRPERSON: You didn't leave it to them
 12 to decide whether they'd escort them. You said they must
 13 be escorted. You told your men, the members, they must
 14 escort the strikers.
 15 MAJOR-GENERAL MPEMBE: Correct,
 16 Chairperson.
 17 CHAIRPERSON: To the koppie.
 18 MAJOR-GENERAL MPEMBE: Correct,
 19 Chairperson.
 20 MR GUMBI: How far is the koppie from the
 21 railway line, General?
 22 MAJOR-GENERAL MPEMBE: Chairperson, I did
 23 indicate to the Commission, maybe I can –
 24 CHAIRPERSON: That was debated before and
 25 he said he's not very good in distances and he doesn't

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1 know, but it's obviously several kilometres, and if it's
 2 necessary we can I'm sure get some objective evidence on
 3 that point from a scale map or something, but I don't think
 4 we need waste time with him on that. He'd already said
 5 he's not good at distances, so let's not waste any
 6 further –
 7 MR GUMBI: I have noted that,
 8 Chairperson. Thanks very much.
 9 MR NGALWANA: Chair, it's also a question
 10 that Mr Madlanga asked pointedly.
 11 CHAIRPERSON: I said it had been dealt
 12 with already. You don't have to [inaudible] judgment that
 13 I give a ruling. Carry on, Mr Gumbi.
 14 MR GUMBI: Thanks very much, Chairperson.
 15 Can I focus now on Warrant-Officer Lepaaku, the late
 16 Warrant-Officer Lepaaku. Was he among –
 17 CHAIRPERSON: I see it's now quarter past
 18 11. You're obviously moving on to a new topic which hasn't
 19 been covered before, so let's take the tea adjournment at
 20 this stage, and try to be back by half past, please.
 21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 [11:34] CHAIRPERSON: The Commission resumes.
 23 You're still under oath, Major-General. Mr Gumbi.
 24 MR GUMBI: Thanks very much, Chairperson.
 25 General, before I could even move onto another aspect a few

<p style="text-align: right;">Page 12448</p> <p>1 questions I wanted to ask you before I wrap up this point. 2 The video footage of 15th was played before this Commission 3 and we have a transcript here and in that way the footage - 4 you appeared there, you give an ultimate accounting for the 5 protesters to hand over their dangerous weapons. Do you 6 remember that? 7 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 8 I did see that. 9 MR GUMBI: And it's common cause that 10 after that also again the protesters proceeded with their 11 march. 12 MAJOR-GENERAL MPEMBE: Correct, 13 Chairperson. 14 MR GUMBI: So, I wanted to know, General, 15 when did you make this decision? After they proceeded with 16 their march or you made a decision to escort them before 17 you could even count? 18 MAJOR-GENERAL MPEMBE: Chairperson, I did 19 answer this question many times to say that there was a 20 time where I briefed the members where I made the decision 21 and even I gave Lieutenant-Colonel Merafe to raise his 22 concern with what I was deciding and then it was not done 23 when the people were marching. 24 CHAIRPERSON: I think this point's been 25 covered already, Mr Gumbi.</p>	<p style="text-align: right;">Page 12450</p> <p>1 CHAIRPERSON: You don't have it? Mr 2 Gumbi, I understood the documents were going to be made 3 available to the parties beforehand, a day beforehand and - 4 MR GUMBI: They were circulated, 5 Chairperson. 6 MR NGALWANA: I'm seeing it now for the 7 first time, Chair. 8 CHAIRPERSON: Well they were circulated 9 this morning were they? 10 MR GUMBI: Yes, Chairperson. 11 CHAIRPERSON: Why weren't they circulated 12 beforehand? 13 MR GUMBI: I got yesterday then I send 14 email to the evidence leaders. 15 CHAIRPERSON: Oh I see. To whom did you 16 send the email? 17 MR GUMBI: Yesterday, Chairperson. 18 CHAIRPERSON: To whom did you send the 19 email? 20 MR GUMBI: To Mrs Kameshni. 21 MS PILLAY: Chair, I don't want to - 22 CHAIRPERSON: I take it you're referring 23 to Advocate Pillay. 24 MR GUMBI: Advocate Pillay, yes. 25 MS PILLAY: Chair, I downloaded the email</p>
<p style="text-align: right;">Page 12449</p> <p>1 MR GUMBI: Yes, I wanted to - so let us 2 focus on Warrant Officer Lepaaku. Was he among those 3 police officers that were following the miners on foot? 4 MAJOR-GENERAL MPEMBE: Chairperson, 5 Warrant Officer Lepaaku, if I still remember very well, he 6 was in another Nyala, not the same Nyala with Lieutenant 7 Baloyi but the Nyala that was on the right-hand side. 8 MR GUMBI: I do have a pocket book here. 9 I would like to invite your comment, General, of one of the 10 police officers. I hope the Chairperson and the 11 Commissioners you are in possession of that pocket book. 12 CHAIRPERSON: We've got a number of 13 pocket books. Tell us which one you're referring to now. 14 Give it an exhibit number if Mr Ngalwana doesn't object. 15 MR GUMBI: Yes, it's a pocket book by LM 16 Mativa, NIU Pretoria, it's dated - it has an official stamp 17 on the left-hand side, 10 August 2012. 18 CHAIRPERSON: Mr Ngalwana, you did 19 indicate that you might object to some of these documents. 20 Are you objecting to this one? 21 MR NGALWANA: I don't even have it, 22 Chairperson. 23 CHAIRPERSON: Sorry? 24 MR NGALWANA: I don't even have it with 25 me.</p>	<p style="text-align: right;">Page 12451</p> <p>1 first thing this morning and circulated it immediately. 2 CHAIRPERSON: What's your answer, Mr 3 Ngalwana? 4 MR NGALWANA: Perhaps I don't want to be 5 harsh on my learned friend. 6 CHAIRPERSON: Sorry, before you carry on, 7 have you seen this pocket book before, before you're being 8 asked about it now? 9 MAJOR-GENERAL MPEMBE: Chairperson, when 10 I went out I found them on the seat and then I asked the 11 interpreter, he said that they are meant for you. Attorney 12 came to me and he said can you look quickly, they are going 13 ask you. 14 CHAIRPERSON: So have you looked yet? 15 MAJOR-GENERAL MPEMBE: I have not looked 16 at that - 17 CHAIRPERSON: You haven't looked at it? 18 MAJOR-GENERAL MPEMBE: Yes. 19 CHAIRPERSON: Very well, Mr Gumbi what 20 I'm going to do, I'm sorry we have to waste time like this 21 and I'm not saying this by way of blaming you, I understand 22 how it arose. But the basic idea is the witness should get 23 an opportunity to see the documents beforehand in order to 24 be ready to give his evidence. So what I'm going to do is 25 I'm going to adjourn. I'm going to give you an opportunity</p>

<p style="text-align: right;">Page 12452</p> <p>1 to discuss with Mr Ngalwana what exactly the documents are 2 that you were referring to, ascertain that the witness has 3 had an opportunity to read them and we will then resume. 4 I'm sorry we'll lose time in the process but we've got to 5 be fair to the witness. I can understand where you're 6 coming to with this point, it's a very important point for 7 you and for the witness. So I think we must deal with it 8 according to the rulings we've made and - so I'll adjourn 9 now and when you are able to report to me that we can 10 proceed in the manner I've instructed you to do so. But 11 before we adjourn - in fact I thought I'd made it clear, 12 but just in case I didn't, if I can make it clear again, 13 all the documents that you're going to refer to, that 14 you've given us copies of you must be satisfied that Mr 15 Ngalwana knows about them and has copies, the witness knows 16 about them and has copies and has an opportunity to read 17 them. Okay?</p> <p>18 [COMMISSION ADJOURNS COMMISSION RESUMES] 19 [12:00] CHAIRPERSON: The Commission resumes. Mr 20 Gumbi, I understand, you told me as I came in that 21 everything is now in order; you're ready, and we can 22 proceed without any further difficulty. Is that correct? 23 MR GUMBI: Yes, Chairperson, but before I 24 could even proceed, Chairperson, I've spoken to Mr Fischer 25 of Human Rights Commission, he wanted to say something</p>	<p style="text-align: right;">Page 12454</p> <p>1 Rights Commission's response was that we were not in a 2 position yet to share the results of our review because it 3 was ongoing and there was nothing complete to share, but 4 that we were aware of a number of specific pocketbooks that 5 we could share, and those are the pocketbooks that Adv 6 Gumbi is going to refer to today. I thought it would be of 7 assistance to explain how they have come before the 8 Commission. 9 CHAIRPERSON: - whether the pocketbooks 10 that we have now been given were ones that you saw 11 initially, the seven you saw initially, or are they among 12 those that you saw later? 13 MR FISCHER: Chair, they're all amongst 14 those that were not disclosed by the SAPS. 15 CHAIRPERSON: Mr Ngalwana, that's 16 something I – not now, but I'd like an explanation on 17 later. We will give it an exhibit number in due course. I 18 think it's, Tsinyane is the one pocketbook that I have in 19 my hand which certainly contains an entry which is 20 relevant, and if the story originally was there were only 21 seven that contained relevant entries and this was not one 22 of them, that's something that calls for explanation. 23 Don't give it now. Obviously I don't expect you to be able 24 to give it now, and there may be other entries in the 25 pocketbooks that weren't originally shown which were seen</p>
<p style="text-align: right;">Page 12453</p> <p>1 before the Commission. 2 CHAIRPERSON: Mr Fischer? 3 MR FISCHER: Thank you, Chair. Chair, I 4 thought it appropriate to explain the derivation of the 5 pocketbooks that you have in front of you now. Chair, you 6 recall that since January of this year the Human Rights 7 Commission has been requesting sight of all the pocketbooks 8 of members present on the 13th and 16th of August. In May 9 or June of this year, I can't recall exactly when, the SAPS 10 submitted seven pocketbook entries purporting to be all 11 those that were relevant, but on the Commission's urging 12 the Human Rights Commission was permitted to inspect all 13 remaining pocketbooks. That inspection is still ongoing. 14 So far the Human Rights Commission has reviewed around 350 15 pocketbooks. There are around 200 outstanding that have 16 yet to be provided by the SAPS. As such the Human Rights 17 Commission has not completed its review of pocketbooks and 18 is nowhere near completing that review. Those pocketbooks 19 that are in front of the Commission today derive from the 20 partial review that the Human Rights Commission has been 21 able to do so far. 22 Adv Gumbi approached the Human Rights Commission 23 on Tuesday to ask whether there were any specific 24 pocketbooks relating to the 13th that might be directly 25 relevant to his line of cross-examination. The Human</p>	<p style="text-align: right;">Page 12455</p> <p>1 later, which are relevant, which should have been disclosed 2 initially when asked for, and the fact that they weren't 3 prima facie is a serious matter which requires explanation. 4 I don't expect you to give it now. You have to take 5 instruction, but it must be quite clear that we expect the 6 police to honour the commitment they made when the 7 Commission was appointed, to give full cooperation, and 8 that means disclosing all documents that are relevant, that 9 are asked for. Right? Thank you. Carry on, Mr Gumbi. 10 MR GUMBI: Thank you very much – 11 CHAIRPERSON: Adv Hemraj reminds me that 12 at some stage down the process that you were talking about, 13 when Human Rights Commission raised the question with the 14 Commission, I spoke to Adv Semanya, who immediately 15 undertook to make all the pocketbooks available, and that, 16 as far as I understand, that undertaking he gave has been 17 honoured. My remarks to Mr Ngalwana relate to what you 18 said, that prior to that when you asked for pocketbooks 19 that were relevant, you were only given seven, and if what 20 you say is correct, that there were other pocketbooks that 21 contained relevant entries which were not shown, which 22 should have been shown, that's the matter in respect of 23 which I want an explanation. But anyway, obviously Mr 24 Ngalwana can't deal with it now. He'll deal with it when 25 he's taken instruction.</p>

<p style="text-align: right;">Page 12456</p> <p>1 MR FISCHER: Chair, I should clarify one 2 point; the Human Rights Commission has been given access to 3 all the pocketbooks that are in the possession of the SAPS 4 legal team. The SAPS legal team are not in possession of 5 all the pocketbooks of the members on the day, and my 6 understanding is that they're doing everything in their 7 power to get access to all of those pocketbooks. So 8 there's no criticism at all about what the SAPS have done 9 with the pocketbooks that are in their possession. It's 10 also not quite right to – 11 CHAIRPERSON: This would be the SAPS 12 legal team? 13 MR FISCHER: SAPS legal team. 14 CHAIRPERSON: Yes, no my comments weren't 15 directed in any way at the SAPS legal team. I have no 16 doubt that Mr Semenya saw to it that the undertaking he 17 gave would be implemented, no difficulty, but if what you 18 say is correct, that initially when you asked for 19 pocketbooks that were relevant and you were only shown 20 seven, and there are obviously others that contain relevant 21 entries that weren't shown, that is something prima facie 22 which calls for explanation, but I'm sure Mr Ngalwana will 23 give it to us in due course. Can we now carry on with the 24 cross-examination? 25 MR GUMBI: Thanks very much, Chairperson.</p>	<p style="text-align: right;">Page 12458</p> <p>1 that are relevant, are these seven, and seven were given, 2 and it turns out there were others later, that's what I 3 want the explanation on. Of course the basic assumption on 4 which my query is based is the one I mentioned, that your 5 clients were asked for pocketbook entries that were 6 relevant and only produced seven. But anyway, that's a 7 matter you'll go into before you give the explanation in 8 due course. 9 MR NGALWANA: And that's not the issue I 10 was addressing myself on just now – 11 CHAIRPERSON: No, no, no, no, you were 12 dealing with a different question. You were dealing with 13 the authenticity point, which as you correctly say, you're 14 not going to cause any difficulties at this stage; you will 15 obviously wish it to be shown to you later that the 16 pocketbooks are correctly identified and the notes at the 17 top of them indicating the owner of the pocketbook are in 18 fact right, but we don't have to waste time on that in the 19 Commission here. 20 MR NGALWANA: And so as to make it clear, 21 Chair, that I haven't caught my learned friend by surprise, 22 I did discuss this issue with him before we resumed. 23 CHAIRPERSON: Are you now ready after 24 that – 25 MR GUMBI: Yes, Chairperson, I'm ready to</p>
<p style="text-align: right;">Page 12457</p> <p>1 General, before I could even – 2 MR NGALWANA: No, no, sorry, Chair, just 3 one observation, not about the discussion that has now just 4 preceded, but in relation to the copies of what purports to 5 be pocketbooks that are about to be put to the General in 6 cross-examination, I'm not going to stop, or object to my 7 learned friend cross-examining on them, but I want to place 8 it on record that there is no agreement that the documents 9 that are placed before the Commission and in cross- 10 examination to the witness are what they purport to be. We 11 gave them the originals of the pocketbooks, but there is no 12 telling that for example this NM Tsinyane, what is alleged 13 to be Tsinyane's pocketbook is indeed Tsinyane's 14 pocketbook. There is a way of presenting documentary 15 evidence. This is not it. You can't just write a name of 16 a person at the top right-hand corner of a page and say 17 that is what, it is what it purports to be. But subject to 18 that disclaimer, Chair, I'll allow him to – we're happy for 19 him to cross-examine, but once we have checked these things 20 we may well raise the point and – 21 CHAIRPERSON: Yes, I understand you've 22 reserved your position in that regard, and of course just 23 to be absolutely clear, what I was talking about earlier 24 was if it's correct that the response the Human Rights 25 Commission got was the only pocketbooks that are, entries</p>	<p style="text-align: right;">Page 12459</p> <p>1 proceed – 2 CHAIRPERSON: - preliminary discussion to 3 proceed with your – 4 MR GUMBI: Yes. 5 CHAIRPERSON: Now what's the first 6 document you're going to refer to? Is it the one that – 7 MR GUMBI: The first pocketbook I'm going 8 put to the witness, Chairperson, is that one of Mativa, LM, 9 NI Pretoria – 10 CHAIRPERSON: Right, so it's the 11 pocketbook of Mativa, and that will be exhibit HHH24, Adv 12 Pillay? 13 MS PILLAY: That's correct, Chair. 14 MR NGALWANA: Before we do that, Chair, 15 may I also enquire of my learned friend whether he's going 16 to call this person as a witness, so we can decide whether 17 we want to cross-examine him? 18 CHAIRPERSON: Well, he may decide to call 19 him or he may suggest that you should call him in the sense 20 he's produced a document in his handwriting which contains 21 certain statements and prima facie if you want the witness 22 to come and say he didn't say all those things, then maybe 23 you must call him. Remember, we're not bound by the strict 24 rules of evidence here. Mr Gumbi, you've heard the 25 question that you're being asked.</p>

<p style="text-align: right;">Page 12460</p> <p>1 MR GUMBI: Yes, I will take instruction 2 on that one, Chairperson. 3 CHAIRPERSON: Do you know what the rank 4 is of Mr Mativa? 5 MR GUMBI: It's written here CST, I think 6 he's a constable – 7 CHAIRPERSON: Thank you, alright. So 8 it's a pocketbook, I won't put in purportedly, but, 9 although Mr Ngalwana may want me to say that, but I will 10 describe it as the pocketbook of Constable Mativa. It's 11 actually an extract from, isn't it? Extract from the 12 pocketbook of Constable Mativa, but this is on the 13 understanding that you will establish that that is indeed 14 his pocketbook – 15 MR GUMBI: Yes, Chairperson. 16 CHAIRPERSON: Otherwise we may have to 17 change the description of the exhibit if it turns out that 18 that's not correct. 19 MR GUMBI: Yes, Chairperson. We have 20 another one, NM Tsinyane, it's written at the top there, 21 Chairperson. It's Tsinyane – 22 CHAIRPERSON: [Microphone off, inaudible] 23 so that's the next one. 24 MR GUMBI: Yes. 25 CHAIRPERSON: You want that to be HHH25?</p>	<p style="text-align: right;">Page 12462</p> <p>1 MR GUMBI: Yes. 2 CHAIRPERSON: Alright. 3 MR GUMBI: Then the last one is that one 4 written Captain Mahalenle. 5 CHAIRPERSON: So I'm sorry, I've now 6 finally caught up with you. What is 27 going to be? 7 MR GUMBI: Captain Mahalenle. 8 CHAIRPERSON: Oh, Captain. Ma-ha - 9 MR GUMBI: Yes, Chairperson. 10 CHAIRPERSON: Just to make sure that 11 we're all following, I've marked the – Adv Hemraj has 12 pointed out that the ones of the officers are diaries, and 13 I think it was explained to us previously in the course of 14 the evidence that officers have diaries and members of the 15 force who are not officers have pocketbooks. So exhibit 16 HHH24 is extract from the pocketbook of Constable Mativa. 17 MR GUMBI: Yes. 18 CHAIRPERSON: Exhibit HHH25, extract from 19 the diary of Captain Tsinyane. Exhibit HHH26, extract from 20 the diary of Lieutenant-Colonel Merafe, and exhibit HHH27, 21 extract from the diary of Captain Mahalenle. 22 MR GUMBI: Yes, thanks very much, 23 Chairperson. General, before we could even deal with this 24 aspect, you testified before this Commission that – or if 25 may I rephrase it. It's an evidence before this Commission</p>
<p style="text-align: right;">Page 12461</p> <p>1 MR GUMBI: HHH25. 2 CHAIRPERSON: [Microphone off, 3 inaudible]. 4 MR GUMBI: Yes, Chairperson. 5 CHAIRPERSON: Is he also a constable? 6 MR GUMBI: I'm not sure, it is not 7 written anywhere whether he's a constable or not. 8 CHAIRPERSON: [Microphone off, inaudible] 9 I'll describe it as the pocketbook of Constable Tsinyane. 10 If I'm wrong, we'll give him the necessary promotion when 11 the correct information is available. 12 MR GUMBI: Correct, Chairperson. 13 MS PILLAY: Chair, the document reflects 14 him as Captain Tsinyane. 15 MR GUMBI: Captain. 16 CHAIRPERSON: [Microphone off, inaudible] 17 captain. Are you just relying on those two for the moment? 18 MR GUMBI: Yes, Chairperson. If we can 19 maybe mark all of them, Chairperson, I think for a sake of 20 smooth progress. We have another one – 21 CHAIRPERSON: [Microphone off, inaudible] 22 MR GUMBI: We have another one written OJ 23 Merafe, Rustenburg POP. 24 CHAIRPERSON: That will be HHH26, extract 25 from pocketbook of – he's a Lieutenant-Colonel, isn't he?</p>	<p style="text-align: right;">Page 12463</p> <p>1 that the Warrant-Officer Monene before he was killed by 2 those marchers, he was inside the Nyala. He alighted from 3 the Nyala. 4 MAJOR-GENERAL MPEMBE: Chairperson, there 5 was a video that was shown there. Maybe it could be shown 6 again because that was also a video that was shown where 7 three members who alighted the Nyala. 8 CHAIRPERSON: We saw that video. Do we 9 have to see it again? 10 MAJOR-GENERAL MPEMBE: I'm just answering 11 the question. 12 CHAIRPERSON: Yes, yes. 13 MR GUMBI: Ja, but my question is saying 14 that before they were attacked they were inside the Nyala, 15 they alighted from the Nyala, then they were attacked by – 16 MAJOR-GENERAL MPEMBE: Chairperson, I do 17 not understand the question. 18 MR GUMBI: Let us deal with Lieutenant 19 Baloyi. You saw that video footage, you saw Lieutenant 20 Baloyi alighting from a Nyala before he was attacked. 21 MAJOR-GENERAL MPEMBE: I'm sorry, 22 Chairperson, should I answer Lieutenant Baloyi or Lepaaku? 23 I'm getting confused. 24 CHAIRPERSON: The problem is that you 25 have been referring in your introductory remarks to various</p>

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1 people. Just before we took the adjournment you talked
2 about Lepaaku. Now you're talking about Baloyi. You also
3 talked about Monene too, I think.

4 MR GUMBI: Yes, Chairperson.

5 CHAIRPERSON: So I think in fairness to
6 the witness, I think you should make it clear to him which
7 particular person you were talking about so he can then
8 concentrate on that person in his answer. And you talked
9 now about Lieutenant Baloyi.

10 MR GUMBI: I do apologise for that
11 confusion, Chairperson. I understand it. Can I start with
12 Lieutenant Baloyi?

13 CHAIRPERSON: Yes.

14 MR GUMBI: Then I'll move on to the other
15 witnesses.

16 CHAIRPERSON: Alright, it's your cross-
17 examination. I won't tell you what to do.

18 MR GUMBI: Yes.

19 CHAIRPERSON: But as long as it's clear.
20 You're now going to be asked questions about Lieutenant
21 Baloyi and when he moves on to talk about somebody else
22 he'll tell you he's talking about somebody else and who
23 that person is. Okay?

24 MR GUMBI: General, you saw the video
25 footage that was played before this Commission. We saw the

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1 Nyala, we saw Lieutenant Baloyi alighting from that Nyala.
2 Thereafter he was attacked by marchers there. Do you
3 confirm that.

4 [12:20] MAJOR-GENERAL MPEMBE: Chairperson,
5 Lieutenant Baloyi was not immediately attacked when he
6 alerted the Nyala, but it's true that while they were still
7 out and there were so many other actions that happened
8 before the attack could take place. I'm not in a position
9 to say yes or no, but the issue is when he alerted the
10 Nyala, he was not immediately attacked. This is only what
11 I wanted to indicate.

12 CHAIRPERSON: In the statement he
13 actually walked some distance from the Nyala and it was
14 only when the attack started and he tried to get back to
15 the Nyala, when he got to the Nyala, there were other
16 people there ahead of him, but that's the statement that's
17 before us that he's made. So certainly his own case
18 doesn't seem to be that he alighted from the Nyala and was
19 immediately attacked, isn't that right.

20 MAJOR-GENERAL MPEMBE: I understand that.

21 CHAIRPERSON: Am I correct?

22 MAJOR-GENERAL MPEMBE: Yes.

23 CHAIRPERSON: You just want confirmation
24 of the fact that he was originally in an Nyala, he alighted
25 from the Nyala and sometime thereafter, what exactly the

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1 time is he's attacked. Is that all you want confirmation
2 of? I take it you won't have problem with that, General,
3 that correct, isn't it?

4 MAJOR-GENERAL MPEMBE: Correct,
5 Chairperson.

6 MR GUMBI: The same apply with the late
7 Warrant-Officers Monene and Lepaaku?

8 MAJOR-GENERAL MPEMBE: Chairperson, I'm
9 requesting again, with humbleness, Lieutenant Baloyi, I've
10 said it many times, he was together with Warrant-Officer
11 Monene. Warrant-Officer Lepaaku was not there. It's
12 automatically in a different Nyala. May I deal with the
13 issues of Lieutenant Baloyi and Warrant-Officer –

14 CHAIRPERSON: Ja, you can do that, but I
15 think the point being made is a simple one, that all three
16 of those persons were in Nyalas. Lepaaku and Monene in
17 one, is that right? Oh, sorry, I've got it right now.
18 Baloyi - in fact, this is with the other question. Baloyi
19 and Monene were in one Nyala and they both got out and they
20 were subsequently attacked, and Lepaaku was in another
21 Nyala and he also got out and was attacked as well, having
22 alighted from another Nyala. That's correct, isn't it.

23 MAJOR-GENERAL MPEMBE: Correct,
24 Chairperson.

25 CHAIRPERSON: Now, what the witness says,

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1 he would appreciate if you firstly asked him about -
2 consistently about one of the members before you move on to
3 the other one, because it's a bit confusing. So if you'll
4 – I think that's a reasonable request. So you've
5 established the facts that you wanted, all three of them
6 were in Nyalas, two in one and one in another, all three of
7 them alighted, all three of them were thereafter attacked,
8 presumably before they could get back to the Nyalas. Is
9 that right?

10 MR GUMBI: Yes, thanks very much,
11 Chairperson, for explaining that.

12 CHAIRPERSON: I don't think the General -

13 MR GUMBI: Yes. Thanks, Chairperson, I
14 appreciate that. That's my point. Then it is your
15 evidence in this commission, General, that you did not
16 instruct any of the members to alight from the Nyala?

17 MAJOR-GENERAL MPEMBE: Correct,
18 Chairperson.

19 CHAIRPERSON: You didn't give them any
20 instructions at all, as far as I understand, according to
21 your evidence, is that correct?

22 MAJOR-GENERAL MPEMBE: Chairperson?

23 CHAIRPERSON: Once they went off in
24 Nyalas, you didn't give them, as far as I understand your
25 evidence, you didn't give them any instructions at all, is

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1 that right?

2 MAJOR-GENERAL MPEMBE: Correct,

3 Chairperson.

4 MR GUMBI: Let us focus on this aspect of

5 issuing of instruction on the 13th August 2012 along the

6 railway line. I wanted to confront you with a version of

7 other police officers who were there, and some of the

8 versions they are extracted from pocketbook. Then I will

9 invite you, General, to comment on that one.

10 MAJOR-GENERAL MPEMBE: May I again

11 request that I need to be sure whether are we now on the

12 scene or I'm back at the railway line? Because now it's

13 really confusing me.

14 CHAIRPERSON: Yes. I think point raised

15 by the General is a valid one, are you going to talk to him

16 about the instructions he gave at the railway line?

17 Remember, where he told them to escort the people to the

18 koppie. Or are you going to talk to him about instructions

19 which you say he gave thereafter? I think he's entitled to

20 know the answer to that.

21 MR GUMBI: The instruction he gave before

22 there was this conflict between –

23 CHAIRPERSON: That's an ambiguous answer.

24 He gave instructions - it's common cause, at the railway

25 line when they started walking away.

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1 MR GUMBI: Yes.

2 CHAIRPERSON: The instruction was let

3 them go, escort them. That's his evidence. But as I

4 understand it, the issue in debate is whether he gave

5 subsequent instructions as they were proceeding towards the

6 koppie. Is that correct?

7 MR GUMBI: Yes.

8 CHAIRPERSON: Right. Now, that's what

9 you want to ask him about. You're not asking about

10 instructions he gave when they set off from near the

11 railway line, you want to ask him about what happened

12 sometime thereafter. Is that correct?

13 MR GUMBI: Yes. If I do have a version,

14 I will put it to him.

15 CHAIRPERSON: Do you understand that,

16 General?

17 MAJOR-GENERAL MPEMBE: Correct,

18 Chairperson.

19 CHAIRPERSON: Now, you said something in

20 a pocketbook. Now, as we've seen, we've got three diaries

21 before us at the moment and one pocketbook. The only

22 pocketbook is exhibit HHH24.

23 MR GUMBI: Can I focus on HHH24,

24 Chairperson? The pocketbook from Constable Mativa LM is a

25 Pretoria NIU member. Can you go to page 4, General, of

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1 that pocketbook? Can I read it on record what he said on

2 his pocketbook? At the bottom there where it starts,

3 "General instructed us to follow them, escort them to the

4 place where they were heading to. While escorting, then

5 the General again instructed Nyalas to block the group in

6 front. Then the group started to fight the police with the

7 pangas and the police die at the scene. Others were

8 injured." Have you read that, General?

9 MAJOR-GENERAL MPEMBE: I note, and I've

10 read it.

11 MR GUMBI: What is your comment on this

12 allegation by Constable Mativa?

13 MAJOR-GENERAL MPEMBE: Chairperson,

14 giving instruction, I don't know how the constable is

15 saying I gave the instruction, whether by radio or by what,

16 because at that time they were already escorting. And if

17 it's by radio, surely everybody could be saying we heard

18 the General giving the instruction.

19 CHAIRPERSON: The argument you're giving

20 us, the question is did you give such an instruction?

21 MAJOR-GENERAL MPEMBE: Chairperson, I

22 already said I never gave an instruction when the people

23 were going.

24 CHAIRPERSON: So you say the constable is

25 wrong in the entry he made in the pocketbook to which

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1 counsel has referred to?

2 MAJOR-GENERAL MPEMBE: That's why I

3 wanted also to know to say how did I gave that instruction?

4 COMMISSIONER HEMRAJ: Chair, just for the

5 purposes of the record, Constable Mativa is a female

6 officer.

7 CHAIRPERSON: You raised a point which I

8 don't think Mr Gumbi can answer. If the constable comes,

9 you can ask her that, but you say you didn't give such an

10 instruction either by radio or otherwise, but I take it

11 implicitly what you're saying is that if you had given an

12 instruction to the Nyalas, you would have had to have given

13 it by radio, otherwise they wouldn't have heard it. Is

14 that right? Am I summarising your evidence correctly.

15 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

16 I also wanted to add to say because at the time also and

17 the key word is - so if I did brief personally the

18 constable, the key word should have been briefing,

19 underlined, by Major-General Mpeembe, and this was precisely

20 the briefing. So that's why I'm saying the whole entry, I

21 don't know under what circumstances the entry was made.

22 Maybe if I may, it might also be brought to me in what

23 circumstances. And the time indicates 10 o'clock and maybe

24 you can go back to the videos to check at what time did I

25 address the officers, at what time did I address the

<p style="text-align: right;">Page 12472</p> <p>1 members at the railway line?</p> <p>2 CHAIRPERSON: No, General, I did think we</p> <p>3 need to waste time on that. I think that's a bad point.</p> <p>4 There's general entry in the pocketbook starting at the top</p> <p>5 of page 4 at 10 o'clock, and she's giving an account, as I</p> <p>6 read it, or purporting to give an account to what happened</p> <p>7 thereafter. The next entry is 21h00, you see. So she's</p> <p>8 telling us what happened from 10 o'clock till 9 o'clock in</p> <p>9 the evening. So that's not a good point you're making.</p> <p>10 The point you make is that she, in relation to the</p> <p>11 instruction, she says in her entry that you instructed the</p> <p>12 Nyalas. She doesn't pretend that the instruction was given</p> <p>13 to her, she says you instructed the Nyalas to block the</p> <p>14 group at the front. You say you could only have given that</p> <p>15 instruction – you say you didn't give the instruction, but</p> <p>16 you say that if you had given it, you would have had to</p> <p>17 have given it by radio otherwise the Nyalas wouldn't have</p> <p>18 heard you, and then other people would have heard you as</p> <p>19 well. That's your point, isn't it?</p> <p>20 MAJOR-GENERAL MPEMBE: Correct,</p> <p>21 Chairperson.</p> <p>22 CHAIRPERSON: Alright, can we move on?</p> <p>23 MAJOR-GENERAL MPEMBE: Chairperson, also</p> <p>24 what I am indicating here is that she doesn't say she was</p> <p>25 reported for me to have said that. She talks as if she</p>	<p style="text-align: right;">Page 12474</p> <p>1 o'clock. Some of them must have taken place, that's the</p> <p>2 only point I was making. But anyway it helps for you and</p> <p>3 me to have arguments, we must concentrate on the cross-</p> <p>4 examiner and the witness, and if you have anything to say,</p> <p>5 confine them to objections and we carry on.</p> <p>6 MR GUMBI: Can I also refer to another</p> <p>7 pocketbook, General? It was marked as exhibit HHH27 before</p> <p>8 this commission.</p> <p>9 CHAIRPERSON: Diary. I've explained to</p> <p>10 you the evidence was – think one of the first witnesses</p> <p>11 gave the evidence, Lieutenant-General Botha. Officers have</p> <p>12 diaries, ordinary members have pocketbooks.</p> <p>13 MR GUMBI: Yes, Sir.</p> <p>14 CHAIRPERSON: And what you're now</p> <p>15 referring to is the diary of Captain Mahalenle.</p> <p>16 MR GUMBI: Yes, Chairperson, thank you.</p> <p>17 Can you go to the page written 13 Monday, 13 August,</p> <p>18 Monday? When you go down there at about 9 o'clock there.</p> <p>19 I do understand the handwriting is not clear here, but I</p> <p>20 can I read it to you, General?</p> <p>21 CHAIRPERSON: It's not at 9 o'clock, I</p> <p>22 think it's just opposite 9 o'clock on the page.</p> <p>23 MR GUMBI: Yes, Chairperson, thank you.</p> <p>24 Can I read what she said? "On escorting the miners to the</p> <p>25 koppie, I'm sure, with their dangerous weapon, General</p>
<p style="text-align: right;">Page 12473</p> <p>1 heard me giving her the Nyalas the instruction.</p> <p>2 CHAIRPERSON: Ja, well of course, if you</p> <p>3 had given it over the radio, she would have heard it,</p> <p>4 wouldn't she?</p> <p>5 MAJOR-GENERAL MPEMBE: Correct,</p> <p>6 Chairperson.</p> <p>7 CHAIRPERSON: Okay. Your point is that</p> <p>8 she's not the only one who would have heard it, everyone</p> <p>9 else would have heard it as well, but it's not a criticism</p> <p>10 of her to say that she heard the instruction, if in fact</p> <p>11 she's correct and you gave it to over the radio, but you</p> <p>12 deny that, so there's the conflict between the two of you.</p> <p>13 MR NGALWANA: Chair, may I be so bold as</p> <p>14 to say that the Chair was criticising the explanation that</p> <p>15 the witness was giving as regards the time period to which</p> <p>16 the entry in the pocketbook relates. Of course, the Chair</p> <p>17 himself doesn't know whether that relates to the events of</p> <p>18 that day between 10:00 and 9 o'clock in the evening. May I</p> <p>19 just, Chair, just round up the point? It seems to me the</p> <p>20 proper way to arrive at precisely when this was done was</p> <p>21 for the person who made the entries to tell us. The</p> <p>22 chairperson cannot assume that it relates to entries from</p> <p>23 10:00 to 9:00 in the evening.</p> <p>24 CHAIRPERSON: Well, all those incidents</p> <p>25 recorded there couldn't have taken place precisely at 10</p>	<p style="text-align: right;">Page 12475</p> <p>1 Mpembe ordered that the group must be stopped and</p> <p>2 disarmed." Then he is saying one CS gas was a shot with a</p> <p>3 stun grenade followed by the –</p> <p>4 CHAIRPERSON: Look at the word, one CS</p> <p>5 Gas.</p> <p>6 MR GUMBI: CS Gas, yes, Chairperson,</p> <p>7 which shot with stoppage or followed or stun grenade – I'm</p> <p>8 not clear about that – followed by the stun grenade.</p> <p>9 MAJOR-GENERAL MPEMBE: Yes.</p> <p>10 MR GUMBI: What is your comment, General,</p> <p>11 on this version?</p> <p>12 MAJOR-GENERAL MPEMBE: Chairperson, I did</p> <p>13 give an answer to say I did not order anybody to use even a</p> <p>14 CS Gas, it's on record. And I did not order that people</p> <p>15 should be stopped and I also indicated in my statement,</p> <p>16 supplementary statement, and where I had differences</p> <p>17 Colonel Merafe. And I also spoke about situational</p> <p>18 appropriateness to this commission.</p> <p>19 CHAIRPERSON: You're repeating what you</p> <p>20 said before. You gave that evidence. You denied that you</p> <p>21 gave an order as the people were proceeding and you denied</p> <p>22 that you gave any order of any kind, actually, as they were</p> <p>23 proceeding. That's the evidence you gave. It's been put</p> <p>24 to you now that the captain in his diary has recorded</p> <p>25 something different and you were asked to comment and your</p>

<p style="text-align: right;">Page 12476</p> <p>1 comment is, I take it, you persist in your denial. Is that 2 correct?</p> <p>3 MAJOR-GENERAL MPEMBE: Correct, 4 Chairperson, in line with my evidence.</p> <p>5 MR GUMBI: Can we move on, General, to 6 another one, to another diary? HHH25. It's Captain 7 Tsinyane. It's paragraph – can you go to the page written, 8 13, Monday? There is time written there, 12:20. Do you 9 see that, General?</p> <p>10 MAJOR-GENERAL MPEMBE: I don't see the 11 time. Maybe it's because of the photostatting.</p> <p>12 CHAIRPERSON: Sorry, I think he's 13 referring the 12:20. Never mind the printed times, there's 14 a handwritten time 12:20, and that starts, "Arrival at the 15 place," and then it goes on. Do you see?</p> <p>16 MAJOR-GENERAL MPEMBE: Yes.</p> <p>17 CHAIRPERSON: And then five lines down at 18 the end of the line – or the five lines down we see, 19 "Started to move in the open veld."</p> <p>20 MAJOR-GENERAL MPEMBE: Yes.</p> <p>21 CHAIRPERSON: "General Mpembe instructed 22 the members to stop them." That's the passage counsel is 23 referring to.</p> <p>24 MAJOR-GENERAL MPEMBE: Yes, I see it, 25 Chairperson.</p>	<p style="text-align: right;">Page 12478</p> <p>1 regard to the statement of Baloyi at page 3 of 5, in 2 paragraph 7, he doesn't say anything about the General 3 giving them orders to stop people, and shoot stun grenades. 4 In fact, he says "I advised the General that stun grenades 5 should be used to disperse them." He, Baloyi, and I have 6 dealt with this in-chief, and the General denied it. So 7 now, my learned friend is putting a totally different 8 version from someone else, so he needs to nail his colours 9 to the mast, with respect.</p> <p>10 CHAIRPERSON: Mr – I don't think your 11 point is correct, you are correct when you say that 12 Lieutenant Baloyi doesn't say that the General gave 13 instructions, but he also doesn't say he didn't give 14 instructions. He says that he was in an Nyala and he says 15 he got out of the Nyala and he says what happened 16 thereafter. If an order had been given as the Captain 17 alleged in his diary, it doesn't follow that Lieutenant 18 Baloyi would have heard it. That's the point, surely. The 19 interesting questions arise regarding the fact that we are 20 not bound by the sequence of evidence. Interesting 21 questions may arise later, as to whether he could be 22 expected to call the Captain or you should call the Captain 23 to explain the entry in the diary, but these are matters we 24 don't have to decide yet. I will allow him to proceed with 25 the question.</p>
<p style="text-align: right;">Page 12477</p> <p>1 CHAIRPERSON: I have difficulty in 2 reading the next sentence, but hopefully someone will read 3 it for me.</p> <p>4 MR GUMBI: Yes, can I read the sentence 5 again on record, Chairperson? Captain Tsinyane is saying 6 that General Mpembe instructed the members to stop them. 7 What is your comment, General?</p> <p>8 [12:39] MAJOR-GENERAL MPEMBE: Chairperson, as 9 I've said, I did not instruct any member, but in the same 10 diary, at 11:50 I see the Captain says that myself and the 11 Provincial Commissioner, we personally briefed him, and I 12 don't remember me and myself, General Mbombo, briefing this 13 specific officer, only him.</p> <p>14 MR GUMBI: So in essence, General, you 15 deny that you issued instructions to stop the miners who 16 were marching?</p> <p>17 MAJOR-GENERAL MPEMBE: Correct, 18 Chairperson.</p> <p>19 MR GUMBI: Let's move again to another 20 diary –</p> <p>21 MR NGALWANA: Chair, with respect, I need 22 to know what version our learned friend is advancing, 23 because his own witness, Captain Baloyi says something 24 totally different to what he is putting to the witness, as 25 arising from what other officers have said. If you have</p>	<p style="text-align: right;">Page 12479</p> <p>1 MR NGALWANA: Yes, Chairperson, I must 2 also clarify this, by not putting the version of Baloyi, 3 with respect –</p> <p>4 CHAIRPERSON: I found in your favour, 5 don't deliver -</p> <p>6 MR NGALWANA: Chair, with respect, I am 7 making a totally different point. All I am saying, my 8 learned friend's witness and I shan't belabour the point, I 9 will bow by the Commission's ruling on this, I just want to 10 make this one last point, just to make sure that I am clear 11 and I am heard clearly, Chair, with respect, Captain Baloyi 12 says that he advised the General to shoot stun grenade. My 13 learned friend is putting a version from other officers 14 that says, the General ordered them to shoot CS gas and to 15 stop them, to stop the marchers. These are two conflicting 16 versions. He can't have his witness saying one thing, and 17 then put to the witness in cross-examination something that 18 is totally different from what his own witness says. 19 That's all I am saying.</p> <p>20 CHAIRPERSON: There's not a conflict. 21 What Baloyi says is, "before I went off in the Nyala, I 22 spoke to the General, and I said, look here, we should use 23 stun grenades. The General didn't agree. I then took a 24 stun grenade on my own." What is now being put is that 25 after the General had not agreed with Lieutenant Baloyi, at</p>

<p style="text-align: right;">Page 12480</p> <p>1 a later stage the General then apparently changed his mind. 2 Now, counsel is leading up, I suspect, to another document 3 that he gave us which is a report on mine unrest at Lonmin, 4 Marikana, August 2012, the 141 page document. He is going 5 to refer us I think to page 35, but let's wait for him to 6 get there. But it's clear that what he is putting is not 7 in conflict with his client's own version but it deals with 8 something that happened after what his client described. 9 Mr Gumbi, the point made by my colleague, Adv Tokota, is, 10 the witness is consistently denying these statements, so I 11 don't know if it helps us to just hammer them, I understand 12 you must put the various statements in the diaries in the 13 pocket book and so on, but it seems clear what the 14 witnesses answer is. So I don't think it's necessary you 15 have got to hammer every time, it looks as if he is just 16 going to go on denying. Whether the denial is justified or 17 not, is a matter we have to decide in due course but – 18 MR GUMBI: Yes, Chairperson, I think 19 maybe the best way is read on record all these extracts 20 then we will allow the General to comment on – 21 CHAIRPERSON: Give him a chance to 22 comment. 23 MR GUMBI: Yes. 24 CHAIRPERSON: But just put them to him, 25 you've put to him what you've done so far, carry on with</p>	<p style="text-align: right;">Page 12482</p> <p>1 COMMISSIONER HEMRAJ: So what are you 2 putting to him? 3 MR GUMBI: Yes, thanks very much 4 Commissioner. Thank you very much, if I can elaborate on 5 that one. I think the witness had a certain question. 6 General, Merafe is saying "Police tried to disarm them." 7 Was there any instruction to disarm the protesters? 8 CHAIRPERSON: He didn't say there was an 9 instruction. 10 MR GUMBI: Yes. 11 CHAIRPERSON: He simply said what they 12 were trying to do. The question arises, what were they up 13 to? If, without an instruction from him, someone fired 14 teargas and someone used a stun grenade, what were they 15 trying to do? But the important point is, Merafe's diary 16 doesn't indicate that this witness gave any instruction. 17 MR GUMBI: Yes, Chairperson, and - 18 CHAIRPERSON: Or even that anybody else 19 gave an instruction. 20 MR GUMBI: Yes. 21 CHAIRPERSON: These people may have tried 22 to do this on their own without an instruction. 23 MR GUMBI: Yes, Chairperson. 24 CHAIRPERSON: So I am not sure that that 25 document helps you.</p>
<p style="text-align: right;">Page 12481</p> <p>1 the other passages you rely on. 2 MR GUMBI: Yes. 3 CHAIRPERSON: Can give him a chance to 4 answer generally. Eventually, you can take some time with 5 the other document. 6 MR GUMBI: Yes. You also have another 7 diary, General, from Merafe, Rustenburg POP is written OJ 8 Merafe Rustenburg POP, is HHH26. Are you in possession of 9 that diary, General? 10 MAJOR-GENERAL MPEMBE: I have it, 11 Chairperson. 12 MR GUMBI: Go to the page with the title 13 13, Monday 2012. 14 MAJOR-GENERAL MPEMBE: Yes, I am there, 15 Chairperson. 16 MR GUMBI: Go to the bottom of that page, 17 I think the last paragraph. Merafe is saying, "Police 18 tried to disarm them. They attacked us." Do you see that? 19 Then we have again another document I will refer to you, I 20 don't think, Chairperson, it has been entered as an 21 exhibit, the Lonmin report compiled by – 22 COMMISSIONER HEMRAJ: Mr Gumbi, there's 23 nothing in this exhibit that refers to any order being 24 given by the witness. 25 MR GUMBI: Yes.</p>	<p style="text-align: right;">Page 12483</p> <p>1 MR GUMBI: Yes, Chairperson if, may I 2 rephrase my question because according to Merafe, police 3 tried disarm. So – 4 CHAIRPERSON: Sorry to interrupt, the 5 other point is of course he tried to disarm them too by 6 addressing them by the railway line. If he says, run two 7 things together, they've attempted to disarm by speaking to 8 them at the railway line. Thereafter there was this attack 9 by some of the strikers on the police with the consequences 10 that we know, that's the next important event which he 11 records in his diary. I don't see how that helps you. 12 MR GUMBI: Thank very much, Chairperson. 13 CHAIRPERSON: It seems to be mutual, 14 surely at best for – 15 MR GUMBI: Yes. I am prepared, I can 16 move to another – 17 CHAIRPERSON: I suggest you move on to 18 something - 19 MR GUMBI: Again, can I refer you to 20 another document, Chairperson, that's a report "Mine Unrest 21 at Lonmin Marikana August 2012." 22 CHAIRPERSON: It's a 141 page document. 23 MR GUMBI: Yes, it's 141 – 24 CHAIRPERSON: So that's we've got to give 25 an exhibit number to.</p>

<p style="text-align: right;">Page 12484</p> <p>1 MR GUMBI: Yes, we haven't given this one 2 an exhibit number. 3 CHAIRPERSON: Right, so that would be 4 HHH28, report, described as "Report Mine unrest at Lonmin 5 Marikana August 2012, exhibit HHH28. Have you seen this 6 document before? I know you only had a chance to read it 7 today, but have you seen this before? 8 MAJOR-GENERAL MPEMBE: I did read it, 9 Chairperson, yesterday. 10 CHAIRPERSON: But in August and September 11 last year, did you see this document? 12 MAJOR-GENERAL MPEMBE: I know the process 13 that bring about this document. 14 CHAIRPERSON: What is this document 15 actually? 16 MAJOR-GENERAL MPEMBE: Chairperson, as I 17 explained in my evidence, that it's a compilation of what 18 different people were saying from the different scenes, 19 what happened from 9th of August until the 16th of August, 20 when Colonel Visser was actually getting the information 21 from different people. I did testify on how that process 22 took place. 23 CHAIRPERSON: It does look, if one looks 24 at page 3, that Colonel Visser was somehow connected with 25 this document because his name appears at the top, with his</p>	<p style="text-align: right;">Page 12486</p> <p>1 protesters had been involved in looting shops owned by 2 foreigners and assaulting innocent bystanders who crossed 3 their paths. To protect the lives and properties of 4 innocent people the intention was to allow the protesters 5 to proceed to koppie 1 around the settlement." Now we come 6 to the paragraph you referred to. 7 MR GUMBI: Yes. 8 CHAIRPERSON: "To prevent them from 9 entering the settlement, the police used teargas and stun 10 grenades to disperse, discouraging them from their intended 11 path. Major General Mpeembe issued a command for stun and 12 teargas after which Warrant Officer Kuhn fired a shotgun CS 13 rifle grenade." And then it continues, in the next 14 paragraph, "The group turned around and with their 15 dangerous weapons charged the members of the police behind 16 them," and then he goes on about the deaths and the – the 17 deaths of the two people, Monene and Lepaaku. That's the 18 passage that you – 19 MR GUMBI: Yes. 20 CHAIRPERSON: - are putting to the 21 witness. 22 MAJOR-GENERAL MPEMBE: Chairperson, I am 23 on record to this Commission to say that at Potchefstroom, 24 and I did not hide it, that members said I gave the 25 command. And Chairperson, it's on record to this</p>
<p style="text-align: right;">Page 12485</p> <p>1 telephone number and the – he is the person to whom 2 enquiries have to be directed according to page 3 of the 3 document. 4 MAJOR-GENERAL MPEMBE: Correct, 5 Chairperson. 6 CHAIRPERSON: It is - September. 7 MAJOR-GENERAL MPEMBE: Correct, 8 Chairperson. 9 MR GUMBI: Then can you go to page 35 of 10 that document. That sentence, I mean the third paragraph, 11 General, are you in possession of that paragraph? Can I 12 read it to you, General? 13 CHAIRPERSON: I think for the benefit of 14 those people who are sitting in the auditorium without the 15 document in front of them, and those who were watching on 16 television, if you just put that paragraph, it's not going 17 to make any sense. So perhaps I should put the three 18 paragraphs. Should I read them? "Major-General Mpeembe 19 gave instructions to let the group proceed to koppie 1, but 20 the members of the police had to follow behind them and 21 prevent them from entering an informal settlement to the 22 left of their route to koppie 1 to prevent incidents of 23 looting and endangering innocent lives. On their way to 24 Koppie 1, some of the protesters changed direction towards 25 the informal settlement. Previous incidents indicated the</p>	<p style="text-align: right;">Page 12487</p> <p>1 Commission that Warrant Officer Kuhn who fired the shot, he 2 doesn't say it's General Mpeembe who gave me the command. 3 MR GUMBI: But General, this is an SAPS 4 document. It was compiled after Potchefstroom meeting, 5 will you agree with me? It is dated 5 September 2012. 6 MAJOR-GENERAL MPEMBE: Chairperson, I 7 have already testified to that one. 8 CHAIRPERSON: It is an official report, 9 it may be, it may be just a draft of some kind, but what it 10 indicates is the compiler, Lieutenant-Colonel Visser, 11 sorry, Colonel, Colonel Visser appears to have accepted for 12 the purposes of his report, the statements made by the 13 persons to whom the witness referred, who alleged that he'd 14 given the command which he told us, he denied it at 15 Potchefstroom. But Colonel Visser accepted, at least 16 provisionally, the person incorporating this report. 17 MAJOR-GENERAL MPEMBE: Yes. 18 CHAIRPERSON: Obviously Colonel Visser 19 wasn't there, he didn't know what happened. So he had to 20 choose in compiling his report between what the Major- 21 General said on the one hand, and these other persons he's 22 referred to on the other. And he appears to have accepted 23 for whatever reason, and for whatever purpose, what they 24 said. Can one take it further than that? We don't even 25 know whether Lieutenant – sorry, I've done it again, one</p>

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1 doesn't even know whether Colonel Visser accepted it, or
 2 simply recorded it as being what was said, but even if he
 3 did accept it, it doesn't matter, he's not the Commission,
 4 it's for us to decide which was correct. Maybe that the
 5 allegation is correct, it may not be. It's one of the
 6 matters we have to decide. But the fact that Colonel
 7 Visser put it in his report, it doesn't really add much to
 8 it, does it?
 9 MR GUMBI: Thanks very much, Chairperson.
 10 CHAIRPERSON: If you maybe ask another
 11 point, I suggest you do so at 01:30 after we've taken the
 12 lunch adjournment, unless you want to make a point now
 13 before we adjourn.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [13:51] CHAIRPERSON: The Commission resumes.
 16 There were discussions that we had in chambers during the
 17 various matters, which delayed us, that's why we didn't
 18 come back at the time that I indicated and I apologise for
 19 that. You're still under oath, Major-General.
 20 WILLIAM MPEMBE: s.u.o.
 21 CHAIRPERSON: Mr Gumbi, do you have any
 22 more questions to ask the witness?
 23 MR GUMBI: Yes, Chairperson, on this
 24 topic. Chairperson, there are other few statements that I
 25 wanted to put to the General that are outstanding, and we

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1 know the position of the General when he testified that he
 2 denied having issued any instruction.
 3 CHAIRPERSON: Mr Gumbi, we were given a
 4 number of statements.
 5 MR GUMBI: Yes.
 6 CHAIRPERSON: I just want to make sure
 7 that I've got them all. Let's mark them now.
 8 MR GUMBI: Yes, Chairperson.
 9 CHAIRPERSON: And if there are any points
 10 that are going to be raised by way of objection from the
 11 side of the SAPS, then we can deal with those as well
 12 before I mark them. Before we deal with the extra
 13 statements, we did deal earlier with exhibit HHH22, which
 14 is an SAPS15 document. It's marked on the police hard
 15 drive, for those who have the benefit of the police hard
 16 drive, 001020. Now when it was handed in there was a
 17 problem because the document, which is more accurately
 18 described as the rear side of the document, wasn't – or the
 19 reverse side, wasn't attached, and has that problem now
 20 been sorted out?
 21 MS PILLAY: Chair, we quickly established
 22 that the second page to that document is the rear side of
 23 what SAPS was referring to.
 24 MR GUMBI: Yes.
 25 CHAIRPERSON: It's always nice when

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1 counsel describes documents elegantly. Now there are two
 2 more like that, which I don't think we marked. There's one
 3 more I've been handed which I don't think we've marked,
 4 which is from the Rustenburg POP. It's 001045. I have in
 5 my hand a copy of both the front side as well as the
 6 reverse side of this document. Do you persist in wanting
 7 to use that document?
 8 MR GUMBI: Not now, Chairperson, because
 9 what I wanted to do, I wanted to confirm with the SAPS
 10 those document, then I can make use of it.
 11 CHAIRPERSON: [Microphone off, inaudible]
 12 I have got three documents in my hand [inaudible] are both
 13 the statement of Constable Benjamin –
 14 MR MAHLANGU: Microphone.
 15 CHAIRPERSON: - and statement of
 16 [inaudible].
 17 MR MAHLANGU: Chair, not on record.
 18 CHAIRPERSON: Oh, yes, I'm not on record.
 19 I've got three statements in my hand that were given to me.
 20 MR GUMBI: Yes, Chair.
 21 CHAIRPERSON: I don't know whether – I'm
 22 sure there are other documents as well. One is a statement
 23 by Constable Benjamin.
 24 MR GUMBI: Yes, Chairperson.
 25 CHAIRPERSON: Another is a statement by

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1 Constable, it looks like Mguye –
 2 MR GUMBI: Mguye, yes, Chairperson.
 3 CHAIRPERSON: It's M-G-U-Y-E. I'm not
 4 sure I'm pronouncing the name correctly.
 5 MR GUMBI: Yes, Chairperson.
 6 CHAIRPERSON: And the last is one by
 7 Constable, it looks like –
 8 MR GUMBI: Joseph Sexeweleya.
 9 CHAIRPERSON: Sexeweleya, thank you for
 10 now pronouncing it for me.
 11 MR GUMBI: Yes.
 12 CHAIRPERSON: Are those the three
 13 documents that you still want to refer to?
 14 MR GUMBI: Yes.
 15 CHAIRPERSON: Give me the order in which
 16 you want them and we'll mark them.
 17 MR GUMBI: Maybe if we can start with the
 18 statement of Constable Katlego Joseph Sexeweleya, we mark
 19 it –
 20 CHAIRPERSON: Right, we'll mark that one
 21 HHH29 and that's statement of Constable, how does he spell
 22 his name? His writing isn't too clear. It looks like S-E-
 23 X-E, is it? W-E-L-E-Y-A.
 24 MR GUMBI: L-E-Y-A, yes.
 25 CHAIRPERSON: Okay, that will be exhibit

<p style="text-align: right;">Page 12492</p> <p>1 HHH29. Then the next one?</p> <p>2 MR GUMBI: The next statement is that one</p> <p>3 of Constable Nkosana Shepeko Mguye.</p> <p>4 CHAIRPERSON: That is Mguye, Constable</p> <p>5 Mguye, is it?</p> <p>6 MR GUMBI: Yes.</p> <p>7 CHAIRPERSON: HHH30. Statement of</p> <p>8 Constable M-G-U-Y-E, and the next one HHH31, is –</p> <p>9 MR GUMBI: Statement of Constable Magume</p> <p>10 Benjamin.</p> <p>11 CHAIRPERSON: And that will be exhibit</p> <p>12 HHH31. They're all constables. Constable Benjamin.</p> <p>13 MR GUMBI: Yes.</p> <p>14 CHAIRPERSON: Alright, so we've got them</p> <p>15 in the order in which you –</p> <p>16 MR GUMBI: Yes, Chairperson –</p> <p>17 CHAIRPERSON: - wish to refer to them.</p> <p>18 MR GUMBI: We do have another one –</p> <p>19 CHAIRPERSON: Hang on a second. Hang on</p> <p>20 a second.</p> <p>21 MR GUMBI: Okay.</p> <p>22 CHAIRPERSON: Yes, the key passage in</p> <p>23 exhibit HHH29 appears to be at the foot page 1. Is that</p> <p>24 right? And the last line is missing on the photostat I've</p> <p>25 got.</p>	<p style="text-align: right;">Page 12494</p> <p>1 CHAIRPERSON: Are you going to put them</p> <p>2 as a whole to the witness or one by one?</p> <p>3 MR GUMBI: I'm going to read it one by</p> <p>4 one, then I will allow the witness to comment.</p> <p>5 CHAIRPERSON: Alright.</p> <p>6 CROSS-EXAMINATION BY MR GUMBI (CONTD.):</p> <p>7 Yes, let me start with the statement of, General, Constable</p> <p>8 Katlego Sexeweleya, that is HHH29. Are you in possession</p> <p>9 of that statement, General?</p> <p>10 MAJOR-GENERAL MPEMBE: Correct,</p> <p>11 Chairperson.</p> <p>12 MR GUMBI: Will you go at the bottom of</p> <p>13 that page? Can I read it for your benefit, General?</p> <p>14 MAJOR-GENERAL MPEMBE: Yes, Chairperson.</p> <p>15 CHAIRPERSON: I think the General could</p> <p>16 read it for himself but you could read it for the benefit</p> <p>17 of the people in the auditorium who don't have the document</p> <p>18 in front of them, and those who are watching on television.</p> <p>19 Can anyone help us with the last line on the foot of the</p> <p>20 first page?</p> <p>21 MR NGALWANA: That of course is a</p> <p>22 difficulty of presenting statements of people who are not</p> <p>23 here, Chair, because then the person who deposed to this</p> <p>24 statement would be able to say what's missing in that line.</p> <p>25 COMMISSIONER HEMRAJ: But is there not a</p>
<p style="text-align: right;">Page 12493</p> <p>1 MR GUMBI: Yes.</p> <p>2 CHAIRPERSON: I don't think anything</p> <p>3 turns on the missing line. Do we know what the missing</p> <p>4 line is?</p> <p>5 MR GUMBI: No, Chairperson.</p> <p>6 CHAIRPERSON: Alright, we then –</p> <p>7 MR GUMBI: The document was scanned, then</p> <p>8 I printed it from –</p> <p>9 CHAIRPERSON: And then in HHH30 it</p> <p>10 appears to be the top of page 2, the second to the fourth</p> <p>11 line, I think. Is that right?</p> <p>12 MR GUMBI: Yes.</p> <p>13 CHAIRPERSON: And HHH31 –</p> <p>14 MR GUMBI: Is on –</p> <p>15 CHAIRPERSON: - the key passage again</p> <p>16 appears to be –</p> <p>17 MR GUMBI: Second page.</p> <p>18 CHAIRPERSON: - well it's the last line</p> <p>19 on the first page.</p> <p>20 MR GUMBI: Yes.</p> <p>21 CHAIRPERSON: Followed by the first four</p> <p>22 lines on the second.</p> <p>23 MR GUMBI: Yes, Chairperson.</p> <p>24 CHAIRPERSON: Is that correct?</p> <p>25 MR GUMBI: Yes, Chairperson.</p>	<p style="text-align: right;">Page 12495</p> <p>1 copy of this statement which shows what it contained in</p> <p>2 that last line?</p> <p>3 MR NGALWANA: It's an IPID statement,</p> <p>4 Chair, from what I understand, so it's not a question, it's</p> <p>5 not a statement that we took. So we received it like this.</p> <p>6 CHAIRPERSON: Yes, I see. We were given</p> <p>7 copies of the IPID statements, so do we know where the</p> <p>8 originals are?</p> <p>9 MR NGALWANA: We don't.</p> <p>10 CHAIRPERSON: Mr Gumbi, did you just get</p> <p>11 photocopies of IPID documents, or have you seen the</p> <p>12 original of the statement?</p> <p>13 MR GUMBI: No, I haven't seen the</p> <p>14 original. This document I retrieve it from the SAPS hard</p> <p>15 drive.</p> <p>16 CHAIRPERSON: Have you got the SAPS –</p> <p>17 MR GUMBI: - IPID hard drive.</p> <p>18 CHAIRPERSON: No, no, if it wasn't the</p> <p>19 SAPS – well, are the IPID statements on the SAPS hard</p> <p>20 drive, or is there –</p> <p>21 MR GUMBI: IPID –</p> <p>22 CHAIRPERSON: - a special IPID hard</p> <p>23 drive? Anyway, it doesn't matter.</p> <p>24 MR GUMBI: Yes.</p> <p>25 CHAIRPERSON: Anyway, this particular one</p>

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1 doesn't actually help us very much anyway, because the
 2 statement simply reads the, talks about how they were going
 3 off to the koppie, and then the instruction was given the
 4 disperse them with CS and with rubber bullets. CS was used
 5 and –
 6 MR GUMBI: Yes.
 7 CHAIRPERSON: So it doesn't say who gave
 8 the instruction.
 9 MR GUMBI: Yes.
 10 CHAIRPERSON: So that's the first one.
 11 MR GUMBI: Yes.
 12 CHAIRPERSON: Then the second one is
 13 HHH30. That's Constable Mguye's statement.
 14 MR GUMBI: Yes, and it reads as follows,
 15 "While they were escorting instruction was given that they
 16 must disperse and disarm and one" –
 17 CHAIRPERSON: Sorry, they must be
 18 dispersed.
 19 MR GUMBI: Yes, "must be dispersed and
 20 disarmed, and one CS to be used. One CS was thrown to them
 21 and they started attacking the police." That is the
 22 statement of Constable Mguye. Then we have again another
 23 one of Constable Magume Benjamin, that is HHH31. If you
 24 can go at the bottom of that page, General, that is, should
 25 be paragraph 5, it reads as follows, "Then General Mpembe

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1 gave order/instruction to escort them. As they were
 2 walking same police official went back to the cars. I was
 3 walking close to the General," and then the next page, "and
 4 he gave instruction to disarm the mineworkers who were on
 5 strike. He (General) instructed to use one CS and two
 6 rubber per person who was walking on the field or open
 7 space. Then one member fired a CS. It landed inside the
 8 group. Then they run towards the police official. Two of
 9 the participants came straight to me with pangas on their
 10 hands." If I may wrap up that point again, Chairperson,
 11 can I refer the Commission to another exhibit that was
 12 presented during the cross-examination by Mr Madlanga?
 13 MR NGALWANA: Well, before my learned
 14 friend goes there, HHH31, Chair, seems incomplete. So
 15 perhaps our learned friend can tell us what's contained in
 16 the other paragraph that may be there.
 17 MR GUMBI: Yes, we noted that,
 18 Chairperson, even when you go to the IPID file you don't
 19 find any page except these two pages as presented before
 20 this Commission.
 21 CHAIRPERSON: You want to refer to
 22 another document now?
 23 MR GUMBI: Yes, Chairperson, it's the –
 24 CHAIRPERSON: You can't do any better
 25 than the documents you've got from IPID, and the statement

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1 ends, dealing with something else, namely the people going
 2 off to the shacks and it would appear that the – the
 3 grammar is not very good, but it appears that the deponent
 4 then withdrew to check those who'd been hacked.
 5 MR GUMBI: Yes.
 6 CHAIRPERSON: Anyway, you put the
 7 passage. You now want to put something else. Shouldn't
 8 you give the witness a chance now to deal with the passage
 9 that you've put? Otherwise things will get a bit out of
 10 hand.
 11 MR GUMBI: Yes, Chairperson. There's
 12 another one that is outstanding, if I can just sum up this
 13 point –
 14 CHAIRPERSON: Yes, I'm sorry, Mr Gumbi,
 15 there's something I should have put to you before you carry
 16 on to the point you're making, and that's in the
 17 penultimate paragraph of exhibit HHH31 the following
 18 appears, "When I was close to General Mpembe he screamed
 19 that we must shoot at the mineworkers who were chopping the
 20 police with pangas. That's when I shot two rubber rounds
 21 and they took the," it's looks like - is it rifle? - "from
 22 the police who was chopped and run away." So this is
 23 obviously while the attack is going on. Suggestion is that
 24 the General then gave an order that the miners who were
 25 hacking at a policeman with a panga, that they should be

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1 shot and he then, the witness, the deponent then did shoot
 2 rubber rounds, two I think he said, and the person who was
 3 being attacked then had his rifle taken away and they then
 4 ran away. Now that of course is something that happened
 5 after the attack had started, but it does involve the
 6 witness. So perhaps – anyway, perhaps it would be helpful
 7 to get the witness's comment on the three statements you
 8 put to him –
 9 MR GUMBI: Yes.
 10 CHAIRPERSON: - before you move on to the
 11 next one.
 12 MR GUMBI: Thanks very much, Chairperson.
 13 Yes, can you comment, General? What is your comment?
 14 MAJOR-GENERAL MPEMBE: Chairperson, I
 15 will comment on, from each statement that was presented.
 16 The one of Joseph Sexeweleya, I don't know whether the
 17 member says that the instruction comes to me.
 18 CHAIRPERSON: Of course they don't. I
 19 mean what they, the ones who just say there was an
 20 instruction don't say who gave the instruction and you
 21 remember Kuhn himself says he got an instruction, but then
 22 he doesn't know who gave the instruction. He doesn't
 23 suggest it was you. So there are two questions; the one is
 24 whether instruction was given. I understood your evidence
 25 to be you never heard the instruction given. You didn't

<p style="text-align: right;">Page 12500</p> <p>1 give one and you never heard one being given, but 2 presumably if someone did it without a radio right down the 3 other end of the line near Kuhn, you wouldn't have 4 necessarily heard it. Is that right? 5 MAJOR-GENERAL MPEMBE: If it was given 6 not on the radio, yes. 7 CHAIRPERSON: Yes, you wouldn't 8 necessarily have heard it, but of course one of the 9 witnesses says, one of the deponents says you gave the 10 instruction. Now you've already denied that. 11 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 12 I'm also coming to that one because according to him – 13 sorry, Chairperson, it disappeared here from the papers. 14 He says I gave an instruction of, to use one CS, one rubber 15 bullet per person. 16 CHAIRPERSON: No, one CS and two rubbers 17 per person. 18 MAJOR-GENERAL MPEMBE: Yes, and it's very 19 strange to me that how, what type of instruction I gave, 20 but I respect the hearing of the member, but I did not give 21 such an instruction to use – 22 CHAIRPERSON: What's even funnier, 23 actually, is that then only one person responded to this 24 alleged instruction and fired one CS, but nobody else fired 25 a CS. So if that instruction had in fact been given as</p>	<p style="text-align: right;">Page 12502</p> <p>1 MAJOR-GENERAL MPEMBE: Yes, POP people 2 did have that. 3 MR NGALWANA: Chair, the current of this 4 cross-examination is rather confusing. Is my learned 5 friend referring to HHH30, the first paragraph on page 2 to 6 suggest that it is the General who gave the order or is he 7 simply making a point that an order was given? 8 CHAIRPERSON: We don't normally allow one 9 counsel to ask questions of counsel who are busy cross- 10 examining but I hope the fact that I'm allowing it this 11 time isn't going to be quoted as a precedent in a couple of 12 minutes. But it is a sensible question to be fair which 13 was asked by Mr Ngalwana but I should have asked it before 14 he did. But what is your answer to his query? What 15 exactly are you putting? The first two statements that 16 we're now dealing with, HHH29 and 30 simply say an 17 instruction was given. The witness has already said he 18 didn't hear an instruction and he didn't give one but if it 19 was not given over the radio, if it was given by someone - 20 he wouldn't have heard it. But the question that you're 21 being asked is what exactly are you putting to the witness, 22 was there an instruction are you saying, or are you asking 23 pertinently whether he gave the instruction referred to by 24 these two witnesses who made these two statements? 25 MR GUMBI: I'm asking the witness,</p>
<p style="text-align: right;">Page 12501</p> <p>1 alleged, I would have expected a number of other members 2 also to have fired off one CS and two rubbers, but which 3 didn't happen, which makes me wonder whether there was an 4 instruction at all. But that's something we don't have to 5 debate with you. You just say you never heard the 6 instruction, you didn't give it. That's your case, is it? 7 MAJOR-GENERAL MPEMBE: Correct, 8 Chairperson. Chairperson, I need to add, I did give 9 evidence, I'm on record to say when the protesters attacked 10 the police, the police did retreat and when they retreated 11 I did scream to say we have move forward but I never said 12 shoot or what. 13 [14:10] CHAIRPERSON: So you also deny then the 14 statement in the penultimate paragraph of exhibit HHH31 15 that you screamed that they must shoot at the mineworkers 16 because who were chopping the police with pangas, you deny 17 that? 18 MAJOR-GENERAL MPEMBE: I only say I 19 screamed for them not to retreat but not to shoot because I 20 didn't say to shoot. 21 CHAIRPERSON: Do I assume that all the 22 members there had teargas canisters in their possession? 23 MAJOR-GENERAL MPEMBE: Correct, 24 Chairperson. Members of POP. 25 CHAIRPERSON: Yes, all the POP people.</p>	<p style="text-align: right;">Page 12503</p> <p>1 Chairperson, whether he gave instruction in the light of 2 all these statements. 3 CHAIRPERSON: I think we got his answer. 4 He persists in his denial. 5 MR GUMBI: Yes, Chairperson. 6 MAJOR-GENERAL MPEMBE: Chairperson, I 7 need this to be on record. All the witnesses that were put 8 to me as my colleagues, police officers by Advocate Gumbi 9 since this morning, with respect, none of them indicated 10 the briefing that I gave to show the tolerance, the degree 11 of tolerance that they should have exhibited to the 12 protesters. I did use a case to show how we could make a 13 degree of tolerance but none of them did not say it. Some 14 of them they say it in their statements but in their pocket 15 books and those that I know I briefed them they did not 16 indicate it in their diaries. Thanks, Chairperson. 17 MR GUMBI: Can I refer you again, 18 General, now I think the last statement, the statement that 19 was taken by Captain Tupe and it's dated the 12th of 20 December 2012. It was entered as an exhibit during the 21 cross-examination by Justice Madlanga. 22 CHAIRPERSON: He was not yet then. 23 MR GUMBI: Yes he was not yet - yes it 24 was exhibit HHH15.1 and that statement is dated 12 December 25 2012, it was taken long time ago, after the Potchefstroom</p>

<p style="text-align: right;">Page 12504</p> <p>1 meeting. And then when we check that statement, paragraph 2 3 of that statement also again it deals with the issue of 3 instruction for firing of teargas and redirecting the 4 protesters. Though in that statement it did not mention 5 you by name. 6 CHAIRPERSON: I haven't got my copy with 7 me here. Would you be kind enough to read the paragraph 8 for me so I can follow the point you're making? 9 MR GUMBI: Yes, Chairperson. I do 10 apologise, it was on the list of - I included it on the 11 list of the document I was going to refer to but I'll read 12 it on record, Chairperson. Can I read the whole content of 13 paragraph 3, General? "The participants refused to 14 surrender their weapons and while General Mpeembe was still 15 negotiating with them they stood up and started to move 16 towards the koppie and General Mpeembe instructed us to 17 follow and monitor them. While following and monitoring 18 them the protesters changed their direction and went 19 straight towards the informal settlement. Then instruction 20 was given for firing of teargas to redirect them, not to 21 pass through the informal settlement and they went through 22 the tear smoke. Then stun grenades was used in order to 23 disperse and disarm the participants. Immediately after 24 the launching of stun grenades the participants started 25 running towards the police and attacked them. Rubber shots</p>	<p style="text-align: right;">Page 12506</p> <p>1 a statement later on he doesn't say that? 2 MAJOR-GENERAL MPEMBE: Yes. 3 CHAIRPERSON: So we'll deal with him when 4 - Advocate Hemraj says to me that I may have it wrong. 5 That Tupe may have said at Potchefstroom that he heard, not 6 you giving instruction, but he heard that it was said that 7 you gave the instruction. If that's the case then of 8 course what he states in his statement is perfectly 9 consistent that he was repeating hearsay. But you were 10 present at Potchefstroom, what did he say, as far as you 11 can remember? 12 MAJOR-GENERAL MPEMBE: Chairperson, I 13 remember him saying that I did give an instruction. 14 CHAIRPERSON: But you see the difference 15 - the point being put to you is did he say that heard you 16 giving the instruction or did he say that he heard someone 17 else allege that you had given the instruction? Do you 18 understand the difference? 19 MAJOR-GENERAL MPEMBE: Chairperson, I 20 just want to check what I said but I remember the issue of 21 me giving an instruction came from Captain Tupe. 22 CHAIRPERSON: Yes, yes I understand that 23 but what I'm interested to know is did he repeat it as what 24 we lawyers call hearsay? In other words he heard someone 25 else allege, or did he say, based on his own observations</p>
<p style="text-align: right;">Page 12505</p> <p>1 were fired but with no effect. The participants attacked 2 the police and I saw four of them hack the police member 3 with pangas and stab him, an arrow. I approached the 4 participant and one of them grabbed the R5 rifle of the 5 police officer and they ran away with it." What is your 6 answer? 7 MAJOR-GENERAL MPEMBE: Chairperson, 8 Captain Tupe in his statement I don't see whether he says 9 it's me who gave instructions to shoot the teargas. 10 CHAIRPERSON: Captain Tupe is the one who 11 accused you at Rustenburg of having issued the order. 12 MAJOR-GENERAL MPEMBE: At Potchefstroom I 13 did testify. 14 CHAIRPERSON: I always say Rustenburg - 15 MAJOR-GENERAL MPEMBE: At Potchefstroom, 16 yes. 17 CHAIRPERSON: What exactly did he say at 18 Potchefstroom? 19 MAJOR-GENERAL MPEMBE: At Potchefstroom 20 he said and that's why the record was made by Colonel 21 Visser that he heard me giving that order. 22 CHAIRPERSON: Did he say he heard you 23 giving that order? 24 MAJOR-GENERAL MPEMBE: Yes. 25 CHAIRPERSON: So when he comes and makes</p>	<p style="text-align: right;">Page 12507</p> <p>1 that he heard you give the instruction? Maybe we'll have 2 to look at the record on that but as far as you can 3 remember now, sitting here now what can you remember did 4 the Captain say at Potchefstroom on this day? 5 MAJOR-GENERAL MPEMBE: Chairperson, 6 according to my observation and how I understand him is 7 that I gave an instruction but I wanted to check when I 8 testified because it was still in my mind basically when I 9 - 10 MR GUMBI: Thanks, Chairperson. I have 11 another statement, General, I wanted you to refer to, the 12 statement of Colonel Samuel Dioli. 13 CHAIRPERSON: Sorry. Is this an exhibit 14 or - 15 MR GUMBI: It's not yet entered as an 16 exhibit, Chairperson. 17 CHAIRPERSON: Oh is this Dioli's - 18 MR GUMBI: Statement. 19 CHAIRPERSON: Colonel Dioli. 20 MR GUMBI: Yes. 21 CHAIRPERSON: Do you want that to be 22 HHH32? 23 MR GUMBI: Yes, Chairperson. Do you know 24 Colonel Dioli, General? 25 MAJOR-GENERAL MPEMBE: Correct,</p>

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1 Chairperson, I know General Dioli.
 2 MR GUMBI: My instruction is that Colonel
 3 Dioli he was one of the senior police officers who was
 4 there, he was a senior police officer who was there then
 5 Colonel was the second one.
 6 MAJOR-GENERAL MPEMBE: Correct,
 7 Chairperson.
 8 MR GUMBI: When you go to paragraph - to
 9 page 6 of his statement, paragraph 22. Are you on page 6,
 10 General?
 11 MAJOR-GENERAL MPEMBE: Correct,
 12 Chairperson, I can see paragraph 22.
 13 MR GUMBI: Colonel Dioli say in that
 14 paragraph 22, "I did not hear Major-General Mpeembe say that
 15 we must follow the protesters to the koppie." What is your
 16 comment, General, on this allegation by Colonel Dioli?
 17 CHAIRPERSON: Really how is this going to
 18 help us? Everybody else, well not everybody else but a lot
 19 of other people say that he did say that, that's what led
 20 to the trouble. That's why people disagreed with him and
 21 remonstrated with him and he persisted in what he'd said.
 22 Now all that Colonel Dioli says is he didn't hear it. He
 23 doesn't say it wasn't said but everybody else appears, well
 24 most of the other statements we've got, seem to say it was
 25 said. He did say follow them to the koppie. Is it an

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1 issue that he gave that instruction they must follow them
 2 to the koppie and if so what do you say about all the
 3 others who say he gave that instruction? That led to the
 4 dissatisfaction. Unless your instructions are that you're
 5 going to put to the General that he did not tell the
 6 members that they must escort the miners, strikers to the
 7 koppie.
 8 MR GUMBI: That's where I was heading,
 9 Chairperson. My client's version, that is Lieutenant
 10 Baloyi, General, is that indeed on that day you did not
 11 issue instruction that the police officers must escort the
 12 miners on their way on the koppie, you did not give a
 13 verbal instruction to that -
 14 MAJOR-GENERAL MPEMBE: Chairperson, I
 15 respect the views of Lieutenant Baloyi. HH3 is very clear
 16 in terms of why there was a disagreement between myself and
 17 Colonel Merafe, Lieutenant-Colonel Merafe and the majority
 18 of the members they were saying also we were escorting them
 19 to the mountain.
 20 CHAIRPERSON: I don't want to make your
 21 task more difficult than it is but I have difficulty in
 22 understanding what exactly you're putting to the witness.
 23 In the light of paragraph 7 of your client's statement,
 24 which is exhibit GGG16. Perhaps I should read it. Having
 25 said in paragraph 6 how the strikers started singing and

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1 started moving forward towards the police and we allowed
 2 them to proceed he says, he goes on to say this, "When they
 3 were about 300 metres away from us the General told us to
 4 let them go and we would disarm them at the mountain. One
 5 senior Colonel," that's Merafe I think, "advised the
 6 General that we intended to disarm them because it was
 7 better to disarm them there because at the mountain they
 8 would outnumber us. The General told us to follow them. I
 9 advised the General that stun grenades should be used to
 10 disperse them." And then he goes on how he got to the
 11 Nyalas. So what he says is "The General told us to let
 12 them go and we would disarm them at the mountain" which
 13 obviously involves by necessary inference that they were to
 14 follow them to the mountain because that's where they were
 15 going to disarm them. But in the meanwhile they were to
 16 let them go. Now what exactly does your - does he still
 17 say that or does he say something else? I don't understand
 18 your question.
 19 MR GUMBI: Chairperson, I think on that
 20 particular aspect, I do have my client's version on that
 21 one but I think for sake of progress let me rather park
 22 this point. I will re-visit it then I can continue with
 23 the other aspect of cross-examination.
 24 CHAIRPERSON: Before you answer the point
 25 you want to take instruction?

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1 MR GUMBI: Yes.
 2 CHAIRPERSON: That's fair enough. All
 3 right so you're going to move onto another point in the
 4 meanwhile.
 5 MR GUMBI: Yes, Chairperson.
 6 CHAIRPERSON: That's fine.
 7 [14:30] MR GUMBI: General, can I refer you to
 8 exhibit QQ13. Are you in possession of exhibit QQ13,
 9 General?
 10 MS PILLAY: Chair, I think Mr - there is
 11 no QQ13.
 12 MR GUMBI: The transcript of the 13th -
 13 MAJOR-GENERAL MPEMBE: I don't see it
 14 also.
 15 MS PILLAY: It's QQ3 probably.
 16 MR GUMBI: QQ3, I do apologise.
 17 MS PILLAY: Sorry, QQ2.
 18 MR GUMBI: It should be QQ2. I do
 19 apologise, Chairperson. Mine is written QQ13. I don't
 20 know how. Are you in possession of it, General?
 21 MAJOR-GENERAL MPEMBE: Chairperson, mine
 22 here which I've been given is written QQ3. I don't know
 23 whether it's the same. Maybe if the paragraph is written
 24 then we might -
 25 MR GUMBI: I don't know, maybe the SAPS

<p style="text-align: right;">Page 12512</p> <p>1 assist. It's the transcript of the 13th, along the railway 2 line. Do you have it, General? 3 MAJOR-GENERAL MPEMBE: It has been given 4 to me just now, Chairperson. 5 MR GUMBI: Can you go to page 6 of that 6 document, line number 20. 7 MAJOR-GENERAL MPEMBE: Chairperson, I'm 8 just requesting the page number. 9 MR GUMBI: Mine is written page 6 at the 10 top. Page 6. 11 MAJOR-GENERAL MPEMBE: I am on page 6, 12 Chairperson. 13 MR GUMBI: Go to line 20; do you see the 14 written line 20? 15 MAJOR-GENERAL MPEMBE: I can see line 20, 16 Chairperson. 17 MR GUMBI: Can I read on record what is 18 reflected on those sentences. Line 20, one of the 19 policemen said, "Our member are going to die just for 20 shit." That's a policeman. I do apologise, Chairperson, 21 for using the word "shit." It's written here. It's not my 22 intention. 23 CHAIRPERSON: [Microphone off, inaudible] 24 your machine. Do you want to – 25 MR NGALWANA: Yes, thank you, Chair.</p>	<p style="text-align: right;">Page 12514</p> <p>1 come back and we will save quite a lot of money. So we'll 2 take the tea adjournment now. 3 [COMMISSION ADJOURNS COMMISSION RESUMES] 4 [14:51] CHAIRPERSON: I didn't realise that the 5 General wasn't back with us. To be fair, the General may 6 have been called away or something. There may have been a 7 reason why he's not here. I should have checked that he 8 was back in the chamber before I returned. But here he 9 comes. 10 COMMISSIONER HEMRAJ: Mr Gumbi, can I 11 just ask you something? Yesterday before we adjourned you 12 introduced exhibit HHH23, but you haven't referred to it. 13 I'm just pointing that out to you. 14 MR GUMBI: Yes, I've noted that, 15 Commissioner. I'll revisit those documents I've 16 introduced. 17 CHAIRPERSON: Are you going to deal with 18 it? Are you going to revisit it? 19 MR GUMBI: I will revisit it. 20 CHAIRPERSON: Major-General, I'm sorry, I 21 came back from the chamber before being told that you were 22 here, so it's my fault. So don't apologise; I apologise to 23 you. You're still under oath. Let's carry on. 24 WILLIAM MPEMBE: s.u.o. 25 MR GUMBI: Yes, Chairperson, we did</p>
<p style="text-align: right;">Page 12513</p> <p>1 CHAIRPERSON: Do you want to give us a 2 more elegant rendering of that? 3 MR NGALWANA: No, Chair, perhaps our 4 learned friend is reading from a different document because 5 the page 6 that we have on page 20, on line 20, doesn't say 6 what he's reading. 7 MR GUMBI: Maybe, Chairperson, if you can 8 compare, because the one I'm having is written like that. 9 My instructing attorney is showing the General. 10 CHAIRPERSON: Mr Ngalwana is not 11 suggesting that you are not reading from a document that is 12 written like that, as you put it. He's suggesting you're 13 reading from the wrong document. That's his point. He 14 says that there's another document he's got, which is the 15 right one, which says something different. I think that's 16 the point. 17 MR NGALWANA: Chair, let me make it 18 clear. Thank you, Chair. Our learned friend has referred 19 us to QQ2. We've gone to QQ2. 20 CHAIRPERSON: I thought you said – 21 MR GUMBI: QQ2. 22 MS PILLAY: Chair, the exhibit is exhibit 23 RR2. 24 CHAIRPERSON: [Microphone off, inaudible] 25 I suggest we take the tea adjournment now, sort it out and</p>	<p style="text-align: right;">Page 12515</p> <p>1 manage to sort out the exhibit number of this document. It 2 is RR2, the correct one, and I hope my learned colleague – 3 CHAIRPERSON: That's the document with 4 the rather strong statement of reluctance to be killed, by 5 one of the policemen on the video. 6 MR GUMBI: Yes, Chairperson. 7 CHAIRPERSON: Now what's the point you're 8 making of it? 9 CROSS-EXAMINATION BY MR GUMBI (CONTD.): 10 Ja, I wanted to wrap up on this one before I could move to 11 my next topic, this topic. Yes, go to page 6, General. 12 I'm going to read what other police officers said on that 13 day. I see the General wanted to say something. 14 MAJOR-GENERAL MPEMBE: I don't have – I 15 still have those two, but I don't see RR here. 16 CHAIRPERSON: RR2 is what you – 17 MAJOR-GENERAL MPEMBE: RR2. 18 CHAIRPERSON: Well, if you haven't got 19 it, just listen quietly while it's read. It's on the 20 screen. 21 MR GUMBI: Yes. 22 MR NGALWANA: Chair, we object to the 23 introduction of this – well, not introduction, but 24 reference to this document for the purposes for which our 25 learned friend seems to want to refer to it. This document</p>

<p style="text-align: right;">Page 12516</p> <p>1 was introduced, or was allowed, in fact initially Mr Mpofu 2 wanted to use it in cross-examining the National 3 Commissioner. There was an objection and Mr Mpofu withdrew 4 it. Then Mr Ntsebeza wanted to cross-examine Mr Mathunjwa 5 purely on the basis of what the song means, and that was 6 the only basis on which this was allowed. There is no 7 agreement about whether the content of what is said, the 8 speeches that are made, are true reflection of what was 9 said there.</p> <p>10 MS PILLAY: Chair, just to correct one 11 point; I think that it was initially introduced by Mr 12 Ntsebeza during the cross-examination of Mr Mathunjwa, but 13 it wasn't admitted for a limited purpose, and the document 14 has been referred to since then.</p> <p>15 CHAIRPERSON: Yes, is your complaint – I 16 mean is this a document or a video?</p> <p>17 MR NGALWANA: It was a video, Chair, 18 which is now transcribed –</p> <p>19 CHAIRPERSON: It's a transcript of a 20 video, yes. Now is your complaint that what was said is 21 not correctly translated? I mean the video is before us. 22 It's not suggest it's hearsay in the sense that what was 23 said is being tendered to prove the truth of what was said. 24 What, as I understand it, is being tendered is to simply 25 illustrate that that is what was said. Now do you complain</p>	<p style="text-align: right;">Page 12518</p> <p>1 CHAIRPERSON: Oh, the whole question is 2 whether it was correctly transcribed. Alright, okay. We 3 haven't seen the video. Now Mr Gumbi –</p> <p>4 MR NGALWANA: We've seen the video. We 5 can't hear it.</p> <p>6 CHAIRPERSON: Absent the video having 7 been heard by us personally, or agreement as to the 8 accuracy of the transcription, then isn't Mr Ngalwana 9 right? You know, you've already, as you've put it, parked 10 one point to deal with later. Maybe this one must go to 11 the same car park and you move on to the next one, and you 12 could bring it back later if you can show by reference to 13 the video that it indeed is what was said, and that the 14 translation thereof is correct. That's something maybe you 15 can sort out with your learned friend after we've 16 adjourned, but let's not waste time with it at the moment.</p> <p>17 MR GUMBI: Yes, Chairperson.</p> <p>18 CHAIRPERSON: Get on to the next point 19 and you can – I gather you're not going to finish by the 20 end of today.</p> <p>21 MR GUMBI: Yes, Chairperson.</p> <p>22 CHAIRPERSON: So maybe you can greet us 23 on the morrow with this point, duly sorted.</p> <p>24 MR GUMBI: Yes, I can proceed to another 25 point, then I can park again this one, then I will sort out</p>
<p style="text-align: right;">Page 12517</p> <p>1 about the translation, or what's your objection?</p> <p>2 MR NGALWANA: Well, we're complaining 3 about the accuracy of what is purported to have been said 4 there. In any event, we couldn't even hear –</p> <p>5 CHAIRPERSON: No, no, no, I'm sorry. I'm 6 sorry, you're not answering my question. This is a 7 policeman apparently giving an explanation of what he 8 thinks the members are going to die for. Now it's being 9 tendered to prove that that's what they were going to die 10 for. Am I correct, Mr Gumbi? You're just putting it in to 11 show that that's what was said. I don't know where this 12 point is going to take you. Perhaps you can take us into 13 your confidence about that in a moment, but the first point 14 is you want to establish that that is what was said, not to 15 prove that what was said was true. Is that correct? Is 16 that right?</p> <p>17 MR GUMBI: That's correct, Chairperson, 18 yes.</p> <p>19 CHAIRPERSON: Now therefore you –</p> <p>20 MR NGALWANA: Now we dispute that that 21 was what was said, Chair. That's the simple point.</p> <p>22 CHAIRPERSON: But didn't we hear it on 23 the video?</p> <p>24 MR NGALWANA: No, no-one can hear it. 25 The National Commissioner –</p>	<p style="text-align: right;">Page 12519</p> <p>1 with my learned colleagues. General, it was your testimony 2 before this Commission that later on after that incident 3 you had a briefing with the National Commissioner.</p> <p>4 MAJOR-GENERAL MPEMBE: Not immediately 5 after, but at about 16, 18:00.</p> <p>6 MR GUMBI: Yes, I agree with you. Then 7 you made a statement about what happened on the 13th of 8 August 2012, a handwritten one.</p> <p>9 MAJOR-GENERAL MPEMBE: Chairperson, I did 10 the statement, but not to the National Commissioner, but to 11 Brigadier Van Zyl.</p> <p>12 MR GUMBI: Can I refer to your statement 13 that was entered here as an exhibit HHH13. That's a 14 handwritten one that you signed on the 13th of August around 15 6 o'clock.</p> <p>16 MAJOR-GENERAL MPEMBE: I have it, 17 Chairperson.</p> <p>18 MR GUMBI: When you check paragraph 3 19 until to, from paragraph – if I may say paragraph 4, not 20 paragraph 3, will I be correct that in your statement 21 nothing is indicated that members on that day fired teargas 22 or used force without your instruction? Do you agree with 23 me?</p> <p>24 MAJOR-GENERAL MPEMBE: Chairperson, may I 25 get the question clear?</p>

<p style="text-align: right;">Page 12520</p> <p>1 MR GUMBI: From paragraph 3, from 2 paragraph 4 – or from any paragraph of your statement, can 3 you quote a sentence which says that members on the 13th of 4 August 2012 fired teargas, stun grenade, without your 5 instruction, or used force without your instruction? 6 MAJOR-GENERAL MPEMBE: Chairperson, in 7 paragraph 4 it states that the teargas was used, but I've 8 been consistent to say that I did not give the instruction. 9 It's true that the statement, in my statement I didn't say 10 that members did use a teargas without my instruction. 11 MR GUMBI: Will I be correct, General, 12 that this incident was still fresh in your memory? Why you 13 did not point out that members on the 13th of August 2012 14 fired or discharged their ammunition without your 15 instruction as an operational commander? 16 MAJOR-GENERAL MPEMBE: Chairperson, I did 17 testify when I was asked by the then Adv Madlanga, that the 18 purpose of this statement, it was for the case. It was not 19 for me to explain all, any other matters according to 20 Brigadier Van Zyl. 21 MR GUMBI: When you briefed the National 22 Commissioner - before we can go to the issue of briefing 23 the National Commissioner, you and me – if may I rephrase 24 it, Chairperson. Will you agree with me, General, that the 25 firing of teargas, stun grenade without your instruction as</p>	<p style="text-align: right;">Page 12522</p> <p>1 didn't issue instruction, teargas, stun grenade were fired. 2 As a result of that there was a conflict between the police 3 and the protesters. These are common causes. As a result 4 of that, two police officers were killed and one was 5 injured. Those are the facts before this Commission, 6 unless my learned colleague – 7 CHAIRPERSON: What is your question? 8 What's your question? 9 MR GUMBI: I was putting a – 10 CHAIRPERSON: What's your question? 11 MR GUMBI: I was putting a proposition to 12 say two police officers – I was putting a proposition to a 13 witness, Chairperson, that police officers on that day, 14 they fired stun grenade or teargas without General's 15 instruction, and he denied that. Then my proposition was, 16 as a result of that there was a conflict between the police 17 and the marchers and two police officers were killed and 18 one was injured. It's there. That's the proposition I was 19 putting – 20 CHAIRPERSON: You know counsel don't just 21 put propositions to witnesses; they ask them questions. 22 Now what exactly is the question you put? 23 MR GUMBI: Yes, if – 24 CHAIRPERSON: I was re-reading his 25 evidence yesterday and there's a passage long ago when I</p>
<p style="text-align: right;">Page 12521</p> <p>1 an operational commander, is contrary to Standing Order 2 262, read together with other police documents dealing with 3 crowd management of the SAPS? 4 MAJOR-GENERAL MPEMBE: Chairperson, 5 Standing Order 262, paragraph 11(5), it was deliberated 6 much more and I also did indicate that in big operations 7 section commanders, and it was made clear by the honourable 8 Chairperson to say that according to the Standing Order it 9 should be given by the command, and I did agree. 10 MR GUMBI: And in our case it's 11 criminally worse because as a result of that there was a 12 conflict between the police and the protesters, and 13 Warrant-Officer Lepaaku, Warrant-Officer Monene, and 14 Lieutenant Baloyi, the two were killed and Lieutenant 15 Baloyi survived that killing; he was injured. Would you 16 agree with me? 17 MR NGALWANA: Chair, this is an unfair 18 question to the witness. Firstly, my learned friend cannot 19 draw a link between the lack of instruction being given and 20 the death of people. That's the first thing. The second 21 thing is what he's asking the witness to say is something 22 about which this Commission is here to determine. It's a 23 totally unacceptable question, Chair, with respect. 24 MR GUMBI: Chairperson, it's common cause 25 that on that day, as the General is contending that he</p>	<p style="text-align: right;">Page 12523</p> <p>1 used the expression "vonk," the spark that caused the 2 trouble was the teargas and the stun grenade, and he agreed 3 with that, but that's not relevant on question of 4 culpability and so on, but what is the question you're 5 putting to him? I mean – 6 MR GUMBI: That was – 7 CHAIRPERSON: What's the answer you want 8 from him? 9 MR GUMBI: Yes, that's a proposition; I 10 was going to ask my question again. 11 CHAIRPERSON: Well, ask your question. 12 MR GUMBI: Yes, let me do that, 13 Chairperson. When you briefed the National Commissioner, 14 General, did you inform the National Commissioner that on 15 that day you as the operational commander, members under 16 your command fired teargas, stun grenade, without your 17 instruction? Did you inform the National Commissioner? 18 MAJOR-GENERAL MPEMBE: Chairperson, what 19 I informed the National Commissioner is that the teargas 20 was used by Warrant-Officer Kuhn, who said that he heard an 21 instruction, and I did indicate that he does not know which 22 instruction, who gave the instruction, but I did not give 23 him the instruction. 24 MR GUMBI: But the National Commissioner 25 testified before this Commission; she did not testify to</p>

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1 that effect that you informed her that –

2 CHAIRPERSON: Was she asked anything

3 about it? Did she deal with the topic of the details of

4 the instruction, or information she received from the

5 witness?

6 MR GUMBI: Yes, Chairperson, she didn't

7 go to that extent –

8 CHAIRPERSON: Well, how can you then put

9 the point you're putting to the witness? I mean if she'd

10 been asked the question and given an answer which conflicts

11 with what he now says, that's something you can put, but

12 the point wasn't raised with her at all. A lot of other

13 points were raised with her, which she had some difficulty

14 in dealing with because then she didn't, she wasn't there

15 at the time, but she wasn't asked that question, which is

16 something she could have been asked because it dealt with

17 something that was said to her, or allegedly said to her,

18 when she came to Marikana. Now absent evidence of that

19 kind from her, or any questions in that regard addressed to

20 her, how can you put the point you've now put to the

21 witness? That's certainly not correct.

22 MR GUMBI: Fair enough, Chairperson. I'm

23 happy to move to another point again. General Mbombo, did

24 you inform her about this?

25 MAJOR-GENERAL MPEMBE: Chairperson, I

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1 testified that I phoned General Mbombo while I was still on

2 the scene and she was on her way to Potch and she came

3 back, and I did inform her exactly as I've said now.

4 MR GUMBI: And then General Annandale who

5 testified before this Commission again, he testified that

6 you relayed to him about what happened on the 13th of August

7 2012. Did you inform him about this, that the police fired

8 teargas, stun grenade, without an instruction?

9 MAJOR-GENERAL MPEMBE: I informed him the

10 same as I informed the National Commissioner, Chairperson.

11 MR GUMBI: You further testified here,

12 General, that you had a debriefing that afternoon on the

13 13th of August 2012.

14 [15:10] MAJOR-GENERAL MPEMBE: Chairperson, I'm

15 requesting that may I be referred to the script where I

16 said we had, because I know how –

17 CHAIRPERSON: Wait, wait, wait, before

18 you carry on with that, there's something I want to raise

19 with Mr Gumbi. You remember when Adv Jele was cross-

20 examining, there was a bit of a confusion because the word

21 "debriefing" is ambiguous. It can either relate to a

22 debriefing in the sense of getting the person's story of

23 what happened, which is a factual debriefing, and the other

24 debriefing is a sort of therapeutic debriefing where a

25 psychologists or a councillor or someone of that kind –

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1 MR GUMBI: Yes.

2 CHAIRPERSON: - talks to a person who's

3 had a traumatic experience and tries to help them through

4 it. Now those documents that were put before us indicated

5 the people had had a debriefing and it turned out, the

6 point that was trying to be made was it was a factual

7 debriefing, and in the end the point, it appeared because

8 it was a therapeutic debriefing. Now when you asked the

9 witness, "Did you have a debriefing," you must make clear

10 which of the two you refer to. But let me ask the

11 question. On that day, the 13th, did you speak to a

12 councillor or a psychologist? Did you receive what one can

13 call therapeutic debriefing to help you to deal with the

14 traumatic experience that you'd gone through witnessing

15 this attack upon your police members? Did you have that

16 kind of briefing?

17 MAJOR-GENERAL MPEMBE: Correct,

18 Chairperson, and also members were there where they also

19 went through that.

20 CHAIRPERSON: Alright, now –

21 MR GUMBI: Yes, Chairperson, I was

22 referring to the debriefing with members, factual

23 debriefing with members, report-back. Did you have factual

24 debriefing with members, or report-back from the members

25 that afternoon, General?

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1 MAJOR-GENERAL MPEMBE: Chairperson, I did

2 indicate that what happened on that day is that the members

3 themselves, they spoke to their commanders. We only met

4 with the commanders of those members, but not with the

5 members themselves.

6 CHAIRPERSON: Does that mean that you

7 didn't have a factual debriefing (if one can use that

8 expression) yourself?

9 MAJOR-GENERAL MPEMBE: Correct,

10 Chairperson.

11 CHAIRPERSON: What you did, we know, is

12 you made a short statement at about 6 o'clock that evening,

13 which is filed in the case dockets, which is exhibit HHH13,

14 and which you gave a short summary of what happened, and

15 then later on you made fuller statements. Is that correct?

16 MAJOR-GENERAL MPEMBE: Correct,

17 Chairperson.

18 MR GUMBI: So the debriefing you had with

19 commanders involved all the commanders of those units.

20 Would I be correct? Who were there along the railway line.

21 CHAIRPERSON: I didn't understand him to

22 say he had a debriefing. He said the opposite. He said

23 the commanders had sessions with their members.

24 MR GUMBI: Yes, yes.

25 CHAIRPERSON: He said he himself didn't

<p style="text-align: right;">Page 12528</p> <p>1 have a debriefing. He said he wrote a short statement to 2 put in the docket and then on a subsequent occasion, or 3 subsequent occasions, he made further statements, but 4 that's as far as his evidence goes, as I understand. Am I 5 right?</p> <p>6 MAJOR-GENERAL MPEMBE: Correct, 7 Chairperson, and meeting with the commanders, it was 8 already on the 14th, Chairperson knows that I did meet the 9 commanders at that time, but not on the 13th.</p> <p>10 MR GUMBI: Yes, General, can I refer you 11 to another document, SAPS document dealing with crowd 12 management for platoon commanders, briefing and debriefing. 13 It's contained in one of my documents, while we are dealing 14 with this aspect.</p> <p>15 MS PILLAY: Chair, the document is GGG25.</p> <p>16 MR GUMBI: Yes, thank you very much.</p> <p>17 CHAIRPERSON: Thank you.</p> <p>18 MR GUMBI: Are you in possession of that 19 document, General? GGG25.</p> <p>20 MAJOR-GENERAL MPEMBE: Chairperson, I do 21 have it.</p> <p>22 CHAIRPERSON: What page are you referring 23 to?</p> <p>24 MR GUMBI: Can you go to page 8, General? 25 Yes, tactic documentation, paragraph 12. When you read</p>	<p style="text-align: right;">Page 12530</p> <p>1 thought the matter would be dealt with before the 2 Commission, and what they had instead was the meeting at 3 Potch where they tried to sort out the facts and work out 4 their presentation. The decision was taken not to have a 5 debriefing, as I understand it - if I'm wrong, I'll be 6 corrected – and I seem to remember that Mr White actually 7 said he could understand it in the circumstances, and the 8 matter was left there, really. But the decision not to 9 have a debriefing was not taken in any event by this 10 witness. So any way, let's clarify it. Am I correct in 11 thinking there wasn't a debriefing; a decision was taken 12 not to have a debriefing because the day after the 16th it 13 was already announced that a commission was going to be 14 appointed?</p> <p>15 MAJOR-GENERAL MPEMBE: Correct, 16 Chairperson.</p> <p>17 CHAIRPERSON: But the decision not to 18 have a debriefing but rather prepare for the Commission and 19 to cooperate fully with the Commission was not taken by 20 you, I take it was taken by the National Commissioner 21 herself. Is that right? Perhaps the Provincial 22 Commissioner, but it wasn't taken by you. Am I right? 23 MAJOR-GENERAL MPEMBE: Chairperson, it 24 was not by me, but it was the discussion amongst the 25 officers and the decision was taken there, but also, and</p>
<p style="text-align: right;">Page 12529</p> <p>1 paragraph 12 of that document, it's saying that, "After 2 every debriefing session a brief report should be compiled 3 by the platoon commander and filed together with 4 preparation order for the period of five years." Do you 5 see that?</p> <p>6 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 7 I can see it.</p> <p>8 MR GUMBI: So do we have a debriefing 9 report from commanders who were involved on the 13th, that 10 was filed to you, in fact, General?</p> <p>11 MAJOR-GENERAL MPEMBE: Chairperson, I 12 don't understand the question properly because I did 13 testify that the incident of the 13th, the operation was 14 still on because the people were still at the koppie. I 15 don't know whether that was seen as a separate operation. 16 Here also what is confusing me, it's a platoon commander, 17 and I was not a platoon commander. It was a completely 18 different situation.</p> <p>19 CHAIRPERSON: Mr Gumbi, as far as I can 20 recall this point was dealt with before. It was dealt with 21 when General Annandale was in the box - was at the witness 22 table, sorry – and the point made was that they decided not 23 to have a debriefing. This is what they do when they were 24 debriefing, decided not to have a debriefing despite the 25 fact that the Standing Order says they should, because they</p>	<p style="text-align: right;">Page 12531</p> <p>1 when the Provincial Commissioner asked me the reasons as 2 overall commander I did also agree on what was discussed 3 amongst myself, General Annandale, General Naidoo, and the 4 Provincial Commissioner herself.</p> <p>5 MR GUMBI: So this decision you are 6 talking about, General, I wanted to be clear on it, was it 7 taken on the 13th, or was it taken after the 13th?</p> <p>8 CHAIRPERSON: He said it was taken after 9 the event, was it? When was the decision taken not to have 10 a debriefing but rather wait for the Commission? Was that 11 taken after the 16th?</p> <p>12 MAJOR-GENERAL MPEMBE: Ja, after the 16th 13 when the Commission was announced, but Advocate, 14 Chairperson, the Advocate asked me about why I did not 15 debrief the people on the 13th, I think he said –</p> <p>16 MR GUMBI: Yes.</p> <p>17 MAJOR-GENERAL MPEMBE: And I've said it 18 several times that we did not see the 13th as a separate 19 operation from that one of the 16th.</p> <p>20 CHAIRPERSON: And to be fair, you had a 21 number of other things to deal with from the 13th onwards. 22 There wasn't time, I would assume – I don't want to put 23 words in your mouth, but I would have thought you had a 24 serious crisis on your hands that you had to deal with and 25 only when that was over would you have had time and</p>

<p style="text-align: right;">Page 12532</p> <p>1 opportunity to do a debriefing as envisaged in this 2 document and the other documents. Is that correct? 3 MAJOR-GENERAL MPEMBE: Correct, 4 Chairperson. 5 CHAIRPERSON: And by that time it was 6 announced that there's going to be a commission, and so the 7 other decision was taken that you referred to. Is that 8 right? 9 MAJOR-GENERAL MPEMBE: Correct, 10 Chairperson. 11 CHAIRPERSON: Mr Gumbi, I don't want to 12 stop you, but it does sound, you know, as if this point 13 isn't going to take us anywhere, but maybe you've got 14 better points that you could raise. 15 MR GUMBI: Yes, if I can ask one or two 16 questions on this one before I can proceed, Chairperson. 17 General, the IPID, was it investigating already on the 13th? 18 MAJOR-GENERAL MPEMBE: Correct, 19 Chairperson, I did indicate that the IPID was called to 20 attend the scene on the 13th. 21 MR GUMBI: According to your knowledge is 22 there any statement, written statement filed by all members 23 of the units who were there as from the 13th to the IPID? 24 CHAIRPERSON: I don't understand what 25 you're talking about, Mr Gumbi. You've already put in a</p>	<p style="text-align: right;">Page 12534</p> <p>1 investigation. I think we've got enough other matters to 2 look at, but what exactly is the point you're trying to 3 make? You must forgive my inability to understand. 4 MR GUMBI: No, fair enough, Chairperson. 5 I wanted to check with the witness whether he's aware is 6 there any written statement that was made on the 13th, 7 because according to our analysis of the statements we 8 have, some of them they are not dated. We are not sure 9 whether they were taken exactly on the 13th or maybe they 10 were taken after the 14th. 11 CHAIRPERSON: You understand the question 12 relates to whether you know whether any of the IPID 13 statements were taken, I take it the period is the 13th to 14 the 16th. Is that what you want to know, Mr Gumbi? 15 MR GUMBI: Yes. 16 CHAIRPERSON: Do you know the answer to 17 that? Were you involved in any way with the IPID 18 investigation? 19 MAJOR-GENERAL MPEMBE: No, Chairperson, 20 the only thing that I know is that I must only inform IPID 21 when a police official has discharged a firearm; that I 22 did, and I did make sure that they know that they should 23 attend the scene, and what I know is only that IPID work 24 independently from SAPS. 25 CHAIRPERSON: Did IPID interview you?</p>
<p style="text-align: right;">Page 12533</p> <p>1 couple of statements that were actually IPID statements 2 made by members of the police service who were present on 3 the 13th. So we know that IPID people did an investigation, 4 they took some statements at least which you put before us. 5 What's your question? Do you want to know whether they 6 questions every one of the policemen or women who were on 7 the scene, or – 8 MR GUMBI: Yes, Chairperson – 9 CHAIRPERSON: - what exactly do you want 10 to know? 11 MR GUMBI: Because some of the statements 12 they are not dated. That's why – 13 CHAIRPERSON: The? 14 MR GUMBI: Some of the statements they 15 are not dated, so that's why I wanted to – 16 CHAIRPERSON: Oh well, they're not dated, 17 but I mean that's not the witness's fault. 18 MR GUMBI: The ones with the – 19 CHAIRPERSON: That's not the witness's 20 fault. 21 MR GUMBI: Yes. 22 CHAIRPERSON: That's a matter you could 23 ask, if ever it became necessary, of the IPID people, but 24 subject to what people may say, I'm not disposed to embark 25 upon an inquiry as to the adequacy or otherwise of the IPID</p>	<p style="text-align: right;">Page 12535</p> <p>1 MAJOR-GENERAL MPEMBE: No, Chairperson. 2 CHAIRPERSON: Mr Gumbi, I am informed by 3 someone who knows about these matters that what often 4 happens with an IPID investigation is they take a statement 5 and then the last page is the attestation section. In 6 other words it's a roneoed form, the attestation part, and 7 on that they put the dates and what we've been given are 8 some of the IPID statements minus that last roneoed 9 attestation page upon which the date appears. So if it's 10 relevant for you to ascertain the dates upon which 11 particular statements were made, I suggest you address an 12 enquiry to IPID, possibly through the evidence leaders or 13 directly yourself, to ascertain where the originals are and 14 whether the particular statements that you're interested 15 in, whether the attestation certificates are available, 16 which will give the dates that you want. But let's not 17 spend any more time on it now. Make those enquiries. You 18 may draw a blank, alternatively you may hit the jackpot, 19 but whether you will or not is a matter we don't know the 20 answer to at the moment. 21 MR GUMBI: Yes, I understand, 22 Chairperson. I will engage the evidence leaders after I've 23 received instructions. 24 CHAIRPERSON: [Microphone off, inaudible] 25 particular you are interested in the dates are.</p>

<p style="text-align: right;">Page 12536</p> <p>1 MR GUMBI: Yes, Chairperson, I will do 2 that. Let us move on, General. While you were at 3 Potchefstroom, preparing for this Commission, and while you 4 were in the process of preparing exhibit L that was 5 presented before this Commission – 6 CHAIRPERSON: Hang on a second. That 7 makes an assumption which may not be accurate. Are you 8 suggesting that this witness was involved in preparing 9 exhibit L? 10 MR GUMBI: If I can – 11 CHAIRPERSON: Because I – you know, you 12 made it as a statement, as I understand, so it may not be 13 right. Maybe you should ask him, because my impression is 14 that responsibility for the contents, the accuracy, or in 15 some cases possibly the inaccuracy of statements made in 16 exhibit L doesn't rest with this witness, but possibly with 17 others. 18 MR GUMBI: Yes, Chairperson. If I can 19 ask – 20 CHAIRPERSON: So perhaps ask the question 21 directly first. 22 MR GUMBI: - a direct question, let us 23 start with the Potchefstroom meeting, General. At 24 Potchefstroom while you were there, preparing for this 25 Commission, did you inform all the officials who were there</p>	<p style="text-align: right;">Page 12538</p> <p>1 CHAIRPERSON: Perhaps we can be told what 2 the exhibit number is, and then – 3 MR GUMBI: FFF9, Chairperson. 4 CHAIRPERSON: What's the point you want 5 to make about that? Because I take it it's not suggested 6 that this witness had a hand in the opening statement, or 7 is it? Did you have anything to do with the content of the 8 opening statement of the SAPS before the Commission? 9 MAJOR-GENERAL MPEMBE: No, Chairperson. 10 [15:30] MR GUMBI: But it was contained on the 11 document I gave to you for reading. You did have an 12 opportunity to read through it, General? 13 MAJOR-GENERAL MPEMBE: It's correct, 14 Chairperson, but when Advocate gives me the document I 15 cannot deny to study it. 16 CHAIRPERSON: I know the [inaudible] is 17 difficult for you. I could understand there may be some 18 factual averment in the opening statement which in all 19 probability must have emanated from this witness, but 20 clearly that's something you can ask him about, but you 21 can't ask him general questions about the opening 22 statement; that's just wasting time. But is there some 23 particular paragraph that you want to rely on that you say 24 he must be the original informant upon whose information 25 that statement was based and you want to question him about</p>
<p style="text-align: right;">Page 12537</p> <p>1 that members fired without your instruction, there at 2 Potchefstroom? 3 CHAIRPERSON: Now Mr Gumbi, he's already 4 said that. I don't know whether everybody was in the room, 5 but he's told us on several occasions that he said that 6 shots were fired, the teargas that was fired without his 7 instruction, and then we've heard there was a debate. 8 Someone said they heard he had given the instruction. Kuhn 9 was the man who'd fired it, was there; he said he heard an 10 instruction. He didn't know who it was from. That all 11 happened at Potchefstroom, and his statement that he didn't 12 give the instruction was made there. As I say, whether 13 everybody was there is another matter, but certainly he's 14 told us several times what happened on that occasion. I 15 think you're really repeating a matter that's been dealt 16 with in detail already. If there's a new angle on it that 17 you want to raise, I won't stop you, but don't just repeat 18 points we know already. 19 MR GUMBI: Thank you very much, 20 Chairperson. General, can I refer you to SAPS opening 21 statement presented before this Commission? 22 CHAIRPERSON: The opening statement is an 23 exhibit. 24 MR GUMBI: It is an exhibit, yes 25 Chairperson.</p>	<p style="text-align: right;">Page 12539</p> <p>1 that? If that's what you want to do, carry on. 2 MR GUMBI: That's what I wanted to do, 3 Chairperson. That's why I referred this witness – I was 4 going to refer to the paragraph that I wanted to rely on. 5 I was not going to use the whole document. 6 CHAIRPERSON: Tell him what the paragraph 7 is and let's get on with it. 8 MR GUMBI: Go to paragraph 44.2. Maybe 9 if you can take it from paragraph 44.1 and to paragraph 10 44.2, dealing with the incident of the 13th of August 2012. 11 For ease of reference, General, can I read it for you, 12 paragraph 44.1 and 44.2, if the Chairperson will allow me. 13 CHAIRPERSON: I haven't got my copy here, 14 so I'd be very grateful if you'd read it out. Oh, they 15 found it for us on the – they put it on the screen, but for 16 the benefit of those who can't read the screen, "By the 17 time shooting occurred around the kraal on the afternoon of 18 Thursday, 16 August" - is this the passage you want? – 19 "numerous attempts by senior officers, including General 20 Mpeembe and Lieutenant-Colonel McIntosh had already been 21 made since Monday, 13 August 2012, to persuade protesters 22 to disarm. They had refused and proceeded to the koppie, 23 killing two police officers and severely injuring another 24 on their way there. They had also robbed the police 25 officers they'd killed and injured of two pistols and an R5</p>

<p style="text-align: right;">Page 12540</p> <p>1 rifle and shotgun, a police two-way radio and ammunition.”</p> <p>2 You want to read sub-para 2 as well?</p> <p>3 MR GUMBI: 44.2.</p> <p>4 CHAIRPERSON: “Teargas, stun grenades and</p> <p>5 rubber bullets had been used to disperse them and stop them</p> <p>6 going into a residential informal settlement. None of</p> <p>7 these measures deterred them. That was Monday, 13 August</p> <p>8 2012.”</p> <p>9 MR GUMBI: Yes, General, do you see that</p> <p>10 in that two paragraphs the Chairperson read to you, is</p> <p>11 nothing that is indicated that members fired teargas</p> <p>12 without any instruction?</p> <p>13 MAJOR-GENERAL MPEMBE: I can see,</p> <p>14 Chairperson.</p> <p>15 MR GUMBI: Same applies when you go to –</p> <p>16 CHAIRPERSON: Sorry, Mr Gumbi. He’s</p> <p>17 already told us (as we discussed already) several times,</p> <p>18 that when he was at Potchefstroom he told the people</p> <p>19 concerned who were drafting exhibit L that he didn’t give</p> <p>20 instructions for the teargas and stun grenades. For some</p> <p>21 reason or other the persons who drafted L and those who</p> <p>22 drafted the opening statement didn’t consider that</p> <p>23 statement he made material enough to include. I’m not sure</p> <p>24 that - that may be a ground of criticism. There may be all</p> <p>25 sorts of things that will flow from that, but I’m not sure</p>	<p style="text-align: right;">Page 12542</p> <p>1 MR GUMBI: Can I read it to you, the SAPS</p> <p>2 perspective of what happened on the 13th. “On their way to</p> <p>3 the koppie some of the protesters changed direction towards</p> <p>4 the village. To prevent them from entering” –</p> <p>5 CHAIRPERSON: For the benefit of those</p> <p>6 who are going to read the record later, you’re quoting</p> <p>7 slide 47, aren’t you?</p> <p>8 MR GUMBI: Yes, slide 47, the first</p> <p>9 bullet, saying that, “On their way to the koppie some of</p> <p>10 the protesters changed their direction towards the village.</p> <p>11 To prevent them from entering the village, police used</p> <p>12 teargas and stun grenade to disperse the protesters,</p> <p>13 discouraging them from their intended path. With their</p> <p>14 dangerous weapons a group of protesters turned around and</p> <p>15 charged at the members behind them. Two of the members of</p> <p>16 the police who died at the scene were retreating and firing</p> <p>17 at the protesters with shotgun rubber bullets, until they</p> <p>18 were overpowered and hacked to death.” Will you agree with</p> <p>19 me, General, summing up this point, that it’s nothing that</p> <p>20 is suggested that members fired without your instruction</p> <p>21 here?</p> <p>22 CHAIRPERSON: Mr Gumbi, we can read that</p> <p>23 for ourselves. Isn’t this the same point as the one we</p> <p>24 discussed a few minutes ago? He wasn’t responsible for</p> <p>25 compiling L. If the fact that no instruction was given is</p>
<p style="text-align: right;">Page 12541</p> <p>1 that this witness can be held responsible for the omission</p> <p>2 of that fact because he wasn’t a party to that, was he?</p> <p>3 MR GUMBI: Yes, Chairperson.</p> <p>4 CHAIRPERSON: And it may or may not be</p> <p>5 correct to say, presumably it may be argued before us, that</p> <p>6 the complete picture wasn’t put before us because that fact</p> <p>7 wasn’t disclosed, but we’re not busy with that at the</p> <p>8 moment and it’s not his fault, if someone is to blame for</p> <p>9 that, I don’t say anyone is to blame, but if someone is to</p> <p>10 blame it’s not the gentleman sitting at the witness table</p> <p>11 at the moment, is it?</p> <p>12 MR GUMBI: I do understand, Chairperson,</p> <p>13 and can I move again to another aspect on this one, but I</p> <p>14 wanted to refer the witness to exhibit L, then I will</p> <p>15 establish whether he knows the contents of exhibit L.</p> <p>16 CHAIRPERSON: So now you’d better tell us</p> <p>17 again what slide in L you’re referring to because –</p> <p>18 MR GUMBI: I’ll focus on the incident of</p> <p>19 the 13th, that’s slide number 47. Are you in possession of</p> <p>20 exhibit L, General?</p> <p>21 MAJOR-GENERAL MPEMBE: No, Chairperson.</p> <p>22 CHAIRPERSON: [Microphone off, inaudible]</p> <p>23 on the screen above you.</p> <p>24 MAJOR-GENERAL MPEMBE: I will look it at</p> <p>25 the screen, Chairperson.</p>	<p style="text-align: right;">Page 12543</p> <p>1 relevant, and its omission is unfortunate and may give rise</p> <p>2 to discussion, it’s not discussion that involves him</p> <p>3 because he told that to the people at Potchefstroom. They</p> <p>4 chose not to put it here. It’s a question they could be</p> <p>5 asked about, but not him, surely. We can understand if he</p> <p>6 hadn’t said anything at Rustenburg – sorry, at</p> <p>7 Potchefstroom. You could then say well by implication he</p> <p>8 was admitting that he did give an instruction or there was</p> <p>9 no problem of a lack of instruction. But in the light of</p> <p>10 his evidence repeated over and over again that he didn’t</p> <p>11 give the instruction, then the fact that the people who</p> <p>12 drafted this document chose not to mention what he had said</p> <p>13 is not a matter you can take up with him. It’s not his</p> <p>14 fault, is it?</p> <p>15 MR GUMBI: I would be happy, Chairperson,</p> <p>16 if we can do that by establishing to the witness whether he</p> <p>17 contributed during the drafting of this document. I think</p> <p>18 it will be –</p> <p>19 CHAIRPERSON: L was produced I think by,</p> <p>20 I think the evidence is, was it Colonel Visser and Colonel</p> <p>21 Scott? They were the people who did it in the end, as far</p> <p>22 as I can recall. Based upon what had been said by the</p> <p>23 various participants at Potchefstroom. He was one of those</p> <p>24 participants. He said, “I didn’t give the instruction.”</p> <p>25 So how could you take it any further? I don’t want to stop</p>

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1 you if there's some point I'm overlooking, but as I see it,
 2 there's no point in trying to beat him about the head on
 3 this point because he's not responsible for the omission,
 4 is he?
 5 MR GUMBI: I understand, Chairperson. I
 6 wanted to establish from him whether he contributed on this
 7 document. Maybe if I can get the answer from the witness.
 8 CHAIRPERSON: Did you have any hand in –
 9 play any role in the actual drafting of this document,
 10 exhibit L?
 11 MAJOR-GENERAL MPEMBE: Chairperson, I
 12 only participate and I also told them that I did not give
 13 the instruction, but I was not responsible to ultimately
 14 draw exhibit L and bring it to the Commission.
 15 MR GUMBI: Chairperson, with your leave,
 16 I see it's almost 20 to 4 and I think –
 17 CHAIRPERSON: We're proposing to go on
 18 till 4 o'clock because we did lose a bit of time on other
 19 matters, and it is, as we've heard, we've got serious
 20 problems in trying to finish our work in the time allotted
 21 to us, so I'm loath to adjourn now, unless you could tell
 22 me there's a reason why you need an adjournment now, you
 23 want to take instructions, you're not able to proceed,
 24 something of that kind. I won't view such a request
 25 unsympathetically, but time is a precious resource for us.

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1 MR GUMBI: There are few instructions I
 2 wanted to take, Chairperson, then so that when I proceed
 3 with my cross-examination then I'm sure what I'm going to –
 4 CHAIRPERSON: Nothing else you can deal
 5 with now?
 6 MR GUMBI: I saw it was almost 20 to 4
 7 o'clock and –
 8 CHAIRPERSON: Well, I know, but I was
 9 proposing to go till 4 o'clock.
 10 MR GUMBI: I propose to adjourn now so
 11 that I will –
 12 CHAIRPERSON: Well, you'll adjourn now.
 13 I see. Shall we carry on without you?
 14 MR GUMBI: Yes, we can carry on tomorrow.
 15 CHAIRPERSON: No, no, no, you didn't hear
 16 me. So you're going to adjourn now. Shall we carry on
 17 without you?
 18 MR GUMBI: No.
 19 CHAIRPERSON: Who decides on adjournment
 20 in this Commission; you or me? If you've got a good reason
 21 for an adjournment, give it to me and I'll give you the
 22 adjournment. But don't arrogate to yourself powers of
 23 adjournment that you haven't got.
 24 MR GUMBI: Thank you, Chairperson. Yes,
 25 I propose adjournment now, then so that I can take further

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1 instruction, if I –
 2 CHAIRPERSON: - further instructions?
 3 MR GUMBI: Yes, Chairperson.
 4 CHAIRPERSON: Alright, we will start
 5 again tomorrow at 9 o'clock, I hope, and for the benefit of
 6 those who've forgotten our sitting times on Fridays, we
 7 normally adjourn at 1 o'clock. So we'd like to carry on
 8 till 1 o'clock tomorrow, starting at 9, and do you
 9 anticipate that you'll be finished with your cross-
 10 examination –
 11 MR GUMBI: Tomorrow.
 12 CHAIRPERSON: - by 1 o'clock tomorrow?
 13 MR GUMBI: Yes, Chairperson.
 14 CHAIRPERSON: If not before.
 15 MR GUMBI: Yes, Chairperson, it can be
 16 before.
 17 CHAIRPERSON: Obviously it depends upon
 18 what we call injury time and points that arise and so
 19 forth.
 20 MR GUMBI: Yes.
 21 CHAIRPERSON: Dealing with such
 22 objections as may be raised and so forth, but as you see
 23 it, we should finish your cross-examination by then?
 24 MR GUMBI: Yes, Chairperson.
 25 CHAIRPERSON: Alright. Thank you, Mr

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1 Gumbi. We'll see you on the morrow 9 o'clock.
 2 MR GUMBI: Yes, Chairperson.
 3 CHAIRPERSON: We take the adjournment.
 4 [COMMISSION ADJOURNED]
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