

# RealTime Transcriptions

TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

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

#### HELD ON

DAY 125      28 AUGUST 2013      PAGES 12931 TO 13077



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<p style="text-align: right;">Page 12931</p> <p>1 [PROCEEDINGS ON 28 AUGUST 2013]  2 [09:05] CHAIRPERSON: The Commission resumes.  3 Major-General, you're still under oath.  4 ZONDASI WILLIAM MPEMBE: (s.u.o.)  5 CHAIRPERSON: Ms Le Roux, are you going  6 to move on to another point?  7 MS LE ROUX: Yes, Chair.  8 CHAIRPERSON: May I enquire just what the  9 topic will be?  10 MS LE ROUX: It still relates to, it  11 still relates to scene 2. It relates to the command  12 structures of scene 2.  13 CHAIRPERSON: Okay, well, before you go  14 on to that I'd like to ask a question arising from a  15 question, something, a point you made yesterday. When –  16 yes, Major-General?  17 MAJOR-GENERAL MPEMBE: I'm sorry,  18 Chairperson, I just wanted maybe to say something to the  19 Commission -  20 CHAIRPERSON: We don't know what it is  21 but I suppose I can –  22 MAJOR-GENERAL MPEMBE: - if I may be  23 allowed. Chairperson, yesterday there was an insinuation  24 that I'm very unhelpful and not co-operative. I just want  25 to put this on record that with regard to Mr Cees – or he</p>	<p style="text-align: right;">Page 12933</p> <p>1 respect everybody in the Commission, I will always be  2 helpful and co-operative. Thanks Chairperson.  3 CHAIRPERSON: Thank you, Major-General.  4 Yes, the question I want to ask you flowing from questions  5 asked yesterday relates to a passage in exhibit HHH48, that  6 is to say the pocket book of Sergeant Cebekhulu at pages 61  7 and 62. It's the last exhibit that was handed in  8 yesterday. Pages 61 and 62, have you got it?  9 MAJOR-GENERAL MPEMBE: Yes Chairperson, I  10 do, I've got it.  11 CHAIRPERSON: The passage that was put to  12 you by Adv Le Roux reads – it's the last line on page 61,  13 "Debriefing at JOC by head office members and by  14 commanders." When that was put to you, you said that you  15 weren't involved in that but you did say that the  16 commanders, after these commanders had done the debriefing  17 as it's here described, they then came and spoke to you  18 about what had happened at scene 2. That's my  19 recollection. Yes – no, I'm reminded, I put it wrongly.  20 You said yesterday that you had a debriefing with the  21 commanders and the commanders of course had had a  22 debriefing as appears from this pocket book, with the  23 members. Now what I'd like to know from you is what did  24 the commanders tell you when you had your debriefing with  25 them and was it before or after they'd had the debriefing</p>
<p style="text-align: right;">Page 12932</p> <p>1 is Cees - always when I met him and as I indicated in  2 Rustenburg – I met him as a part of consultation with the  3 lawyers.  4 CHAIRPERSON: Mr De Rover?  5 MAJOR-GENERAL MPEMBE: Yes. I met him as  6 a part of consultation with the lawyers. That meeting was  7 arranged by our lawyers. He was meeting – I met him on the  8 issue of the, after I'd been informed or introduced to him,  9 I met him on the issue of scene 1 and my role as an overall  10 commander in the operation. Chairperson, as I have said in  11 my statement HH3, I will talk to the Commission and be very  12 truthful in whatever events that I know of, of my personal  13 knowledge to what has happened in Marikana.  14 Chairperson, in terms of this issue is that Mr De  15 Rover, in his statement he also says that he went to the  16 scene with the members that were there at koppie 2, at  17 koppie 3 or at scene 2 as it's known to the Commission. I  18 want to say to the Commission I was not party to the team  19 that went to the scene. In the light of that, yesterday I  20 could not comment because I did not know when they went  21 there, which terminology they wanted to use to explain  22 what. Chairperson, hence yesterday I said I could not  23 comment on this issue. I wanted to say to the Commission,  24 as a senior police officer in the police I will continue  25 humbling myself, I will respect the Commission, I will</p>	<p style="text-align: right;">Page 12934</p> <p>1 with their members? Is that right? Two questions, I must  2 ask them one at a time. Your debriefing with the  3 commanders, was it before or after they had their  4 debriefing with their members?  5 MAJOR-GENERAL MPEMBE: Chairperson, to be  6 precise, normally – I'll talk on the normally issue but  7 normally they were supposed to have got it, to have got the  8 debriefing with the members but I will confirm that.  9 Normally when they come to the JOC they already have a  10 debriefing with their members and then they will come and  11 tell me in the JOCOM what has happened.  12 CHAIRPERSON: What happened on this  13 occasion?  14 MAJOR-GENERAL MPEMBE: So in this case,  15 Chairperson, I will take it in that way that they did  16 already have a debriefing with the members and they came to  17 – and they come and tell me in the JOCOM.  18 CHAIRPERSON: What did they tell you?  19 MAJOR-GENERAL MPEMBE: Chairperson, as I  20 indicated yesterday, when I have read their statements,  21 those that were in scene 2, it's exactly what the  22 commanders they said to me on that day.  23 CHAIRPERSON: Tell us what they told you  24 on that day.  25 MAJOR-GENERAL MPEMBE: Chairperson, with</p>

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1 regard to Captain Kidd, Captain Kidd said that where he was  
 2 posted to at the informal settlement where he was supposed  
 3 to guard the informal settlement –  
 4 CHAIRPERSON: Sorry to interrupt you, was  
 5 that forward holding area 2?  
 6 MAJOR-GENERAL MPEMBE: Correct,  
 7 Chairperson, holding area 2. He said he heard from the  
 8 radio that – not from the radio, he said he heard the  
 9 shooting. When he heard the shooting it was upon himself  
 10 to go and check what were they shooting, what was the  
 11 shooting all about. Chairperson, he said that there were  
 12 people that they were going in the direction of the Karee –  
 13 CHAIRPERSON: Karee shaft? They were –  
 14 MAJOR-GENERAL MPEMBE: Yes, Chairperson.  
 15 CHAIRPERSON: They were going to the left  
 16 of the direction in which the people had been - on the 13th,  
 17 you remember, as the strikers were moving forward the Karee  
 18 shaft is on their left. We're now talking of course about  
 19 the 16th but it's the same direction, is that right?  
 20 MAJOR-GENERAL MPEMBE: Chairperson, it  
 21 could be in the same direction but in terms of the  
 22 dispersal you remember we were discussing at the westerly,  
 23 it was when Adv Madlanga asked me, it was in that  
 24 direction. And others, Chairperson, he says those that  
 25 they did not have – those that they did not have the

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1 weapons, he let them go. He says he saw the chopper and in  
 2 the chopper, the chopper directing him to the direction of  
 3 the koppie. While he was still going to the koppie after  
 4 having heard the shots there and that direction, according  
 5 to him it was given by Lieutenant-Colonel Vermaak. So then  
 6 he came from that direction of, to the koppie from that –  
 7 maybe if it is here I could say in that westerly direction.  
 8 Chairperson, I will leave him – maybe let me finish what he  
 9 told me on that day.  
 10 CHAIRPERSON: I think that's sensible.  
 11 MAJOR-GENERAL MPEMBE: And Chairperson he  
 12 said that when he was nearer at the scene there was one  
 13 person who came armed with a dangerous weapon, I will not  
 14 be specific what weapon he spoke about, and he ordered him,  
 15 he gave him the warning, he ordered him to drop the weapon  
 16 and the person persistently came to him. There was a time  
 17 where he said he shot a warning shot and the person  
 18 persistently came to him. Then that's then when they used  
 19 a firearm to defend themselves. Chairperson, I will –  
 20 CHAIRPERSON: Did he say he then shot the  
 21 person?  
 22 MAJOR-GENERAL MPEMBE: Yes, Chairperson.  
 23 CHAIRPERSON: And was the person killed?  
 24 MAJOR-GENERAL MPEMBE: I don't know  
 25 whether the person was killed or not, Chairperson.

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1 CHAIRPERSON: But he certainly was  
 2 injured.  
 3 MAJOR-GENERAL MPEMBE: But what I know is  
 4 that the person was shot.  
 5 CHAIRPERSON: Yes. Obviously Kidd hadn't  
 6 been trained how to disarm people without bloodshed.  
 7 MAJOR-GENERAL MPEMBE: Chairperson?  
 8 CHAIRPERSON: Obviously Kidd hadn't been  
 9 trained how to disarm people without blood being shed.  
 10 MAJOR-GENERAL MPEMBE: Chairperson, at  
 11 this stage I don't know whether Captain Kidd had undergone  
 12 POP training.  
 13 CHAIRPERSON: You were telling us what  
 14 Captain Kidd told you and there was this incident and did  
 15 he himself do it or one of his members, shoot the person  
 16 who was approaching with a dangerous weapon?  
 17 MAJOR-GENERAL MPEMBE: Chairperson, it  
 18 was not himself, he said one of his members.  
 19 CHAIRPERSON: One of his – I see. Yes  
 20 and what else did he tell you?  
 21 MAJOR-GENERAL MPEMBE: Chairperson?  
 22 CHAIRPERSON: What else did Captain Kidd  
 23 tell you?  
 24 MAJOR-GENERAL MPEMBE: That is where I  
 25 will leave what Captain Kidd told me. That's what I

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1 understand about the situation of Captain Kidd.  
 2 CHAIRPERSON: That is the debriefing you  
 3 got from him?  
 4 MAJOR-GENERAL MPEMBE: Yes, Chairperson.  
 5 CHAIRPERSON: And from whom else did you  
 6 receive a debriefing?  
 7 MAJOR-GENERAL MPEMBE: Chairperson, with  
 8 regard to the – and let me finish this one of Captain Kidd,  
 9 that there were other members of Canine that they were with  
 10 Major-General Naidoo. Now this will lead me to what  
 11 General Naidoo reported to me. Chairperson, General Naidoo  
 12 said that by the time when he got a call for medical  
 13 assistance, he heard the shooting, he heard the gunshots.  
 14 Then he said he could not continue to go to where the  
 15 people were injured.  
 16 CHAIRPERSON: [Microphone off,  
 17 inaudible].  
 18 MAJOR-GENERAL MPEMBE: Correct,  
 19 Chairperson, because he was afraid that these bullets that  
 20 are coming might hit the medics that they are supposed to  
 21 go to attend to those that were injured. As a result of  
 22 that then he went to check what was happening, whether  
 23 members are under attack or what is happening.  
 24 CHAIRPERSON: Did you say where he went?  
 25 You say he went to check, did he say where he went?

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1 MAJOR-GENERAL MPEMBE: He went where he  
 2 heard the shoot - the gunshots were firing. So probably my  
 3 understanding is that was now what is now known as scene 2.  
 4 Chairperson, he said when he arrived there he saw somebody  
 5 that was carrying a firearm and seeing that person carrying  
 6 a firearm and when he heard that shot, he also used his  
 7 firearm. And that information, when he conveyed it I was  
 8 with Major-General Annandale. It was before the JOCOM,  
 9 also in the JOCOM he repeated the same story. Then he said  
 10 later he was joined by the NIU members and NIU members, if  
 11 my recollection serves me well, it was under the command of  
 12 now Colonel Modiba. Chairperson, on that day when reported  
 13 to me, I did not know whether NIU did shoot or they did not  
 14 shoot.  
 15 Chairperson, then on the other side is Colonel  
 16 McIntosh, where Colonel McIntosh reported that there is a  
 17 gentleman that was called Rasta and he persistently  
 18 attacked, he persistently came to the members irrespective  
 19 of the warning. Those are the – and then the members also  
 20 defended themselves. I cannot recall what dangerous weapon  
 21 is, Mr Rasta was having. Chairperson, with Colonel  
 22 McIntosh I understand that that's where also Brigadier  
 23 Calitz could hear when that incident was happening. That's  
 24 how far I have been told by these other members,  
 25 Chairperson, and on that side that's where Captain Ryland

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1 was also on that side. Thanks Chairperson.  
 2 [09:24] CHAIRPERSON: This debriefing took place  
 3 on the 16th, evening of the 16th, is that right? That's the  
 4 debriefing that Sergeant Cebekhulu talks about in his  
 5 diary, that was on the 16th.  
 6 MAJOR-GENERAL MPEMBE: Correct,  
 7 Chairperson.  
 8 CHAIRPERSON: Was it recorded in terms of  
 9 paragraphs 13.1 and 2 of standing order, General, 262? If  
 10 you're looking for it, it's exhibit SS2.  
 11 MAJOR-GENERAL MPEMBE: Correct  
 12 Chairperson, I'm just looking at it very quickly. I'm  
 13 sorry, Chairperson, it seems as if it's been taken out from  
 14 this file. I think it's already on another file. If I may  
 15 be -  
 16 CHAIRPERSON: Alright, I'll tell you what  
 17 I'll do, I'll lend you my copy for the moment.  
 18 MAJOR-GENERAL MPEMBE: Chairperson said  
 19 it's paragraph?  
 20 CHAIRPERSON: I think it's 13.1 and 2.  
 21 It's now been put on the screen for us to see. The  
 22 reference to the record is 13.1, para 13.1.  
 23 MAJOR-GENERAL MPEMBE: No, Chairperson,  
 24 and I will say the reasons why I say no.  
 25 CHAIRPERSON: So the answer is no.

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1 MAJOR-GENERAL MPEMBE: Chairperson, in  
 2 terms of standing order 13.2, before I called a debriefing  
 3 which I have explained why I did not, why it was not  
 4 called, all levels of command should brief, should debrief  
 5 themselves. Chairperson, that debriefing has to be  
 6 recorded and made in a debriefing certificate and that  
 7 input of that debriefing is now vested in the overall  
 8 debriefing with the police and the other role players.  
 9 Chairperson, and the debriefing with regard to the one that  
 10 was done and Constable Cebekhulu reported or noted in his  
 11 diary –  
 12 CHAIRPERSON: Sergeant.  
 13 MAJOR-GENERAL MPEMBE: Sorry,  
 14 Chairperson?  
 15 CHAIRPERSON: Sergeant.  
 16 MAJOR-GENERAL MPEMBE: Sergeant, yes.  
 17 Chairperson, every time when members are reporting off  
 18 duty, irrespective of what happened, they must first be  
 19 paraded as they have been paraded when they report on duty  
 20 by the same commander who put them on duty in the morning.  
 21 Then an individual member he will say what has happened  
 22 during the tour of duty, where he has sustained the injury  
 23 he will say I did sustain the injury and the circumstances  
 24 under which the injury is supposed to have been sustained.  
 25 When he has used the firearm he will say under what

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1 circumstances he has used the firearm and how many rounds  
 2 he has shot and how many – and the commander will have to  
 3 correlate what was recorded in the SAPS15 in the morning  
 4 when he reports on duty and compare it with what the member  
 5 is now saying. Chairperson, that should also correlate  
 6 with whatever the officer who has visited the scene will  
 7 say, if there was an officer that visited that scene. And  
 8 after that parade holding, it is then that they come to the  
 9 JOCOM. That's when then the commanders will report to me  
 10 at the JOCOM what has happened.  
 11 CHAIRPERSON: Is that your answer?  
 12 MAJOR-GENERAL MPEMBE: Correct,  
 13 Chairperson.  
 14 CHAIRPERSON: Ms Le Roux, this point  
 15 arises essentially from the point, the questions you asked  
 16 yesterday. I take it when Adv Hemraj is asking her  
 17 questions, you may have some questions as well.  
 18 COMMISSIONER HEMRAJ: General, the  
 19 debriefing that takes place with you, is that a formal  
 20 debriefing where everything is minuted and recorded or do  
 21 you thereafter go and make a record and a summary of what  
 22 was conveyed to you? I just want to be clear about what  
 23 and how the record is kept of the debriefing.  
 24 MAJOR-GENERAL MPEMBE: Chairperson will  
 25 recall in terms of my statement HHH3 to say when we are

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1 supposed to have a short analysis debriefing. Commanders  
 2 without the JOCOM structure that is normally sitting, they  
 3 will do that short analysis first so that they could have a  
 4 meaningful input in the in-depth debriefing that is  
 5 supposed to be held for the whole operation, because at  
 6 that particular moment it's important when you do the in-  
 7 depth briefing to understand exactly how a constable or a  
 8 sergeant on the ground has fared and how the community were  
 9 affected and how, what the community said and it's many  
 10 issues that they have to be taken into account – the  
 11 utilisation of the resources and how they have been  
 12 utilised.

13 Chairperson, I'm trying to distinguish the one  
 14 that is only to check in terms of the injury and what has  
 15 happened, with the in-depth – with the short analysis  
 16 before the one that is, because it starts at that level, so  
 17 that there must be a clear understanding in terms of the  
 18 short analysis debriefing and the one that the commander  
 19 has to do with any normal shift, not necessarily in  
 20 Marikana. When members are reporting at the police station  
 21 they must stand the parade when they report on duty and  
 22 they must stand off duty parade also. So when it comes to  
 23 the debriefing of on duty parade and the bigger, and the  
 24 operation debriefing, they are all interpreted under  
 25 standing order 13.2.

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1 COMMISSIONER HEMRAJ: The information  
 2 obtained in the debriefing, where is that recorded?  
 3 MAJOR-GENERAL MPEMBE: Chairperson, this  
 4 one is supposed to be recorded by the commander in his  
 5 diary so that he can insert it in the JOCOM meeting.  
 6 COMMISSIONER HEMRAJ: And practically  
 7 that 13.1, the C-JOC and the debriefing, during what time  
 8 period is it expected to take place after the event?  
 9 MAJOR-GENERAL MPEMBE: Chairperson, it  
 10 will depend on the situations. In an operation that  
 11 nothing has taken place then you normally, like I will say  
 12 the crowd management in this specific case that has taken  
 13 place where a notice has been served, where you have got  
 14 all different role players, you will decide it even after  
 15 that all people have gone off, or you will also combine,  
 16 meet at the JOCOM with all different role players and you  
 17 announce the date in terms of when the one in terms of 13.1  
 18 it will take place. Then you also announce a short  
 19 analysis date for all the people to understand and this one  
 20 of 13.1 it will normally take place after all this other  
 21 debriefing by different role players in the JOCOM has taken  
 22 place, so that they can have the input to the one that the  
 23 C-JOC is going to make.  
 24 COMMISSIONER HEMRAJ: Thank you, General.  
 25 CHAIRPERSON: Ms Le Roux, I think you

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1 indicated you had some questions on this point as well,  
 2 arising from the answers that we've received so far.  
 3 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):  
 4 Thank you, Chair. Good morning, Major-General.  
 5 MAJOR-GENERAL MPEMBE: Good morning,  
 6 Advocate.  
 7 MS LE ROUX: Major-General, if I could  
 8 just start where you started this morning with your brief  
 9 statement and clarify for the record, I don't – I didn't  
 10 mean yesterday to convey a sense that you were being unco-  
 11 operative with this Commission and I appreciate the  
 12 statement that you made. All I meant to indicate to the  
 13 Commission is that because you don't have personal  
 14 knowledge of a lot of the events, that wasn't helpful for  
 15 the Commission. So I didn't mean you to understand me to  
 16 say that you had not been co-operative. I just wanted to  
 17 clarify that.  
 18 CHAIRPERSON: Major-General, I think  
 19 you're entitled to respond to that.  
 20 MAJOR-GENERAL MPEMBE: Chairperson, as I  
 21 said I'll continue to humble myself. The reason why I was  
 22 so hurt because yesterday all over in the news it was  
 23 clearly said that I'm very unco-operative and I - my  
 24 seniors that are there, which we have been told to be co-  
 25 operative, that's why I was hurt.

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1 CHAIRPERSON: I trust that what Adv Le  
 2 Roux has now said will be conveyed to your seniors and will  
 3 also [microphone off, inaudible] the reports of yesterday  
 4 which hurt you.  
 5 MAJOR-GENERAL MPEMBE: Thanks  
 6 Chairperson, thank you Advocate.  
 7 CHAIRPERSON: I see you're very emotional  
 8 about this.  
 9 MAJOR-GENERAL MPEMBE: Correct.  
 10 CHAIRPERSON: Would you like us to take a  
 11 short adjournment to give you a chance to compose yourself?  
 12 It's difficult to testify in circumstances where you are  
 13 very upset and feel emotional.  
 14 MAJOR-GENERAL MPEMBE: I will really  
 15 appreciate.  
 16 CHAIRPERSON: Would you like a five  
 17 minutes – let's make it a 10 minute adjournment.  
 18 MAJOR-GENERAL MPEMBE: Correct,  
 19 Chairperson.  
 20 CHAIRPERSON: Perhaps have a glass of  
 21 water or a cup of tea or something and when you're ready,  
 22 let us know and we can carry on and I think Ms Le Roux has  
 23 got other questions to ask you arising from the debriefing  
 24 point that we were discussing, you and I.  
 25 MAJOR-GENERAL MPEMBE: Correct,

<p style="text-align: right;">Page 12947</p> <p>1 Chairperson.</p> <p>2 CHAIRPERSON: We're now going to –</p> <p>3 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>4 [09:59] CHAIRPERSON: The Commission resumes.</p> <p>5 Major-General, you're still under oath.</p> <p>6 ZONDASI WILLIAM MPEMBE: (s.u.o.)</p> <p>7 CHAIRPERSON: Are you feeling better now?</p> <p>8 Are you able to carry on?</p> <p>9 MAJOR-GENERAL MPEMBE: Extremely better</p> <p>10 Chairperson, thank you very much.</p> <p>11 CHAIRPERSON: Ms le Roux? Sorry, is</p> <p>12 there anything further you want to say before Ms Le Roux</p> <p>13 continues with her cross-examination?</p> <p>14 MAJOR-GENERAL MPEMBE: No, Chairperson.</p> <p>15 CHAIRPERSON: Ms Le Roux?</p> <p>16 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):</p> <p>17 Thank you, Chair. Major-General, there is something</p> <p>18 further I would like to say because I've reflected on it</p> <p>19 over the adjournment and because, as you've noticed this</p> <p>20 morning, the media is in the room and there has been some</p> <p>21 inaccuracy in the reporting about what the Human Rights</p> <p>22 Commission's position is. So I want to just clarify it one</p> <p>23 more time and this may be difficult for you to hear but I</p> <p>24 feel I must, for the record, clarify our position and it's</p> <p>25 this, we do not mean to suggest that you have not been co-</p>	<p style="text-align: right;">Page 12949</p> <p>1 means that in terms of assisting this Commission after the</p> <p>2 fact in trying to establish what happened, your evidence</p> <p>3 has not been able to assist the Commission yet and we know</p> <p>4 that there will be other people who will come and testify</p> <p>5 and we hope that their testimony will assist the</p> <p>6 Commission, but that is all that the South African Human</p> <p>7 Rights Commission is submitting and I just wanted to</p> <p>8 clarify that for you. So there were many interventions</p> <p>9 over the last two days on our cross-examination saying, you</p> <p>10 know, what is the point of this, this is a question for a</p> <p>11 different witness, the Major-General won't know the answer</p> <p>12 and that's precisely the point, that although you were</p> <p>13 overall commander, you don't seem to have had personal</p> <p>14 knowledge of what happened. So I don't mean to suggest</p> <p>15 that you haven't assisted the Commission by being unco-</p> <p>16 operative, all we say is that you didn't have personal</p> <p>17 knowledge, despite being overall commander.</p> <p>18 CHAIRPERSON: I take it – that's the</p> <p>19 statement, the attitude of the Human Rights Commission,</p> <p>20 something they'll elaborate on in argument. I take it that</p> <p>21 it's not part of the cross-examination but Mr Ngalwana,</p> <p>22 we'll hear it being perhaps developed subsequently in</p> <p>23 cross-examination and even in argument later but I don't</p> <p>24 think it's part of the cross-examination as such. Mr</p> <p>25 Ngalwana, did you want to say something?</p>
<p style="text-align: right;">Page 12948</p> <p>1 operative with this Commission, not at all. What we do</p> <p>2 mean to suggest, though, to the Commission is that you were</p> <p>3 overall commander in name only. You did not know that the</p> <p>4 plan had changed fundamentally to channel the protesters</p> <p>5 into an inevitable and deadly confrontation with the TRT.</p> <p>6 You don't know what happened at scene 1, you don't know</p> <p>7 what happened at scene 2. When you were up in the</p> <p>8 helicopter it appears you didn't have an appreciation for</p> <p>9 what had happened because you were flying around in circles</p> <p>10 and then it only comes much later that you heard through</p> <p>11 other people and that you don't know, with respect to</p> <p>12 briefing, whether the unit commanders properly briefed all</p> <p>13 of their members on what was happening. And the reason all</p> <p>14 of that is important is because this Commission needs to</p> <p>15 understand who was in charge on the day and it appears from</p> <p>16 your evidence that we still don't know that. So –</p> <p>17 MR NGALWANA: Chair, with respect –</p> <p>18 MS LE ROUX: - we also need to understand</p> <p>19 – I need to finish my statement, Chair.</p> <p>20 MR NGALWANA: - there's clear evidence as</p> <p>21 regards all the overall –</p> <p>22 CHAIRPERSON: [Microphone off,</p> <p>23 inaudible]. Carry on, Ms Le Roux.</p> <p>24 MR NGALWANA: I apologise, Chair.</p> <p>25 MS LE ROUX: Major-General, it also then</p>	<p style="text-align: right;">Page 12950</p> <p>1 MR NGALWANA: Yes Chair, very briefly.</p> <p>2 We take strong exception to the statement that has just</p> <p>3 been made by our learned friend. First, she premises her –</p> <p>4 well, I'll call it address, not to put it higher than that</p> <p>5 – she premises it by referring to the presence of the</p> <p>6 media. Clearly that sets the scene for everything that she</p> <p>7 says thereafter. She then says without any proof –</p> <p>8 CHAIRPERSON: I'm sorry to interrupt you</p> <p>9 there. I did not understand her to be grandstanding, which</p> <p>10 I think is what you're insinuating. My understanding was</p> <p>11 she said there'd been an inaccurate report in the media or</p> <p>12 inaccurate reports in the media and she mentioned the fact</p> <p>13 that she appreciates the fact that the media are here now,</p> <p>14 what she said was being televised, therefore inaccurate</p> <p>15 reports will be put right. I think that is the thrust of</p> <p>16 what she said.</p> <p>17 MS LE ROUX: Correct.</p> <p>18 CHAIRPERSON: But anyway, please carry on</p> <p>19 with what you have to say, Mr Ngalwana.</p> <p>20 MR NGALWANA: Having referred to the</p> <p>21 evidence, to the presence of the media, she then mis-</p> <p>22 characterises the evidence. She says we don't know who is</p> <p>23 in charge or who was in charge. There has been ample</p> <p>24 evidence, it has been put to the General that the person</p> <p>25 who was in charge was the Provincial Commissioner, she</p>

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1 denied it consistently. There is also reference to – she  
 2 says the evidence of the General hasn't assisted this  
 3 Commission. She has absolutely no basis for saying this.  
 4 It is nothing more than grandstanding, Chair, I persist in  
 5 that statement. We take strong except to what –  
 6 CHAIRPERSON: Ms Le Roux, I don't think  
 7 it's – I don't propose to respond at any length to what you  
 8 said but I don't think it's appropriate to suggest that the  
 9 witness's evidence is unhelpful in the course of a speech  
 10 in the middle of his cross-examination. If you are going  
 11 to contend that at the end of the day you're entitled to do  
 12 so. You're entitled to advance your arguments as to why  
 13 you say that but to make a statement like that in the  
 14 middle of his evidence – I understand the context in which  
 15 it arose but still, to make a statement like that is not  
 16 appropriate in the circumstances and the evidence wasn't  
 17 quoted with entire accuracy. I think I understand the  
 18 point that you –  
 19 MR MAHLANGU: - just recording, Mr  
 20 Chairperson.  
 21 CHAIRPERSON: I think I know the point  
 22 you are proposing to make. It can be appropriately made at  
 23 the end if you have evidence to support it but at the  
 24 moment you can't, on the available evidence, make the  
 25 statements you did. It may be that you will elicit further

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1 evidence from this witness and others which has a bearing  
 2 on the point, maybe at the end of the day you'll be able to  
 3 argue the point but it's certainly not a statement that can  
 4 be made as a fact at this point and I don't think it's a  
 5 tendency which I should encourage for people to make  
 6 speeches here. This is the place for evidence, evidence-  
 7 in-chief, cross-examination, re-examination and answers by  
 8 witnesses and the fewer speeches we have the better, but  
 9 let's now carry on with cross-examination.  
 10 MS LE ROUX: Major-General, could I ask  
 11 you to turn to an exhibit GGG25? It's a document entitled  
 12 "Crowd management for platoon commanders briefing and  
 13 debriefing." It's not a document that had been on our  
 14 index but it does provide the answer to Commissioner  
 15 Hemraj's question regarding the policy around debriefing.  
 16 Do you have access to exhibit GGG25?  
 17 MAJOR-GENERAL MPEMBE: Correct,  
 18 Chairperson.  
 19 MS LE ROUX: Major-General, for the  
 20 record, this comes from the POP file and I understand this  
 21 to be a policy document by the SAPS around briefing and  
 22 debriefing for platoon commanders. Is that your  
 23 understanding of this document?  
 24 MAJOR-GENERAL MPEMBE: Chairperson, I may  
 25 request the paragraph in which the question is based so

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1 that I can respond.  
 2 MS LE ROUX: Major-General, we'll get to  
 3 the specific paragraph. I just wanted to clarify –  
 4 CHAIRPERSON: I must say I think that's a  
 5 fair question. This is –  
 6 MS LE ROUX: It's paragraph 12.  
 7 CHAIRPERSON: This is a document that's  
 8 apparently been in existence since 1999, so it's a SAPS  
 9 document –  
 10 MS LE ROUX: It's paragraph –  
 11 CHAIRPERSON: It's "Crowd management for  
 12 platoon commanders briefing and debriefing," are you  
 13 familiar with this document? Have you seen it before at  
 14 some stage since 1999 when it came out?  
 15 MAJOR-GENERAL MPEMBE: Chairperson,  
 16 precisely my question. This one that I have is similar as  
 17 FF1, FFF1. It doesn't talk about platoon commanders.  
 18 Maybe – because the one that is –  
 19 CHAIRPERSON: The one we're looking at,  
 20 which is –  
 21 MS LE ROUX: GGG25.  
 22 CHAIRPERSON: GGG25 is headed – I'll tell  
 23 you what I'll do. I'll – my colleague Adv Hemraj can give  
 24 you her copy because it's obviously important for the  
 25 purposes of Ms Le Roux's cross-examination that you have

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1 the document before you. It's being shown on the screen  
 2 now.  
 3 MS LE ROUX: Yes, that's it.  
 4 CHAIRPERSON: The debriefing section  
 5 appears to begin on page 6, paragraph 9. I don't know  
 6 whether you're referring to that or whether there's another  
 7 passage you want to refer to first.  
 8 MS LE ROUX: Chair, the answer to Adv  
 9 Hemraj's question is in paragraph 12, I believe, which is  
 10 now being displayed on the screen. For the record, it  
 11 states, "After every debriefing session a brief report  
 12 should be compiled by the" – I don't know what those things  
 13 mean, perhaps Major-General you can help us – "commander  
 14 and filed together with the operation order for the period  
 15 of five years."  
 16 COMMISSIONER HEMRAJ: I thought the  
 17 witness answered the question to say that they would  
 18 announce the date on which the meeting would be held for  
 19 the formal briefing.  
 20 MS LE ROUX: Correct, Commissioner. My  
 21 understanding of this document, though, it just answers the  
 22 question as to how it is then recorded, what happens to it?  
 23 I believe this document explains that after every  
 24 debriefing session there should be a brief report compiled  
 25 and filed together with the operation order. I'm merely

<p style="text-align: right;">Page 12955</p> <p>1 trying to provide assistance on that question.</p> <p>2 COMMISSIONER TOKOTA: Ms Le Roux, I</p> <p>3 understood the witness to be saying that the debriefing</p> <p>4 which they had on the 16th was not the debriefing as</p> <p>5 envisaged in the standing order, otherwise those are just</p> <p>6 inputs from various commanders, what, the reports of what</p> <p>7 had happened and the debriefing as envisaged in the</p> <p>8 standing order would be done later and the date would be</p> <p>9 announced so that every input would be there. That is</p> <p>10 where the analysis of the events of the whole operation</p> <p>11 would be carried out. That's how I understood it.</p> <p>12 MS LE ROUX: Commissioner Tokota, that</p> <p>13 accords with my understanding of the Major-General's answer</p> <p>14 as well. The reason I'm directing him to this document, if</p> <p>15 I can establish that he's familiar with it, is I want to</p> <p>16 understand when it talks about every debriefing session,</p> <p>17 does that only mean that formal debriefing scheduled</p> <p>18 thereafter or if it's every debriefing, even while the</p> <p>19 operation is underway.</p> <p>20 CHAIRPERSON: Ask him the question, yes,</p> <p>21 but before you ask it, he did raise his hand indicating, I</p> <p>22 think, that he wants to make some comment, clarity to –</p> <p>23 MAJOR-GENERAL MPEMBE: That's correct,</p> <p>24 Chairperson. Chairperson, the same document, the same</p> <p>25 question and paragraph it was asked by Adv Shozi. I</p>	<p style="text-align: right;">Page 12957</p> <p>1 they get inspected by the commander and the commander must</p> <p>2 check whether they are properly dressed, they've got</p> <p>3 correct equipment to execute their work and they are sober</p> <p>4 and thereafter, after that has been done they must be</p> <p>5 briefed how they are going to do their work and in terms of</p> <p>6 – and how the tactics and any other matter is done at that</p> <p>7 parade. That debriefing, it doesn't need any recording but</p> <p>8 as I've indicated yesterday, a member must record it in his</p> <p>9 pocket book who is a non-commissioned officer but a</p> <p>10 commissioned officer, when now the same process that has</p> <p>11 happened in the morning, it has to happen when they report</p> <p>12 off duty. Now the officer, now he gets a briefing from the</p> <p>13 members how they have worked. He has to record it in his</p> <p>14 diary. That should come, if the operation is as big as</p> <p>15 Marikana, from his diary then he has to give the feedback</p> <p>16 now to me or to Major-General Annandale who is chairing</p> <p>17 that meeting of the JOCOM.</p> <p>18 Chairperson, with regard to this one, I normally</p> <p>19 refer to it as the short analysis, so that maybe – or it's</p> <p>20 where you have to check your strengths, your weaknesses,</p> <p>21 the opportunities, strengths and threats. It's totally</p> <p>22 different, it's at the strategic level but it has to start</p> <p>23 with the members. With the members we indicate what</p> <p>24 problems did you experience with the radios, what problems</p> <p>25 did you experience, then the members they tell us what</p>
<p style="text-align: right;">Page 12956</p> <p>1 explained it extensively and I will again explain it,</p> <p>2 Chairperson, to say in terms of that paragraph 12 the</p> <p>3 debriefing that is being mentioned there is the one that I</p> <p>4 indicated in my HH3 why it was not held and at that time I</p> <p>5 did also explain that the section commander and platoon</p> <p>6 commanders and all, is the one that has to be filed in the</p> <p>7 file of an operation because each operation it has a file</p> <p>8 number. This indicates the different debriefing that</p> <p>9 should have taken place prior the in-depth debriefing by</p> <p>10 the C-JOC. Together, all these debriefings they will be</p> <p>11 put in that file and it has to stay for five years, then</p> <p>12 after five years it can be destroyed.</p> <p>13 CHAIRPERSON: Yes, I can understand it</p> <p>14 now. You've already indicated the question you were going</p> <p>15 to ask and perhaps you should repeat it briefly for the</p> <p>16 benefit of the witness so that we can then get his answer.</p> <p>17 MS LE ROUX: Major-General, when this</p> <p>18 document refers to every debriefing session, would that</p> <p>19 include debriefings that you've testified about that</p> <p>20 happened during the course of the operation?</p> <p>21 MAJOR-GENERAL MPEMBE: No, Chairperson.</p> <p>22 Chairperson, in the normal course of the operation, I've</p> <p>23 made an example of a normal on duty, to come and report on</p> <p>24 duty at any police station. When members are reporting on</p> <p>25 duty they must come 15 minutes before, they stand a parade,</p>	<p style="text-align: right;">Page 12958</p> <p>1 problems they experienced with all what has happened on</p> <p>2 that day, how is the feeling of the community, and</p> <p>3 thereafter that has now to be taken to the in-depth</p> <p>4 briefing which me, as a C-JOC I have to hold. And</p> <p>5 thereafter, after the police have done their debriefing</p> <p>6 then you call other role players. In the case of Marikana</p> <p>7 we have to call all other role players, in the hospitals</p> <p>8 that we worked with, the people that were – the paramedics</p> <p>9 that there were in the scenes, the securities that they</p> <p>10 were there to work with us, all the people, now they come</p> <p>11 and after finalising, those different certificates they</p> <p>12 must be recorded in that file and be filed in that file</p> <p>13 which I've mentioned for five years according to that</p> <p>14 paragraph 12, Chairperson.</p> <p>15 [10:19] MS LE ROUX: Thank you for that</p> <p>16 explanation, Major-General, that's helpful. Major-General,</p> <p>17 I'd like to move on now to what you said, you testified at</p> <p>18 length this morning about what you heard from, about scene</p> <p>19 2 from McIntosh, Naidoo and Kidd. Did any of them report</p> <p>20 to you that there was a charging mob at scene 2?</p> <p>21 MAJOR-GENERAL MPEMBE: Chairperson, as</p> <p>22 I've indicated is that Captain Kidd said that there was a</p> <p>23 person which marched at them and General Naidoo said that</p> <p>24 there was a person who had a firearm and Colonel McIntosh</p> <p>25 said that – and the name, if I recall very well, it was</p>

<p style="text-align: right;">Page 12959</p> <p>1 Rasta – he was charging at them.  2 MS LE ROUX: Major-General –  3 COMMISSIONER HEMRAJ: If I can just  4 interrupt, the phrase “charging mob” appears in some or  5 other document. Did you receive any report whatsoever that  6 there was a charging mob at scene 2? Was that reported to  7 you at all?  8 MAJOR-GENERAL MPEMBE: No, Chairperson.  9 MS LE ROUX: Major-General, you testified  10 about what Captain Kidd told you, that he heard the gunfire  11 and then moved in response to that. Is that accurate, was  12 that your – is that your recollection of what you were told  13 by Captain Kidd? He heard the gunfire and moved towards  14 it.  15 MAJOR-GENERAL MPEMBE: On his way, then  16 he was directed by the chopper.  17 MS LE ROUX: Major-General, I'm just  18 trying to understand. Did he report to you that he got an  19 order from the JOC or, you know, that the chopper sort of  20 said to him go there? Did he report an order or that, I  21 don't know, the chopper sort of said, gave him a route on  22 how to get to where the shooting was happening?  23 MAJOR-GENERAL MPEMBE: He heard a  24 gunfire. As a police officer he took an initiative to go  25 and check what is happening. On his way to where he heard</p>	<p style="text-align: right;">Page 12961</p> <p>1 not need to be more specific because there are various  2 units there?  3 CHAIRPERSON: You say “who was,” you see,  4 it might be “who were?” Was there one person in overall  5 command of the people we see on this slide or would it be  6 more accurate to say that certain units were under command  7 by one officer and other units were commanded by another  8 officer or other officers?  9 MAJOR-GENERAL MPEMBE: Chairperson as I  10 have said, Major-General Naidoo and in terms of the  11 evidence before the Commission he was posted as forward  12 holding area 1 commander.  13 CHAIRPERSON: So he's obviously –  14 MAJOR-GENERAL MPEMBE: So he was –  15 CHAIRPERSON: He's obviously in command  16 of those people we see referred to in the bottom right-hand  17 corner of the slide, the forward holding area 1 people and  18 some Canine people were there too, were there as well, but  19 was anybody in overall command, any officer in overall  20 command of all the members we see referred to here on the  21 slide or must we enquire who was in command of some of the  22 other units? Do you understand the point I'm making?  23 MAJOR-GENERAL MPEMBE: Correct,  24 Chairperson.  25 CHAIRPERSON: What's your answer?</p>
<p style="text-align: right;">Page 12960</p> <p>1 the gunfire, then the chopper directed him.  2 MS LE ROUX: And Major-General, when the  3 chopper was directing him, that's presumably by radio,  4 correct?  5 MAJOR-GENERAL MPEMBE: I could not  6 precisely say but the chopper normally when they direct you  7 they fly, they will fly on top of you or they will indicate  8 also by means of how you should move but that precisely  9 Captain Kidd can shed the light and as well as Lieutenant-  10 Colonel Vermaak.  11 MS LE ROUX: Major-General, could I ask  12 you to pick up exhibit L and turn to slide 249, please?  13 For the record, this is a slide in the police presentation  14 with the narrative heading “Time 16:15 the photograph below  15 shows the positioning of the police units as they converged  16 on koppie 3 to continue to disarm and arrest the  17 protesters.” It then identifies POP forward holding area 2  18 with PRG POP and Canine, forward holding area 1, Canine,  19 STF, NIU and NIU aboard the helicopter. Major-General, do  20 you have that slide?  21 MAJOR-GENERAL MPEMBE: Correct  22 Chairperson, I do.  23 MS LE ROUX: Major-General, who was  24 commanding these members at koppie 3?  25 COMMISSIONER HEMRAJ: Does your question</p>	<p style="text-align: right;">Page 12962</p> <p>1 MAJOR-GENERAL MPEMBE: It will be those  2 that are in command of the units, as I've said that they  3 went there –  4 CHAIRPERSON: Yes, I see, okay. So the  5 real question should be – if Ms Le Roux will allow me to  6 amend it – was, who were in command of the members that we  7 see here on the slide. You've told us General Naidoo was  8 in charge of the forward holding area 1 people. Who was in  9 charge of the STF people, special task force?  10 MR NGALWANA: Chair, it might assist to  11 look at slides 136 and following of exhibit L.  12 CHAIRPERSON: I want to know if this  13 witness can answer, I don't want to know what the slide  14 says. Thank you for the attempt at assisting me. Would  15 you tell me please from your own knowledge who was in  16 command of the STF people there?  17 MAJOR-GENERAL MPEMBE: Chairperson, STF  18 is from head office. I remember it will be Colonel or  19 Lieutenant-Colonel Gaffley.  20 CHAIRPERSON: And the NIU people?  21 MAJOR-GENERAL MPEMBE: It will be – he  22 was a Lieutenant-Colonel, now he's Colonel Modiba.  23 CHAIRPERSON: And there are two boxes  24 headed FHA2, that's forward holding area 2. Who was the  25 member in charge of those persons – in command, sorry.</p>

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1 MAJOR-GENERAL MPEMBE: Chairperson,  
 2 you'll remember when I spoke about Captain Kidd, so he had  
 3 also members of the TRT. You'll remember that Lieutenant-  
 4 Colonel Pitsi, firstly it was Lieutenant-Colonel Pitsi and  
 5 he was recalled -  
 6 CHAIRPERSON: He wasn't available on the  
 7 fateful day of the 16th, he'd been there earlier. I think  
 8 he was there on the 15th, wasn't he?  
 9 MAJOR-GENERAL MPEMBE: No -  
 10 CHAIRPERSON: But he wasn't there on the  
 11 16th, is that right?  
 12 MAJOR-GENERAL MPEMBE: No, he was still  
 13 there, Chairperson -  
 14 CHAIRPERSON: Where was he?  
 15 MAJOR-GENERAL MPEMBE: But Brigadier  
 16 Calitz called him to go and assist as he is a reserve.  
 17 CHAIRPERSON: Yes, yes, I see. Yes, no,  
 18 thank you. And then there's the POP, there's a box with  
 19 two arrows relating to POP. So who was the member in  
 20 charge of them?  
 21 MAJOR-GENERAL MPEMBE: Chairperson this  
 22 one of POP, because there is no any other line that was  
 23 there, Brigadier Calitz after he moved, when after the  
 24 dispersal in scene 1, he should be the one who is there,  
 25 Brigadier Calitz who is the operational commander of this

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1 operation.  
 2 CHAIRPERSON: Yes, I see. I take it that  
 3 is the information that you wanted at this point, Ms Le  
 4 Roux, is that correct?  
 5 MS LE ROUX: It's part of it, Chair. So  
 6 Major-General, if I understand your evidence as you've  
 7 recapped now with the Chair, each of the five units that  
 8 converged on koppie 3 had their own commanders. Who was  
 9 co-ordinating that?  
 10 MAJOR-GENERAL MPEMBE: Chairperson, I've  
 11 already said that what officers told me of acting on their  
 12 own initiative when they heard gunfire, so as a result of  
 13 that there was no-one who was co-ordinating that.  
 14 MS LE ROUX: Major-General, in your view,  
 15 given that you have five units and five commanders  
 16 converging on koppie 3, do you think there should have been  
 17 someone co-ordinating the five units?  
 18 MAJOR-GENERAL MPEMBE: In terms of what  
 19 they have told me for having acted on their own initiative,  
 20 I understood what they have said but it should be co-  
 21 ordinated.  
 22 CHAIRPERSON: But the operational  
 23 commander was Brigadier Calitz, so I take it he is the  
 24 person who should have done the co-ordination, is that  
 25 correct?

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1 MAJOR-GENERAL MPEMBE: Correct,  
 2 Chairperson.  
 3 COMMISSIONER HEMRAJ: At the time of  
 4 scene 2, was Lieutenant-Colonel Vermaak still on the  
 5 helicopter?  
 6 MAJOR-GENERAL MPEMBE: Chairperson, I  
 7 need just to confirm. At that time there were still two  
 8 choppers, that is the one of Colonel Vermaak and the one of  
 9 Brigadier Fritz was -  
 10 CHAIRPERSON: What function was Brigadier  
 11 Fritz supposed to be performing in the helicopter?  
 12 MAJOR-GENERAL MPEMBE: Chairperson, I  
 13 will request that we should go to his statement because he  
 14 made it very clear that he was sent by Major-General  
 15 Annandale to go and look - my explanation is in terms of  
 16 his statement - to go and check the people because the team  
 17 that he was having, he had to direct the chopper that was  
 18 having the NIU and the POP in the Oryx, so he had to go and  
 19 do the analysis of the groups that have already dispersed,  
 20 might not come and attack the members from behind.  
 21 CHAIRPERSON: Thank you, I understand.  
 22 MAJOR-GENERAL MPEMBE: So it was a  
 23 wayward checking, then he could co-ordinate it with  
 24 Brigadier Calitz because Brigadier Calitz, he could be  
 25 concentrating on the side of dispersal but -

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1 CHAIRPERSON: Yes, so - I'm sorry to put  
 2 words in your mouth and if I'm putting wrong words you must  
 3 tell me but am I correct in thinking, from what you say,  
 4 that his job, Brigadier Fritz's job was essentially to help  
 5 Brigadier Calitz by seeing from above what was happening  
 6 and then giving him information so that he could co-  
 7 ordinate the members correctly. Is that, would that be an  
 8 accurate summary?  
 9 MAJOR-GENERAL MPEMBE: Chairperson, I  
 10 just want to add to say on a wayward because Brigadier,  
 11 Lieutenant-Colonel Vermaak as - he was a post for Brigadier  
 12 Calitz so he had to concentrate where people are moving for  
 13 Brigadier Calitz because he couldn't see on the other side  
 14 of the mountain. And Colonel, Brigadier Fritz he had to go  
 15 wayward, a little bit wider than -  
 16 CHAIRPERSON: Would it be fair to say  
 17 that Lieutenant-Colonel Vermaak and Brigadier Fritz had to  
 18 act as Brigadier Calitz's eyes in the sky, telling him from  
 19 above what they could see was happening, which Brigadier  
 20 Calitz couldn't see, to enable him to do his job as  
 21 operational commander, would that be fair?  
 22 MAJOR-GENERAL MPEMBE: In those words,  
 23 yes.  
 24 MS LE ROUX: Chair, for the record, slide  
 25 146 of exhibit L sets out Brigadier Fritz's task on the

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1 day, but Major-General I'd like to take you back to  
 2 Brigadier Calitz, you said that as operational commander if  
 3 anyone was going to be co-ordinating the five units  
 4 converging, it would be him. On this photograph do you  
 5 know where Brigadier Calitz was?  
 6 MAJOR-GENERAL MPEMBE: I do not know  
 7 precisely, as I've indicated to the Chairperson, to say  
 8 that POP he should have been there, but I'm not sure where  
 9 he was at that time.  
 10 CHAIRPERSON: Did he make a report to you  
 11 as to what he was doing during – you know, later when you  
 12 spoke to him in the JOC. I take it you spoke to him in the  
 13 JOC, did you, afterwards, did you?  
 14 MAJOR-GENERAL MPEMBE: I did, yes.  
 15 CHAIRPERSON: Now, did he tell you what  
 16 he was doing at this time that we're busy with now when the  
 17 events, when this particular slide was taken of scene 2?  
 18 Did he tell you what he was doing, if anything?  
 19 MAJOR-GENERAL MPEMBE: Chairperson,  
 20 Brigadier Calitz explained that immediately after the  
 21 dispersal he was almost, he has moved from where scene 1  
 22 happened. So he was the one that he was actually waiting,  
 23 he says there was a time where he had to wait a little bit  
 24 for the members who were left at the – because the plan  
 25 was, after the dispersal the members of TRT dog unit they

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1 had to sweep, to sweep the mountain for any other exhibits,  
 2 so then he had to wait for the other POP members and that's  
 3 the time when he called to check why people are still  
 4 waiting at the back. So then that's why he said, I was  
 5 there General, waiting for these people to go to the JOC.  
 6 And he also explained that after he left the place then he  
 7 also gave the command to say, use the water cannon, use the  
 8 water cannon, disperse, and he also ordered the members to  
 9 go out of the Nyalas in a safe area to effect arrests.  
 10 That you could also hear from the radio, that he is still  
 11 moving in command of the operation. In my understanding it  
 12 was that after the dispersal, after the people have  
 13 regrouped he waited somewhere and that's where then I'm not  
 14 sure where he waited at. That's why, Chairperson, to say  
 15 I'm not sure whether it's him, that one of that, of POP, or  
 16 it's somebody else.  
 17 MS LE ROUX: Major-General when, you said  
 18 Brigadier Calitz told you that he was then, you say he  
 19 waited for a period of time and then he was directing  
 20 people to arrest protesters. What was your understanding  
 21 of where those arrests were happening?  
 22 [10:39] MAJOR-GENERAL MPEMBE: In my  
 23 understanding the arrests were made where people were being  
 24 found in the veld who have been overpowered but he later,  
 25 after the dispersal of the water, he also went to scene 1 –

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1 to scene 2, I'm sorry, and now the majority of the arrests  
 2 were done at scene 2 and firearms that were recovered, most  
 3 of the firearms were also recovered at scene 2.  
 4 MS LE ROUX: Chair, we've managed to –  
 5 with the assistance of the SAPS and I believe they've  
 6 confirmed these – we've managed to establish which one of  
 7 the POP vehicles is Brigadier Calitz's Nyala, if I could  
 8 ask them to zoom in on him. He is the Nyala below the  
 9 upper arrowhead that says POP, if we could zoom in.  
 10 CHAIRPERSON: I don't think you mean  
 11 upper arrowhead, there are two arrowheads above the POP  
 12 box, below the POP box.  
 13 MS LE ROUX: Yes.  
 14 CHAIRPERSON: The one is vertical  
 15 immediately below the box and the other one is at an angle.  
 16 MS LE ROUX: Yes Chair, the one that's at  
 17 sort of 8 o'clock.  
 18 CHAIRPERSON: Ja.  
 19 MS LE ROUX: His is the Nyala directly  
 20 below that, sort of sitting by itself. There are four  
 21 vehicles close together and then there's him further down.  
 22 Again in due course we'll –  
 23 CHAIRPERSON: If one starts out from the  
 24 FHA2 box, top right-hand corner, and moves towards the  
 25 right, immediately below the line which would be drawn if

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1 one moved to the right from the top right-hand corner of  
 2 FH2 there appears to be a Nyala. Is that the one you're  
 3 talking about?  
 4 MS LE ROUX: Yes, Chair. We've actually  
 5 managed to introduce a red arrow that's pointing at it,  
 6 cutting through the vertical POP arrowhead, if you can see  
 7 that new red arrow we've introduced, pointing at that  
 8 Nyala. That would be – there.  
 9 CHAIRPERSON: Now you'd better describe  
 10 it because when the record is transcribed, the "that's" and  
 11 the "there's" and the arrows and so on won't make sense.  
 12 So if one starts in the top right-hand corner of the FH2  
 13 box and moves right, to the right, one – above, just  
 14 immediately above that line as one proceeds about just  
 15 under halfway between the top right-hand corner of FH2 and  
 16 the vertical line from the bottom of the POP box, just  
 17 under halfway on that distance, just above that there is a  
 18 Nyala. You say that, according to your information, is  
 19 Brigadier Calitz's –  
 20 MS LE ROUX: Yes, Chair.  
 21 CHAIRPERSON: Then if one goes down below  
 22 that line, imaginary line, there's another one that looks  
 23 as if it's – I'm not sure, it looks like a bush next to it  
 24 actually. There's something, it looks as if it's something  
 25 green to the left of it as one looks at it. I don't know

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1 what that is but that's not the Nyala. It's the one you've  
 2 described just above that line that I've referred to. Do  
 3 you see that, Major-General?  
 4 MAJOR-GENERAL MPEMBE: I could see it,  
 5 Chairperson.  
 6 CHAIRPERSON: Obviously you can't tell us  
 7 whether that's correct but that's the information that the  
 8 police have given to Ms Le Roux's side.  
 9 MS LE ROUX: Sorry Chair, my instructions  
 10 were incorrect. That has not yet been confirmed by the  
 11 SAPS.  
 12 CHAIRPERSON: Oh!  
 13 MS LE ROUX: Which – that's the best of  
 14 our current analysis –  
 15 CHAIRPERSON: Oh, I see –  
 16 MS LE ROUX: I understand obviously when  
 17 Brigadier Calitz comes –  
 18 CHAIRPERSON: I see.  
 19 MS LE ROUX: He should be able to confirm  
 20 that for us.  
 21 CHAIRPERSON: Okay. Yes, I was wrong in  
 22 thinking the police confirm that but that's a provisional  
 23 proposition that's put to you. You're asked to assume, I  
 24 take it, for the moment.  
 25 MS LE ROUX: And Chair again for

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1 Brigadier Calitz when he comes, the video evidence  
 2 indicates that he arrives in that position at 16:08 on what  
 3 we call eTV time in the evidence leaders' time presentation  
 4 and he doesn't move from that position until, at the  
 5 earliest, 16:22 eTV time and it's between those two times  
 6 that most of the shooting at scene 2 occurs.  
 7 CHAIRPERSON: Yes, I understand, you've  
 8 told us that but I don't know whether the witness can help  
 9 us.  
 10 MS LE ROUX: No.  
 11 CHAIRPERSON: Do you know anything about  
 12 that, Major-General? You were dependent upon what you were  
 13 told after the event in the JOC, is that right?  
 14 MAJOR-GENERAL MPEMBE: Correct,  
 15 Chairperson.  
 16 CHAIRPERSON: Now you've heard what the  
 17 information of the Human Rights Commission or the result of  
 18 their analysis is, I take it – can you comment on whether  
 19 that's correct or not, based on what you were told  
 20 subsequently?  
 21 MAJOR-GENERAL MPEMBE: No Chairperson, I  
 22 cannot comment.  
 23 CHAIRPERSON: What we've established from  
 24 you so far is that no-one was – there was a period when  
 25 there was no single person co-ordinating the activities at

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1 scene 2 for the reasons you've explained and that Brigadier  
 2 Calitz, who was the person who was supposed to be co-  
 3 ordinating, was waiting in the circumstances that you've  
 4 explained to us, according to what he told you. Is that  
 5 right?  
 6 CHAIRPERSON: Correct, Chairperson.  
 7 MS LE ROUX: Thank you, Chairperson.  
 8 MAJOR-GENERAL MPEMBE: I'm sorry,  
 9 Chairperson, I just want to add to my explanation to say  
 10 that there was a time when he went forward and he did the  
 11 dispersal there at scene 2 and where arrests, where he  
 12 ordered also members that were –  
 13 CHAIRPERSON: I'm sorry, before Ms Le  
 14 Roux proceeds, I just want to put something to you that's  
 15 occurred to me. You must tell me whether what I'm going to  
 16 put to you is correct. It sounds to me as if what was  
 17 happening at scene 2 was in effect, later on anyway when  
 18 Brigadier Calitz moved forward, was in effect the  
 19 implementation of part of stage 3 of the plan. Obviously,  
 20 according to what we've been told, what happened at scene 1  
 21 resulted, happened after the uncoiling of the barbed wire  
 22 but it wasn't part of the plan by the SAPS. But thereafter  
 23 a number of the strikers dispersed to scene 2 and when they  
 24 were there, according to what you've told us, what then  
 25 happened was water cannon was used and an attempt was

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1 obviously made to disperse them and they were dispersed to  
 2 some extent, I take it, arrests were made and people were  
 3 disarmed because their arms were taken possession of, is  
 4 that correct?  
 5 MAJOR-GENERAL MPEMBE: Correct,  
 6 Chairperson, and that some of them they went into the bush  
 7 and some of them there also went to the rocks.  
 8 CHAIRPERSON: Yes, I understand but it  
 9 sounds to me and I think you've agreed with this that, in  
 10 effect, what was happening was that part of stage 3 was now  
 11 being implemented at scene 2, as was explained to you by  
 12 Brigadier Calitz. That's right, isn't it? That's my  
 13 impression. I'm just checking whether you agree with me.  
 14 MAJOR-GENERAL MPEMBE: Chairperson,  
 15 according to the crowd management policy, says that  
 16 whenever you have dispersed the people and they regroup,  
 17 you need to continue dispersing them, you cannot hold and I  
 18 think this is tied up in terms of my statement of GGG12,  
 19 that paragraph 56.  
 20 CHAIRPERSON: I understand that but what  
 21 was happening also, dispersal was happening which was part  
 22 of stage 3, disarming was happening to the extent that  
 23 people were presumably laying down their arms and those  
 24 were being confiscated and arrests were being made where  
 25 possible, is that right?

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1 MAJOR-GENERAL MPEMBE: Now I understand  
 2 what the Chairperson is saying, then I agree on that basis.  
 3 CHAIRPERSON: Thank you. My  
 4 interpretation is withdrawn for the moment, Adv Hemraj  
 5 wants to ask a question first.  
 6 COMMISSIONER HEMRAJ: General, if you say  
 7 that someone should be co-ordinating this scene 2 and that  
 8 task was supposed to have been within the realm of  
 9 Brigadier Calitz's duties, did you as overall commander  
 10 have any discussion with him as to the lack of co-  
 11 ordinating of the activities around scene 2?  
 12 MAJOR-GENERAL MPEMBE: Correct  
 13 Chairperson, and Brigadier Calitz says that he was not  
 14 aware that there were people that went there on their own  
 15 initiative.  
 16 MS LE ROUX: Major-General –  
 17 CHAIRPERSON: Now you can proceed.  
 18 MS LE ROUX: Thank you, Chair. Major-  
 19 General, as I understand the plan it was to disperse the  
 20 protesters to the west and koppie 3 is to the west of  
 21 koppies 1 and 2, correct?  
 22 MAJOR-GENERAL MPEMBE: Chairperson, since  
 23 I've never been at koppie 3, maybe I will need to confirm  
 24 it in terms of the map or something else.  
 25 MS LE ROUX: I think we can –

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1 MAJOR-GENERAL MPEMBE: But what I do  
 2 know, what I do know is that the people did regroup.  
 3 Whether it was on the westerly side or koppie 3 was on the  
 4 westerly side, I am not sure at this stage unless then  
 5 there is a map or something that I could confirm it.  
 6 MS LE ROUX: Major-General, it's a fact  
 7 that koppie 3 is to the west of koppie 1 and 2 so you can  
 8 accept that. My question is, in the dispersal, dispersion  
 9 plan, did you anticipate that they may regroup in koppie 3,  
 10 given that they would be moving in that direction? Did you  
 11 anticipate that they might regroup in koppie 3?  
 12 MAJOR-GENERAL MPEMBE: Correct,  
 13 Chairperson, that is on any normal crowd, it does happen  
 14 and that we did anticipate.  
 15 MS LE ROUX: Major-General, what was then  
 16 the plan? So you'd anticipated they may regroup in koppie  
 17 3, what was then the plan?  
 18 MAJOR-GENERAL MPEMBE: It's exactly what  
 19 I've explained to the Chairperson earlier on to say you  
 20 continue dispersing them and that, it happened when  
 21 Brigadier Calitz gave command to use the water cannon, he  
 22 used the water cannon and go out, do the arrests, it's when  
 23 you could realise that those they have already been  
 24 properly dispersed and it's exactly what the Chairperson  
 25 said, to say then at that time stage 3 and stage 4 was

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1 happening.  
 2 MS LE ROUX: Major-General, are you aware  
 3 that there are statements from several members and we'll  
 4 deal with them when those members are called and appear,  
 5 but that there are statements from members saying that they  
 6 were unaware of the presence of the other units on the  
 7 other side of koppie 3 and that it appears as if the  
 8 gunfire they were hearing and thought came from protesters,  
 9 in fact came from their fellow SAPS members who had  
 10 encircled the koppie. Are you aware of those statements?  
 11 MAJOR-GENERAL MPEMBE: Chairperson, the  
 12 only person that I'm aware of is Brigadier Calitz when he  
 13 said to me he was not aware that there were people in  
 14 front, but that there are statements which have been taken,  
 15 that could have been done afterwards and which I don't have  
 16 knowledge of.  
 17 CHAIRPERSON: Statements were taken  
 18 subsequently, obviously.  
 19 MAJOR-GENERAL MPEMBE: Yes.  
 20 CHAIRPERSON: But you say you don't know  
 21 about that.  
 22 MAJOR-GENERAL MPEMBE: I don't know about  
 23 –  
 24 CHAIRPERSON: All you know about is what  
 25 Brigadier Calitz told you, presumably on the night of the

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1 16th, which you've repeated to us. Is that right?  
 2 MAJOR-GENERAL MPEMBE: Correct,  
 3 Chairperson. And Chairperson just to add, is also that  
 4 General Naidoo took his own initiative and I said also  
 5 Captain Kidd took his own initiative. That is what also I  
 6 know.  
 7 CHAIRPERSON: Can I ask you a question  
 8 about that? When an officer takes his own initiative, I'm  
 9 not suggesting improperly but when he takes his own  
 10 initiative because he considers it necessary, is it  
 11 normally expected of him or her, if it's a lady, that the  
 12 operational commander should be told? In other words, when  
 13 Captain Kidd for example took his own initiative as he  
 14 explained to you, would you have expected him to have got  
 15 on the radio and told Brigadier Calitz this is what I've  
 16 done, so that Brigadier Calitz could know what was  
 17 happening or – either Brigadier Calitz, I suppose, or the  
 18 JOC but let's confine ourselves to Brigadier Calitz for the  
 19 moment but anyway if he got on the radio to Brigadier  
 20 Calitz the JOC would've heard anyway, wouldn't they, so it  
 21 wouldn't have been two separate communications, it would've  
 22 been one.  
 23 MAJOR-GENERAL MPEMBE: Correct,  
 24 Chairperson.  
 25 CHAIRPERSON: Right. Now the question

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1 is, would you have expected Captain Kidd when he took his  
 2 own initiative and moved forward as he did, to have  
 3 communicated that to the operational commander and to, by  
 4 the same radio communication, and to the JOC.  
 5 MAJOR-GENERAL MPEMBE: Correct,  
 6 Chairperson.  
 7 CHAIRPERSON: Do we know whether he did?  
 8 Well, I don't know but I'm asking you, do you know from  
 9 your information whether he did?  
 10 MAJOR-GENERAL MPEMBE: Chairperson, I  
 11 asked him that question. He said that's when the most  
 12 problem of the radio communication was raised.  
 13 MS LE ROUX: Major-General, in the  
 14 transcript of the Protea Coin chopper, Brigadier Calitz is  
 15 heard addressing what he calls tack teams. What are Tac  
 16 teams?  
 17 MAJOR-GENERAL MPEMBE: Chairperson, I  
 18 don't know what's a Tac team. Maybe if we can listen to  
 19 the radio I might be able to interpret it.  
 20 MS LE ROUX: Major-General, we think he  
 21 might mean tactical team but if you don't know we can ask  
 22 Brigadier Calitz when he comes. Chair, I'm moving on to a  
 23 new topic, I'm not sure when you want to take the  
 24 adjournment.  
 25 CHAIRPERSON: Well, we did take an

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1 adjournment at one point in the middle of the witness's  
 2 evidence, you'll remember.  
 3 MS LE ROUX: I'm happy to continue.  
 4 CHAIRPERSON: If you would prefer me to  
 5 take the adjournment now, I will because you know, you may  
 6 have things you want to look at in the adjournment,  
 7 otherwise let's proceed on the basis that when it's  
 8 appropriate for you, you'll let me know and we'll take the  
 9 adjournment.  
 10 MS LE ROUX: Yes. Chair, I have two  
 11 short topics that remain in my cross-examination. Major-  
 12 General –  
 13 CHAIRPERSON: If that's so, it's always  
 14 sensible for counsel to take the adjournment just before  
 15 you get to the last bits of cross-examination because you  
 16 may well discover thereafter that there's something else  
 17 you would like to have dealt with, so perhaps it's a good  
 18 idea for us to take the adjournment now just so you can  
 19 finally wrap up.  
 20 MS LE ROUX: I'm in your hands, Chair.  
 21 CHAIRPERSON: Are you going to deal with  
 22 those SMSes or that SMS? At one stage you asked for some  
 23 SMSes or an SMS, I can't remember if it was singular or  
 24 plural and an undertaking was given that you'd get them.  
 25 Are you going to dealing with those before you stop cross-

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1 examining? Are those among the two topics that you  
 2 referred to?  
 3 MS LE ROUX: Not currently but, Chair,  
 4 I'll take a further instruction.  
 5 CHAIRPERSON: Good reason then for us to  
 6 take the tea adjournment.  
 7 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 8 [11:17] CHAIRPERSON: The Commission resumes.  
 9 Major-General, you're still under oath.  
 10 MAJOR-GENERAL MPEMBE: Correct,  
 11 Chairperson.  
 12 CHAIRPERSON: Ms Le Roux?  
 13 ZONDASI WILLIAM MPEMBE: (s.u.o.)  
 14 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):  
 15 Thank you, Chair. Chair, over the adjournment I have  
 16 received instructions and the specific SMS provided by  
 17 Major-General Mpembe doesn't raise any questions that I'll  
 18 be putting but the general issue of cell phone records, we  
 19 will continue to engage with SAPS around that, so I still  
 20 only have two topics left.  
 21 CHAIRPERSON: I think there were two  
 22 issues, weren't there? The one was cell phone records and  
 23 the other was whether the police could confirm or deny  
 24 whether all the entries in the occurrence book were based  
 25 upon radio reports. That was the foundation of your cross-

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1 examination on one of your aspects of cross-examination and  
 2 that was queried, you'll remember, and I suggested you  
 3 ascertain from the police what the position was. I take it  
 4 I can assume from what you're telling me that you haven't  
 5 yet ascertained what the position is in that regard.  
 6 MS LE ROUX: Correct, Chair, but we will  
 7 continue to engage.  
 8 CHAIRPERSON: Yes. If the information  
 9 comes to the effect that all the entries were based on  
 10 radio reports, I take it you would want the witness to come  
 11 back, would you?  
 12 MS LE ROUX: Chair, I think that's  
 13 premature. I think we should wait to see what we ascertain  
 14 and then we'll take instructions and advise the Commission  
 15 accordingly. I wouldn't like to commit now.  
 16 CHAIRPERSON: No, I understand. Alright,  
 17 well then proceed with your cross-examination.  
 18 MS LE ROUX: Thank you, Chair. Major-  
 19 General, could you turn to exhibit FFF7 which is a  
 20 statement provided by Warrant Officer Myburgh?  
 21 MAJOR-GENERAL MPEMBE: Chairperson, I'm  
 22 just requesting on the documents that have been provided,  
 23 what number is that?  
 24 CHAIRPERSON: The real question is  
 25 whether Ms Le Roux wants to put them in or – sorry, we've

<p style="text-align: right;">Page 12983</p> <p>1 been handed some documents, I don't know what the fate of 2 them is going to be but Ms Le Roux will have to tell us for 3 the moment. She's in charge in the sense that she's the 4 cross-examiner at the moment.</p> <p>5 MS LE ROUX: Major-General – 6 CHAIRPERSON: You, in turn, want to know 7 about some documents so let's deal with your query first. 8 What's your query? 9 MAJOR-GENERAL MPEMBE: It's not such a 10 query but myself and Adv Le Roux, we do have the index so 11 if she can just tell me what number is that statement, then 12 I can go directly to it.</p> <p>13 MS LE ROUX: Yes and I'm sorry, Major- 14 General, when I look at this, the exhibits in the FFF range 15 are your item 4 but this FFF7 is not in that list, I'm 16 afraid. It's an exhibit, we'll have to provide that to 17 you. Do you have a full set of exhibits available to you? 18 MAJOR-GENERAL MPEMBE: No, Chairperson. 19 MR NGALWANA: In other words, Chair, the 20 witness wouldn't have had time to read this if he wasn't 21 forewarned that it was going to be used. 22 MS LE ROUX: Chair, it's a two page 23 statement. Perhaps we could locate it and provide – I 24 apologise for this, I didn't know that it hadn't been 25 included in the list.</p>	<p style="text-align: right;">Page 12985</p> <p>1 start questioning you? 2 MAJOR-GENERAL MPEMBE: Correct, 3 Chairperson. 4 MR NGALWANA: Chairperson, I object. 5 This statement has been the subject of cross-examination 6 with the National Commissioner. 7 CHAIRPERSON: So? 8 MR NGALWANA: And there is no way the 9 General can be able to comment and I know reference is 10 going to be made to paragraph 3 of this statement and he 11 can't possibly know what happened at scene 2, he wasn't 12 there. 13 CHAIRPERSON: He did receive information 14 subsequently from some of the commanders there. I think 15 the questions are permissible and the fact that the 16 National Commissioner has been asked isn't a reason why he 17 shouldn't be asked as well. When I gave my ruling earlier 18 I said I didn't want the same point raised over and over 19 again ad nauseam. I don't think that stage has been 20 reached. Please proceed. I disallow the objection, please 21 proceed. 22 MS LE ROUX: Thank you, Chair. Major- 23 General, were you aware of this report by Warrant Officer 24 Myburgh? 25 MAJOR-GENERAL MPEMBE: Chairperson, the</p>
<p style="text-align: right;">Page 12984</p> <p>1 COMMISSIONER HEMRAJ: Is this Mr 2 Myburgh's statement? 3 MS LE ROUX: Correct. 4 CHAIRPERSON: Major-General, if you want 5 a bit of time to read the document and you want me to take 6 a short adjournment, I will. Otherwise if you're happy to 7 read it quietly while we wait for you to familiarise 8 yourself with its contents, we'll do that as well. Tell me 9 what you want me to do. 10 MAJOR-GENERAL MPEMBE: Chairperson, I 11 just want to take time to read it. 12 CHAIRPERSON: Do you want me to adjourn 13 or are you happy that we sit here quietly while you read 14 it? It's only two pages but I'm in your hands. 15 MAJOR-GENERAL MPEMBE: The Commission can 16 sit quietly and then I'll have to check. 17 CHAIRPERSON: Very well. We will try to 18 be quiet, I'm not sure if we can control everybody else. 19 MAJOR-GENERAL MPEMBE: I'm sorry, 20 Chairperson. 21 CHAIRPERSON: No need to apologise, just 22 – 23 MAJOR-GENERAL MPEMBE: I am through, 24 Chairperson. 25 CHAIRPERSON: So can Adv Le Roux now</p>	<p style="text-align: right;">Page 12986</p> <p>1 first time that I heard about it, it was during the 2 Commission at Rustenburg. 3 CHAIRPERSON: It sounds as if that's the 4 end of the point, Ms Le Roux. 5 MS LE ROUX: Just one follow-up, Chair. 6 Major-General, do you know what the SAPS whistle blowing 7 policy is? We have requested it from the SAPS and are yet 8 to receive it. Do you know what the SAPS whistle blowing 9 policy is? 10 MAJOR-GENERAL MPEMBE: Chairperson, if 11 the question could be specific because we don't have a 12 whistle blowing but we do have policies with regard to 13 informers, policies with regard to – to us it will be an 14 informers' policy. I don't know whether a whistle blower, 15 you equate it to informer. 16 CHAIRPERSON: A whistle blower I take it 17 is someone in the organisation who is aware of some 18 irregularity, criminal offence or irregularity of some 19 other kind, who then reports it to a superior so that it 20 can be dealt with. In the private sphere very often there 21 is a procedure in place which protects the identity of the 22 whistle blower in some cases from disclosure or in other 23 cases prevents the whistle blower from being disciplined 24 for reporting what has been reported, but normally it's 25 someone in the organisation who is giving information. I</p>

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1 take it your informer policy relates, generally speaking,  
 2 to outside people who provide information to the police.  
 3 So the real question is, is there a policy and if so, are  
 4 you aware of it, relating to the kind of situation that I  
 5 sketched in relation to information coming from people  
 6 within the organisation. Do you want to elaborate on my  
 7 attempt to explain?  
 8 MS LE ROUX: No Chair, I think that was  
 9 more than adequate.  
 10 MAJOR-GENERAL MPEMBE: Chairperson, after  
 11 the explanation, to us it will be a policy which  
 12 discourages corruption that will say what will you, what a  
 13 member should do when he realises that there is corruption  
 14 within, that's the one that I know.  
 15 CHAIRPERSON: There is recent legislation  
 16 on the point but I understand – I'm not sure if it's in  
 17 force yet but it certainly wasn't in force, as I understand  
 18 it, in August 2012 so we don't have to look at that. The  
 19 question is whether before the legislation came before  
 20 parliament there was an internal policy in the police  
 21 service dealing with that kind of situation. You say as  
 22 far as corruption is concerned there was, but I don't think  
 23 the question is related to that. So perhaps you can  
 24 reformulate because I think the witness now knows what  
 25 you're talking about so perhaps you could proceed with the

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1 point.  
 2 MS LE ROUX: Thank you, Chair. Major-  
 3 General, are you aware of any policy of the SAPS that would  
 4 cover the situation where one member sees another member do  
 5 something wrong in the course of their duties, not  
 6 corruption but something like what's set out in the  
 7 statement of Warrant Officer Myburgh? Do you know of a  
 8 policy of how that member can report that within the  
 9 organisation for investigation?  
 10 MAJOR-GENERAL MPEMBE: Chairperson, not a  
 11 written policy but a policy that has been done over some  
 12 years, yes, that one I can talk about from experience  
 13 field.  
 14 COMMISSIONER HEMRAJ: What you're saying  
 15 is that there's a practice rather than a document that  
 16 specifies?  
 17 MAJOR-GENERAL MPEMBE: Correct,  
 18 Chairperson.  
 19 MS LE ROUX: Major-General, what is that  
 20 practice?  
 21 MAJOR-GENERAL MPEMBE: The practice will  
 22 be that when a member sees something wrong, the member will  
 23 report that to the next commander, the second commander and  
 24 the second commander will be upon his duty to make sure  
 25 that what the member is requesting, it will happen, and in

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1 the case that actually the problem that has been seen, it  
 2 has to be addressed in a manner that is not going to affect  
 3 the junior member – but, it has to be done with respect and  
 4 it has to be done in the police with regarding to  
 5 discipline.  
 6 MS LE ROUX: And Major-General, is the  
 7 practice limited to reporting within your command  
 8 structure? Is there any practice of reporting to an  
 9 independent person?  
 10 MAJOR-GENERAL MPEMBE: It's not only  
 11 limited to in the structure. The member, like any other  
 12 members of the community, a member, if he reported it he  
 13 can do it in a dual purpose. If you are referring to the  
 14 oversight bodies over the police a member can do that and  
 15 there will be no steps taken against that member. For  
 16 example, a member can report it to the MEC for Safety and  
 17 Security in the province or the member can report it to  
 18 IPID or even to the Public Protector.  
 19 MS LE ROUX: Thank you, Major-General.  
 20 Chair, I'd then like to move on to my final topic of cross-  
 21 examination which relates to the Mail & Guardian article  
 22 that my learned friend for SAPS has already raised an  
 23 objection to and I believe he wants it addressed not in  
 24 open session. I don't know if he persists in that  
 25 preliminary request that we deal with whether the document

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1 is dealt with in public session. I certainly have  
 2 submissions in that regard but perhaps I should understand  
 3 what my learned friend's position is.  
 4 CHAIRPERSON: Well, firstly the question  
 5 I'd like to ask you before we get there is, what is the  
 6 relevance of those allegations? Before we get to that, I'm  
 7 informed at the time the objection was raised by Mr  
 8 Ngalwana, on that date the press came into possession of  
 9 the document and it was extensively reported by one of the  
 10 media houses. The full text, I think, of the Mail &  
 11 Guardian article was reported so the matter has already  
 12 received extensive publicity so there'd be no point, as I  
 13 see it, prima facie – subject to what Mr Ngalwana may say –  
 14 in holding the hearing in camera, anyway something I'm  
 15 reluctant to do because this Commission, one of the things  
 16 it stresses is it's concerned to investigate these matters  
 17 in an open and transparent fashion. But that aside, I'm  
 18 still not quite sure what the relevance of these allegation  
 19 is and I'd be grateful if you'd address me on those.  
 20 MS LE ROUX: Thank you, Chair. Chair,  
 21 based on the article I want to ask the Major-General  
 22 essentially two questions which I submit are relevant in  
 23 two respects. The two questions are, what is the status of  
 24 the charges that were brought against him and what is the  
 25 status of his claim against the SAPS which is reported in

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1 that article?

2 CHAIRPERSON: What's the relevance of

3 that?

4 MS LE ROUX: It's relevant in –

5 CHAIRPERSON: I'm sorry to interrupt.

6 These are things that happened after the events of the 16th.

7 Allegations were made against him that he was present and

8 effectively permitted, encouraged perhaps or allowed the

9 torture of people. He was arrested, detained for some

10 time. He feels that it was an unlawful arrest and he

11 suffered damages in consequence and he's claiming the

12 damages. Now I don't see how it's going to help us to know

13 what the outcome of that is in answering the questions that

14 have been put to us for our, to be answered.

15 MS LE ROUX: Chair –

16 CHAIRPERSON: If you can explain that to

17 me I'd be grateful.

18 MS LE ROUX: Chair, as I stated earlier,

19 we believe it would assist the Commission and be relevant

20 in two respects. The first is it goes to the evaluation of

21 the Major-General's evidence. As we've already covered

22 this morning, the Human Rights Commission in due course

23 will be submitting that, you know, as overall commander he

24 was not actually in overall command and so we then are

25 trying to understand why the Major-General's testimony says

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1 he was and it wasn't the Provincial Commissioner, it wasn't

2 the National Commissioner, it was him. And it's possible

3 that the status of the claim against the SAPS arising out

4 of the charges against him –

5 CHAIRPERSON: I'm sorry –

6 MS LE ROUX: - may inform that

7 motivation, could inform your evaluation of his evidence.

8 [11:37] CHAIRPERSON: Sorry, I don't understand

9 that and I'm given the power under the regulations to

10 disallow cross-examination even if it has some relevance,

11 if I'm satisfied it's not sufficiently relevant to help the

12 Commission to do its work and come to conclusions. You're

13 not suggesting, as I understand it, that it's irrelevant

14 for his credibility, is it, and even then it would be very

15 tangentially so. Obviously we can take note of the fact

16 because I take it it's virtually common cause that he was

17 arrested, that he instituted a claim. Those facts we know,

18 I take it, but does it go beyond that?

19 MS LE ROUX: Well, Chair, the difficulty

20 is we don't know if he has instituted a claim. We know

21 that he made – there's a letter of demand for a million

22 rand that, if not responded to, would result in a summons

23 being issued. We don't know if he has sued SAPS. Perhaps

24 SAPS has settled that case, perhaps the terms of that

25 settlement relate to his co-operation and participation in

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1 the Commission –

2 CHAIRPERSON: Well, that seems to be -

3 MS LE ROUX: That would go to the

4 evaluation of his evidence.

5 CHAIRPERSON: That seems to me to be

6 inherently speculative and I mean are you suggesting that

7 he settled the case, he may have settled it on the basis

8 that he must come and commit perjury here to support the

9 SAPS case? I mean unless it's something like that which is

10 totally speculative, so fanciful – prima facie I think I

11 must exercise my power under the regulations to disallow

12 it. You see, it may raise all sorts of other side-issues

13 as well. We've got enough things to think about, we've got

14 a limited time and something as tangential and remote as

15 that, if it's got any relevance at all, I'm afraid isn't

16 going to help us. There's a lot of material which you've

17 elicited in cross-examination which may well assist us and

18 for which we're grateful and I think if I may be permitted

19 to say this, the Commission, the Human Rights Commission is

20 playing a meaningful role here in this Commission and we're

21 grateful for its participation but this particular one is a

22 bridge too far I think, so I would disallow cross-

23 examination on it.

24 MS LE ROUX: Chair –

25 CHAIRPERSON: Unless you want to say

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1 something further?

2 MS PILLAY: Chair, if I may just raise a

3 point in keeping with the spirit of the new expanded role

4 of the evidence leaders, this issue of the charges that

5 were facing, that the General was facing, was raised by Mr

6 Mpofu during his cross-examination of both General Phiyega

7 and General Annandale and the point which Mr Mpofu was

8 arguing, Chair, which we submit might be a valuable one for

9 the Commission to consider was that the allegations of

10 assault were part of a general theme of brutality of the

11 police. It was a theme that started before the 16th and the

12 13th and carried on until after the miners were arrested and

13 that was the context within which Mr Mpofu raised the

14 question of the allegations of assault.

15 CHAIRPERSON: I don't understand Ms Le

16 Roux to be wanting to advance the point on that basis. She

17 wants, she says she wants to know, she wants details of the

18 claim, she wants to know whether it's been settled and she

19 wants to know, presumably, the terms of the settlement. I

20 don't understand how the point to which you've referred is

21 covered by that.

22 MS LE ROUX: Chair, the intervention by

23 Adv Pillay is obviously a supplementary reason, perhaps it

24 could be dealt with by the evidence leaders but my

25 instructions are also that the family that was represented

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1 by the Legal Resources Centre also intended to raise, for  
 2 the purposes of evaluating the credibility of the Major-  
 3 General's evidence, this claim that was pending and its  
 4 status and whether it has any impact on how this evidence  
 5 should be considered. My instructions are also that it was  
 6 a point to be raised by the LRC.  
 7 CHAIRPERSON: I understand that but it  
 8 doesn't mean it's a good point. Here's something that  
 9 happened subsequently, he lodged a claim – I mean without  
 10 going into the question of whether it was a good claim or a  
 11 bad claim, which is very much a side-issue, then that it's  
 12 been settled, the terms of the settlement, really I hear  
 13 what you say about the Legal Resources Centre wanting to  
 14 take the point as well but it doesn't make it a better  
 15 point because they want to take it. I'm afraid –  
 16 MS LE ROUX: Chair, can I make one final  
 17 submission -  
 18 CHAIRPERSON: Yes.  
 19 MS LE ROUX: - which is this, that this  
 20 particular point of how the existence of the charges and  
 21 the status of the suit impacts the evaluation of Major-  
 22 General Mpenbe's evidence is one aspect but that situates  
 23 within a broader point, a broader context which is – and it  
 24 is a theme that has already come up in the Commission and I  
 25 believe will be explored in even more detail as we go

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1 forward, which is the overall credibility, co-operation,  
 2 nature of presentation of evidence to this Commission by  
 3 the SAPS is a theme that I know other parties are certainly  
 4 exploring. Has there been full disclosure, has there been  
 5 a particular – I'm trying to find the appropriate word –  
 6 has there been, you know, Potchefstroom et cetera.  
 7 CHAIRPERSON: I understand, I understand  
 8 the issue. It raises questions about Potchefstroom, it  
 9 raises points about videos and all that kind of thing, I  
 10 understand that but I still don't see how this particular  
 11 issue has a bearing on that. Here's a claim which arose or  
 12 allegedly arose after the events. Firstly he was arrested  
 13 apparently, then he was kept in custody for some time and  
 14 he now is bringing a claim against the SAPS for that.  
 15 Whether it's been settled or not is neither here nor there  
 16 but I don't understand how that can have any impact on the  
 17 co-operation or lack thereof of the police as far as this  
 18 Commission is concerned and I don't think the SAPS can be  
 19 blamed, for example, for not leading evidence on this point  
 20 because it's irrelevant, as I see it. But even if it is  
 21 tangentially relevant, is it of sufficient relevance to  
 22 justify an inquiry which might well raise all sorts of  
 23 other issues that have got to be looked at, while we should  
 24 be concentrating on the events, as far as phase 1 is  
 25 concerned, of the deaths of the 44 people that we are

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1 concerned with, not just the 34 but all 44 of them  
 2 including the security officers from Lonmin, the other  
 3 employees of Lonmin and the members of the police force.  
 4 These are the matters we must concentrate on. Let's keep  
 5 our eye on those balls rather than on this side-issue which  
 6 isn't going to help us very much. So I'm afraid I've heard  
 7 what you have to say and without calling on Mr Ngalwana for  
 8 the benefit of his submissions on the point, I have made  
 9 the ruling that I have. If the evidence leaders want to  
 10 approach it on some other basis, we'll deal with that as  
 11 and when the occasion arises.  
 12 MS LE ROUX: Chair, in light of that  
 13 ruling the South African Human Rights Commission has no  
 14 further questions for Major-General Mpenbe at this stage.  
 15 CHAIRPERSON: Thank you. Ms Pillay, I  
 16 understand you are now going to cross-examine as –  
 17 MS LE ROUX: Chair, I spoke too soon. I  
 18 have a housekeeping issue which is that the South African  
 19 Human Rights Commission has prepared a document which  
 20 summarises the status of the contemporaneous documents  
 21 before the Commission, which is where our cross-examination  
 22 commenced. It has been provided to the Major-General, to  
 23 the SAPS team and to the evidence leaders. We would like  
 24 to submit that to the Commissioners for their assistance.  
 25 I'll obviously receive any objections or feedback from that

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1 and then hopefully be able to provide that to the  
 2 Commissioners today.  
 3 CHAIRPERSON: Well, you've got – have  
 4 your learned friends for the parties who are with us all  
 5 seen that document?  
 6 MS LE ROUX: Chair, we've provided it to  
 7 the Major-General and the SAPS team and only the evidence  
 8 leaders at this stage. We'll circulate it more broadly, if  
 9 the Commissioners would like, before we submit to the  
 10 Commission.  
 11 CHAIRPERSON: Well, you see if anyone  
 12 objects – obviously any assistance we can get that'll help  
 13 us we'll gratefully receive but if there are objections I  
 14 suppose I should give people an opportunity to raise them  
 15 but if everybody here hasn't got it yet, maybe that's  
 16 premature. You'll still be with us, I take it, as the  
 17 evidence unfolds so you can, at an appropriate stage once  
 18 all the relevance housekeeping boxes have been ticked,  
 19 raise the matter from where you are.  
 20 MS LE ROUX: Thank you, Chair.  
 21 CHAIRPERSON: Yes. Ms Pillay, I  
 22 understand you're going to cross-examine, you wish to  
 23 cross-examine. Since your erstwhile leader, now Justice  
 24 Madlanga, asked questions of the witness on behalf of the  
 25 evidence leaders, we made a ruling relating to parties who

<p style="text-align: right;">Page 12999</p> <p>1 are not represented to make sure their version is presented 2 to us and I understand, I was told in chambers that you 3 propose in terms of that ruling we made, to ask questions 4 of the witness. Is that correct? 5 MS PILLAY: Chair, that is correct. 6 CHAIRPERSON: Please proceed. 7 MS PILLAY: I may just indicate, Chair, 8 that I will be careful not to repeat any of the questions 9 that have been asked of – 10 CHAIRPERSON: I'm sure if you do there'll 11 be objections and I'm sure you'll endeavour to avoid those. 12 Please proceed. 13 RE-CROSS-EXAMINATION BY MS PILLAY: Thank 14 you, Chair. General, you agree that the primary instrument 15 which governs crowd management and public order policing is 16 standing order 262, is that correct? 17 MAJOR-GENERAL MPEMBE: Correct, 18 Chairperson. 19 MS PILLAY: And we know, General, that 20 standing order 262 has been refined – refined is my word, I 21 think the Chair has in the past used the word "glossed" – 22 by exhibit S before you which is the National Instruction 23 on the Use of Force in Public Order Policing, is that 24 correct? 25 MAJOR-GENERAL MPEMBE: Chairperson, that</p>	<p style="text-align: right;">Page 13001</p> <p>1 – 2 MS PILLAY: It's important for the 3 purposes of my cross-examination that you have the document 4 before you, General, so we'll just take a few minutes. 5 CHAIRPERSON: I earlier lent him my copy 6 of exhibit SS2 which is the standing order and he's still 7 got it so - it's loose in front of him, I think. 8 MAJOR-GENERAL MPEMBE: Did you put it in 9 line with – thanks Chairperson, I did get it. It's not 10 filed in terms of the – 11 CHAIRPERSON: Well, if you've got your 12 own copy you can give me my one back but – [microphone off, 13 inaudible] – you can give it back to me at lunch time, 14 let's just carry on. As long as you've got a copy in front 15 of you and you can follow the questions that are put. 16 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 17 MS PILLAY: General, we see that the 18 heading is "Crowd management during" – and these are the 19 important words – "gatherings and demonstrations," do you 20 agree? 21 MAJOR-GENERAL MPEMBE: Correct, 22 Chairperson. 23 MS PILLAY: And if you look at the 24 definitions section, General, which is section 2 of 25 standing order 262, I'd like you to turn to the definition</p>
<p style="text-align: right;">Page 13000</p> <p>1 is not my understanding but this letter is also a policy 2 that has to be complied with. My understanding is that 3 there is still a process whereby standing order 262 will be 4 reviewed and that will come as a national instruction. 5 That is my understanding currently. 6 MS PILLAY: But you do accept that to the 7 extent that exhibit S is an instruction from the National 8 Commissioner to members of SAPS, that it is binding on the 9 members of SAPS? 10 MAJOR-GENERAL MPEMBE: Correct, 11 Chairperson. 12 MS PILLAY: Now what I will seek to do, 13 General, is to conduct the bulk of my cross-examination 14 within the framework of standing order 262 and exhibit S. 15 Now there are a number of reasons for doing this, General, 16 but the most important of those reasons is that I'd like to 17 convey to you the relevance of the questions to what we 18 will eventually be making submissions on at the culmination 19 of these proceedings and one of the primary issues on which 20 we will make submissions is on whether or not SAPS complied 21 with all the applicable prescripts. If I may then ask you, 22 General, to turn to exhibit SS2, which is standing order 23 262. 24 MAJOR-GENERAL MPEMBE: Chairperson, it's 25 not in the file here. May I request that a copy, that I do</p>	<p style="text-align: right;">Page 13002</p> <p>1 of "gathering" and the definition of "demonstration" and 2 you'll see, General, in relation to both words that 3 standing order 262 incorporates the definition of these 4 words from the Regulation of Gatherings Act. Now what I 5 will request, Chair, is that the technicians put up the 6 definition of "gathering" and "demonstration" from section 7 1 of the Regulation of Gatherings Act – 8 CHAIRPERSON: He's done so. 9 MS PILLAY: And General, I've given this, 10 a copy of this to your team just to ensure that they're 11 comfortable that that's an accurate extraction from the 12 Act. You'll see that section 1 defines a demonstration as 13 "any" and I emphasise the word "any", "demonstration by one 14 or more persons but not more than 15 persons for or against 15 any person, cause, action or failure to take action." A 16 gathering is defined as "any assembly, concourse or 17 procession of more than 15 persons in or on any public road 18 as defined." Do you see that, General? 19 MAJOR-GENERAL MPEMBE: Chairperson, I do 20 see it. 21 MS PILLAY: So what that means, General, 22 is that a group of less than 15, any group of less than 15 23 people amounts to a demonstration for the purposes of 24 section 1 and if there are more than 15 people it amounts 25 to a gathering in terms of section 1 - where the purpose of</p>

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1 that gathering falls within, and if we can just go further  
 2 down the slide, falls within those subdivisions. And I'd  
 3 like you to look at sub (b), General, it's "how to form  
 4 pressure groups to hand over petitions to any person or to  
 5 mobilise or demonstrate support for or opposition to the  
 6 views, principles, policies, actions or omissions of any  
 7 person or body of persons or institution," do you see that,  
 8 General?  
 9 MAJOR-GENERAL MPEMBE: Correct,  
 10 Chairperson.  
 11 MS PILLAY: So you would agree with me,  
 12 General, that a group of let's say 200 people marching, a  
 13 group of 200 workers marching to the premises of their  
 14 employer would fall within the definition of a gathering  
 15 under the Regulation of Gatherings Act.  
 16 MAJOR-GENERAL MPEMBE: Chairperson, I  
 17 will request maybe we should see Roman figure (i). I only  
 18 see Roman figure (ii) so maybe if we can check what is said  
 19 by Roman figure (i).  
 20 MS PILLAY: General, the way you see it  
 21 now is the relevant portions. We've excluded all the  
 22 irrelevant portions, so Roman (ii) onwards is irrelevant so  
 23 what you see now is the relevant portions of the section.  
 24 The question is that a group of 200 workers marching to the  
 25 premises of its employer would fall within the scope of

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1 (b), "as to form pressure groups to hand over petitions to  
 2 any person or to mobilise or to demonstrate support for or  
 3 opposition to the views, principles, policy, actions or  
 4 omissions of any person or body of persons or institution."  
 5 Do you agree, General?  
 6 [11:57] MAJOR-GENERAL MPEMBE: Correct,  
 7 Chairperson, as Lonmin will also fall under that part.  
 8 MS PILLAY: And we know from the  
 9 definition of a gathering in standing order 262 that if  
 10 something qualifies as a gathering under the Regulation of  
 11 Gatherings Act, then it would qualify as a gathering under  
 12 the standing order.  
 13 MAJOR-GENERAL MPEMBE: Correct,  
 14 Chairperson, subject also to the Regulation of Gatherings  
 15 Act that requires certain actions from the organisers.  
 16 MS PILLAY: So General, the significance  
 17 of what I've covered with you now is twofold. Firstly, it  
 18 means that standing order 262 applies to any gathering and  
 19 I emphasise "any" because that's the word used in the Act,  
 20 in the Regulation of Gatherings Act and the thrust of the  
 21 proposition is this, General, irrespective of whether the  
 22 gathering is spontaneous or not.  
 23 MAJOR-GENERAL MPEMBE: Chairperson,  
 24 before I can answer the question may I also request that we  
 25 check the background of standing order 262, the same SS2

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1 paragraph 1 and 2.  
 2 MS PILLAY: General, I'm happy to deal  
 3 with the background and we'll do that in a moment if you  
 4 can just answer the question for now and the question is –  
 5 MR NGALWANA: No, with respect Chair, no  
 6 question has been posed. She's just put a proposition to  
 7 him and the witness is entitled to –  
 8 CHAIRPERSON: Let her ask the question  
 9 then we can see. Ms Pillay, the point is taken that you  
 10 haven't asked a question yet, so I suggest you say  
 11 something with a question mark after it and then we can  
 12 carry on.  
 13 MS PILLAY: Thank you, Chair, I'll do  
 14 that. General, do you agree that standing order, the  
 15 definition of "gathering" in standing order 262 would apply  
 16 to any gathering, including a spontaneous one?  
 17 MR NGALWANA: In fact that's a legal  
 18 question, Chair, with respect.  
 19 MS PILLAY: Chair, we know from a factual  
 20 perspective that the witness was appointed as the C-JOC  
 21 under standing order 262 and one of the requirements is  
 22 that the person appointed as the C-JOC has to be fully  
 23 conversant with standing order 262.  
 24 CHAIRPERSON: No, you see there are two  
 25 issues, the one is what's the law, what's the meaning of

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1 the standing order? Another one, and you don't normally  
 2 ask witnesses for their views on questions of law but the  
 3 second question which could be relevant is the  
 4 understanding of a witness as to the legal, as to what the  
 5 law is which would then form a basis of further  
 6 questioning. So if your question is directed not to what  
 7 the law says but what the witness understood the law to say  
 8 or to mean, then I'll allow it but if it's the former then  
 9 I'll uphold Mr Ngalwana's objection.  
 10 MS PILLAY: Chair, probably the latter.  
 11 CHAIRPERSON: If it's definitely the  
 12 latter I'll allow the question.  
 13 MS PILLAY: General, if you may answer  
 14 the question that I posed to you, that's that the  
 15 definition of "gathering" in standing order 262 includes a  
 16 spontaneous gathering.  
 17 CHAIRPERSON: Sorry, the question really  
 18 relates to what you understood the standing order to be  
 19 saying and the law to be saying because it's relevant in  
 20 order to assess your actions and whether they were lawful  
 21 and so on and did you understand the standing order and the  
 22 Act to refer not only to organised gatherings, you know,  
 23 where there's an organiser who comes forward and gives  
 24 information to the police and the plan is drawn up and all  
 25 that kind of thing, but also to spontaneous, unplanned or

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1 unnotified gatherings? Did you understand that the Act and  
 2 the standing order applied to those gatherings as well?  
 3 MAJOR-GENERAL MPEMBE: Chairperson, my  
 4 understanding is that that is normally also brought in by  
 5 the policy on crowd management. The spontaneous one, we  
 6 call it, we legalise it, we put it in brackets, in the  
 7 manner we handle it. The understanding is that we still  
 8 have to register a docket in terms of the Regulation of  
 9 Gatherings Act because there was no notice served but in  
 10 handling it, we police it as if a notice has been served.  
 11 CHAIRPERSON: Yes. I see that paragraph  
 12 14 of the standing order deals with "unforeseen  
 13 (spontaneous) gatherings." So it's quite clear and I'm  
 14 sure this would be your understanding as well, that the  
 15 standing order applies also to "unforeseen (spontaneous)  
 16 gatherings," is that right?  
 17 MAJOR-GENERAL MPEMBE: Chairperson, I  
 18 will request that - maybe I need to be broadened in terms  
 19 of my understanding - the understanding of that we still,  
 20 in managing it, we have to manage it as if a notice has  
 21 been served but we still have to act by, against  
 22 convenience if later they are found that they have been  
 23 identified according to the Regulation of Gatherings Act.  
 24 CHAIRPERSON: I think the point is that  
 25 the conveners are the people who get into trouble because

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1 they should have given notice.  
 2 MAJOR-GENERAL MPEMBE: Correct,  
 3 Chairperson.  
 4 CHAIRPERSON: I don't want to anticipate  
 5 the cross-examination but I think the point raised by Mr  
 6 Budlender when he cross-examined General Annandale was that  
 7 the attenders, some people wrongly call them attendees but  
 8 the attenders, they don't commit a crime, it's only the  
 9 conveners who commit the crime, not by being at the  
 10 gathering but by having a gathering and failing to give the  
 11 necessary notices and so on. I think that's the point.  
 12 You remember it was covered with General Annandale. Is  
 13 that your understanding as well?  
 14 MAJOR-GENERAL MPEMBE: Chairperson,  
 15 correctly. Chairperson, I just want to add to my  
 16 understanding in terms of the policing of a gathering where  
 17 notice is served and a gathering where notice is not  
 18 served. My understanding, it will also go to paragraph 2  
 19 if the Commission allows that maybe -  
 20 CHAIRPERSON: I think Ms Pillay is  
 21 concerned, understand, what your understanding was of the  
 22 position. She nods her head, so I think you must proceed  
 23 as you were intending to proceed and give us your  
 24 understanding specially in relation to notified gatherings  
 25 and non-gatherings.

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1 MS PILLAY: General, before we - and we  
 2 can easily cover that today but my next proposition may  
 3 make that unnecessary. Do you accept, General, that once  
 4 you are appointed by the Provincial Commissioner as the C-  
 5 JOC in terms of the standing order, that the provisions of  
 6 the standing order then regulate your conduct?  
 7 MAJOR-GENERAL MPEMBE: Correct,  
 8 Chairperson. Also I need to comply with the policy on  
 9 crowd management.  
 10 MS PILLAY: Now General, if we can then  
 11 go through the -  
 12 MR NGALWANA: Chair, I'm not sure - the  
 13 witness was about to explain, give his own understanding  
 14 with reference to that paragraph.  
 15 CHAIRPERSON: I think, Ms Pillay, we must  
 16 give the General an opportunity to explain his  
 17 understanding of the matter because it's clearly important  
 18 to know how he understood things and how he applied what he  
 19 understood to be the law. So give us your understanding  
 20 but try to keep it as brief as you can.  
 21 MAJOR-GENERAL MPEMBE: Chairperson, my  
 22 understanding as has already been explained, is also  
 23 contained in that paragraph 2 to say that in the case where  
 24 a spontaneous has happened, you don't normally have the  
 25 other party, the conveners are not there but what is more

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1 important to me is that once the other party is not there  
 2 and - it becomes very much problematic for the police to  
 3 work because according to the Regulation of Gatherings Act,  
 4 compels that there should be two parties where there must  
 5 be the planning and the other part, the other party, and  
 6 that is my understanding. So when we're dealing with  
 7 standing order 262, my understanding is that we have to  
 8 deal also with the other party in terms of saying you had  
 9 also an obligation in terms of the Regulation of Gatherings  
 10 Act. And also the actions of the police to police these  
 11 spontaneous as legal, it's also part of - the Regulation of  
 12 Gatherings Act is also part of standing order 262 but my  
 13 understanding, it will be that when coming to the  
 14 compliance of standing order 262 it also has to be seen in  
 15 the sense that were there any two parties or it was one  
 16 party?  
 17 MS PILLAY: General, just following up on  
 18 that explanation, may I ask you to turn to clause 6 of the  
 19 standing order?  
 20 MAJOR-GENERAL MPEMBE: Yes.  
 21 MS PILLAY: You will see, General, that  
 22 clause 6 envisages two distinct situations, a situation  
 23 where, one, an authorised member receives notice of a  
 24 gathering and that I think is one of the scenarios you were  
 25 dealing with, General, when the convener follows the

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1 prescripts of the Regulation of Gatherings Act and gives  
 2 notice of the gathering, but clause 1 also refers to  
 3 instances where the member receives information regarding a  
 4 gathering which we would submit, General, encompasses a  
 5 situation where the convener does not follow the prescripts  
 6 of the Regulation of Gatherings Act and that clause 6 would  
 7 then apply to both scenarios. Do you agree with that,  
 8 General?  
 9 MAJOR-GENERAL MPEMBE: I still want to  
 10 understand the question, whether to comment or to agree  
 11 with what has been written here.  
 12 MS PILLAY: The question, General, is do  
 13 you agree that clause 6 encompasses both the scenarios you  
 14 refer to and therefore would apply to both scenarios?  
 15 MR NGALWANA: The Chairperson, with  
 16 respect, has made a ruling on this issue about whether a  
 17 witness agrees or not, at page 2035 of the prescript, of  
 18 the transcript. You said, the Chairperson said whether the  
 19 witness agrees or not is beside the point. In fact, I can  
 20 read directly what the Chairperson says, "You'll be able to  
 21 ask the witness directly involved in the matter about these  
 22 issues. By just putting the argument to the Bishop and  
 23 saying, what's your comment on this in the hope that he  
 24 will agree, with respect, isn't going to help us at all to  
 25 answer the questions that we've been asked to answer." So

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1 putting a legal proposition to the witness and asking him  
 2 to agree is not going to help the Commission.  
 3 CHAIRPERSON: I think you're right, Mr  
 4 Ngalwana, but it's against a background of, she doesn't  
 5 have to repeat the words every time, of his understanding  
 6 of the matter. Perhaps you can reformulate the question  
 7 and avoid the objection.  
 8 MS PILLAY: Chair, just to respond very  
 9 briefly to the objection, I think what we're dealing with  
 10 here is a different species of legal prescript. This is a  
 11 document that the witness accepts governs his conduct on  
 12 the day and we've indicated at the start of this cross-  
 13 examination that the purpose is not only to get, to test  
 14 the witness's understanding of what he was entitled and  
 15 supposed to do but also to give the witness the benefit of  
 16 understanding the submissions which we will make at the end  
 17 on whether or not the prescripts were complied with or not.  
 18 MAJOR-GENERAL MPEMBE: Yes, Chairperson,  
 19 I do agree and in agreeing in terms of what has also been  
 20 written, I'll also like that maybe we should check the  
 21 authorised officers and so on but the understanding, yes, I  
 22 do agree.  
 23 CHAIRPERSON: I don't want to unduly  
 24 interfere but would this not perhaps help to shorten  
 25 matters, the position is you have three situations. The

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1 first case is where there's a gathering and you've been  
 2 told by the convener in advance and various things happen.  
 3 The second case is there's a gathering, you haven't been  
 4 told by the convener in advance of the gathering but you do  
 5 receive information, the police concerned, the authorised  
 6 member under the Act, he receives notice that a gathering  
 7 is going to take place – not from the convener but from  
 8 someone else. And that information can either come from  
 9 another member of the police service or from an outsider.  
 10 As far as I can see from 6, it tells you what the  
 11 authorised member must do if he receives information  
 12 regarding a gathering. If he gets it from the convener he  
 13 must do what the first box says, if he receives it from  
 14 another member of the force – service, I beginning your  
 15 pardon – he must do what the second box says and if he's  
 16 contacted by the responsible officer then he's got to do  
 17 what the third box says. It doesn't deal with the  
 18 situation where he – there are two other situations, the  
 19 one is where he receives information not from someone else  
 20 in the service or from the responsible officer but from  
 21 some outsider, that's the first thing that's not dealt with  
 22 clearly and the second thing not dealt with is where he  
 23 doesn't receive information from anybody at all. In fact  
 24 he just suddenly discovers that the gathering is taking  
 25 place. Now, but I take it that it's generally accepted

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1 surely that even if the gathering takes place and the  
 2 police don't know about it till it happens, they still must  
 3 act insofar as they can under the standing order. Would  
 4 you accept that? Is that the practice in your  
 5 understanding?  
 6 MAJOR-GENERAL MPEMBE: Yes Chairperson,  
 7 but what exactly Chairperson has explained now, that was  
 8 not in here which I wanted it should also be on record.  
 9 CHAIRPERSON: Have I put it on record to  
 10 your satisfaction?  
 11 MAJOR-GENERAL MPEMBE: I'm extremely  
 12 happy, Chairperson.  
 13 CHAIRPERSON: Ms Pillay, perhaps you can  
 14 now proceed with some of the undergrowth having been  
 15 removed.  
 16 [12:16] MS PILLAY: I'm indebted, Chair. If we  
 17 can then go to the factual matter, General Mpeembe, and I'm  
 18 going to put to you that what is encompassed in clause 6 of  
 19 standing order 262 was short-circuited in relation to the  
 20 incident of the 13th because of the presence of the  
 21 Provincial Commissioner and her immediate appointment of  
 22 you as the C-JOC on the day.  
 23 MAJOR-GENERAL MPEMBE: Chairperson, I  
 24 need to understand what is short-circuited and in relation  
 25 to the standing order, maybe we –

<p style="text-align: right;">Page 13015</p> <p>1 MS PILLAY: What I'm putting to you,  2 General, is that in relation to the incident of the 13th,  3 the information was not given to the responsible person  4 appointed under the standing order and under the Regulation  5 of Gatherings Act. The information was given directly to  6 the Provincial Commissioner who acted immediately on that  7 information by appointing you as the C-JOC under the  8 standing order.  9 MR NGALWANA: Chair, may I understand?  10 Is my learned friend saying there was no authorised person  11 appointed, for purposes of my –  12 CHAIRPERSON: Are you asking me or asking  13 her, because if you're asking me you're asking the wrong  14 person.  15 MR NGALWANA: I have to ask through you,  16 Chair, if you don't mind.  17 MS PILLAY: Chair, I would submit that  18 the representatives of SAPS would know whether an  19 authorised person was appointed or not. That was not my  20 contention. I put to the witness that due to the  21 Provincial Commissioner's presence on the day, that the  22 information was received by the CCTV, she saw it and  23 immediately appointed him as C-JOC in terms of clause 8 of  24 standing order 262.  25 MAJOR-GENERAL MPEMBE: Chairperson, I</p>	<p style="text-align: right;">Page 13017</p> <p>1 clause 8.2 of the standing order.  2 MAJOR-GENERAL MPEMBE: Chairperson, if I  3 have to answer that question it's that the C-JOC in my  4 understanding is that you are responsible for all actions  5 for the operation and normally these, it's happening before  6 the operation. That is my understanding.  7 MS PILLAY: So General, on your  8 understanding when does the operation commence?  9 MAJOR-GENERAL MPEMBE: Chairperson, when  10 in my understanding, in that case of on the 13th it's  11 already when the people were there and the operation starts  12 there but if maybe earlier on that day I have received the  13 information that these are the people that could have – I  14 could have found out from Captain Govender whether was  15 there any notice or whether he heard about it but it was to  16 me when I was told an operation had to start, as I have  17 already given my testimony.  18 MS PILLAY: So on your evidence, General,  19 the operation commenced when you were appointed as C-JOC  20 and when you were requested/instructed by General Mbombo to  21 attend to the people who were marching back from Karee  22 Mine.  23 MAJOR-GENERAL MPEMBE: Chairperson, I  24 know that in my evidence-in-chief this was discussed  25 extensively but there were questions that Adv Ngalwana</p>
<p style="text-align: right;">Page 13016</p> <p>1 would agree in terms of short-circuited but in terms of an  2 authorised officer in that area, I was not the authorised  3 member. I would agree as far as the appointment is  4 concerned but not agreeing on the responsibility with  5 regard to as an authorised member because the authorised  6 member of that area it's Captain Govender who has been  7 appointed in writing by the Provincial Commissioner and  8 myself as the C-JOC for the operation.  9 MS PILLAY: General, I will put it to you  10 that it is not relevant whether or not the authorised  11 member performed the actions that he ought to have  12 performed under standing order 262 or not, because  13 ultimately you as C-JOC are responsible for all actions  14 taken and all actions that ought to have been taken under  15 the standing order.  16 MR NGALWANA: Chair, with respect, the  17 legal foundation that is being put is not correct in terms  18 of 262 itself. 262 gives functions to the authorised  19 member. My learned friend cannot say it's not relevant at  20 all.  21 CHAIRPERSON: What do you say about that?  22 MS PILLAY: Chair, if I may refer – and  23 it's a pity that I didn't get the answer from the witness,  24 which would've been preferable – if I could refer my  25 learned friend, and maybe the witness by implication, to</p>	<p style="text-align: right;">Page 13018</p> <p>1 asked me and the Chairperson also made me to understand,  2 maybe if I can go to my transcript of exactly what I said.  3 MS PILLAY: General, with the greatest of  4 respect, it's a straightforward question. Were you, did  5 the operation commence when you were appointed as C-JOC and  6 you were instructed by General Mbombo to attend to the  7 people who were returning from Karee Mine?  8 MAJOR-GENERAL MPEMBE: I need just to  9 check whether it was – because the question was, was it  10 before or after, but in the answer it will be when I was  11 appointed to attend.  12 MS PILLAY: General, clause 7 of standing  13 order 262 requires there to be a threat assessment once  14 information has been received of a gathering. In her  15 evidence General Phiyega described this process, General,  16 as an environmental scan, this scan of – the threat  17 assessment. Now on my understanding of the evidence and  18 that's documentary and the oral evidence before this  19 Commission, General, is that there is no evidence that  20 there was a threat assessment conducted before you  21 descended on the marchers who were returning from Karee  22 Mine.  23 MAJOR-GENERAL MPEMBE: Chairperson, the  24 environmental or the threat assessment here has to do with  25 whether it was in accordance to the crowd management</p>

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1 policy. It will be level 1 when it's normally handled by  
 2 the station, that's my understanding, and then level 2 it's  
 3 when a station is being told by POP, is handling it but POP  
 4 is on standby. Level 3 then it's the most level that is  
 5 senior and in my understanding is that when I arrived there  
 6 on the scene and with what has already happened, then that  
 7 we equated it to level 3 and more but, Chairperson, I need  
 8 to explain this because there was no – normally this threat  
 9 assessment is done by crime intelligence who will say  
 10 because of this and that and that, that will be equated to  
 11 a level 2 or a level 3. Chairperson, in terms of my  
 12 testimony, before I got there that hasn't have happened  
 13 because of the spontaneous of it.

14 CHAIRPERSON: May I ask you this? Who  
 15 was the provincial head, operational response services in  
 16 the North-West Province in August last year?

17 MAJOR-GENERAL MPEMBE: Brigadier Calitz.

18 CHAIRPERSON: And when there's reference  
 19 in 7.1 to the area commissioner or member designated by him  
 20 or her of a proposed gathering, that's a reference I take  
 21 it to the authorised person, is it? Who was the area  
 22 commissioner or person designated by the area commissioner  
 23 for that area? Was that Govender?

24 MAJOR-GENERAL MPEMBE: I'm sorry,  
 25 Chairperson, I thought that the interpreter – Chairperson,

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1 in that case if I take you a little bit back it will be,  
 2 the area commissioner will be replaced by cluster commander  
 3 and the cluster commander was on leave, who is Major-  
 4 General Asaneng, the acting one was Brigadier Seboloke.  
 5 Now in that case a member designated by this, acting as a  
 6 commissioner, would be Captain Govender but because Captain  
 7 Govender he is not a POP member, that will be either at the  
 8 level of the cluster commander, it would have been  
 9 Lieutenant-Colonel Merafe.

10 MS PILLAY: General, when you say "When I  
 11 arrived on the scene we equated it to level 3 or more," who  
 12 do you include in "we?"

13 MAJOR-GENERAL MPEMBE: Chairperson, when  
 14 I include, I say "we," I include the crime intelligence as  
 15 it is its function actually to do the threat assessment  
 16 with what happened.

17 CHAIRPERSON: [Microphone off,  
 18 inaudible].

19 MAJOR-GENERAL MPEMBE: Crime  
 20 intelligence, yes Chairperson, but I did also go on to say  
 21 on that day that threat assessment wasn't done because it  
 22 was spontaneous, whereby I had to attend to it but in terms  
 23 of what has already happened, one or even we could have  
 24 equated it or we take it as level 3 and more.

25 MS PILLAY: General, I just want to step

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1 away from the outcome of a threat assessment process, in  
 2 other words as to whether it was a level 1, level 2 or  
 3 level 3 and I want us to focus on the process itself. Now,  
 4 we know from clause 7.1 that that has to be, the threat  
 5 assessment has to be conducted at JOCOM, is that correct?

6 MAJOR-GENERAL MPEMBE: Normally it's  
 7 presented to the JOCOM by the crime intelligence or by  
 8 different intelligence agencies together and presented to  
 9 the JOCOM. That is in the normal crowd management.

10 MS PILLAY: And once you're appointed as  
 11 C-JOC you're also the head of JOCOM.

12 MAJOR-GENERAL MPEMBE: Correct,  
 13 Chairperson.

14 MS PILLAY: Now we know from clause 7.2  
 15 of the standing order that the process of assessment is an  
 16 involved one, General, it involves an evaluation of a  
 17 number of different factors. Do you agree?

18 MAJOR-GENERAL MPEMBE: Correct,  
 19 Chairperson.

20 MS PILLAY: Now, as I understand your  
 21 evidence today, General, you're quite clear that in your  
 22 presence there was never any threat assessment evaluation  
 23 done.

24 MAJOR-GENERAL MPEMBE: Chairperson, I  
 25 earlier said that because of the spontaneous event of it

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1 and by that time myself, as I was coming on leave, when I  
 2 established a JOCOM, a JOCOM was established thereafter but  
 3 there was a JOC which was established on Saturday.

4 MS PILLAY: General, I'm sorry I'm not  
 5 clear on when the JOCOM was established on the 13th. You  
 6 were asked to come back from leave. In relation to your  
 7 arriving at the railway line, when was the JOCOM  
 8 established?

9 MAJOR-GENERAL MPEMBE: It was after the  
 10 incident.

11 CHAIRPERSON: Is that right, Major-  
 12 General? If you look at the definition of JOCOM in  
 13 paragraph 2(k) of the standing order it seems to envisage  
 14 that there is a standing body which is the JOCOM because it  
 15 says, "JOCOM means the joint operational co-ordinating  
 16 committee," it's an integrated operational body, it goes on  
 17 about that and then it says it meets weekly and only deals  
 18 with planned activities and so on. So is there normally a  
 19 standing body, a JOCOM that exists to deal with all  
 20 notified gatherings? Yes, yes, and deals with planned  
 21 activities and so forth as they are reported. So if there  
 22 was a standing JOCOM already in Marikana which was supposed  
 23 to meet every week and deal with planned activities, then  
 24 you don't have to set up a JOCOM, you've got one. And  
 25 then, if that's correct, and then what then happens of

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1 course is that when there is a particular gathering which  
 2 is likely to cause trouble, you normally have a threat  
 3 assessment about it, decide which level it fits in and then  
 4 various other things happen. And if it's clear that it's  
 5 going to be, the operation is quite a complicated  
 6 operation, then a C-JOC is appointed and various other  
 7 things follow from that. Is that more or less the way it  
 8 works or am I understanding it wrongly?  
 9 [12:36] MAJOR-GENERAL MPEMBE: Chairperson, your  
 10 understanding is correct except that it's not existing  
 11 always.  
 12 CHAIRPERSON: I see.  
 13 MAJOR-GENERAL MPEMBE: It's assembled for  
 14 a certain operation or a threat assessment, normally it's a  
 15 continuous process of crime intelligence in conjunction  
 16 with other agencies like SSA.  
 17 CHAIRPERSON: Yes. What 9, paragraph 9  
 18 appears to tell us is that once the C-JOC has been  
 19 appointed, he or she has got various things to do and one  
 20 of the things that he must do is activate a JOC. That we  
 21 get from 9.2.3, activate a JOC and appoint the operations  
 22 officer. The C-JOC is appointed by the Divisional  
 23 Provincial or Area Commissioner. In your case, you were  
 24 appointed by the Provincial Commissioner on the 13th, is  
 25 that right?

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1 MAJOR-GENERAL MPEMBE: Correct,  
 2 Chairperson.  
 3 CHAIRPERSON: You then had to – you were  
 4 then automatically in overall command of the specific  
 5 operation. There would have been other people dealing with  
 6 the matter before that – Merafe and who was the other one?  
 7 MAJOR-GENERAL MPEMBE: Captain Govender.  
 8 CHAIRPERSON: Ja, they'd been dealing  
 9 with the situation up to then but it got more serious on  
 10 the Monday. It got serious on the Sunday actually, but it  
 11 got particularly serious on the Monday and you were then  
 12 appointed C-JOC and you had various tasks to perform, inter  
 13 alia you had to activate the JOC and you had to appoint an  
 14 operations officer, is that right?  
 15 MAJOR-GENERAL MPEMBE: Correct,  
 16 Chairperson.  
 17 CHAIRPERSON: Did you activate the JOC?  
 18 MAJOR-GENERAL MPEMBE: Yes, correct  
 19 Chairperson.  
 20 CHAIRPERSON: And did you appoint then  
 21 Calitz as the operations officer, is that correct? But  
 22 there was something of a crisis on the go because there  
 23 were several hundred people wandering around near the  
 24 railway line with dangerous weapons. So you decided to  
 25 leave your newly appointed operations officer behind

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1 because he couldn't speak the language and you went off to  
 2 deal with the situation, is that what happened?  
 3 MAJOR-GENERAL MPEMBE: Correct,  
 4 Chairperson, up to so far I just wanted also to include  
 5 that the JOC was actually established on Saturday on the  
 6 arrival of Brigadier Calitz. I only take it and expand it  
 7 when I realised on the 13th, I only wanted to include that  
 8 one.  
 9 CHAIRPERSON: Sorry Ms Pillay, I took you  
 10 a bit off your pre-determined course but I take it you can  
 11 get back to it without much trouble.  
 12 MS PILLAY: I can and I'm indebted to the  
 13 Chair.  
 14 MAJOR-GENERAL MPEMBE: I'm sorry, Chair,  
 15 but I just wanted to add also to say at that time when the  
 16 JOC was established the station commander was these as well  
 17 as the acting cluster commander by that time.  
 18 MS PILLAY: Just to get back to the  
 19 thrust of this line of questioning, General, is that from  
 20 the time that you were appointed as C-JOC and became chair  
 21 of JOCOM, there was no threat assessment done.  
 22 MAJOR-GENERAL MPEMBE: Chairperson, I  
 23 just wanted clarity whether before the incident or after  
 24 the incident?  
 25 CHAIRPERSON: [Microphone off, inaudible]

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1 – sorry. You weren't the chair, you were appointed,  
 2 General. I take it you would have been the chair except  
 3 for the fact that you appointed General Annandale to be the  
 4 chair because you had a lot of other things to do apart  
 5 from just sitting in the chair at the JOCOM, is that right?  
 6 MAJOR-GENERAL MPEMBE: Correct,  
 7 Chairperson.  
 8 CHAIRPERSON: What incident are you  
 9 talking about? There was a series of incidents which  
 10 started on the, started in the previous week, but there'd  
 11 been serious incidents on the 12th when the security guards  
 12 were killed, that evening other employees who were  
 13 reporting for work were killed as well, presumably in an  
 14 attempt to enforce an unprotected strike and then on the  
 15 Monday there was this group of people, I think 200  
 16 approximately, people marching across the countryside with  
 17 dangerous weapons. That was the first situation. Is that  
 18 the incident that's being talked about or do you mean some  
 19 other incident?  
 20 MS PILLAY: Chair, if I may just –  
 21 CHAIRPERSON: Perhaps I must ask Ms  
 22 Pillay –  
 23 MS PILLAY: If I may just indicate that  
 24 all of these questions are based on the gathering which we  
 25 identified as the 200 people marching from Karee Mine.

<p style="text-align: right;">Page 13027</p> <p>1 CHAIRPERSON: Yes, sorry. I didn't see 2 that your light had come on. 3 MR NTSONKOTA: Thank you, Chair. Just 4 for the record again, the name is Thando Ntsonkota on 5 behalf of NUM. Chair, I hold no brief for SAPS and maybe I 6 should've made this observation much earlier but I thought 7 I should just let Ms Pillay to continue with her cross- 8 examination and perhaps it may not be necessary. Chair, as 9 I understood the rules adopted the other day, the evidence 10 leaders would be permitted to cross-examine chiefly for the 11 purposes of putting a version of those that are not before 12 the Commission and in particular the injured and arrested 13 and perhaps the families as well but up until now, Chair, a 14 new line of cross-examination is being put to the witness. 15 So I thought perhaps I should just find out from the – 16 CHAIRPERSON: I understand what you're 17 saying – sorry, can I – 18 MR NTSONKOTA: If I could just – 19 CHAIRPERSON: Please carry on, yes? 20 MR NTSONKOTA: More so this witness in 21 particular, bearing in mind that, you know, the evidence 22 leaders through Mr Madlanga whilst he was still with us, 23 had sufficient opportunity to cross-examine the witness and 24 he was cross-examined at length by the evidence leaders so 25 it's almost like now, you know, having a second bite at the</p>	<p style="text-align: right;">Page 13029</p> <p>1 report. 2 Now the version of the miners doesn't only 3 include factual averments but obviously involves other 4 aspects that they would wish to put before us that they 5 would regard as relevant. Now I'm still not quite sure 6 where Ms Pillay goes but I must assume that she's gone into 7 this very carefully and she is proposing, she is following 8 a line which she understands the miners would wish to have 9 put before us so that we can give a full and complete 10 report dealing with various facets. So it's not really a 11 second bite at the cherry. In a sense literally I suppose 12 it is, but it isn't really a second bite at the cherry 13 because the evidence leaders are now performing a function 14 that they weren't called upon to perform when Mr Madlanga 15 cross-examined but which has become necessary because of 16 the departure of the representatives of the miners. As 17 I've said, she's not representing the miners but she is 18 doing a duty, which evidence leaders must do, to assist the 19 Commission to deal with the matter as comprehensively as it 20 can by presenting the version of the miners and that's what 21 she's doing. Where exactly she's, we're going to go is not 22 quite clear to me at the moment but as you know, sometimes 23 a cross-examiner likes to make that point become clear when 24 all the necessary boxes have been ticked and the witnesses 25 have made the necessary concessions.</p>
<p style="text-align: right;">Page 13028</p> <p>1 cherry, so to speak, Chair. It's clearly not an 2 observation, I'm just – 3 CHAIRPERSON: No, no – 4 MR NTSONKOTA: It's not an objection, 5 it's an observation – 6 CHAIRPERSON: Finish what you want to 7 say. I want to comment on what you said in a moment and I 8 think you – 9 MR NTSONKOTA: Well, I'm done, Chair. 10 That's all I wanted to – 11 CHAIRPERSON: The position is as follows, 12 as I explained at the beginning. When Mr Madlanga cross- 13 examined, he cross-examined on the basis that Mr Mpofu was 14 going to follow and Mr Mpofu was going to put up certain 15 contentions on behalf of his clients, the arrested and 16 injured miners – we'll just call them the strikers for 17 present purposes – and it was clear from the line he'd 18 taken earlier that there were certain contentions he was 19 going to advance on behalf of his clients which Mr Madlanga 20 didn't deal with because he thought Mr Mpofu was going to. 21 Now that Mr Mpofu is no longer with us, we altered the 22 rules to provide that obviously we couldn't provide for the 23 evidence leaders to represent the miners but we did provide 24 that they should present the version of the miners so that 25 we would not at the end of the day come up with a one-sided</p>	<p style="text-align: right;">Page 13030</p> <p>1 So I think we must let her carry on for the 2 moment and not come with allegations of second bites at 3 cherries. If the cross-examination deals with matters that 4 are irrelevant or deals with matters that have been 5 repetitive, been dealt with before, that's a legitimate 6 ground. She's already undertaken at the very commencement 7 to try to avoid repetition as much as possible, so let her 8 carry on for the time being. 9 Let me also intervene and make another 10 observation. I take it, General – not an observation, it's 11 really a question – I take it there would be situations 12 where you can make the threat assessment in a flash. If 13 you have a gathering of people walking down the street 14 clanking cutlasses and pangas and assegais together, you 15 don't require to be a rocket scientist to be able to 16 determine in a split second that you're dealing with a 17 level 3 threat, would that be right? 18 MAJOR-GENERAL MPEMBE: Correct, 19 Chairperson. 20 CHAIRPERSON: Is that what happened here 21 on the 13th? Adv Hemraj is going to improve my question 22 before the witness answers. 23 COMMISSIONER HEMRAJ: When you say you 24 equated it to a level 3, the question I'd like to ask is by 25 what process did you arrive at that conclusion?</p>

<p style="text-align: right;">Page 13031</p> <p>1 MAJOR-GENERAL MPEMBE: Chairperson, may I 2 steal your words to say – 3 CHAIRPERSON: [Microphone off, inaudible] 4 the wrong word, I give you – as a Major-General in the 5 police you wouldn't do something like commit – no, you can 6 carry on if you like. 7 MAJOR-GENERAL MPEMBE: Chairperson, it is 8 in that line when you say you need not to be a rocket 9 scientist. It's when I arrived there to realise that this 10 is level 3 and more and is also, I also stated in my 11 statement in GG12 that it's then that I realised that I'm 12 not dealing with an ordinary crowd management. There is 13 one paragraph here in my statement that specifies exactly 14 what I'm saying now. 15 MS PILLAY: General, I'm going to put it 16 to you that what clause 7.2 of standing order 262 requires 17 is a more qualitative assessment than you looking at the 18 miners and deciding you don't need to be a rocket scientist 19 to understand that they're dangerous. If you look at 20 clause 7.2 it sets out a number of factors which need to be 21 taken into account and carefully considered before an 22 appropriate course of action is decided on. 23 MAJOR-GENERAL MPEMBE: Yes Chairperson, I 24 do agree and on the 13th this is not operationally, it's not 25 operationally easy or compatible that you need to sit and I</p>	<p style="text-align: right;">Page 13033</p> <p>1 sure that the people, the 200 people who were returning 2 from Karee Mine were the same people that went to the NUM 3 offices the day, on the 11th? 4 MAJOR-GENERAL MPEMBE: On Saturday I was 5 still on leave. 6 MS PILLAY: If we can then turn, General, 7 to clause 8.2 of the standing order and I just wanted to 8 test your understanding, General, do you accept that once 9 you are appointed as C-JOC that you are fully responsible 10 for ensuring compliance with the standing order? 11 MR NGALWANA: Chair, we have already 12 dealt with this issue. 13 CHAIRPERSON: It's unlikely the answer is 14 going to be no, but instead of having a long argument 15 whether the question should be asked, I take it the answer 16 is yes, am I right? 17 MAJOR-GENERAL MPEMBE: It is correct, 18 Chairperson, with an addition to say that with the 19 assistance of other officers in terms of the JOC structure. 20 That's what I said to Adv Madlanga. 21 CHAIRPERSON: - ultimately what happens, 22 all actions are actions for which you are to be held 23 responsible even though obviously you couldn't do 24 everything yourself, you had to be assisted by other people 25 but the standing order makes it clear, all actions taken</p>
<p style="text-align: right;">Page 13032</p> <p>1 see in this case it will be the intelligence co-ordinating 2 committee, they need to check in terms of what 7.2 has to 3 do and that's why on that day I followed that process when 4 I arrived on the scene and that was also one of my reasons 5 to go there. 6 CHAIRPERSON: I see there's an et cetera 7 at the end of 7.2. Now what had happened on his occasion 8 was on the Saturday there had apparently been a group of 9 2 000 – yes, 2 000, was it 200 or 2 000? 200, sorry, 200 10 people, I mustn't exaggerate, 200 people with – not 11 disputed in evidence before us – some of them armed with 12 dangerous weapons who went to the NUM office and then there 13 was trouble that we've heard extensively in the evidence. 14 The following day, the Monday, Sunday two security guards 15 were killed during the day and two other people who were 16 reporting for work were killed that night, property was 17 damaged. The Monday you have a group of 200 people with 18 dangerous weapons who go to the Karee Mine. Now those 19 facts in themselves, would they be enough to raise the 20 matter to level 3 or was there any chance that extra 21 information might reduce it to level 1 or level 2? 22 MAJOR-GENERAL MPEMBE: No, Chairperson, 23 with those incidences there was no chance that it could 24 either go to level 1 or 2. 25 MS PILLAY: General, did you know for</p>	<p style="text-align: right;">Page 13034</p> <p>1 you're responsible for, provided the people are under your 2 command and to talk about, just for a moment about what 3 happened on the 13th, if someone took it into his head to 4 fire a teargas canister that you hadn't ordered or someone 5 else took it into his head to order a teargas canister to 6 be fired which you hadn't authorised and there's a major 7 problem as a result of that, that sparks what happened, 8 that's something you can't be held responsible for because 9 that wasn't anything that you ordered or authorised, is 10 that right? 11 [12:56] MAJOR-GENERAL MPEMBE: It is correct, 12 Chairperson, with – through all out actions until on the 13 16th, that it is the understanding, I will agree, 14 Chairperson. 15 CHAIRPERSON: Ms Pillay, it's nearly one 16 o'clock. When you reach a suitable stage will you let me 17 know and we'll take the adjournment? I'm not suggesting we 18 must adjourn now, you must tell us when you think it's 19 appropriate for your cross-examination. 20 MS PILLAY: Chair, it is convenient to 21 adjourn now. 22 CHAIRPERSON: We'll take the lunch 23 adjournment until quarter – 24 [COMMISSION ADJOURNS COMMISSION RESUMES] 25 [14:21] CHAIRPERSON: The Commission resumes.</p>

<p style="text-align: right;">Page 13035</p> <p>1 Major-General, you're still under oath.  2 MAJOR-GENERAL MPEMBE: Correct,  3 Chairperson.  4 CHAIRPERSON: Ms Pillay, are you going to  5 continue with the cross-examination? Sorry, I see Mr Mpofo  6 and Mr Ntsebeza and various other people are here and  7 you've turned your light on, Mr Mpofo. Do you wish to say  8 something?  9 MR MPOFU: Thank you very much,  10 Chairperson, yes thank you, we do want to say something,  11 yes Chairperson. As indicated earlier, we just wanted to  12 start, Chairperson, with a kind of report back on the issue  13 that we raised when we were last here, I think it was  14 Monday last week, including the matter of part B, the  15 hearing of part B. We indicated to the other parties and  16 we'll also be approaching them individually, that we would  17 hold a meeting with the Deputy Judge-President together  18 with the representatives of the President and the Minister  19 of Justice. That meeting took place upon the basis of the  20 agreement of all the parties that the hearing of part B  21 should be done on an expedited basis and the dates that  22 have been secured for the hearing are the 25th and 26th of  23 September, Chairperson, and time frames have been  24 indicated, agreed, on when the exchange of supplementary  25 papers, if any, should be done.</p>	<p style="text-align: right;">Page 13037</p> <p>1 whether the answer would be yea or nay but I'm not at  2 liberty to disclose who the potential donor was, but the  3 decision is now nay, so that aspect falls away.  4 MR MPOFU: Yes. Thank you, Chairperson.  5 I think the point we would make then simply is that we  6 would have appreciated if that was communicated to us  7 because out there people are saying, well, and we agreed  8 with them that among the possible solutions is the one that  9 was postulated by the Chairperson but I think that matter  10 is now clarified, that there is no longer the unnamed or  11 mysterious funder who is lurking around the corner, so that  12 that then becomes relevant to what I'm going to say further  13 down. Thank you, Chairperson, for that clarification.  14 The third issue that we would like to report or  15 place on record, Chairperson, is exactly that there's been  16 a new wave of harassment of our witnesses. Since last week  17 round about Thursday there have been pre-dawn raids that  18 have been carried out which resulted in the arrests of a  19 number of people, including some of the key witnesses in  20 this Commission in the name of Mr Simphiwe Booi who, as you  21 know Chairperson, is still going to testify particularly  22 around the issues of the 13th that the current witness,  23 General Mpeembe, is dealing with. He is the gentleman at  24 the inspection in loco who, along with the General, were  25 assisting the Commission with the version of what happened.</p>
<p style="text-align: right;">Page 13036</p> <p>1 Now, the implications of that then, Chairperson,  2 as I indicated last time unfortunately the reporting on the  3 case has been unfortunately inaccurate, is that that is  4 actually the actual application for funding. I'm trying to  5 paraphrase the prayer in part B. It says something like  6 giving legal assistance for the future and for the previous  7 portions that were unfunded, less any funding that had been  8 received, on an equitable basis – that kind of prayer. And  9 that, as was indicated, is not what was determined upon by  10 either the North Gauteng High Court nor the Constitutional  11 Court. So that matter will be going anew to the, for a  12 hearing in the High Court. So that's the first issue,  13 Chairperson.  14 The second issue by way of report back was when  15 we were here last time the Chairperson had indicated that  16 there was a possible funder, unnamed, and who would  17 possibly be prepared not only to fund the interim but the  18 main representation and since then we have not heard  19 anything. We understood the continuation of the Commission  20 to have been on the basis that that funding was around the  21 corner, as it were, and if it is no longer around the  22 corner then at least we would like to know –  23 CHAIRPERSON: I think I can say that the  24 matter stood down from time to time on the basis that a  25 decision had not yet been arrived at and we didn't know</p>	<p style="text-align: right;">Page 13038</p> <p>1 Yes, and the past four or five days we've had to be dealing  2 with many further arrests and telephone calls of people  3 being arrested at two or three in the morning because when  4 that happens, despite what was said publicly, they phone  5 us, they still phone us, they don't phone the evidence  6 leaders unfortunately. Mr Budlender correctly points out  7 that they don't purport to represent them or at least they  8 don't share that view which I appreciate, thank you. But  9 on a more serious note, we've been – we've had I think  10 about a total of eight people who have been targeted and I  11 think we've processed about five of them for bail  12 applications. This week another person who was arrested  13 and who appeared is Mr Mzoxolo Magidiwana who is sitting  14 there whom you might remember, Chairperson, as the witness  15 who had been shot several times. He also falls under the  16 description of a key witness in these proceedings.  17 Yes, I'm sorry Chairperson, the correct  18 statistics seem to be five have already been arrested and  19 another five will be arrested or, and charged tomorrow. So  20 that makes it a total of 10.  21 CHAIRPERSON: They haven't been arrested  22 yet?  23 MR MPOFU: Yes –  24 CHAIRPERSON: Five have been arrested.  25 Have they already been given bail?</p>

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1 MR MPOFU: Yes, Chairperson.  
 2 CHAIRPERSON: Another five are scheduled  
 3 to be arrested, is that tomorrow?  
 4 MR MPOFU: That's –  
 5 CHAIRPERSON: And presumably there'll be  
 6 a bail application.  
 7 MR MPOFU: We'll do the same bail  
 8 application and – ja, they have each been given bail at  
 9 R2 500 each so that's another R25 000 that my team had to  
 10 fork out to assist in that. Yes, so Chairperson that's a  
 11 matter that we would like the Commission to – obviously  
 12 it's a matter for the police and it's already been said  
 13 before that neither nor the Commission nor ourselves have  
 14 the power to stop the police from doing their work but the  
 15 relevance of that to this Commission is that there was  
 16 already a ruling in relation to it made by the Commission  
 17 which, as far as we now, has not been complied with but  
 18 secondly, its effect, its relevance here is the fact that  
 19 it tends to scare away witnesses, potential witnesses and  
 20 any other witnesses that are already on the witness list  
 21 would not be forthcoming if they think that this is what  
 22 happens to witnesses. But most importantly, it is part of  
 23 the unequal treatment that is meted out to the victims. We  
 24 know that up until now, despite some of the shooters who  
 25 shot and presumably killed people being known, none of them

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1 have been arrested. We know that some of the members of  
 2 the NUM who had been identified as suspects in the  
 3 attempted murder of the 11th August last year whose names  
 4 appear on the docket have not been arrested. So it would  
 5 seem that in relation to the matters pertaining to the  
 6 events of the 9th to the 16th of August the only people who  
 7 are susceptible to arrest are the victims and that is  
 8 patently wrong.  
 9 If the reason that the other people have not been  
 10 arrested is, as we understand it, to await the outcome of  
 11 the Commission, including the police who killed many  
 12 people, then what's good for them should also be good for  
 13 the victims. In any event, these arrests are just – can  
 14 only serve the purpose of harassment because all these bail  
 15 applications are resolved in the same manner, namely, that  
 16 the case will only be revisited once the Commission has  
 17 been finished and that has been the case since last year.  
 18 So then what's the point of harassing people and searching  
 19 them in the morning when we all know that those trials are  
 20 not going to take place until the Commission is over, which  
 21 is purportedly the reason why the police who killed people  
 22 have not been arrested.  
 23 Thank you, Chairperson, I think before we deal  
 24 with the issue of the postponement maybe I'd like us to  
 25 deal with the harassment issue, Chairperson.

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1 CHAIRPERSON: Before we deal with the  
 2 question of whether the postponement application can be  
 3 heard now, I propose asking Mr Semenya who represents the  
 4 police service and thereafter I'll ask the evidence leaders  
 5 if they have anything to say as well, to respond to what  
 6 has been said by Mr Mpofu in relation to the other matters  
 7 raised and particularly the question of the possible  
 8 harassment of witnesses or potential or possible witnesses.  
 9 MR SEMENYA SC: Thank you, Chair. I am  
 10 able to confirm, as far as my instructions go, that no  
 11 arrests have been made for the purposes of either harassing  
 12 the witnesses and alternatively tampering with the smooth  
 13 running of the Commission. Chair, you would recall that  
 14 the arrangement is two-fold, the one is that under the law  
 15 the South African Police Service have, if on good cause  
 16 they have reason to effect arrests, the power to do so.  
 17 That cannot be constrained by the Commission or anybody  
 18 else.  
 19 The second thing is, we had made an undertaking  
 20 to the evidence leaders that insofar as there is a  
 21 perceived harassment of any of the witnesses or that the  
 22 arrests are intended to be for nothing else but harassment,  
 23 we would have the evidence leaders an opportunity to  
 24 inspect the dockets to see whether or not there is  
 25 objective evidence that prima facie explains those arrests

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1 and excludes whatever maybe the perceived basis for an  
 2 improper motive on the part of the police. So that  
 3 arrangement is in place. If, for one or other reason, Mr  
 4 Mpofu's clients have a basis for perceiving that to  
 5 constitute harassment and they communicate that information  
 6 to the evidence leaders, they can be assured that the  
 7 evidence leaders will inspect the dockets to validate or  
 8 negative that type of perception. That must completely  
 9 answer that point.  
 10 There is also no basis for any targeting of any  
 11 particular witness as far as our instructions go, Chair,  
 12 but we can assure Mr Mpofu that even the question of  
 13 arrangement that has been made in relation to bail is  
 14 intended primarily to be in part for the purposes of  
 15 helping Mr Mpofu's clients in the processing of bail  
 16 applications. It's a matter trite that there are bail  
 17 conditions to bail, which means that for the purposes of  
 18 investigations those who are arrested with bail conditions  
 19 of X are enjoined in law to abide by those bail conditions.  
 20 It is not an harassment platform at all, that we can assure  
 21 the Commission.  
 22 CHAIRPERSON: Mr Budlender, do you wish  
 23 to say anything in regard to the, on the aspects of the  
 24 matter that have been covered so far?  
 25 MR BUDLENDER SC: Chair, I confirm that

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1 we have made arrangements with the South African Police  
 2 Service on the prosecution, that we will be given sight of  
 3 each of the dockets in question to enable us to satisfy  
 4 ourselves that there is a lawful basis for the arrests and  
 5 that this is not being done simply as a matter of impeding  
 6 or interfering with the work of the Commission.  
 7 MR MPOFU: Thank you.  
 8 CHAIRPERSON: Thank you.  
 9 MR MPOFU: Thank you, Chairperson, I  
 10 appreciate the remarks of my colleagues save to say this,  
 11 that it is not unfortunately a complete answer, as Mr  
 12 Semenya said. The one, the first issue is if these arrests  
 13 are done in order to help our clients, as he puts it, then  
 14 –  
 15 CHAIRPERSON: I think he said the bail  
 16 was –  
 17 MR MPOFU: Yes.  
 18 CHAIRPERSON: - I think the bail was an  
 19 aspect that was –  
 20 MR MPOFU: Ja, well that –  
 21 CHAIRPERSON: - in order to help them.  
 22 MR MPOFU: Ja, well, that also is not  
 23 correct. The bail conditions is something we argued in the  
 24 Magistrate's Court in Ga-Rankuwa last year, based on the  
 25 statements of the National Director of Public Prosecutions.

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1 What simply has happened now is that when these arrests are  
 2 made, since last year, we simply show whoever is the  
 3 prosecutor the connection between these cases and the  
 4 Commission and that's how the bail arrangement was made but  
 5 in any event, if indeed it was done in the spirit of being  
 6 helpful then there's no reason to raise people at 2 AM. Mr  
 7 Booi, sitting there, called me at 2:06 AM to say the police  
 8 were at his house, they were taking him out and so on. So  
 9 I don't want to get into details but there's no need for  
 10 pre-dawn raids if we are in the mode of mutual assistance.  
 11 MR NTSEBEZA SC: Taking him out, you are  
 12 not implying that they were killing him –  
 13 MR MPOFU: Yes, Mr Ntsebeza has corrected  
 14 my turn of phrase that when they took him out at 2 AM, I  
 15 don't mean it in the mortal sense.  
 16 CHAIRPERSON: He's here to prove that  
 17 they didn't do it in that –  
 18 [14:40] MR MPOFU: Yes. So that's the first  
 19 thing, Chairperson. Apropos the question of the evidence  
 20 leaders and the arrangement, once again we appreciate the  
 21 fact that the dockets might be scrutinised but that does  
 22 not answer the question of why there is selective  
 23 treatment. So maybe that arrangement should be extended so  
 24 that the evidence leaders must also investigate the non-  
 25 arrest of people where we know there is prima facie

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1 evidence because it doesn't help to say there's prima facie  
 2 evidence in relation to the victims but when we know  
 3 there's prima facie evidence in relation to the police and  
 4 other parties, their non-arrest is not explained because  
 5 that will not remove the complaint of bias, but I'll leave  
 6 that issue at that.  
 7 And the bail conditions are actually very  
 8 prohibitive. These amounts are out of reach for these  
 9 clients and in the case of Mr Magidiwana, for example, he  
 10 has given us instructions yesterday to say – because he is  
 11 now required to go and report at the police station twice a  
 12 week, on Mondays and Friday and in his condition, in his  
 13 physical condition that's just completely unsustainable.  
 14 There's simply no reason that I can think of, except for  
 15 harassment, why Mr Magidiwana who has come and testified  
 16 here, who attends the Commission freely, who is everywhere,  
 17 must now report every Monday and Friday. What flight risk,  
 18 what flight risk can he be? He is here, sitting here now  
 19 and –  
 20 CHAIRPERSON: But that's not something  
 21 over which we have control.  
 22 MR MPOFU: Of course. I'm simply  
 23 illustrating – I appreciate that, Chairperson, I'm just  
 24 illustrating the devastating effect that this has while at  
 25 the same time the police who shoot people are sitting at

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1 home and not reporting even once a year to anybody. So  
 2 that really is the crux of our complaint. Thank you,  
 3 Chairperson.  
 4 Now moving to our main reason for being here,  
 5 Chairperson now that the dates have been set out for the  
 6 determination of the question of funding and all the  
 7 constitutional issues around that which I don't need to  
 8 repeat, it is our view that or rather our instruction that  
 9 we should (a) place on record the objection of our clients  
 10 to the continuation of the Commission pending those  
 11 hearings and (b) to make an application for a postponement  
 12 of the Commission during that period. The first part,  
 13 which is the placing of the objection, is based on various  
 14 grounds, namely that really every day that the Commission  
 15 continues –  
 16 CHAIRPERSON: I'm sorry to interrupt you,  
 17 Mr Mpofo, I take it the grounds of objection that we're now  
 18 stating will be relevant for the postponement application.  
 19 The postponement application will, to some extent, be based  
 20 upon those grounds, is that correct?  
 21 MR MPOFU: Ja, not 100% but yes, yes,  
 22 they will overlap, yes.  
 23 CHAIRPERSON: Therefore the appropriate  
 24 stage to deal with them is during the postponement  
 25 application and when you came to see us in chambers we

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1 indicated to you, as we had already indicated to you in  
 2 writing through a letter sent by the secretary of the  
 3 Commission, that we thought prima facie that the correct  
 4 way to deal with the application, the appropriate way to  
 5 deal with it would be by way of a written application with  
 6 a supporting affidavit – setting out the relief sought and  
 7 a supporting affidavit setting out the facts upon which the  
 8 application is based. The application to be, a copy of the  
 9 application to be sent to all the parties to enable them to  
 10 consider the application, consider their response thereto,  
 11 investigate the facts, put out, put further facts forward  
 12 if they considered that to be appropriate.

13 MR MPOFU: Yes.

14 CHAIRPERSON: That was what we  
 15 communicated to you and perhaps, seeing we have the  
 16 representative of the police here and the other parties are  
 17 present, some if not all of them, perhaps we should find  
 18 out what their attitude is.

19 MR MPOFU: Yes. Let's do that first,  
 20 Chair.

21 CHAIRPERSON: Mr Semenya? Mr Semenya,  
 22 what is your attitude in relation to the procedure to be  
 23 followed in dealing with the application for a  
 24 postponement?

25 MR SEMENYA SC: Certainly, Chair, we will

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1 benefit in knowing on written form what the objection of  
 2 the continuation is and what the reasons are for the  
 3 application. We also can allude to a legal point that  
 4 perhaps even that relief is not competent before this  
 5 Commission but I'm not able to advance the argument until  
 6 such time as I've seen the papers and the reasons for it.

7 CHAIRPERSON: Before I call on the  
 8 evidence leaders to respond is there any other party who  
 9 wishes to say anything? Is there – representative of  
 10 Lonmin?

11 MR SHOZI: Mr Chair, we endorse fully –

12 CHAIRPERSON: Sorry no, I think Mr  
 13 Ntsebeza's raised his hand. I think I should give him an  
 14 opportunity first.

15 MR NTSEBEZA SC: Thank you, Mr Chair, Mr  
 16 Chairman and members of the Commission for indulging us, if  
 17 for no other reason but for my age I should speak ahead of  
 18 the representative for POPCRU, for Lonmin. Mr Chairman, I  
 19 suppose the position of the families who are in support of  
 20 the application for a postponement, insofar as only now we  
 21 are dealing with the procedure, I think everyone – it's  
 22 difficult times for everybody, the Commission, the  
 23 families, the SAPS, the evidence leaders and I think one of  
 24 the reasons why we are opting to have an application moved  
 25 in the way in which we moved the last application for a

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1 postponement, not on paper, and in which some other  
 2 applications have been moved without the necessity to  
 3 reduce them to paper, is expedition. Applications for  
 4 postponement, seeking of indulgence as they always do, are  
 5 able to be dealt with without having to reduce them to  
 6 writing. One of the reasons quite apart from expedition is  
 7 that we have here a running record and as a consequence it  
 8 is possible to capture the essence of what the application  
 9 is on almost an hourly basis or certainly if we made the  
 10 application this afternoon and there was a need for it to  
 11 be considered by those who would oppose it, it will be on  
 12 record, it will be available, the bases on which the  
 13 application for a postponement are made will be available  
 14 to whomsoever wants to oppose it, if so advised, but it  
 15 would also take care of the need to do these things on an  
 16 expedited basis. So from the point of view of the families  
 17 who would be supporting the application for reasons that  
 18 obviously would be clear, it will be on the basis that we  
 19 are seeking expedition and we are seeking your indulgence  
 20 in allowing the postponement application to be done orally  
 21 as I have indicated.

22 CHAIRPERSON: Thank you, Mr Ntsebeza. Mr  
 23 Shozi?

24 MR SHOZI: Chair, thank you. Chair, we  
 25 endorse fully the sentiments expressed by the Chairperson

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1 and Mr Semenya for the police, namely that the application  
 2 must be brought in writing with a supporting affidavit  
 3 explaining fully the reasons why Mr Mpofu and those who he  
 4 represents seek an application for postponement. The  
 5 reasons advanced by Mr Ntsebeza for not bringing an  
 6 application in writing, namely that of expedition, is with  
 7 respect, Chair, untenable. We understand the position to  
 8 be that Mr Mpofu was advised to apply in writing not today  
 9 but yesterday or the day before yesterday and he hasn't  
 10 done so. If he wishes to bring an application for a  
 11 postponement we would request that you direct him to do in  
 12 writing for us to be able to take proper instructions.

13 Thank you, Chair.

14 CHAIRPERSON: Ms Le Roux?

15 MS LE ROUX: Thank you, Chair. The South  
 16 African Human Rights Commission, shares the view of Adv  
 17 Ntsebeza that expedition must be served in how this  
 18 application is determined and in addition, the secondary  
 19 purposes of a written application, namely notice to all  
 20 parties, in our submission is not necessary now. The facts  
 21 are well known to everyone in the room as to why there has  
 22 been, why, you know, as to the status of the Commission in  
 23 the current circumstances. So we don't believe that there  
 24 would be any purpose served by merely reducing that to  
 25 writing. As far as I'm aware there are no new facts that

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1 support the postponement application and it will only delay  
 2 the determination of the application which we hope will be  
 3 expeditious.  
 4 CHAIRPERSON: Thank you. Anybody else  
 5 wish to say anything before I call on the evidence leaders?  
 6 Mr Budlender?  
 7 MR BUDLENDER SC: Chair, this application  
 8 is a very serious matter which can have very substantial  
 9 consequences for many persons, not least for the public  
 10 because it will affect the ability of the Commission to  
 11 conclude its work within a reasonable time or the time  
 12 provided for by the President. It's a very serious matter  
 13 and it's very important, we submit, that it be carefully  
 14 dealt with.  
 15 In our view it's necessary in a matter of this  
 16 kind that it not be dealt with informally but that it be  
 17 dealt with properly on paper so that everything is properly  
 18 before the Commission. I can just say that, without  
 19 getting into the merits of the matter, that if the High  
 20 Court is going to hear the matter on the 25th and 26th of  
 21 September, which is about a month from now and if,  
 22 optimistically, the High Court takes two weeks to give  
 23 judgment, that takes one to let's say the 10th of October –  
 24 whichever party is unsuccessful is likely to seek leave to  
 25 appeal against that judgment either to the Supreme Court of

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1 Appeal or to the Supreme Court of Appeal and thereafter to  
 2 the Constitutional Court or directly to the Constitutional  
 3 Court but in either event, the best prospect is that in  
 4 mid-October, about a month and a half from now, there'll be  
 5 an application for leave to appeal which then has to be  
 6 decided and then the court hearing the appeal, if leave to  
 7 appeal is granted, has to decide the matter. There's a  
 8 very material prospect, in other words, that the matter  
 9 cannot be brought to an end before November or December.  
 10 Now, I don't want to enter into the merits of the  
 11 application, that's not what I'm dealing with now. What  
 12 I'm submitting though is that a decision by this Commission  
 13 that it should adjourn effectively until, optimistically,  
 14 November or December is a very serious matter which affects  
 15 the public interest very considerably and it's very  
 16 important that it should be dealt with fully and formally.  
 17 So we submit that under the circumstances, having  
 18 regard to the history of the matter, it's desirable that  
 19 there should be a formal application, that formal  
 20 application should deal with the following. Firstly, it  
 21 should deal with the facts on which the applicants rely,  
 22 secondly it should deal with the grounds on which they  
 23 contend that a postponement should be granted and in  
 24 particular the question of what prejudice they will suffer  
 25 if it is not postponed, because that will be the critical

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1 question before the Commission. And the prejudice needs to  
 2 be fully spelt out and will then need to be carefully  
 3 considered by the Commission in the light of other  
 4 prejudice which may result. So it's a matter of setting  
 5 out the facts on which reliance is placed, a matter of  
 6 addressing the prejudice which will be caused by a non-  
 7 postponement and also the application ought to deal  
 8 explicitly with what the terms are of the postponement that  
 9 is sought. Is it a postponement until the matter is heard  
 10 by the High Court and decided by the High Court? What is  
 11 contemplated once the High Court has made its decision,  
 12 because it's not satisfactory that this matter should be  
 13 dealt with piecemeal. If the Commission is going to  
 14 postpone, it needs to know for how long it's going to  
 15 postpone.  
 16 So all of these matters, we submit, need to be  
 17 dealt with properly and formally placed before the  
 18 Commission so that the parties and the evidence leaders can  
 19 respond to them and that the Commission will then be best  
 20 placed to make a fully considered and fully balanced  
 21 decision in this regard. We understand the expedition, we  
 22 share the concern about the expedition but another few –  
 23 given the history of this matter, another few days, because  
 24 that's all we're inevitably talking about, a week or 10  
 25 days maximum, will not cause material prejudice of any kind

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1 but it will enable the Commission to deal with the matter  
 2 properly, whereas dealing with it with haste may cause very  
 3 substantial prejudice.  
 4 So we understand the expedition, we endorse the  
 5 need for the matter to be dealt with, with expedition, but  
 6 we submit it should be dealt with in a way which enables  
 7 proper notice to be given to all of the parties, all of the  
 8 facts and contentions to be properly placed before the  
 9 Commission and for the Commission then to be enabled to  
 10 make its decision in the full knowledge of all of the facts  
 11 and contentions which are in issue. Thank you, Chair.  
 12 CHAIRPERSON: Thank you, Mr Budlender.  
 13 Mr Mpofo, do you wish to reply?  
 14 MR MPOFU: Yes, yes, Chairperson, I'll  
 15 reply to what has been raised. Chairperson, firstly I just  
 16 want to say this, without repeat what Mr Ntsebeza said.  
 17 Postponement applications are, by their nature, things that  
 18 happen situationally. Imagine - last week I read in the  
 19 newspaper that there was a postponement here because  
 20 General Mpenbe had a headache during cross-examination –  
 21 CHAIRPERSON: There was an adjournment –  
 22 MR MPOFU: Or an adjournment, even worse,  
 23 ja. So imagine if one had said well, if you have a  
 24 headache you must do it in writing and all that and give  
 25 notice. It doesn't work that way. The issue here is that

<p style="text-align: right;">Page 13055</p> <p>1 unfortunately the question that nobody has addressed is  2 while you have this exchange of papers and all these  3 procedural niceties, what happens to the Commission? If  4 the Commission is going to continue in that time, then  5 that's exactly the issue that is prejudicial. What's the  6 point of coming in three weeks' time and saying, oh well,  7 maybe we should not have continued three weeks ago now that  8 you've convinced us. By then the proverbial water and the  9 baby will be out –</p> <p>10 CHAIRPERSON: What prejudice could be  11 suffered if, in a week's time or two weeks' time, the  12 Commission were to agree to postpone these proceedings, it  13 would not have made any findings yet and it received  14 further evidence in the meanwhile, how could there be  15 prejudice in consequence of that?</p> <p>16 MR MPOFU: Well –</p> <p>17 CHAIRPERSON: If the evidence were of  18 such a nature that it could later be dealt with in cross-  19 examination in the event of your clients returning.</p> <p>20 MR MPOFU: Well, there would be  21 prejudice, Chairperson, firstly to our clients but also  22 even to the general public –</p> <p>23 CHAIRPERSON: You make that assertion but  24 on what is it based?</p> <p>25 MR MPOFU: Yes. Well, I'll tell you now</p>	<p style="text-align: right;">Page 13057</p> <p>1 In the event of it being decided that even if you  2 can't come back because you're not funded, the Commission  3 must do the best it can, then again the evidence that's led  4 in the interim wouldn't have involved the incurrance of  5 wasted costs. So it's only in the event of it being held  6 that if all else fails and you can't get costs, you can't  7 get funding, therefore the Commission must stop, not do its  8 work, not make any findings – which may of course assist  9 your clients in certain material respects and be of  10 importance to society generally – only in that event would  11 the question of wasted costs arise, isn't that so?</p> <p>12 [15:00] MR MPOFU: No, it's not so, Chairperson,  13 with respect. The point I'm making is that there is  14 prejudice which I've described, which I'm not going to  15 repeat, but also the view or the instruction from our  16 client is that every day, every minute literally that the  17 Commission is continuing in their absence is prejudicial in  18 the sense that for example now we are told that what is  19 happening is that the evidence leaders have successfully  20 made an application to re-cross-examine General Mzembe in  21 order to present the versions of the parties that are not  22 here. Well, the parties that are not here that we  23 represent steadfastly do not want that to be done in their  24 name, let me put it that way.</p> <p>25 CHAIRPERSON: Well, it's not being done</p>
<p style="text-align: right;">Page 13056</p> <p>1 what it's based on. As far as the general public is  2 concerned, Chairperson, our estimate is that every day this  3 Commission sits it costs about half a million rand to the  4 taxpayer and if that might be found, after an application  5 on paper in two or three weeks' time, to have not been  6 necessary then that money can never be recovered but more  7 importantly –</p> <p>8 CHAIRPERSON: I'm sorry, I don't  9 understand. You would be seeking funding. If you're  10 getting funding, the Commission will continue in your  11 presence, is that right?</p> <p>12 MR MPOFU: After the court case, yes, of  13 course.</p> <p>14 CHAIRPERSON: Yes, yes, and the evidence  15 that's led in the interim wouldn't have to be led because  16 it's been led already. So in that event the money wouldn't  17 have been, the costs wouldn't have been wasted. In the  18 event of your losing your application for funding in the  19 High Court or whatever court you go to subsequently, then  20 you would suggest, I take it, that because of that the  21 Commission should close up shop and walk away just because  22 one party is not prepared to participate, to close its  23 books, walk away and not do what it's been mandated to do.  24 That's obviously a point that will have to be argued and  25 considered.</p>	<p style="text-align: right;">Page 13058</p> <p>1 in their name.</p> <p>2 MR MPOFU: Well, if it's to present their  3 version then it must be done in their -</p> <p>4 CHAIRPERSON: I'm sorry, I don't  5 understand that. If at the end of the day this Commission  6 decides – I'm not saying it will, I'm keeping it open – if  7 at the end of the day this Commission decides it's got to  8 do the best it can, it's vitally important for the country  9 that it do its work and deal with the matters it's been  10 asked to deal with, it would clearly be important that it  11 should do its best to present a report which is not one-  12 sided, which is based as far as it can base it on the  13 versions and the contentions of all the interested parties,  14 if that was so, I don't understand on what basis your  15 clients would say, well, we don't want them to consider our  16 version even though doing that might involve them making  17 findings in our favour. We don't want that, we would  18 prefer them to give a one-sided report because we don't  19 want our version to be put before it at all, even though  20 it's been put before it already for nine months, even  21 though statements have been drafted and have been filed and  22 intention has been, notice has been given of the intention  23 to call those witnesses, even though there is an opening  24 statement in which their contentions are fully set out, the  25 Commission must close its eyes to all that. I mean can</p>

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1 that be right?

2 MR MPOFU: No, Chairperson, with respect,

3 I'm sure the Chairperson knows that's not what we mean.

4 What we mean is that to present or represent, or whatever

5 verb one chooses, a version of people with whom one has

6 never consulted, based on statements which are summaries of

7 days and days and days of consultation cannot say – if the

8 Chairperson of course is saying that's the best we can do

9 under the circumstances, that I can appreciate but let's

10 not elevate that to the ideal because it is wrong,

11 Chairperson.

12 You can, nobody is qualified to present a version

13 for someone with whom they have not consulted. None of us

14 have the magic powers. It's unacceptable and I do

15 understand why the Chairperson allows it. As Mr Ntsebeza

16 said this whole situation is frustrating all round, so

17 we're not casting any aspersions but let's not elevate it

18 to the ideal and that there's no problem –

19 CHAIRPERSON: I'm not suggesting for a

20 moment that –

21 MR MPOFU: There's a big problem.

22 CHAIRPERSON: Sorry to interrupt you.

23 I'm not suggesting for a moment it's going to be elevated

24 to the ideal but I explained the consequences of not doing

25 the best one can and in fact doing the best one can,

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1 subject to the fact that one doesn't, isn't prepared to

2 consider anything by way of a version, even though it's to

3 some extent on paper already, of a very important party to

4 the proceedings, that's all. It's obviously not ideal. It

5 would be best if they were represented. If they can't be

6 represented then we either have to close shop and say we're

7 not going to do what we were told to do, mandated to do, or

8 we're going to do a job which we know will inevitably be a

9 bad job because it excludes a consideration of particular

10 versions –

11 MR MPOFU: Ja, I understand that –

12 CHAIRPERSON: - so that, with respect,

13 isn't a point –

14 MR MPOFU: Yes -

15 CHAIRPERSON: - that's one of your better

16 points, Mr Mpofo.

17 MR MPOFU: Thank you. Well, maybe it

18 will be if I make the following clear. To the extent that

19 it's not ideal then it is prejudicial to our clients. And

20 now what we're saying, Chairperson, Mr Shoji for Lonmin

21 says that we must explain, it's untenable. We don't know

22 why it is untenable to make an application for a

23 postponement. We made an application for a postponement

24 here about three weeks ago, nobody said it was untenable

25 and –

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1 CHAIRPERSON: What happened a couple of

2 weeks ago was you came along, you addressed us, made

3 certain preliminary submissions and in the end when we said

4 well, when are you going to make your application or are

5 you making your application and so on, you said that's it,

6 I've got nothing to add and you sat down. So we then had

7 to treat the application as having been made. In the

8 result we didn't deal with it in the circumstances that you

9 mentioned earlier.

10 MR MPOFU: Well –

11 CHAIRPERSON: It's not quite correct to

12 say that we countenanced a procedure whereby application

13 was made from the Bar without more – the question is that

14 the appropriate procedure was never even considered at that

15 stage.

16 MR MPOFU: No – ja, but Chairperson I

17 would contest that. Firstly, no – or the issue, the only

18 thing I said, which is correct, is that nobody said that it

19 was untenable, one. Two, many applications have been made

20 in this, including by ourselves for that matter, the

21 application for relocation, the application for this, that

22 and the other, the application for the evidence leaders,

23 the rules and so on. None of those applications were done

24 on affidavit which was served on us.

25 That's the point I'm making, so if for the first

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1 time that we adopt a procedure that says an application

2 must be in writing, it is in relation to people who have no

3 money to do that, who are complaining about the very

4 prejudice that will be continuing while that is happening,

5 then that would be strange indeed if that is the case. But

6 more importantly, Chairperson, the representatives of

7 Lonmin can't really say that they are endorsing what the

8 evidence leaders and the SAPS are saying because we all

9 know that the suggestion came from them that the

10 application should be in writing first. At the meeting of

11 the 21st August 2013 Lonmin said, and it says here in the

12 minute, "SB" – which is Schalk Burger – "suggested that the

13 application for a postponement should be brought formally

14 before the Commission in writing and parties be afforded an

15 opportunity to answer.

16 So it is rather the other people who are

17 endorsing Lonmin's position, which is wrong because neither

18 Lonmin nor those endorsers can explain why, if we cannot

19 address the issues that Mr Budlender rightfully says should

20 be addressed in such an application now, and they read the

21 transcript tomorrow and – because we are ready to address

22 all the issues that Mr Budlender has raised. He is

23 correct, you need to set out the prejudice, you need to do

24 all this and the other but we are ready to do it now and

25 they can read all about it tomorrow and then they can

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1 respond, those who want to respond, but it cannot be that  
 2 the Commission must continue while at the same time we are  
 3 caught up in a procedural warp, as it were, that takes us  
 4 to the next couple of days when we are saying the  
 5 prejudice, rightly or wrongly but we are saying the  
 6 prejudice for us is situational and happens every time  
 7 there is a continuation or every moment of continuation  
 8 but, Chairperson, ultimately that's a decision that the  
 9 Commission should make.

10 We would beg you to say that this application  
 11 should be dealt with like all the other applications and  
 12 that the parties who may want to deal with the application  
 13 should do so on the basis of the transcript.

14 The last issue, Chairperson, is that remember  
 15 this application is identical to the other application in  
 16 the sense that there are other efforts for obtaining  
 17 funding. Some public appeals, I indicated last time that  
 18 the workers themselves had made a collection and we were  
 19 surprised that the money came, it was counted by the Bishop  
 20 and came up to an amount of 17 000 and something, that's  
 21 obviously not – it won't go far but it shows that there is  
 22 a potential out there of raising money. If, and we want to  
 23 make that assurance again, Chairperson, again responding to  
 24 what Mr Budlender was saying, if for some reason those  
 25 public appeals result in the raising of money, for obvious

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1 reasons – because we want this Commission to be finished  
 2 like everybody else – we will be the first ones to return,  
 3 even before the hearing of the High Court application and  
 4 say Chairperson, we have enough, let's say even just for  
 5 the interim, for the two or three weeks that takes us to  
 6 the hearing of the High Court application and therefore  
 7 let's carry on until then. But right now, as matters stand  
 8 we are not in a position to do so. Thank you, Chairperson,  
 9 I think I've –

10 MR MAHLANGU: Just apologising,  
 11 Chairperson, for us not having interpreted everything  
 12 because we did not want to interfere with the argument that  
 13 was taking place. I've just very briefly told the members  
 14 of the public that we apologise and what the application  
 15 was all about.

16 CHAIRPERSON: Yes, thank you. Mr  
 17 Ntsebeza, I see you've raised your hand.

18 MR NTSEBEZA SC: Thank you, Mr Chairman  
 19 and members of the Commission, I just want to, before the  
 20 evidence leaders and obviously my learned friends from the  
 21 SAPS and everybody else responds, I would like to again, Mr  
 22 Chairman –

23 CHAIRPERSON: I'm sorry, Mr Ntsebeza, I  
 24 don't understand that the evidence leaders and your learned  
 25 friend from Lonmin have to respond because they were

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1 responding to the application.

2 MR NTSEBEZA SC: Yes, this procedure –

3 CHAIRPERSON: You do have a right to –

4 MR NTSEBEZA SC: - talk about procedure,  
 5 yes.

6 CHAIRPERSON: You have a right to reply  
 7 but they haven't got a right to reply to you, to your  
 8 reply.

9 MR NTSEBEZA SC: Indeed, indeed. No, I  
 10 just wanted to indicate what I think for everybody but  
 11 certainly for the families who are supporting the  
 12 application for a postponement and in the form in which we  
 13 were suggesting, that even if the Commission were to  
 14 indicate that if we do return, as the intention as far as I  
 15 am instructed is that in the end we should be able to  
 16 return, on two bases – one, if the application goes in our  
 17 favour and there's no appeal but then that's a never-ending  
 18 proposition but things do happen.

19 Secondly, if the optimism expressed by my learned  
 20 friend Mr Mpofu just recently that there may well be that  
 21 elusive funder out there to fund the representation of the  
 22 workers in the interim between now and when we seek to get  
 23 the postponement for, at least the potential prejudice to  
 24 those whom we represent will be minimal if there was, and  
 25 this is something that would be left to the Commission, if

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1 there was at least a postponement that is premised on the  
 2 optimism that either of these two things or both of them  
 3 will happen, there would be an interim funder and/or there  
 4 will be a successful application for funding.

5 The greatness of the prejudice to all of us is  
 6 that we have got a witness who is on the stand and whose  
 7 testimony is critical for all the parties, including the  
 8 party that has called him, and there may well be in the  
 9 intervening period, if it continues, be an alacrity with  
 10 which the other witnesses are called and I cannot imagine  
 11 that even if the Commission were inclined, as I understand  
 12 it, it would be inclined as and when we return, to recall  
 13 all those witnesses, whether that will be sufficient to  
 14 cure the prejudice which would be suffered by the parties.  
 15 It seems to me that –

16 CHAIRPERSON: We're not now debating the  
 17 merits of the matter.

18 MR NTSEBEZA SC: Yes, Mr Chairman.

19 CHAIRPERSON: All we're concerned with at  
 20 the moment is the proper procedure. The point you're now  
 21 dealing with is a point that will be addressed, I take it,  
 22 when the application is heard.

23 MR NTSEBEZA SC: Yes, Mr Chairman. I was  
 24 doing so, only insofar as Mr Budlender was speaking to why  
 25 the procedure he prefers should be the one that we should

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1 opt for and insofar as he raised it, the question of  
 2 prejudice and saying look, we should indicate prejudice. I  
 3 thought that in seeking to persuade what procedure we must  
 4 go, we must prefer, I could indicate at this stage the kind  
 5 of prejudice that we'd suffer.  
 6 CHAIRPERSON: You've told us. Is there  
 7 anything else you want to say?  
 8 MR NTSEBEZA SC: No, no, Mr Chairman.  
 9 CHAIRPERSON: I think it's appropriate  
 10 that we should reserve judgment at least for a short while,  
 11 so we will now adjourn until half past three or if we're  
 12 not clearly of a mind to make a decision one way or the  
 13 other, as soon after half past three as we can. We'll  
 14 adjourn till half past three or a time thereafter that we  
 15 indicate.  
 16 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 17 [15:37] CHAIRPERSON: The Commission resumes.  
 18 RULING  
 19 CHAIRPERSON: We've considered the  
 20 arguments that were advanced by counsel who appeared for  
 21 the various parties and thank them for the submissions and  
 22 we've come to the conclusion that the contention advanced  
 23 by the applicants for the postponement, supported by the  
 24 Human Rights Commission, that this matter should be dealt  
 25 with as expeditiously as possible should be decisive. And

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1 so we propose allowing the application to be made on an  
 2 oral basis, to be transcribed to enable the other parties  
 3 to respond.  
 4 Mr Mpofo, would you be able to finish your  
 5 submissions and I think Mr Ntsebeza is going to make  
 6 submissions as well, by four o'clock? The reason I say  
 7 that is I'm afraid we can't sit beyond four o'clock today.  
 8 MR MPOFU: Yes.  
 9 CHAIRPERSON: So if you haven't, if you  
 10 can't finish by four then we would propose starting at nine  
 11 tomorrow and hearing your submissions then.  
 12 MR MPOFU: Yes, I appreciate that,  
 13 Chairperson. If Chairperson –  
 14 CHAIRPERSON: We'll give you a moment to  
 15 take, to discuss with your colleague.  
 16 MR MPOFU: Chairperson, yes, we would  
 17 prefer to do it now.  
 18 CHAIRPERSON: Can you finish by four  
 19 o'clock?  
 20 MR MPOFU: Yes, Chairperson –  
 21 CHAIRPERSON: Because you see if you do  
 22 it by four o'clock, it's got to be transcribed and given to  
 23 the other side, the other parties to give them an  
 24 opportunity to deal with it. I'm in your hands. If you  
 25 can do it by four, fine, but there are reasons why we can't

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1 sit beyond four today. So I don't want to have a situation  
 2 that at four o'clock you'll still be in mid-flow, as it  
 3 were, and I've got to stop you.  
 4 MR SEMENYA SC: Chair –  
 5 MR MPOFU: Thank you. I'm sorry, sorry  
 6 Mr –  
 7 MR SEMENYA SC: If it is of no great  
 8 inconvenience for other reasons, are we able to release  
 9 General Mzembe for today?  
 10 CHAIRPERSON: Well, let's hear. If we're  
 11 going to continue with the application tomorrow then we can  
 12 spend the rest of the afternoon with the General.  
 13 MR MPOFU: Chairperson yes, I think  
 14 realistically let's do it tomorrow morning. I was trying  
 15 to avoid having to come, Mr –  
 16 CHAIRPERSON: We'll hear the application  
 17 being moved orally tomorrow. All the essential facts and  
 18 considerations and terms of the order and so on being set  
 19 out orally from the Bar tomorrow. That can be transcribed.  
 20 The other parties will have an opportunity to study the  
 21 transcript and we'll expect them to reply by Tuesday,  
 22 either in writing or orally, as they choose. That's the  
 23 ruling we give on the application.  
 24 MR MPOFU: We are indebted, we appreciate  
 25 that, Chairperson.

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1 CHAIRPERSON: Major-General, you're still  
 2 under oath. Ms Pillay, have you got any more questions for  
 3 the witness?  
 4 MR MPOFU: Chairperson –  
 5 CHAIRPERSON: If the Mpofo party would  
 6 wish to leave they have our permission to do so.  
 7 MR MPOFU: Yes, Chairperson, it does.  
 8 And Chairperson, just before we do depart, there's a  
 9 request that we wanted to make to accommodate Mr Ntsebeza  
 10 who has a commitment in Bloemfontein but he thinks he can  
 11 change it for the afternoon. Can we start early, can we  
 12 start at nine?  
 13 CHAIRPERSON: [Microphone off, inaudible]  
 14 nine.  
 15 MR MPOFU: Did he say nine? Oh –  
 16 MR NTSEBEZA SC: No, Mr Chairman, I think  
 17 I will rearrange my conference in Bloemfontein –  
 18 CHAIRPERSON: We can start at nine and if  
 19 necessary he can start first.  
 20 MR MPOFU: Yes, yes. Thank you,  
 21 Chairperson, we will cross that bridge tomorrow. May we  
 22 then be excused, Chairperson?  
 23 CHAIRPERSON: I think we can now  
 24 recommence and those who are talking, if they want to  
 25 continue their conversation I suggest they do it outside.

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1 You're still under oath, Major-General.  
 2 ZONDASI WILLIAM MPEMBE: (s.u.o.)  
 3 CHAIRPERSON: Ms Pillay?  
 4 MS PILLAY: Thank you, Chair. General,  
 5 just to round off the line of cross-examination around non-  
 6 compliance with standing order 262, it is correct that in  
 7 HHH3 paragraph 7, that's your supplementary statement, you  
 8 indicated that you were requested to attend to the incident  
 9 at the railway line at 12:45 on the 13th and that you were  
 10 at the scene by two o'clock that afternoon, which means  
 11 that within one hour and 15 minutes of having received the  
 12 instruction or request by General Mbombo you were on the  
 13 scene.  
 14 MR NGALWANA: Chair, that's not the  
 15 precise evidence in paragraph 7.  
 16 CHAIRPERSON: - precise, he did say he  
 17 had some two hours, as far as I can remember but I don't  
 18 know that anything turns on a few minutes either way but  
 19 perhaps you can reformulate the question in a way which  
 20 obviates the need, if need is the right word, for the  
 21 objection to be taken.  
 22 MS PILLAY: General, your statement  
 23 states that you were on the scene shortly after two  
 24 o'clock, is that correct?  
 25 MAJOR-GENERAL MPEMBE: Correct,

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1 Chairperson.  
 2 MS PILLAY: Which means that it would  
 3 have been around two hours you had received the instruction  
 4 from General Mbombo and had arrived at the scene.  
 5 MAJOR-GENERAL MPEMBE: Correct,  
 6 Chairperson.  
 7 MS PILLAY: General, there is no evidence  
 8 on the record that any of the prerequisites of clause 9 of  
 9 the standing order were complied with, am I correct?  
 10 MAJOR-GENERAL MPEMBE: Chairperson, with  
 11 regard to the 13th, no, with reasons that I have already  
 12 submitted in my testimony.  
 13 MS PILLAY: General, can I then turn to  
 14 clause 11 of the standing order specifically 11.1, General,  
 15 which deals with the need for negotiation.  
 16 MR NGALWANA: Chair, clause 9 has  
 17 numerous SAPS steps. Perhaps our learned friend could be  
 18 more specific as regards which of those she's referring to.  
 19 CHAIRPERSON: No, you can't - no, she's  
 20 moved on to ask something about 11 at the moment. You  
 21 can't demand, you can't dictate to her what questions she  
 22 must ask and in what order. Carry on, Ms Pillay.  
 23 MS PILLAY: General, clause 11.1 of  
 24 standing order 262. In essence, General, 11.1 requires  
 25 ongoing negotiations to take place between officers and the

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1 conveners of the gathering. Now can I ask you to turn,  
 2 General, to exhibit S and in particular to paragraph 2.2.2  
 3 of exhibit S.  
 4 CHAIRPERSON: For the benefit of those  
 5 who are in the auditorium or alternatively those who are  
 6 watching these proceedings from afar, exhibit S is a copy  
 7 of a letter written by the National Commissioner addressed  
 8 to all Provincial Commissioners and various other members  
 9 of the police service dealing with the use of force in  
 10 crowd management and 2.2.2, is that the one you're  
 11 referring to, Ms Pillay?  
 12 MS PILLAY: That's correct, Chair.  
 13 CHAIRPERSON: That's headed "Phase 2,  
 14 soft skills/negotiation phase." It reads, "This consists  
 15 of opening a channel for communication between role players  
 16 in order to negotiate the needs, demands and limits of both  
 17 the police and convener/role player. This requires  
 18 establishing a relationship in order to co-operate and find  
 19 a mutual resolution to potential conflict and  
 20 confrontation. The member undertaking the negotiation must  
 21 be approachable, fair and firm. During negotiation the  
 22 process should be conducted one-on-one or alternatively  
 23 with a record keeper supporting the negotiator and another  
 24 representative assisting the 'convener.' It is recommended  
 25 not to allow more than four people to participate in the

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1 negotiations."  
 2 MS PILLAY: General, were you aware of  
 3 the contents of exhibit S before the incident of the 13th?  
 4 MAJOR-GENERAL MPEMBE: Correct,  
 5 Chairperson.  
 6 MS PILLAY: And you will agree, General,  
 7 that the engagement between you and the strikers on the 13th  
 8 doesn't resemble what is referred to in 2.2.2 of exhibit S?  
 9 COMMISSIONER HEMRAJ: It might be fair to  
 10 tell him -  
 11 MAJOR-GENERAL MPEMBE: No, Chairperson.  
 12 COMMISSIONER HEMRAJ: It might be fair to  
 13 tell him in what respect, Ms Pillay.  
 14 MS PILLAY: General, it doesn't resemble  
 15 what is required in 2.2 in a number of respects. Firstly,  
 16 that there was no one-on-one negotiation with members of  
 17 the gathering. What happened and what was visible on the  
 18 video, General, and you'll correct me if I'm wrong, is that  
 19 you addressed the entire gathering.  
 20 MAJOR-GENERAL MPEMBE: Chairperson, I  
 21 don't agree in the sense that, with the reasons that I have  
 22 advanced earlier on that in terms of this letter and also  
 23 the standing order, the intention is that it's for that  
 24 gathering that is normally taking place as referred to as  
 25 a section 4 meeting and as I've said, in the case of a

<p style="text-align: right;">Page 13075</p> <p>1 spontaneous gathering you actually police it, you actually 2 police it but the situation will not be the same. So when 3 the situations are not the same and the policies could not 4 be applied the same because in the case of the 13th there 5 was no convener and there was no responsible officer 6 chairing that meeting and as actually it's supposed to 7 happen according to the intention of this letter. 8 MS PILLAY: With whom would you conduct 9 the one-on-one negotiations? 10 MAJOR-GENERAL MPEMBE: Chairperson, 11 nobody because in the sense that once you are still trying 12 to get their attention – in this case, because of the 13 benefit of hindsight I could say Mr Noki. The other one 14 who stood up there, and you can't say he must keep quiet 15 and then situation couldn't allow me to, only to take one 16 person to be with that person aside - at that time the 17 atmosphere, with that atmosphere and in that circumstances. 18 And it was a situation where the police were not actually 19 initiating the negotiation, if one will have to compare 20 with what happened on the 13th and what happened on the 21 follow day, on Tuesday. 22 MS PILLAY: General, did you ask the 23 miners to identify the leaders amongst themselves on the 24 13th? 25 MAJOR-GENERAL MPEMBE: Chairperson, I</p>	<p style="text-align: right;">Page 13077</p> <p>1 am I correct? 2 MAJOR-GENERAL MPEMBE: The ultimatum was 3 only with regard to the handing over of dangerous weapons. 4 MS PILLAY: Now, during his cross- 5 examination by Mr Budlender, General Annandale accepted, 6 General, that the concept of negotiation requires a give 7 and take. Do you accept the proposition, General? 8 MAJOR-GENERAL MPEMBE: It depends on the 9 situation. In this case I would have opted, I was opting 10 for a win-win situation and I will explain a win-win 11 situation. 12 CHAIRPERSON: I'm afraid I indicated 13 we'll have to adjourn at four o'clock. Can you tell us 14 about the win-win situation tomorrow when we've heard the 15 application for a postponement? I take it arrangements can 16 be made to let you, to inform you when the application is 17 approaching, the argument in the application is approaching 18 an end so you don't have to sit necessarily here from nine 19 o'clock listening to what's being said. You can obviously 20 come if you want to but if you don't want to, I'm sure 21 arrangements can be made to give you reasonably timeous 22 notice of the necessity for you to come here to continue 23 with your evidence. We'll adjourn now until nine o'clock 24 tomorrow morning. 25 [COMMISSION ADJOURNED]</p>
<p style="text-align: right;">Page 13076</p> <p>1 said to them I wanted to talk to them and the manner in 2 which, as I have described it in my GGG12 and the situation 3 that it was, the manner in which they were so – I could see 4 they were angry. No-one could ever have ever go somewhere 5 and communicate with me. Chairperson, it was in a way that 6 they will want to hear whatever I communicate with any 7 person, they should all hear it. So it should not be 8 somebody who's going to talk somewhere and then they don't 9 hear what will be the negotiation all about. 10 MS PILLAY: Do I understand from your 11 evidence, General, that you did not ask the miners to 12 identify the leaders amongst them on the 13th? 13 MAJOR-GENERAL MPEMBE: Correct, 14 Chairperson. 15 COMMISSIONER TOKOTA: Sorry, General. 16 General, is this what you call a situational 17 appropriateness where you determine what to, in what manner 18 you should address the situation when you find it, 19 especially in the spontaneous gatherings? 20 MAJOR-GENERAL MPEMBE: Correct, 21 Chairperson, and the reasons that I advance are the ones 22 that I have said now. 23 [15:57] MS PILLAY: General, if I may go on to a 24 further point on the question of negotiation, what you 25 ultimately did is you issued an ultimatum to the strikers,</p>	

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