# 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**

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[PROCEEDINGS ON 29 AUGUST 2013]
[09:31] CHAIRPERSON: The Commission resumes. We were asked to wait before commencing this morning so that some of Mr Mpofu's clients had an opportunity to be here but he's now informed me that they've not yet arrived. Perhaps you can say something further on that so we can start in their absence. Do you think they may well arrive while you're busy?
MR MPOFU: Yes, thank you very much, Chairperson.
CHAIRPERSON: Let's put that on record.
MR MPOFU: Thank you, Chairperson, thanks or the indulgence. The reason why we're starting half an hour late is because I requested the Commissioners in chambers to await my clients. We've just called them, they said they are not very far, they're crossing the last bridge. Unfortunately I don't know which – yes, too many rivers to cross for them, I think. So we have agreed that we should start. If their arrival seems to cause any disruption then we'll ask for a five minute adjournment but hopefully - I'm going to ask my attorneys to make sure that they try and move, come in as quietly as possible, Chairperson.
CHAIRPERSON: Thank you. Now what we're doing this morning is you're going to tell us orally what



the relief is that you seek as far as postponement is concerned, you're going to tell us what the facts are on which you rely, so this can then be transcribed or in effect be the written notice of motion and the factual averments upon which it rests and we will then proceed with the evidence. That will be transcribed. I'm assured it will be available by 9 o'clock tomorrow. It can then be given to the parties and they will then have until Tuesday to respond. I was informed this morning that the Department of Justice wishes to oppose the application, so I stated that they were also to be then given a copy of the transcription of what you tell us. Mr Mpofu, would you like to commence?
MR MPOFU: Yes. Thank you, Chairperson. Exactly as the Chairperson outlined, we intend to have the transcript, as it were, serving as the founding affidavit so we'll make both the factual and the legal averment. Chairperson, before we start, just a matter of housekeeping. Thank you for informing us about the Department of Justice. We'll consider our position as to whether they're entitled to oppose the matter in these proceedings but that's another story.
What we would like, Chairperson, with your leave, is maybe an indication at some stage, either now or at some stage of who is opposing the application because it might



help us to tailor what we are going to say. At this stage the only party that has indicated that it will oppose the application are the evidence leaders. They indicated so at the meeting of the 21st of August. As far as we know, all the other parties – at least obviously they're not bound by the positions they took in the previous application but in that application they had indicated that they would abide by the decision of the Commission.
MR SEMENYA SC: Chair, my instructions are to oppose so Mr Mpofu must proceed on that basis.
MR BUDLENDER SC: Chair, as far as our position is concerned, we will reserve our position until we've heard the application. We certainly will want to respond to it but whether we, what formal position we take up will depend on what relief is sought, what the grounds are, what the facts are.
MR SHOZI: Chair, we similarly reserve our position until we've heard the application and the grounds of the application. Thank you.
CHAIRPERSON: Thank you. Does anybody else representing any of the parties wish to state at this stage already what the attitude of the party concerned will be?
MR NTSONKOTA: As the Chair pleases, it's Thando Ntsonkota on behalf of NUM. We would also like to



put forward our position once we've heard the basis for the application, Chair. For now we'd like to reserve our rights, thank you.
MR MPOFU: Thank you very much, Chairperson. Maybe it's appropriate to start with outlining the relief that would have been in a notice of application.
CHAIRPERSON: Effectively you're going to read what would amount to the notice of motion.
MR MPOFU: Yes.
CHAIRPERSON: I see we've been given some documents, I –
MR MPOFU: Chair, yes, I'll refer to those –
CHAIRPERSON: One of them is the amended Notice of Motion –
MR MPOFU: In the –
CHAIRPERSON: In the High Court.
MR MPOFU: Yes.
CHAIRPERSON: Yes, that's been marked 1A.
MR MPOFU: 1A yes. No, hold on, everyone's got this, Chair. It's just cross-referencing, it's not – the others are just cases.
CHAIRPERSON: I take it you're not going to argue the application today, are you? You're just going

to tell us what –

MR MPOFU: Well, the basis – well, what I'll do is, Chair, what I propose to do is not necessarily to argue it but as one would do in an affidavit, you'd put factual and some of the legal –

CHAIRPERSON: Yes, yes –

MR MPOFU: - legal basis.

CHAIRPERSON: No, I understand.

MR MPOFU: But I would – thank you.

MR BUDLENDER SC: Sorry to interrupt, Chair. The parties don't have copies of that. We will, once we've been given copies by the Commission, arrange to distribute to everybody.

CHAIRPERSON: I will listen patiently to Mr Mpofu and, well, Adv Hemraj is ahead of me in proffering her copy so her copies will be taken away and extra copies will be made and made available to the evidence leaders and if there's anyone else who wants copies, will they please raise their hands.

MR MPOFU: It's just the amended Notice of Motion which I'll read into the record. I don't think anyone needs to have a copy as such or alternatively they already have copies, we served it on everybody.

CHAIRPERSON: You carry on. Copies are being made in the meanwhile, it doesn't prejudice anybody



and those who get the copies will appreciate, so the police want a copy and the evidence leaders want a copy. Anybody else? Mr – perhaps 10 copies could be made.

MR MPOFU: Okay. Thank you then, Chairperson, I think that would cover then the issues of housekeeping. Chairperson –

CHAIRPERSON: I'm sorry, that 10, does that include the Human Rights Commission as well? You want a copy too, I take it?

MR BUDLENDER SC: Chair, what we're doing is we're making 10 copies will be enough to cover everyone who's here for the moment and we're getting it scanned and we will circulate to everyone electronically.

MR MPOFU: That's fine. Chairperson, this is – oh sorry, just one more housekeeping matter. I was asked to convey the apologies of my learned colleague Mr Ntsebeza who unfortunately could not change his flight for his Bloemfontein engagement. His attorney Mr Mosikidi is here but since he had promised, he asked me to convey his –

CHAIRPERSON: Thank you.

MR MPOFU: Thanks, Chairperson. Chairperson, this is an application for the postponement of the Commission pending the attainment of funding, either from private sources or the outcome of the application for



state funding which has been set down for hearing on the 25th and 26th of September 2013, whichever happens first. I will therefore start by unpacking, as it were, these two events, the happening of which will mark the end date of the postponement period, of the proposed postponement period.

Firstly, I'll talk about the outcome of the application or the main application set down for 26 and 26 September. That application, Chairperson, in a nutshell is for – I'm referring to the document marked 1A and "Ad B" thereof says the following, it's an application for an order in the following terms, "1. Declaring the conduct of the first, second and fourth respondents" – that is the President, the Minister of Justice and the Legal Aid Board, Legal Aid South Africa as it's called these days – "in failing and/or refusing to provide the applicants with legal aid in respect of the Commission proceedings unlawful, unconstitutional and accordingly invalid. 2. Ordering the first, second and third respondents to take all reasonable steps to provide adequate, fair and equitable legal aid to the applicants in respect of the future proceedings of the Commission on the scale or tariff ordinarily employed by the third respondent, in other words on legal aid rates, including all reasonable costs incurred to date, less any amount received from third parties." The



rest is just the usual prayers for alternative relief and so on. Those are the principal prayers, Chairperson.

In other words, Chairperson, what is – if the Chairperson could just bear with me one second. That prayer or rather those prayers must be read in the context of what was said in the Constitutional Court in summing up the position at paragraph 2 of the Constitutional Court judgment, Chairperson, which says that the Commission – paragraph 1 talks about when the Commission commenced and so on and then 2 says, "To cover the legal and other expenses incurred by their participation in the Commission's proceedings, the applicants procured funding from a non-governmental entity, the Raith Foundation. However, this funding was only secured for the six month period from October 2012 until March 2013. The applicants have been unable to secure funding for the period April 2013 until October 2013, neither have they been able to secure contingent funding should the Commission's term be extended once again." The Constitutional Court summed up therefore in that paragraph the position. In other words, Chairperson, we've unscientifically postulated that the Commission may be extended and let's say for another five months, in which case it would last 18 months, that's just a working figure. If it does, what is being said that the funding requested is for the 18 months minus the six

1 months, which would be the 12 months. That's the period
2 for which no funding has been secured and is being sought.
3 The other issue that I'd like to point out in
4 relation to that application is that although some of the
5 parties are cited as respondents, in reality and in keeping
6 with the posture they assumed in the Constitutional Court,
7 in reality the applicants are the injured and arrested, the
8 deceased families, AMCU, the LRC representing the
9 Ledingwane family and the Human Rights Commission to some
10 extent. And the practical arrangements in court were that
11 those parties would be entitled to argue and reply as if
12 they were applicants. I'm told that the clients are here,
13 thank you Chairperson.
14 CHAIRPERSON: Do you want us to take a
15 short adjournment so that they can come in without
16 disturbing –
17 MR MPOFU: Let's see how it goes,
18 Chairperson, let's see if it's disruptive. If it's not,
19 we'll just carry on, thanks. Yes, in any event I'll deal
20 with the preliminary issues, Chairperson. So that's the
21 other thing I wanted to bring to the attention of the
22 court, of the Commission, in relation to the application.
23 The second issue is or second event which may or
24 may not curtail the period of postponement is the
25 attainment of funds from other sources other than the



1 state, and Chairperson, in respect of that we would submit
2 that there are reasonable prospects of, at the very least,
3 at the minimum, being able – yes, Chairperson, I think
4 we'll have to ask for five minutes.
5 CHAIRPERSON: We'll adjourn for five
6 minutes.
7 [COMMISSION ADJOURNS COMMISSION RESUMES]
8 [10:02] CHAIRPERSON: The Commission resumes. I
9 see quite a lot of your clients have now arrived.
10 MR MPOFU: Yes.
11 CHAIRPERSON: So we're able to proceed?
12 MR MPOFU: We'll proceed. Thank you very
13 much, Chairperson, for the indulgence. There are problems
14 with buses, and so on, but they're here now. Thank you
15 very much, Chairperson, much appreciated. Chairperson, I
16 was at the point where I was talking about the second
17 trigger event, which is the attainment of funds, and I was
18 saying that we believe, Chairperson, in the High Court we
19 were always called eternal optimists, but we have to be
20 optimistic when we are involved in this kind of struggle,
21 but we believe that there are reasonable prospects of the
22 attainment of funds, at the very least for quicker or
23 speedier interim return, even before the hearing. That
24 optimism is based on, as I indicated yesterday, firstly the
25 fact that the clients that we represent, the workers, the



1 protesters, so eager are they to come back to the
2 Commission that they themselves made a collection at the
3 commemoration service, using buckets that were passed
4 around there, which I call their own version of the bucket
5 system, and they collected – the exact amount is
6 R17 201.50. It came mostly in coins and every South
7 African coin was there, from 1 cent, to the R5-coin, and my
8 favourite part is that when the money was being counted, we
9 found on top of this money one American dollar and one
10 Maloti from Lesotho. So it means it has both an African
11 and an international flavour in this collection, and they
12 did this in the name of assisting the effort for their
13 lawyers to return to the Commission.
14 Secondly, Chairperson, I know that they are busy
15 trying to devise other ways of similar fundraising, but
16 secondly there are other more conventional ways of
17 fundraising that have been initiated. Most notably there's
18 a new organisation which calls itself Citizens4Marikana.
19 Mr Eric De Ridder, who's sitting there – you can lift your
20 hand – comes from that organisation, and they have
21 approached us because they in turn have been approached by
22 people from all walks of life and citizens and
23 organisations who also want to assist in the effort to
24 assist the legal representation of the victims, and
25 thirdly, there's always the – although I'm not holding my



1 breath on this one – there's always the off-chance that the
2 government will come to its senses and settle the matter
3 before the hearing, and a combination of those
4 possibilities might see an earlier return than the dates
5 postulated.
6 COMMISSIONER HEMRAJ: Mr Mpofu, when you
7 talk about returning before the court date, what sort of
8 period are you looking at, if you're talking about interim
9 funding?
10 MR MPOFU: I'm sorry, Commissioner, I
11 missed the second part of the question.
12 COMMISSIONER HEMRAJ: If you're talking
13 about interim funding and returning possibly before the
14 court date in the High Court, what sort of periods are you
15 looking at? What timeframes are you looking at?
16 MR MPOFU: Oh, yes, thank you, Madam
17 Commissioner. Well, it's difficult to say. I know for a
18 fact that there's a public march that is being planned,
19 which is also part of the fundraising effort. I'm thinking
20 that by the time that happens, which I've been told is
21 within a week or two, then all these things that I've
22 mentioned would have been pulled together somehow and
23 communicated to us, and if the indication is that there is
24 enough for us to come back, we will come back, and I must
25 indicate that that, as far as I'm concerned it would mean

covering costs of overheads and things like that, not necessarily the fees, because we have gone so long without fees, so another three weeks would not necessarily be prohibitive, because we also have to contribute, we have to contribute – at least speaking for myself, I would contribute to the effort of coming back even if my fees were not covered. So a couple of weeks at worst.

But I think, Commissioner Hemraj, the importance of that happening would not only relate to the period, let's say between that coming back and the case. It would obviously, even the period of awaiting judgment or whatever would have happened, so the advantage would be quite a profound one indeed.

Chairperson, it was correctly pointed out and intimated by the Commission itself and by my learned colleagues Mr Budlender and Mr Semenya that this application is no trivial matter, but one whose outcome will have a profound effect on the complexion and texture and the credibility of the ultimate outcome of this Commission. We agree that this is not your conventional postponement application.

CHAIRPERSON: Mr Mpofu, I understood you were just going to tell us effectively the relief you seek and the facts on which you rely.

MR MPOFU: Yes, I'm getting there.



CHAIRPERSON: Okay.

MR MPOFU: I'm saying that it's profound simply because your unenviable task, Chairperson and Commissioners, will be to make a determination as to whether the Commission continues in the absence of the majority of the victims, or whether it is postponed to enable them meaningfully to participate in the Commission, which cannot be an easy decision. But I would like to venture to say that the decision you make might also have an impact as to whether at the end of the Commission there is ground to suggest that an irregularity has been committed or not, in view of a potential refusal and maybe even a granting; who knows?

So the decision you take may or may not deal a fatal blow to the perceived credibility of the outcome. As the Constitutional Court put it that the outcome would be compromised. This is what the Constitutional Court said – I know I've quoted it before, it says, "Ordinarily a functionary setting up a Commission," in this case that would mean the President, "has to ensure an adequate opportunity to all who should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised."

Well, I'll come back to this point, but just to finalise what I'll call the legal point, I just make a



point that it is trite that the dominant issue in an application of this kind is a question of prejudice or potential prejudice to the applicants, or indeed to both sides.

CHAIRPERSON: Mr Mpofu, I have to say to you, I understand you're not arguing –

MR MPOFU: I understand that, Chair.

CHAIRPERSON: You're going to give us effectively the notice of motion, the relief you seek, and then you're going to give us the facts on which you rely. You're going a little beyond that at the moment. If this is by way of introduction –

MR MPOFU: It is.

CHAIRPERSON: - I'll give you a little bit more leeway, but please don't take too much time for that.

MR MPOFU: Well Chairperson, as I understand it, a founding affidavit is not just crudely composed of facts alone; it also sets out the legal basis for which the application –

CHAIRPERSON: Yes, yes, I understand, but you haven't got to your founding affidavit yet.

MR MPOFU: Ja.

CHAIRPERSON: You're still – are you going to give us a notice of motion first, the relief you



seek?

MR MPOFU: No, I've gone past – oh, I understand, Chairperson. No, no, I've gone past that.

CHAIRPERSON: So I'm interested in what relief you seek.

MR MPOFU: The relief – if I may repeat, it's quite short – it's the postponement of the Commission pending attainment of funding from private sources, or the outcome of the application for State funding, which has been set down for hearing on 25/26 September, whichever happens first. That's it. So I'm unpacking now that relief.

CHAIRPERSON: Now you're giving us the founding affidavit.

MR MPOFU: Absolutely.

CHAIRPERSON: Thank you. We have now the virtual founding affidavit.

MR MPOFU: Thank you, Chairperson. I was saying, Chairperson, that the dominant issue is prejudice and convenience, obviously looked at from both sides. I'd like to start with that, Chairperson, but maybe before I do so, let me – so that the Chairperson doesn't have to remind me again - just outline some of the facts, the crude facts, as it were. One is that –

CHAIRPERSON: [Microphone off, inaudible]

the facts, I suppose you should really outline all the relevant facts.

MR MPOFU: All the relevant facts, but some of them are obviously contained in what are fairly legal submissions.

CHAIRPERSON: I see, alright.

MR MPOFU: Yes. But yes, these are the main facts. (1), that we represent more than 300 persons who are described in the terms of reference either as falling under the category of injured or which I think is estimated at 78 in the terms of reference, but the numbers are not important, and arrested, which in the terms of reference is again estimated at about 250. The actual number is 272, but once again the numbers are not –

CHAIRPERSON: I take it some of the arrested people, or possibly all of the injured people were arrested, were they?

MR MPOFU: Not all –

CHAIRPERSON: Or are there some –

MR MPOFU: There is an overlap, but it's not complete, Chairperson.

CHAIRPERSON: I see. I see.

MR MPOFU: Yes, that's why the number then jumps to over 300, yes, and then of course my learned colleagues represent mostly the deceased's families, which



we'd say the number is probably, that we're talking about is probably just more than 350, give or take.

CHAIRPERSON: The deceased's families are, I understand, receiving legal aid. Is that correct?

MR MPOFU: They are – well, not adequately. I think Mr –

CHAIRPERSON: No, no –

MR MPOFU: But I don't want to speak for some –

CHAIRPERSON: The adequacy –

MR MPOFU: Some legal aid.

CHAIRPERSON: Adequacy is another matter.

MR MPOFU: Yes.

CHAIRPERSON: They did make an application to the Legal Aid Board and they were granted legal aid.

MR MPOFU: They were granted some legal aid. Mr Ntsebeza explained it in detail on the 26th of February –

CHAIRPERSON: Well, there may be a debate about the adequacy –

MR MPOFU: Yes, 26th of February, the transcript would assist you, Chairperson, Mr Ntsebeza outlined it. But in any event, the point is that they are applicants now to this postponement application. That's



the point I'm making.

CHAIRPERSON: Will the High Court then be called upon to decide to what extent the legal aid which has been granted to the families is inadequate and falls short of what should be granted, and then make an order in respect of that? Because I don't see that in the notice of motion.

MR MPOFU: No –

MR MOSIKIDI: Chair, Thabo Mosikidi from SERI. I represent the families of the deceased. Chair, just to clarify the position, the families are indeed funded by the Legal Aid Board and as much as we are applicants in the High Court, or at least we are applicants in the Constitutional Court and we are supporting the High Court application, it is not our aim to seek relief to review the equality of arms or the adequacy thereof, or lack of adequacy of the current fund that's been provided. It might be something that comes along the line, but it's certainly not our relief at this stage.

CHAIRPERSON: So the relief sought only relates actually to the people who've been described as the injured and arrested –

MR MPOFU: Correct.

CHAIRPERSON: - miners.

MR MPOFU: Yes, Chairperson. That is



correct.

CHAIRPERSON: The families are applicants – I'm not sure whether they've locus standi to apply, but that's not a matter that I have to concern myself with. They're only applicants on a sort of solidarity basis, if that's the correct word one can use. Is that right?

MR MOSIKIDI: For a lack of a better word, yes, we can assume it that way, Chair, thank you.

MR MPOFU: Yes, Chairperson, maybe for the sake of completion on that point, my understanding, subject to what my learned colleague would say, is that is also the position of AMCU, which is an applicant but in solidarity, as the Chairperson explained it. The only distinction is that the deceased's families - and I'm sure Mr Mosikidi will deal with that – have made what I think is a profound statement in their own papers of saying that because the people that they represent are deceased, they rely for their own closure and knowing the truth on the testimony of the survivors, namely the injured and arrested, and that without the participation of the injured and arrested, their own participation would be meaningless, and they've made that statement here. Thank you, Chairperson, thank you for seeking that clarity.

CHAIRPERSON: We've got clarity on that. That's all I'm asking.

MR MPOFU: Ja, at least so that the facts –

CHAIRPERSON: - made the point which I hadn't even thought of asking you, but I should have, what's the position of AMCU, but you've explained that.

[10:22] MR MPOFU: Thank you, Chairperson, yes, so that's fact number 1, so to speak. The applicants that I represent, as you know, Chairperson, just for the record, are represented by one advocate and assisted by attorneys whose number varies from time to time but who comes from what we call the triumvirate of law firms, that's all explained in the papers.

The third issue is that – or rather fact, is that the main dispute in these proceedings, there are many disputes so I don't want to be drawn into that but the overriding dispute is whether or not these people that we represent and that they represent were killed or injured by the police in self-defence or not.

CHAIRPERSON: I think it's actually self or private defence – that's effectively the only defence raised by the police.

MR MPOFU: That's correct, Chairperson. Thank you, Chairperson, yes, self or private defence. The other fact is that at least the version of the people I represent is that their calamities, of whichever type, were



caused by a toxic collision between SAPS and Lonmin, that's their version and that those parties in combination are represented by about 12 advocates.

The next fact is that the witness who is testifying at present, General Mpembe, is easily the most important witness in that he was the overall commander of the operation that led to the massacre.

Fact number 6 is that the evidence leaders are currently re-cross-examining that important witness, purportedly to put, among other things, the version of the people that we represent.

Fact number 6 is something that we've already covered, which is that the matter is set down for the 25th and 26th September.

Fact number 7, number 8 is also a matter that we've just covered, namely that the applicants that I represent, with at least two other parties, have provisionally withdrawn from these proceedings.

Fact number 9 is also a matter that we covered when we were dealing with the relief, which is that there are fundraising efforts which may yield earlier temporary relief.

Fact number 10 is an issue we covered yesterday about possible or alleged ongoing harassment of witnesses.

CHAIRPERSON: You covered it yesterday



but I'm not sure it's necessarily on the record unless you just want to refer to the transcript of what you said yesterday.

MR MPOFU: Oh yes, thank you, Chairperson, yes you're quite correct, so that this one is compact. Yes, thank you, Chairperson. That matter, in a nutshell, related to the arrest, wave of arrests that have taken place since last Thursday which involves about 10 people, five of whom have already been arrested and released on bail and five of whom are - actually as we speak, two of my attorneys are not here now, they are doing the, making the bail applications of the other five right now. And the only relevance of that to you, Chairperson and Commissioners, or to this application is the fact that all those bail conditions, just like the one of the 272 accused, have been held over until the conclusion of the Commission. I'll find it later, but that fact should be viewed in conjunction with the wording of phase 1 in this Commission which, among other things, seeks – I'm paraphrasing because I don't have it on hand now – seeks to determine, if I may just, Chairperson – yes, thank you Chairperson. Phase 1, you'll remember – I'm reading this from the affidavit of the Human Rights Commission in the papers with the quote, phase 1, this is what the legal, the Human Rights Commission says. "The 16th respondent," which



is them "is also of the view that the applicants are entitled to proper legal representative before the Commission. This view is based on the fact that the Commission is investigating the applicants and their actions during the week 9 to 16 August 2012. This view is made even stronger by virtue of the fact that the Commission has made a ruling on the scope of phase 1 of the proceedings before the Commission to include '1. an investigation into whether participants in the crowd of protesters at Wonderkop on 16th August 2012 should be held criminally liable for the deaths of 34 of their fellow protesters and/or in respect of the alleged attempted murder or assault of SAPS members at the scene, and 2. the direct causes of and legal responsibility of any party for the deaths and injuries to any persons and damage to property at Marikana during the period 9 to 16 August 2012'."

At the risk of stating the obvious, we are currently busy with that phase 1 which will determine, among other things, the things that I've just set out. And therefore we say that the terms of reference or rather the phase as described deals specifically with the criminal liability of the injured and arrested or rather the arrested, mostly, and some of the people who have now been arrested or rather, subsequently arrested.

Page 13102

Fact number 11 is that what we call the state parties or the government is of the view that there is no need for the legal representative of the applicants, while the state intends to keep its own representation by private lawyers.

And then lastly in the dozen of factual averments is what I call some of the statistical issues or the figures. We know now from what the Minister of Justice said last week that the state proposes, on the assumption that the Commission will finish at the end of October - which we know is not going to happen – has made a provision of some R115 million to be spent on the Commission, made up as R32 million in the year 2012/2013 and a further R83 million in the financial year 83, or rather 2013/2014 and that includes the money that they use for, that they spend on legal representatives and that it was made clear that in that amount of 115 million there's no place for the assistance for the victims or, to be fair, no place for the victims who were not in the employ of the state.

Secondly, because of the already skewed nature of the representation, the estimate of what has been spent on legal representation which was submitted in the Constitutional Court at least and not contested, which is contained at the last page of 1A in front of you there, Chairperson, and according to those estimates – and it's

Page 13103

worked on a rounded 20 day month – the applicants that we represent, the injured and arrested, and these are figures just for what would be advocates' fees, for such a 20 day month at legal aid rates obviously, the cost for the one advocate who represents the applicants would be about R340 000 and the estimate that is given for the monthly spend for SAPS is R3 million. The estimate that's given for the monthly spend for Lonmin is R2 million and the estimate for what is spent on the evidence leaders is about R3 million per month. Based on the current lifespan of the Commission which will end at the end of October, which would be a 13 month lifespan, the spend on the first applicant would be 4.4 million, on SAPS it would be 39 million, Lonmin 24 million, evidence leaders 39 million. And based on the 18 month life span, which is more realistic if there's going to be an extension, the breakdown would be for the applicants 6.1 million, for SAPS 54 million, for Lonmin 36 million, evidence leaders 54 million and those figures might not be exactly fitting with the 115 million that has been admitted by the Minister but they are more or less in line. Of course we accept that in the 115 million there are other costs of running the Commission.

And then the breakdown of the number of advocates as extended – those representing the applicants that I

Page 13104

represent, one advocate, SAPS seven, Lonmin five, evidence leaders seven.

CHAIRPERSON: I think –

MR MPOFU: Oh ja, Mr Madlanga –

CHAIRPERSON: - this elevation of Mr Madlanga to the Constitutional Court, it's now down to six.

MR MPOFU: Well, six and a half. Six and a half. At least he was here for the, until the 1st of August but I accept that correction.

CHAIRPERSON: As far as the relief you seek is concerned, it relates to the future, not the past.

MR MPOFU: Yes.

CHAIRPERSON: It would be six, but anyway presumably that's a matter the evidence leaders will deal with.

MR MPOFU: It's taken into account.

CHAIRPERSON: It doesn't affect the principle.

MR MPOFU: No, it doesn't but I concede that point, Chairperson. And in terms of the seniority, we state that the number of silks or recommended silks, or someone at the Bar calls it silkworms, these are the people who have been recommended for silk but are awaiting a judgment – one for the first applicant, four for SAPS, three for Lonmin and four for evidence leaders or three now

Page 13105

that Mr Madlanga is not here.

CHAIRPERSON: I see, you included recommended silks. That's –

MR MPOFU: Ja, that's what I –

CHAIRPERSON: That's where you get the three from as far as the evidence leaders –

MR MPOFU: That's correct, silkworms, that's what we call them at the Bar. They are neither butterflies nor worms. Thank you, Chairperson. So that then, Chairperson, circumscribes the 12 main factual bases for the application.

If I may then return to the matter of – let me put it this way, the possible effect of not granting the postponement, which is the same thing as saying what prejudice would be, could be suffered by either the applicants or the public in general. Chairperson, it has been said that an application – or rather let me put it this way. My starting point would be that this is effectively a sui generis kind of postponement application because there's a lot of law on applications for postponement based on seeking legal representation and that's really what this is. It's a postponement for, a postponement while the applicants are seeking to assert their right to legal representation, which right by the way is enshrined in the terms of reference, term of reference

number 8 of this Commission.
[10:41] In numerous - too numerous to mention - cases, it has been found that the right to legal representation, or the refusal of a postponement based on an applicant seeking the right to legal representation may amount to a gross irregularity, which undermines or vitiates the proceedings per se, and that is covered very briefly in what I've given you as case number 1, which is the judgment of Plasket J, in S versus Lusu, where he said, just to summarise at the end, "In these circumstances I'm of the view that the accused's fundamental right to a fair trial was infringed by the dismissal of his application for a postponement to allow him the opportunity to apply for legal aid. That being so, the proceedings that led to the conviction of the accused were irregular. This irregularity is of such a nature that it vitiates the proceedings per se." I'm sorry, I'm reading from paragraph 19, the very last paragraph.

In other words, the risk, obviously that was said in the context of a criminal trial, but the risk, fairness is fairness; it doesn't matter whether, whatever it is. The risk of vitiating the proceedings themselves looms large when one is considering the question of a postponement for the purposes of obtaining legal representation, and in relying on that, one of the passages



relied on came from England in the case of Gideon versus Wainwright – no, actually it's the US decision of Black, the well-known Black, J in Gideon versus Wainwright, who said that, and I'm reading against letter E at 542, "Similarly there are few defendants charged with crime, few indeed who fail to hire the best lawyers they can get to prepare and present their defences. That the government hires lawyers to prosecute and defendants who have the money hire lawyers in criminal courts are necessities" – or rather, "hire lawyers to defend, are the strongest indication of the widespread belief that lawyers in criminal courts are necessities, not luxuries," and that can be postulated to proceedings of this kind. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning our State and national constitutions and laws have laid great emphasis on the procedural and substantive safeguards designed to assure fair trials before impartial tribunals, in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with a crime has to face his accusers without a lawyer to assist him."

CHAIRPERSON: On the retrial Mr Gideon was acquitted.



MR MPOFU: Well, that's the spectre that one doesn't even wants to – as the saying goes, too ghastly to contemplate, Chairperson. But very two quick points that I want to make about that is that, as I said, fairness is fairness, but in the particular case of the people I represent it must always be remembered that their own criminal liability is at issue, (1); they have already been arrested and accused, and therefore they are not, you know, ordinary participants.

The next point, Chairperson, covers both the point I've just made, but also the point of – because really the issue is this, Chairperson; I think it's common cause, as we had the discussion yesterday, that the continuation of the Commission under the present circumstances is something that's not ideal. That goes without saying. So the question is not so much whether there's prejudice or not, because there is. It's patent; anyone just has to look at Mr Magidiwana, and if I say here I am, standing with seven bullet wounds, is it prejudicial or not that a Commission about that fact should continue in my absence? Clearly it is. So that goes without saying.

The question is whether the measures that the Commission seeks to implement in the meantime would serve to cure that blatant prejudice. So that specific question, Chairperson, and it's a matter I touched on yesterday about



the fairness or otherwise of presenting, or representing or presenting a version of someone with whom one has not even consulted. That was dealt with in the case of Seri(?), which is number 2 of those cases, Chairperson. That case dealt with the issue of the irregularity, but more specifically relevant to the measures, it says the following. I'm reading from page 36 from the letter C, and pardon my accent. It says, "Ek het reeds gemeld dat nie een van die appellante die staatsgetuies ondervra het nie en dat nie een van hulle getuienis afgelê of getuies geroep het nie. Daar is geen aanduiding dat hulle versuim in hierdie opsig aan iets anders toegeskryf kan word nie dan dat hulle, toe hulle hulself onverwags sonder hul regsverteenwoordiger bevind aan wie hulle hul verdediging toevertrou het, nie voorbereid was om hul eie verdediging te behartig nie. Onder hierdie omstandighede was hulle klaarblyklik ernstig benadeel en het geregtigheid inderdaad nie geskied nie. Die appèl moet gevolglik slaag." Okay, Mr Shozi has dared to asked me to paraphrase. What has been said is that the –

CHAIRPERSON: [Microphone off, inaudible] translate in English.

MR MPOFU: Thank you, Chairperson. I was going to do it in Tswana for him.

CHAIRPERSON: [Microphone off,

inaudible]. "I've already mentioned that not one of the appellants questioned the State witnesses and that not one of them gave evidence or called witnesses. There's no indication that their failure in this respect can be attributed to anything other than the fact that they found themselves unexpectedly without their legal representative, to whom they had entrusted their defence. They were not prepared to conduct their own defence. Under the circumstances they were clearly seriously prejudiced and justice accordingly did not take place. The appeal must accordingly succeed."

MR MPOFU: Thank you. Yes, and the – thank you, Chairperson, that's – not all of us come from Cape Town, as the Chairperson, but –

CHAIRPERSON: Are you going to want to interpret that into Xhosa?

MR MAHLANGU: I did.

CHAIRPERSON: You did, I see.

MR MAHLANGU: Yes, very well.

MR MPOFU: Thank you, Chairperson.

CHAIRPERSON: And Mr Mpofu wants to interpret it into Tswana.

MR MPOFU: Chair, that was an idle threat which I wouldn't be able to carry out. Chairperson, yes, the relevance of that of course is that the, what has been



said here is that these were people, the appeal here succeeded on the basis that the proceedings had to be nullified because the lawyers on whom these people had entrusted their defence, so to speak, had not been able to represent them and as a result they were not able themselves to cross-examine or ask any questions of the other side, so to speak.

The last one, Chairperson, is case number 3, and that's State versus Yelani, where his lordship Mr Van Rensburg J said, and once again I'll just paraphrase. Firstly he relied, at page 806 against the letter G, he relied on the following extract from the case of Mthetwa, or firstly, he started with the Seri case which I've just read out, and then relied on the Mthetwa case which says, "Every person is entitled to obtain for himself legal representation at his trial and should be afforded an opportunity for doing so when it is reasonably demanded." It's obviously the last part that's important, asking for an opportunity for doing so when it is reasonable demanded.

Then I jump, Chairperson, to the following page, which is more relevant to this application. Unfortunately the letters are not clear, but let's say against the letter C on the other side of the page where the learned judge says, "The result of the finding that the appellant was entitled to a postponement is that it is not necessary to



consider whether the sentence imposed on the appellant was a proper one, for the entire sentence will have to be satisfied and the matter remitted for another magistrate for the question of sentence to be considered anew." In other words what they were saying is that once a postponement was refused for the opportunity to obtain legal representation, it was not even necessary to look at the outcome of the proceedings. All the proceedings themselves were just tainted irretrievably by that refusal of the postponement.

Moving towards the end of the founding affidavit then, Chairperson, I would say that in –

CHAIRPERSON: I'm sorry, Mr Mpofu, every now and again you raise your two hands in the air and you make what amounts to quotation mark signs –

MR MPOFU: Yes, that is so, Chair.

CHAIRPERSON: Those of course won't find their way into the transcript, so I suggest if you want to do that you should say "quote, unquote" rather than –

MR MPOFU: Quote, unquote or so-called –

CHAIRPERSON: - rather than make gestures which the transcribers won't see when they transcribe.

MR MPOFU: Okay, Chairperson, thank you very much. The point I really wanted to make is that the – I've already made the point about prejudice. As these



matters are determined by looking at, then counterweighing that against the other prejudice that might be suffered by other parties. Now it's undeniable, Chairperson, that a postponement would itself –

CHAIRPERSON: Mr Mpofu, I don't want to interrupt you unduly. I'm proposing to take the adjournment at some stage shortly after 11, but I don't want to interrupt you at this point. Tell me when it is appropriate for us to take the adjournment and we can then adjourn.

MR MPOFU: Yes, Chairperson, this would be a natural place because these are, as I say, the kind of concluding remarks.

CHAIRPERSON: We will take the tea adjournment, which I hope will be not longer than 15 minutes.

MR MPOFU: Thank you, Chairperson.

[COMMISSION ADJOURNS COMMISSION RESUMES] [11:29] CHAIRPERSON: The Commission resumes. Mr Mpofu?

MR MPOFU: Thank you, Chairperson. Chairperson, before I move on to the last few points I just want to read out very shortly some of the extracts from Du Toit's Commentary on Criminal Procedure. One says at page 22 point 28B dealing with postponements which are dealt

with in section 158 of that Act –

CHAIRPERSON: Paragraph?

MR MPOFU: 22–28B, capital letter B. The first sentence really, says "An adjournment will normally be allowed to enable an accused to obtain legal representation." And then a few cases including Sihari is quoted. I jump to the next paragraph which says, "A failure to grant any postponement at all to enable the accused to obtain legal representation may lead to the quashing of a conviction." Then a whole lot of other cases, in line with what I've already said. And then more importantly on what one might call the remedial attempt at remedial measures on the next page 22-28C, relying on a case of Bayer v Director of Public Prosecutions Western Cape 2003 (1) SACR 164 (C) it talks about that case but the relevant part says, "In that case Selikowitz, J indicated that the idea of being legally represented cannot simply mean having someone stand up and speak on one's behalf. Representation entails that the legal adviser will act in the client's best interest and will say all that needs to be said in favour of the client. This involves calling such evidence as is justified in the circumstances in order to put the best defence before the court." The court then referred with approval to S versus Hilani which I think is number 3. It was held that the applicant was deprived of



effective legal representation, the conviction and sentence were set aside on the ground that the applicant did not have a fair trial. So to transport that to this case it would simply mean that, with due respect, the evidence leaders are not in a position to present the interests of the clients because, through no fault of their own, they would not be able to do what Selikowitz says of being able to present all that needs to be said.

CHAIRPERSON: The person whose cell phone went off please must turn it off. Everyone else must turn their cell phones off and if another cell phone goes off I'll ask the owner of that phone to leave the room.

MR MPOFU: Thank you, Chairperson, that then rounds off that point. And when we went to the break I was at the point where I was saying, Chairperson, one is obviously dealing with a weighing process here. It would be silly for me to deny that the granting of the postponement somehow will cause some general prejudice to others, I think that goes without saying. The question is, which prejudice should prevail really in terms of the impact thereof in the larger scheme of things.

Now one of the tempting things of course is what I call, you know, the bane of modern societies is short-termism. So it must be tempting to want to finish, you know, get on with it and all those important things but the



danger of that approach is that where you might have paused for a couple of weeks and maybe save the whole process, we may proceed in faith, which is understandable, and cause irreparable damage. So we might be faced with a choice between, as I say, tempting instant gratification of reaching the finishing line, between that and the real achievement of sustainable lasting peace, accepting that justice is, by its nature, a very slow animal. That takes me, sorry, that takes me to two points –

CHAIRPERSON: I think Mr Mahlangu wanted to interpret what you said –

MR MPOFU: Yes, yes.

CHAIRPERSON: About the slow animal.

MR MPOFU: Thank you, Chairperson. Thank you, Mr Mahlangu and I had a private deal before we started, Chair. I was saying, Chairperson, Mr Mahlangu and I had a private deal before we started but we are both not implementing it at the right time.

MR MAHLANGU: I said I will try not to –

CHAIRPERSON: If I could be aware I can bear them in mind but if you don't tell me I'd have to do the normal –

MR MPOFU: Thank you, yes. Yes, we won't ask for it to be made a ruling. That, Chairperson, takes me to two very, very, very important points about the



prejudice to the general public interest and I'll take it beyond what I said yesterday about the cost of [inaudible] sitting in the Commission and all that, to what is really crucial and it is this, we have always to remember that when all is said and done and one has gone through the terms of reference and so on, the purposes of this Commission can be reduced to two crucial things. One, it is to establish the truth of what happened during those fateful days, which is important and in which the people we represent have an obvious interest so I don't have to belabour that, but the second one and maybe even more profound is to ensure that something like this never happens again. That second aspect is sometimes – because even in this debate about representation the issue of the truth is obviously one that lends itself to that debate and sometimes people forget that the second aspect of ensuring that this doesn't happen again is equally, if maybe not more important in the sense that we cannot bring back the people who died but at least we can ensure that this never happens again.

Now that aspect is more nebulous, so to speak, and maybe subtle but it relates to something that I want to bring to the Commission, that these people who are victims have actually a right to participate in this process almost as a self standing right, irrespective of the outcome,

irrespective of what happened, but their right to participate, to be part of the process is crucial and should not be underestimated.

Now I say that, Chairperson, because this Commission has achieved things even before – and as I say, irrespective of whatever the outcome is, the mere fact that the Commission has sat and to that I must say particularly the way that it has been conducted by yourselves as the Commissioners has had many, well, I wouldn't say unintended but let's say bonus outcomes already by the mere way in which the victims are treated, the very fact that on the very first day the first thing that happened was reading out of the names – of a minute of silence and so on. Those things were, as I say, intangible but would have contributed a lot to what we all want to see after the Commission.

Now, and I think there are moments in this Commission where that gets realised, obviously by different people at different times but for me that moment was yesterday, Chairperson, when the widows of the police victims and some, and the security guards, said to me we want you back here, we started this together and we would like all the victims to be here. That was a moment which I think was more profound than any witness that has given evidence here and that, Chairperson, I'm no longer going to



quote to you cases, I'm going to quote that legal document called The Sowetan of today where it is said there that, particularly quoting Mrs Ayesha Fundi who is the lady in the black veil, the widow of security guard Hassan Fundi who was killed during the unrest, said she sympathised with the rest of those affected by the events at Marikana and wanted closure. Fundi said she wanted to hear what happened to her husband's missing organs including his tongue and lower jaw and she went on to explain the gruesomeness. But the point is when they approached me and spoke to me but also when they obviously before that spoke to the media, what they were saying is that for the truth to be found and for true reconciliation, everyone should be heard. And that cannot have come easy, Chairperson, because when she says that she is saying that about the people I represent who allegedly are the people who are the killers of her husband or associated with them, whoever those killers might be.

So this Commission is not an ordinary Commission, it's a mini TRC, so to speak, where not only the truth but reconciliation and justice will hopefully eventuate and that experience of talking to those widows taught me that it's possible through this Commission, as I say, irrespective of the outcome, to achieve things that one could not even have dreamt of when we started.



The point of that story, Chairperson, is that without the participation of the majority of the victims, those kinds of outcomes both intended and unintended, will be lost and that we will have, really we will have finished, so to speak, quote/unquote, the race as it were and we'll all put our books and go home and do whatever it is that we do, but we would have left a yawning gap in the real outcomes which is reconciliation and never again having to face this.

Last two points - and I must say Chairperson, that I had a discussion this morning again with Mrs Fundi just to explain the importance of what transpired here yesterday – the last two points is that the Chairperson, I'd like to appeal to you who has to make this unenviable, who have this unenviable task of making this decision, to consider that of course a postponement application is a matter which is in your discretion, as we know, which must be exercised judicially.

CHAIRPERSON: Sorry to interrupt you, Mr Mpofu, it sounds to me, if you'll forgive my saying this, as if you're now busy arguing the matter.

MR MPOFU: No.

CHAIRPERSON: At the moment you're telling us what's in your founding affidavit. Obviously the point you want to make to us is a point that would be



included in your founding affidavit –

MR MPOFU: Yes.

CHAIRPERSON: - and you can carry on, but if it's really the peroration of the end your argument, I think you must reserve it for the argument.

MR MPOFU: Yes, yes, Chairperson, I appreciate that. These are literally, as I say what, if it was an affidavit, a real affidavit I would put it as a conclusion, concluding the matter.

CHAIRPERSON: Well, on that basis please proceed.

MR MPOFU: Thank you, Chairperson. And it's simply to say, Chairperson, that at least the perception of the people that we represent is that, you know, everyone has turned their backs on them, starting from the employer, the police, some government officials or ministers, there are BEE partners and all sorts of people but they do have confidence in this Commission, as I've already indicated before, and we hope that the Commission will not find itself joining that illustrious list and we know that if they feel like that, we will be the first ones to point out that, about the difficulty of the task that you have in balancing the interests of everybody. So I just wanted to assure you, Chairperson, that we will, as we've always done, ensure that whatever the outcome of the

application, that it's not construed in a manner that indicates that indeed everyone has turned their back on them. And their only voice, Chairperson, even if I say so myself at this point, are the people who represent them legally, whatever the difficulties that those people face and all they want really is a chance to have that voice continuing to be heard, for what it's worth.

The last point, Chairperson, is that the – something again that happened yesterday when one of the applicants said to me, well, if they want to continue with this without us then they mustn't call it the Marikana Commission because we are the people who come from Marikana and those people who will remain there are not from Marikana. And I took it at first blush as a joke but when I reflected later, it really said something to me about what the applicants feel should be the character or the continuing character of this Commission and this one didn't come from them, it came from me when I was thinking later that if we, if indeed it continues without them then it will only be a Commission of those who have the money to continue their participation and that it would then be not the Marikana Commission but the Moneykana Commission, M-O-N-E-Y, and we don't want that to happen, Chairperson. We would like to continue with the Marikana Commission as we know it and we appeal to you to ensure that the Marikana



Commission continues after a postponement to allow us to do whatever we can to obtain legal representation for the victims, failing which if we fail, because there's always that possibility, we'll come back and say so, Chairperson, but for now we are very optimistic that starting where, or rather ending where is started, that either one of the two events, either the litigation or the other event will put us back to where we should have been. Yes, we might have lost a month or so but in the fullness of time, in 100 years' time when historians look at this I'm sure they will not count a couple of weeks here and a couple of weeks there. What they will count is whether or not the objectives that are on that just behind you, Chairperson, truth, restoration and justice and I might add reconciliation, whether it was achieved or not and it cannot be achieved without the victims' presence. Thank you, Chairperson.

CHAIRPERSON: Do you wish to say anything on behalf of the families who are in a stance of solidarity with the injured and arrested persons?

MR SHOZI: Indeed, sir.

CHAIRPERSON: If you filed an affidavit in support of the application, what would you say because this is all we're concerned with at the moment, what would you say in such an affidavit, if anything?



MR SHOZI: Thank you, Chair. Chair, we do support the application. When the first "postponement application" was brought we were the so-called co-applicants or second applicant, Chair. Chair, I would like to send my, Mr Ntsebeza's apologies again for not making it this morning. He did try to make alternative arrangements but that did not work out. Indeed Chair, as you also pointed out earlier on, in particular the families of the deceased, they do have funding from the Legal Aid Board to participate, to at least continue with participating in the Commission. However, our instructions are that they cannot continue, at least they see the representation of the applicants at the Commission as very critical at least for the families' meaningful participation at this Commission. They say this because they view the applicants as the only people who can give direct evidence as to what happened at Marikana between the 9th and the 16th of August. In particular they see them as people who really lived to tell the tale or to tell the story as to what happened on that day.

We are instructed again, Chair, to record that the families, the way as they view things, they can never achieve the peace and reconciliation that is intended through the process as the truth about Marikana will remain unknown if the applicants do not continue participating at



the Commission. They in effect, Chair, say that their involvement, that means the families' involvement without the applicants would essentially be meaningless or at least redundant without any version by the applicants.

Now Chair, I've been asked, at least I'm trying to persuade at least to plead with you to postpone the Commission at least pending the return of the Commission, to read a statement by one of the ladies of the deceased, which will be the widow Ms Zaneka Nungu. I would therefore beginning the –

CHAIRPERSON: If it's something that you would have incorporated in an affidavit, a supporting affidavit if such an affidavit had been file –

MR SHOZI: Indeed, Chair.

CHAIRPERSON: If that's the case you can read it out.

MR SHOZI: Indeed, Chair. I thank you for your indulgence, Chair. Chair, just to make sure I don't lose the essence of the statement I will read the statement as is, in Ms Nungu's words, as the representative of the rest of the families, Chair. This is what, it says, "The reason we are participating in the Commission and our interest in it is to find out the truth about what happened to our loved ones. We want and need to know why they were taken away from us in such a sudden and violent manner, why

our husbands, fathers, brothers, sons and cousins who were in most cases our only breadwinners, were shot and killed by the police. We seek the truth about what happened at Marikana, primarily for three reasons - 1. In the hope that this will bring us some measure of healing, closure and restoration and thus give effect to our right to human dignity. 2. To safeguard our rights in relation to possible future civil claims against SAPS for the unlawful killing of our loved ones. Our interest in this regard will clearly be impacted by the Commission's finding. 3. In the hopes of seeing those responsible for our loved ones' deaths brought to justice. The Commission is empowered to make recommendations that specific persons be prosecuted." Mr Mahlangu, maybe you could translate that. "As things stand, SAPS is denying that its members acted unlawfully when they killed our loved ones. In summary, the case that SAPS is advancing before the Commission is that our loved ones were charging at the police and that the police shot and killed them in self-defence and/or private defence. Indeed our loved ones have been painted as violent and brutal men who wanted to kill the police and were in the process of attempting to do so when they were shot and killed. From what we know of our loved ones and the evidence that has been presented at the Commission to date, including the video footages, we have seen the



pictures, we simply don't believe this to be the case. We are of the view that they would not" – that means their loved ones – "they would have not attempted to attack and kill the police. In addition, in our opinion the video footage of the shooting does not support the SAPS version. The only persons who gave, at least the only persons who have given evidence to gainsay the police version are the witnesses who have testified to date on behalf of the first applicant, in particular Mr Magidiwana and Mr Pasha. They have given an explanation for why some of the protesters appear from the video footage of the shooting at scene 1 to be advancing in the direction of the police. It is only due to the evidence of Mr Magidiwana and Mr Pasha that we have been provided with the protesters' side of the story that contradicts the SAPS version. It was only due to the witnesses' participation that we have some understood as to why our loved ones acted in a manner in which they did, of what they were thinking, feeling on that day in the hours, the minutes preceding the killings. These versions relate to the central dispute in the Commission, namely whether or not there were any legally acceptable justifications for the killing of our loved ones. These are two diametrically opposed versions before the Commission regarding whether SAPS acted lawfully when it shot and killed our loved ones. The contrary version has come from the witnesses of the



first applicant. This, to us, is not surprising. They are the only party to the Commission's proceedings, apart from SAPS, who were there and when the relevant events happened, who witnessed them. Indeed it is safe to say that aside from the journalists who are unlikely to testify, they were the only other eye witnesses. It is for this reason that the first applicant's full and effective participation is crucial to our case and to legitimise the Commission. Without their full and effective participation, the other side of the story cannot be told, nor can it be said that there will be no further need for evidence from the applicants, from the first applicant. This is so because there are other critical issues in relation to which the first applicants would be required to give evidence if the other side of the story is to be told. I will refer to two examples of these critical issues. The first example is the incident of the 13th of August 2012 during which three protesters and two police officers were killed. The first applicant has not testified in relation to this incident. Major-General Mpembe, the commander who was in charge of the relevant police operation on that date, is currently giving evidence. He testified that what led to the killings on that day was that the protesters suddenly changed direction while being escorted by the police and started moving in the direction of the informal settlement.



This made it necessary for the police to use force in the form of teargas, stun grenades and rubber bullets in order to deter them from moving in that direction. It is common cause from the inspection in loco conducted by the Commission that the first applicants dispute this version. Their version is that they were simply on their way to the koppie when they suddenly came under attack by the police. The applicants' version has not been given as evidence under oath as yet. Therefore if the applicants are not able to participate fully and effectively, their version in this regard will not become part of the record. The contrary version will simply not be before the Commission. The only way of disputing the police version will be by means of objective evidence of the incident, including the video footage of the day. There will be no-one to speak on behalf of our slain loved ones. It is our respectful submission this could never be in the interests of justice and the outcome of the Commission would not be legitimate if it were to continue in this manner.

The second example is that of Mr X. Mr X, as yet, is an unidentified witness who has provided a statement and who is allegedly going to give evidence on behalf of SAPS. He was allegedly one of the leaders of the protesters. He makes a number of allegations against the protesters, both the living and the deceased. If, by the

Commission, his evidence could lead – if accepted by the Commission, his evidence could lead to adverse inferences being drawn against the protesters, for example that the protesters were highly organised, they had a clear command structure, they were brutal in nature and committed a number of violent crimes in an organised and premeditated fashion and that they believed themselves to be invisible, invincible, due to having used muti and undergone certain rituals with a sangoma.

[12:09] In our view the only persons who can dispute this are the first applicants, particularly those against whom he makes specific allegations. In addition, it will be extremely unfair to require them to do so without having legal representative to advise and protect them. This is so because Mr X makes specific allegations of criminal conduct against them. In seeking to refute these allegations, they do therefore run the risk of incriminating themselves.

In particular, Mr X also makes allegations of criminal conduct against one of the deceased, that being Mr Noki. Mr Noki is Ms Veronica Noki's partner. Accordingly, the applicants who were the witnesses to the event in question are thus the only persons who can possibly speak on Mr Noki's behalf and dispute the allegations which Mr X makes against him.



The applicants are thus the only party to the Commission's proceedings who can counter such version and the degradation of their loved one. In our view they speak for our dead husbands, sons, fathers, brothers, uncles and cousins. If they are not able to participate fully and effectively, we will be forced to sit and listen to their version with no witness to counter it. Our participation in the Commission will thus be rendered meaningless and redundant. Rather than enabling the family members to achieve some measure of healing and restoration, this will only add to our pain, unbearably so. In addition, in our respectful view, such one-sided Commission will not have any legitimacy. We simply could not take part in it.

Thus, in conclusion, if the applicants are not enabled to participate fully and effectively in the Commission's proceedings, the consequences for the family members will be devastating. This will be devastating because our rights to restorative justice, which is an incident of the right to human dignity, will be infringed. It will be a violation of our loved ones' right to life because we will be deprived of the right to participate in the State-appointed Commission of Inquiry into our loved ones' deaths in order to safeguard our rights and legitimate interests. The civil claims which we intend to institute against the State may be prejudiced, and finally,



we will be deprived of our best opportunity of ensuring that those who killed our loved ones are brought to justice. Chair, that's the end of the statement by Ms Nungu.

Chair, as is also known that SERI also represents AMCU, I put on record that AMCU does support the stance, at least the postponed application, and obviously based on the reasons as submitted by the families, and further AMCU regard it as, it will be very difficult for itself to be involved in the Commission and not to be seen to support its members, of which the majority of the applicants are its members. For those reasons they also support the postponed application. I thank you, Chair.

CHAIRPERSON: Well, what has been said will be transcribed. I'm told it will be available at 9 o'clock tomorrow morning. It will be given to the evidence leaders who will then send it electronically to all the parties. As I have indicated, the Departments of Justice and Constitutional Development wishes to oppose the application also and it will be made available to them as well and it may be that locus standi points may be raised, but clearly we will send the transcript to them. Thank you very much. Then we'll take a short – sorry, Mr Budlender?

MR BUDLENDER SC: Chair, could I just ask for clarity on one aspect of the relief which is being



sought in the application? Mr Mpofu has explained that this is an application for a postponement pending the attainment of funding from private sources or the outcome of the pending application in the High Court, whichever comes first. Can I just ask for clarity on what is intended by the outcome of the High Court application? Does that include the outcome of any appeal which follows on the decision of the High Court?

CHAIRPERSON: Mr Mpofu?

MR MPOFU: Thank you, Chairperson. Yes, that's a fair question. No, it does not. As I indicated, maybe not clearly, we're talking about the outcome in the first instance. In other words we would assume to ourselves a duty to come back at that stage of the outcome of the first instance. We would not simply hide behind the word "outcome" and say well, it's the final-final outcome. I'd like to place that on record. Thank you, Mr Budlender.

CHAIRPERSON: Thank you. I think that makes the point clear, Mr Budlender. Before we bring this part of the proceedings to an end, I understand that Mr Semenya – am I correct? – Mr Semenya wishes to say something, and there may be other who wish to say something as well.

MR SEMENYA SC: Not anymore, Chair, thank you.

CHAIRPERSON: Mr Ntsonkota?

MR NTSONKOTA: Thank you, Chair. Now that we've had the privilege of being apprised of the basis and the foundation on which the application and the request by Mr Mpofu stands, I beg to record on behalf of NUM that we will not be opposing the application. In fact, we will abide the ruling of the Commission regarding the request.

CHAIRPERSON: Yes, thank you. That can be – is there anybody else who wishes to say anything before we conclude this part of the proceedings? It doesn't seem so. So I think we'll take a short adjournment now. It's 20 past 12. We'll carry on with our normal work for the time being. Mr Mpofu and his party are excused and, but we'll adjourn to enable them to make a dignified departure, and also of course to enable General Mpembe to be requested to come. I don't know if he's in the building or wherever he is, but we'll take an adjournment and we'll resume when we are told that it's appropriate for us to do so.

MR MPOFU: Chairperson, thank you, I just wanted to say thank you for giving us a hearing. We appreciate it. Thank you, Chairperson.

[COMMISSION ADJOURNS COMMISSION RESUMES]

[12:34] CHAIRPERSON: The Commission resumes. Major-General, you're still under oath.



WILLIAM MPEMBE: Correct, Chairperson.

CHAIRPERSON: Ms Pillay, you're still cross-examining?

CROSS-EXAMINATION BY MS PILLAY (CONTD.): Thank you, Chair. General, just in fairness to you, as we concluded the proceedings yesterday, you were answering around how you understood what you did on the 13th to be the best of both worlds. I think that's the point at which we concluded yesterday. Would you like to complete the answer now?

MAJOR-GENERAL MPEMBE: Correct, Chairperson. What I wanted to achieve, or to end the negotiation on that day was on the fact that since the protesters were having the dangerous weapons, the win-win situation that I spoke about, it was with reference to if they can drop their dangerous weapons, because that to me was extremely important because that is what they can use to maim or kill people. I know that them possessing the dangerous weapons was against the law, and I know that they were not marched legally, but that to me in, when I compare it with the situation, I find only the, for them to lay down their weapons and to allow them to march, that could have, be in a better position for them, and that could have been a win-win in the sense that the laying of, down of weapons, it could have been a win to me because that is



what I targeted, and for them to have marched where they wanted to go, it could have assisted to de-escalate the violence.

MS PILLAY: General, just to round up this point, I just want to put to you what was the evidence of the Reverend Seoka who was asked, was being cross-examined by Mr Ntsebeza on the basis that he's an expert in conflict resolution within a mining context, and he was asked to comment on the "negotiation" that you undertook on the 13th at the railway line. Now I've asked for copies of the relevant portions of the transcript to be made, if I can just – it's day 18 of the transcript, 1-8, at page 2002. Now I'll just read to you, General, what the question from Mr Ntsebeza was and what Reverend Seoka's answer to the question was. Mr Ntsebeza says, "Not very long, Mr Chairman, you know I keep my promises. Now in fact as it is just for the record, the witness has said in paragraph 3 of his statement he has specialised knowledge of and experience in conflict in the mining industry. Now I was asking you for your views on, given the volatile nature of that situation as you see it on the video, what do you think of General Mpembe's reaction to what seems to be a proposition in a tense situation?" Now just for context, General, the video he's referring to is Z1, and the answer by Reverend Seoka is, "I think it was a



desperate, unprofessional way of handling a situation that could explode at any time, as he assumed. If I were him, I would have handled it differently." Mr Ntsebeza says, "Yes, I will not go into how you would have dealt with it. If I heard him correctly or clearly, he began to count even as Xolani, or the worker as beginning to talk to him. He says, 'I am now counting, like listen, you hand over. It's my way, or the highway.' Did you observe that when he said 'I'm counting?'" and the Reverend Seoka's answer is, "That's an indication of being impatient and threatening, really; if I counted this number and have not done what I've asked of you, I will do something. That's my assumption." Can I ask you just to comment on Reverend Seoka's analysis of what you did on the day?

MAJOR-GENERAL MPEMBE: Chairperson, it's true that the situation was tense and I need to indicate that the negotiation that took place at the railway was not a normal negotiation where the environment, which is very conducive, is prepared, all strategies are being applied. I can make an example of all conflict resolutions that they have been dealt with where you put the environment in a proper manner and the approaches are being determined, but these are not hostile to each other.

Secondly, in that circumstances, taking the background of what has happened on the previous day, and I

did say that I did not know who were busy killing and who were doing any other when I started speaking to them. The protesters were carrying extremely dangerous weapons and the manner in which, and the song that they sang that day, is not a song that is normally, or the weapons that are normally being carried in any conflict resolution process that I have ever seen, or understand, which maybe in the case of Reverend Seoka that he knows himself, and secondly – and what was also very crucial there, inasmuch as myself I was realising that by allowing them to march, it's still against the law, I had also to look at the compromise of the dangerous weapons because the dangerous weapons was what was actually being utilised to commit all the crimes that were happening. Even though I did not know who in particular amongst the protesters was committing crime, but it could have been that they were amongst those protesters.

But what was more crucial for me is if they could lay down their weapons and in laying down their weapons then we will, we could have avoided a lot of the damages that had happened, and what was very crucial for me in that instance, in terms of the police crowd management policies and conflict resolution we have to show an extreme tolerance to the protesters, however vulgar words or any other weapons or any other action that they could do, because there were so many provocative actions that were



coming from the protesters, but I could, I keep the members to be tolerant because I could see the situation could have gone either way.

As I have indicated, I had to get dangerous weapons, so at a certain point I had to put them to comply, and I need to say in any country where a senior police official requested any responsible citizen to hand over a dangerous weapon, that is all what I expected on that day, and that could not have happened.

MS PILLAY: Now we see at line 13 on page 2002, General, that Reverend Seoka describes your way of handling the situation as both desperate and unprofessional, and he says that he could have handled it differently. Did you consider at the time, General, that there may have been different ways of handling the negotiations so that you could get the miners to hand over their weapons?

MAJOR-GENERAL MPEMBE: Chairperson, on that day, as a senior police official I felt that, as I've explained already in HHH3, that I could handle the matter also in a manner of, for example asking one of their, two or what of their representatives to talk to me, to negotiate, but in the manner that they were acting themselves, you could see that they could not have allowed, there was no element of trust. They could not have allowed



anybody to go and, allow them to go and negotiate with me because they were feeling that they wanted to go with weapons.

Secondly, I could not have changed the environment in any way to be conducive because what was more important, it was to disarm them, and that is what they could not have allowed me to have done, as they did on that day. Comparatively speaking, on the following day, on the 14th when we were now going to negotiate with them, that was the negotiation that was done, initiated by the police, the five brave "madoda" were asked to negotiate. They were put at ease. They asked, they requested that we should bring "umlungu." I need just to indicate, they asked that we should bring "umlungu" on the 13th. I did that. It's the South African Police Service that initiated the negotiation between the unions and the mine. That could not have happened if the police did not take the initiative.

Thirdly, on the following day, because those were the alternatives after what had happened on the 13th when we said we have to continue, because to us negotiation, it was the extremely better position of ending up the conflict on that day. That's why then we continued with the negotiation. Five brave "madoda" were called. On that day they requested to see "umlungu" through Colonel McIntosh.



Myself, Colonel McIntosh, and now Colonel Moolman, we went to the Lonmin management; we said the protesters, they still want to see you. That message is conveyed to the Lonmin management, and my witnesses in this case is Colonel McIntosh, as well as Moolman can confirm that. Colonel McIntosh, and I think in his statement does state it.

I need just to demonstrate the alternatives that one could have done, depending on different circumstances, and the situations that were changing from time to time. Chairperson, I need to add that we were extremely considerate in terms of whatever they were requesting. There was a time where they wanted my telephone numbers and I said they need to come to the JOC, and that the Adv Shapiro of Pretoria wants to talk to me. The information was conveyed to them many times to say the General is now at the JOC, he wants to talk to you. So any person could have come there, and secondly, Colonel McIntosh did check who's this Adv Shapiro, and we could not find and establish who is this Adv Shapiro.

In ending my answer, it will be that in what Reverend Seoka is referring in terms of the police on that day, I do not know whether he was referring to a normal process of negotiation, like if I may give an example, you could do that if the environment is conducive, like the negotiation that was done between what was happening at

Gallagher Estate, but, or in any place where negotiation has to take place, but there it has, I am a law enforcer; I need to enforce the law of the country. I need also to ensure that the people whenever they march, they march peacefully, unarmed, but I do believe that we did what we could to persuade and to negotiate with the protesters on that day.

CHAIRPERSON: I'm sorry to interrupt. Could I ask a question? Do you know whether Adv Shapiro's telephone number was ever furnished to you or to any other member of the SAPS?

MAJOR-GENERAL MPEMBE: Chairperson, they were not given, but I tasked Colonel McIntosh to follow this Adv Shapiro. He had one Adv Shapiro that he knew, and he followed it up with him and then he said it's not him. The one that he phoned, he was dealing with actually the divorces. He was not actually – and he said that he's not of his lawyer. He didn't know which Adv Shapiro that they were referring to.

CHAIRPERSON: Ms Pillay, are you going to ask any questions about Lonmin's response to this request, or – because if you are, I won't ask any questions about it.

MS PILLAY: No, you could ask them.

CHAIRPERSON: Thank you. You said you



and Colonel McIntosh and Captain Moolman, as she then was, went to see Lonmin to convey what you mentioned to us, the request of the strikers. Did you speak to people at Lonmin about that?

MAJOR-GENERAL MPEMBE: Chairperson, we did go and talk with Lonmin people, and I think Colonel McIntosh will confirm and Colonel Moolman, Adv Moolman.

CHAIRPERSON: To whom did you speak at Lonmin?

MAJOR-GENERAL MPEMBE: I did, Chairperson –

CHAIRPERSON: To whom?

[12:54] MAJOR-GENERAL MPEMBE: We did speak to, at that time it's, one member was Mr Sinclair, he was also having, the gentleman is Abey Kgotle, but - I think it's Abey Kgotle and then it was on the early morning, if I remember very well, of the 15th, that was before that meeting which I was supposed to hold with the unions later, and then they said we will get the answer. Now, and it was also at that time that I emphasised to them to say then I need also to get the unions, so Chairperson, then the answer which I got, then I got the answer which was recorded at the exhibit OO4.

MS PILLAY: General, there's a further dimension to what I've been putting to you, and it's a



contention that was advanced both on behalf of the miners and on behalf of the families, and that is this; that the police had at their disposal a seasoned and experienced negotiator who had experience with conflict resolution in a mining context, who was a man of God, trusted by the miners, and on two occasions, or specifically on the 16th, but also in relation to the 13th, he could have been used as a resource to negotiate with the miners. Now what's your response to that?

MAJOR-GENERAL MPEMBE: Chairperson, according to the statement of Colonel McIntosh, the people are the ones that actually couldn't want to continue with the negotiations any further. Maybe I, we should actually check the statement of Colonel McIntosh because he does put it clearly what happened on the 16th.

COMMISSIONER HEMRAJ: But perhaps Ms Pillay wants to know why the police did not use someone who comes with the reputation that the Reverend Seoka has of dealing with these situations. Why did the police not elect to use him in any of the negotiations?

MAJOR-GENERAL MPEMBE: As far as my recollection is concerned, we did utilise Colonel McIntosh and he has good experience.

CHAIRPERSON: No, no, that's not the question. The question is Colonel McIntosh did his best,



but then the Right Reverend Bishop Seoka arrives on the scene; he's an experienced person facilitating and negotiating and so on, and as we know, he subsequently assisted materially in bringing about the peace accord, facilitating the arrangement that took place subsequently after the 16th, made a very important contribution, as I understand. Now the question you're being asked is why didn't you use, take advantage of his willingness to be involved – I think that's the question, is that right, Ms Pillay?

MS PILLAY: That's correct, Chair.

MAJOR-GENERAL MPEMBE: Thanks, Chairperson. I didn't understand the question.

CHAIRPERSON: That's why I clarified it.

MAJOR-GENERAL MPEMBE: Yes. Chairperson, and I think Reverend Seoka can confirm, I did not know about Reverend Seoka at all. The second part that I need also to mention is, Chairperson, and the Commission, you'll recall in terms of my pleading with all the leaders of the unions in as far as GGG4 is concerned, because if Reverend Seoka was known by one of those leaders and he was introduced, because I even told them that we need somebody that will have to bring change, so if for example I could see now with the benefit of hindsight that he's actually very close to Mr Mathunjwa, if by then he was there, then

we could have utilised him. But myself as an overall commander, I did not know about his services at that time.

CHAIRPERSON: Yes, no I understand that, and to be fair, I don't think he was close to Mr Mathunjwa at that stage. It was only subsequently when he came and facilitated what amounted to a settlement, but that was all after the 16th. So I understand your answer. Is this an appropriate stage for us to take the lunch adjournment?

MS PILLAY: It is, Chair.

CHAIRPERSON: Can you give us an indication, Ms Pillay – I know it's difficult – of how long you're likely to be, when we resume, with the witness?

MS PILLAY: Chair, a maximum of an hour.

CHAIRPERSON: I see. Alright, we'll bear that in mind. We'll now take the lunch adjournment. We'll resume at quarter to 2.

[COMMISSION ADJOURNS COMMISSION RESUMES] [14:01] CHAIRPERSON: The Commission resumes. Major-General, you're still under oath.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: The reason we are late is that we had a visit in chambers from counsel for the police services who wishes to say something which doesn't amount to an objection. Yes, Mr Ngalwana.



MR NGALWANA: Thank you, Chair, let me emphasise again that this is not an objection. It's just an observation of concern that the police team has conceded over the lunch break, the concern is that and I'm dealing only with the witness. This issue relates to the witness who's currently in cross-examination. The concern that the police team has discussed is where the evidence leaders place the version of the miners or the injured workers who are not currently represented here without having consulted with them. And, of course, in light of what Mr Mpofu has said this morning that has also brought this to a head. It made us think a bit and so we consider that if this were to happen and Mr Mpofu comes back it seems to us that very little can stop him from saying well look I am now here, I've consulted with my witnesses. I want to cross-examine General Mpembe on my witness's version as they've conveyed it to me, the evidence leaders could not possibly have articulated fairly the version of my witnesses. We've considered that there may be a way around this problem and it's one of two ways, there may be more, either the evidence leaders, before they put a version of unrepresented people to the Major-General they could have a consultation with the miners who are not here represented either voluntarily, in other words of their free volition of the miners or by way of subpoena. And let me make it



clear, Chair, that I am not talking about versions that are contained in statements being put to the General, I am talking about general versions attributed to people who are not represented here and that being said to be their version. So we fear that it may very well be argued at the end by Mr Mpofu and his team and perhaps Mr Ntsebeza that the process has been irregular and that may very well be a ground for review. We just thought we should place that on record without any objection at all so that we are all alive to this possibility.

CHAIRPERSON: Thank you, Mr Ngalwana. Mr Budlender, as the Chief evidence leader, do you wish to comment at all on what's been said.

MR BUDLENDER SC: Chair, we understand the problem that is raised by our colleagues. It seems to us that the way to resolve it is as follows; that where a witness gives evidence and we have on record a version by the injured and arrested persons put by them themselves either in the form of a statement which they have submitted or in the form of a proposition or a case which is being put by their counsel then we will say, according to the statement of Mr So and So, he says this. And say to the witness what do you say to that or alternatively according to what was said by counsel for the injured or arrested persons their case is this, what do you say to that. That



putting of a version will carry no evidential weight whatsoever, it will give the witness some opportunity to deal with it so that the witness doesn't have to be called back subsequently. And if the injured and arrested persons subsequently come back and say well that's not really what we meant, when we said this that's not what we meant, we meant something else. Well they can deal with that and that can be dealt with in due course but it seems to us that it's both fair to the witnesses and important for the work of the Commission that where we have a version on record from the injured and arrested person, a version created by them themselves is important that should be put to the witnesses.

CHAIRPERSON: Thank you. That seems to be prima facie correct - Mr Ngalwana do you want to comment?

MR NGALWANA: I just want to say something briefly by way of reply. The difficulty, of course, there may not be a difficulty with the injured miners but the difficulty will be that Major-General Mpembe may very well have to be recalled in the event of the injured miners amending the version that was put to Major-General Mpembe and that we think will be an unfair approach to take.

CHAIRPERSON: Shouldn't we cross that

bridge if and when we get there? It may not happen. It would affect weight, I understand the point you make that it might be contended it's an irregularity. Whether that's ever likely to be upheld by a court applies its mind properly to the question is another matter if you don't have to go into it at the moment. But thank you for making the point, for giving us cause to think about it. I think I've already reminded you you're under oath, Major-General. Ms Pillay.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MS PILLAY: Thank you, Chair. Chair during the cross-examination of General Phiyega Mr Mpofu -

COMMISSIONER HEMRAJ: Sorry, Ms Pillay, are you moving away from the extract?

MS PILLAY: Yes, I am.

COMMISSIONER HEMRAJ: I can't remember, did you put lines 24 and 25 to him? I can't remember if you did read it out or not.

MS PILLAY: Yes, I did -

COMMISSIONER HEMRAJ: Okay, thank you. Sorry to interrupt.

MS PILLAY: General, during the cross-examination of General Phiyega Mr Mpofu dealt with what he described as ten prescripts, legal prescripts which were



extracted from the legal framework of the various legal documents that bind SAPS and regulates their conduct. Now General Phiyega agreed with all ten of then and so I think they're largely uncontentious. The one that I want to deal with you today specifically is what was described by Mr Mpofu legal and moral duty on the part of SAPS to act in an impartial and unbiased manner. Now General Phiyega accepted that such a duty exists, do you similarly that SAPS has to act, when they do act they have to act in an impartial and unbiased manner?

MAJOR-GENERAL MPEMBE: Correct, Chair.

MS PILLAY: Now General, Mr Mpofu argued before the Commission that in relation to the Marikana operation that SAPS did not act in an unbiased and impartial manner, in fact he alleged that there was what he called a toxic collusion between SAPS and Lonmin. And he put to both General Annandale and General Phiyega 13 indications of what - factual indications of what he submitted amounted to a toxic collusive relationship between SAPS and Lonmin. Chair, what I've done just to go quite quickly through these points is I've just tabulated them in a table and cross-referenced to where they where they appear in the record and I just seek to go quite quickly through them, General, and get your response.

CHAIRPERSON: I suggest you read all 13



without interruption, you know just to get them on record as it were and then the witness can deal with them either one by one or globally as he considers it appropriate or you consider it appropriate. Shall we give it an exhibit number?

MR NGALWANA: Chair, before we give it an exhibit number, it's not an objection, I'm just alerting us to the fact, I am wondering if this is necessary because I remember distinctly Mr Burger dealing with each and every one of these and quite ably with respect and it seems the effect of that was really to torpedo each and every one of these out of the water. So I wonder if it's necessary for this witness to deal with it.

CHAIRPERSON: Lonmin don't agree there was collusion, perhaps it's appropriate to get a police comment as well but let's not just spend too much time on it, let's rather get it - the next exhibit as far as I can see will HHH49. You'll bear in mind the point that was made by Mr Ngalwana, not by way of objection. Carry on please, Ms Pillay.

MS PILLAY: The 13 points, General, are firstly the appointment of Mr Sinclair as the liaison person to manage the relationship between SAPS and Lonmin. The second point is the partnership between SAPS and Lonmin identifying individuals who were suspects. The third is



the establishment and use of the Lonmin JOC, essentially that relates to the fact that the JOC was based on Lonmin's premises. The fourth was the joint use of the CC TV material by Lonmin and SAPS. The fifth was the joint deployment of medical personnel ad forward holding area 1. The sixth was Mr Botes', the fact that Mr Botes was permanently based at the SAPS JOC. The seventh was the use of the Coin Security helicopter which is referred to in certain documents as the Lonmin Chopper. The eighth was the use of the Lonmin employee George as the Fanagalo interpreter. The ninth was the fact that Mr Kwadi was with the Union representative, sorry the Union President when they were taken to the koppie on the 14th. The tenth was the miners who were arrested on the 16th were processed at the Lonmin Number 1 shaft. The eleventh is the fact that Mr Botes attended the 6am JOC on 16th of August. The twelfth is that there were daily briefing meetings between Lonmin and NUM and that SAPS would occasionally attend the daily briefings and the thirteenth is that when the people were shot the overall commander, that is yourself, was in the Lonmin chopper and not in the JOC at the time.

MAJOR-GENERAL MPEMBE: No, Chairperson.

MS PILLAY: General, if I could ask you to respond first to the general allegations that was some sort of improper relationship between SAPS and Lonmin

during the operation. If I could have your comment to that.

MAJOR-GENERAL MPEMBE: No, Chairperson, there was no toxic relationship between SAPS and Lonmin. I can deal with each item if the Commission does allow me to do that.

MS PILLAY: You can go ahead, General, and deal with whichever points you feel it's necessary to deal with.

MAJOR-GENERAL MPEMBE: The appointment of Mr Sinclair as liaison officer - was liaison person to manage relationship between SAPS and Lonmin, Mr Sinclair in terms of his work, he is a most senior officer of the security in Lonmin and he's not appointed by us. So it is by virtue of his work that he worked with South African Police Service. Chairperson, number 2 recalls me of what I said in terms of on the 13th where people were identified. Lonmin was the employer and for us to know who were the people, we had no any other place to go except to go to Lonmin. And secondly the Commission will recall that I said when the Provincial Commissioner was briefed on Monday the senior officers of Lonmin said we don't know who are these people, they are faceless. So that's why then we had to go there. It was not a partnership. To us to establish that there is a partnership, there should have been a



memorandum of understanding whereby we do share resources or any other issue but this is any other department where we can help. But in this case Lonmin were the employer where we could get more information in order to enable us to do our work.

Chairperson, with regard to number 3 there is no policy that says you cannot establish a JOC to any other place. Secondly, is that we normally, in any operation, we normally establish a JOC where we will be nearer to the problem than any other. The issue that we look at is efficiency, effectiveness. The EEE, economical, efficiency and effectiveness rather than to be away from the place to travel from all over the place where we were not because we were supposed to deploy throughout the day and the night and you have to work to know all the places within a short space of time. We were getting different police officials from different provinces but they had to be on a continuous basis be orientated.

Chairperson, with regard to number 4 the CC TV it was an asset to enable us to do the work. We did not utilise it because there was any other agreement between us and Lonmin. There was no even a prior arrangement or prior - it was an asset that is there that we could utilise it to do our work properly. With regard to number 5, the medical personnel of Lonmin, we couldn't see any reason why we



could not utilise it because in most cases it was in the case of emergency. What happened on the 13th and then with regard to - on the 16th there was no any other prior arrangements in terms of saying we have to plan together so that we should get you to go there. So that to me it didn't show any other toxic relationship. Chairperson, with regard to number 6, Mr Botes is the second in command of Mr Sinclair, he knew the environment very well and in this case for us to have operated in a better way one of the areas that we need to muster well it is the - that environment in which we have to work. So in regard to that that's why Mr Botes was in the JOC.

[14:20] But I need to indicate, Chairperson, with regard to the JOC and that can also be confirmed. And I did state that our JOC was established on Saturday. It worked on Saturday and at that time Mr Botes was there and the police were there and when I arrive on Monday the JOC was separated. So Lonmin JOC was at another place and SAPS JOC was on another place, so it was on the issue of - it's not that he was always there when we were doing the briefing. When we were doing the briefing it was only the police and then Mr Botes will come at a later stage and he will be - the briefing could be done for the operation to continue on a highly classified manner. Chairperson, with regard to number 7, the use of Coin Security helicopter, I need also



to state that there was no prior arrangements with SAPS that the Coin Security should be used by SAPS. Coin is contracted by Lonmin so we saw it as a tool that you can utilise it in that regard. It was not because Lonmin - there was any other prior arrangement between us and Lonmin and in all of my testimony exactly what was said by Lonmin, exactly what was said - I said it without any fear to show that there was no any other relationship. We have just to talk what has happened on that day.

Chairperson, with regard to number 8, the situation at that time needed any resource to use and as I've indicated earlier on that if we knew of the skills of Reverend Walker we could have used him. And in this case the only people that could assist us with the Fanagalo because we didn't have any expect in the police to talk Fanagalo, it was to use one of the Lonmin people. As I indicated that we didn't get those services on Monday but on the following day we did get those services from Lonmin.

CHAIRPERSON: Wasn't there some evidence that Lieutenant-Colonel McIntosh also can speak Fanagalo? Or am I confusing that with something else? I seem to remember some evidence to that effect, am I right?

MAJOR-GENERAL MPEMBE: Chairperson, what I know is he did do a conflict resolution in the mines but that he is very good in Fanagalo I do not know.

Chairperson, with regard to number 9, Mr Kwadi it is his work in Lonmin to be a labour relations officer. As I have indicated that what happened in Lonmin was labour related and the police intervened when people started to be killed, vehicles starting to be torched. We did request Lonmin and Lonmin tasked Mr Kwadi because he had a good relationship with the President already, he's the one that facilitated the meeting that took place on the 15th. So we did not see any toxic relationship. He was there to assist and the meeting that was organised and it was organised by him but called by us and also to go to the mine it was to assist but not to have any other toxic relationship.

Chairperson, with regard to number 10, I did testify that the police station at that time did not have electricity and there were problems that we could have experienced. And with the number and the volume of the people that we could have processed and then what we had to do is to get another place in terms of to process this. It was arranged prior, it was when we said it was - it was arranged prior, yes in the sense that when we realised that the police station there's no electricity because it was under construction. Then we had to get a place where we could process.

CHAIRPERSON: When exactly - what time was that that you made that arrangement with Lonmin that



they would make that place available for the processing of the arrested persons? Can you remember?

MAJOR-GENERAL MPEMBE: Chairperson, if my recollection serves me well it was on the 16th by the time when we were doing the taskings in the morning.

CHAIRPERSON: In the morning.

MAJOR-GENERAL MPEMBE: And I do remember that Brigadier Van Zyl, Seboloke and myself we were responsible for that one.

CHAIRPERSON: We're just going to take a short adjournment of five minutes. There's something that one of my commissioners has to attend to.

[COMMISSION ADJOURNS COMMISSION RESUMES] [14:30] CHAIRPERSON: The Commission resumes. You're still under oath, Major-General.

WILLIAM MPEMBE: Correct, Chairperson.

CHAIRPERSON: Yes, Ms Pillay? I think the Major-General was going through the list and you just finished dealing, I think with number 10, when we took that short adjournment.

MAJOR-GENERAL MPEMBE: Correct, Chairperson. Chairperson, for Mr Botes to attend the 6 o'clock JOC meeting at the, on the 16th, it was when he was just to inform the JOC how they have posted their securities, so it didn't show any other relationship in



terms of planning together to do any other thing. The daily briefings, I do not have any knowledge of any Lonmin and NUM meeting that were attended by SAPS members. That is number 12.

Chairperson, with regard to number 13, my answer is still the same, that as I have said, the chopper was a resource that was there that could be used, but there is no policy that says I must have been at the JOC as an overall commander.

CROSS-EXAMINATION BY MS PILLAY (CONTD.): But General, whether or not these factors indicate a toxic collusion or not, what I've put to you is at the very least from the perception of the miners involved, it may have created a perception that there was an improper working relationship between Lonmin and SAPS, from the perception of the miners involved.

MAJOR-GENERAL MPEMBE: Chairperson, I understand the perception, but what was more important is that all what the miners asked the police during all the activities that happened here, we did convey it to the Lonmin management, and secondly, we have been transparent even in this Commission to say what did we convey to Lonmin and coming from the miners themselves. Our communication with the miners, between the miners and Lonmin was conveyed on both parties.



Secondly, for us to do our work in, as the Constitution says and in terms of the Police Act, Lonmin was the employer and we did feel that Lonmin has the duty to ensure that the situation has to be brought under control. But not only Lonmin; we also felt that the labour unions should also have a duty, and in terms of that, if there was any toxic relationship, with all the meetings and the relationship that I had with the presidents of the unions, in relation – we can check both OOO4 and GGG4, I said to them I'm always 24 hours here; if is there any other thing, just talk to us. So if there was any other issues, we also brought in element of the presidents talking to the miners and also to Lonmin. So it could have been addressed at that time.

MS PILLAY: Within that theme, General, there are just two further points that I need to draw to your attention. The first is that I put it to you that on the morning of the 16th that Lonmin had made available to SAPS additional barbed wire, that was eventually not used.

MR NGALWANA: Chair, whose version is this? Which witness has said it? I'm not aware of this evidence.

MS PILLAY: Chair, we have photographic evidence to that effect, but if needs be we can get a statement from Lonmin which confirms that.

Page 13162

COMMISSIONER HEMRAJ: Was this apropos the police saying there was insufficient barbed wire to go around the copy?

MS PILLAY: To encircle the koppie, yes.

CHAIRPERSON: You know, the rule we've got is that if statements and things are going to be put, the person to be cross-examined should get notice of it beforehand. If this wasn't part of the material that the witness was given, then I don't think you can ask him the question. It may well be that the question can be asked of other people – I think in relation to the barbed wire maybe Brigadier Calitz or somebody can deal with the question, and presumably by the time he gives evidence, the relevant statement to which you refer and the photograph to which you refer can be put to him. But I think Mr Ngalwana was on the point of raising something which would have been an objection and which I would have upheld, but don't concur –

MR NGALWANA: [Inaudible] objection.

CHAIRPERSON: You don't have to, Mr Ngalwana.

MS PILLAY: General, the second point which I wish to put to you, is the following. You were aware that the miners on the 13th had reported to you that there were incidents of violence on the part of Lonmin against the miners. Is that correct?

Page 13163

MR SHOZI: Chair, again might we enquire as to whose version is being put to General Mpembe?

MS PILLAY: Chair, it appears from General Mpembe's statement, GGG15, that on the day, on the 13th the miners informed him that they wished to be armed because they were shot at by Lonmin.

CHAIRPERSON: - Lonmin, NUM. Do they say Lonmin as well? What is that statement? Just give me the reference again. I remember them saying they wanted to retain their arms to protect themselves against NUM, but if they said Lonmin as well, then I don't remember that, but can you give me the reference, please?

MS PILLAY: I'll give you the reference in two seconds, Chair. GGG12 at paragraph 14.

CHAIRPERSON: GGG12, paragraph?

MS PILLAY: Paragraph 14.

CHAIRPERSON: 14. Yes, I see that is correct. It is correct. What they stated was, "They refused to hand over the weapons. One of them stated that the mine security fought with them and it was the mine security that were shooting at them, and that was why they don't want to give their weapons to the police." That's what you yourself said [microphone off, inaudible] told you.

MAJOR-GENERAL MPEMBE: Chairperson, in

Page 13164

this case they were referring to, I was referring to the incident. That's what I thought that they were referring to the incident that happened when the securities were attacked and killed, and I knew that there was a docket that was opened.

CHAIRPERSON: But the point in question is that what the miners said was that the mine security, which are obviously Lonmin employees, had shot at them. That was their allegation. I understand there may be other allegations from other parties, but that was the miners' allegation. That's the basis of the question which Ms Pillay is asking you.

MS PILLAY: The question, General, is if you look at exhibit L, and if you look at slide 43 onwards of exhibit L –

CHAIRPERSON: Which particular bullet are you referring to in slide 43 of exhibit L?

MS PILLAY: It's no particular bullet, Chair. I'll just wait for the witness to open the slide and I'll pose my question.

CHAIRPERSON: I see. Alright, okay.

MS PILLAY: The question, General, is if you look at slide 43 to 48 of exhibit L, it's a summary of the sequence of events that took place on the 13th. Now you will see that there is absolutely no mention in those

Page 13165

slides of reports or allegations even by the miners that they were shot at by Lonmin.

MAJOR-GENERAL MPEMBE: Chairperson, as I indicated earlier on, the inputs that were made in exhibit L were coming from different people and it depends from the compiler how did he compile it. So, but what I do believe is that the versions were put, but how it was compiled is something that I did not have any control of.

MS PILLAY: General, as overall commander of the operation, did you see exhibit L before it was presented to this Commission?

MAJOR-GENERAL MPEMBE: Chairperson, I would say that exhibit L, it was presented to all of us, including myself, but thereafter there were some, many changes that were made, whom I cannot know when were they being made.

MS PILLAY: And it goes further than that, General. Are you aware that there was a docket opened on the 10th of August, recording allegations by two residents of Marikana that they had been shot at by mine security?

MAJOR-GENERAL MPEMBE: No, Chairperson, as on the 10th I was still on leave. I started reporting on the 13th.

MS PILLAY: Chair, if I may hand up two

statements. These are both statements taken from the SAPS hard drive. The first is by Mr Thando Elias Mutengwane, and the second by Mr Bulelani Kluvet Dlomo. Now I've drawn these statements to the attention of both representatives for SAPS and Lonmin, Chair.

CHAIRPERSON: I take it you want me to mark Mr Mutengwane's statement as HHH50?

MS PILLAY: That's correct, Chair.

CHAIRPERSON: And Mr Dlomo's statement as HHH51. I have so marked them.

MS PILLAY: Now General, you will see from the statements of both Mr Mutengwane and Mr Dlomo that they allege that they were shot at from a Lonmin Security twin-cab on the 10th of August.

MAJOR-GENERAL MPEMBE: Chairperson, as I'm saying, on the 10th I was not, on leave, not running away from my responsibilities; on the 13th, I might have made some enquiries, but I did receive now this document here, I could have checked what was done to process of the investigations, is there any other arrests were made or not on this.

MS PILLAY: The proposition that I've put to you, General, as overall commander of the operation, is that we've had a look at slides 11, 12, 13 to 16 to exhibit L, which records a summary of the sequence of events on the



10th of August and nowhere in those slides does it mention allegations by residents of having been shot at by Lonmin.

MAJOR-GENERAL MPEMBE: Yes, Chairperson, my answer is still the same, that this is being brought to me. This was never being brought to my attention on the 13th, as it happened on the 10th.

CHAIRPERSON: I think the question goes a bit further than that. I understand you just came back from leave.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: But the –

MR NGALWANA: Not on the 10th, Chair.

CHAIRPERSON: No, no, no, I'm sorry, I didn't make myself clear. You came back from leave after the 10th. This happened on the 10th apparently, and you didn't know about it because you were on leave.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: And I think you're saying it wasn't drawn to your attention before the 13th. Is that right?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: But the question of Ms



Pillay goes a bit further than that, because she asked you whether you were aware of the contents of exhibit L before it was finalised, and you told us that it was presented just before it was finalised, because you said some changes were made after that, after it was presented to a group, including you. So I think what Ms Pillay wants to know is were you aware at that stage when the draft, as it were, of exhibit L was presented, that these complaints had been made by these two people of their being attacked, or assaulted by Lonmin people.

[14:50] So what's the answer? Did you know of these two dockets, these two cases, allegations at the time when the draft of exhibit L was presented to a group, including you?

MAJOR-GENERAL MPEMBE: At that time, Chairperson, I was not aware in terms of – I do not remember that this was mentioned in the exhibit L, but as I have indicated, there were so many times that exhibit L was updated.

CHAIRPERSON: Yes, yes, I know, but you see, the point is this; we've got the final version of exhibit L. Exhibit L doesn't mention that at this time some of the workers were complaining, miners were complaining that they were being attacked by Lonmin people in the circumstances set out in these statements, and I think the point being made – if I'm wrong, Ms Pillay will



correct me – was that in order to present a fair picture of the situation, this should have been mentioned in L. If you knew about these statements at the time and you were present when presumably a draft of L was presented, you should have put your hand up and say hey, this isn't fair, this isn't completely fair and complete version; there should also be mention of these two incidents that are referred to in HHH50 and 51. I think that's your point, Ms Pillay. Is that right?

MS PILLAY: That's correct, Chair.

MAJOR-GENERAL MPEMBE: Chairperson, as I've indicated that I was not aware of this since I was on leave, but also that as my memory serves me well, I didn't see it when exhibit L was presented to me at that time.

MS PILLAY: General, if I may refer you to a further statement –

MR NGALWANA: Chair, can I just make one, or two corrections? As I understand Ms Pillay, she said that there were two dockets that record people being shot. She can correct me if I'm wrong. It seems to me if you look at the top of the page it's in fact one docket.

MS PILLAY: Chair, I'm about to introduce the second docket.

CHAIRPERSON: What we've got at the moment, exhibits HHH50 and 51, those are from one docket,

but we're now coming to the second docket. Is that right?

MS PILLAY: The second docket, that's correct, Chair.

MR NGALWANA: The second point of correction; it was mentioned that these two mentioned that people were shot from a bakkie, twin-cab that opened fire at them. I haven't seen that allegation in HHH51, Chair. Perhaps our learned friend can help the witness. It seems paragraph 4 is the one that talks about a shooting.

MS PILLAY: Chair, in paragraph 4 it's mentioned of people who were there or from the Lonmin Security.

CHAIRPERSON: So the statement as put to you may not have been precise in the sense that it should have said that the one case that the shots were fired from a Lonmin Security twin-cab. The second case it was said fired from a Lonmin Security, and not stating whether or not it was a twin-cab. That's the difference, but either way the allegation was that Lonmin Security had been involved in shooting at these people, and these two complainants' statements were filed together in one file, one docket, which apparently is CAS69/08/2012, and that's not referred to in exhibit L, and now we're coming to the second docket. How many statements are there? Just one?

MS PILLAY: It's just one document.



CHAIRPERSON: So that will be HHH52, I take it.

MS PILLAY: This will be HHH52. General, do you have the statement of Mr Kellerman in front of you?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MS PILLAY: You will see from paragraph 1 of the statement, General – firstly this statement belongs to Marikana CAS118, and you will confirm, General, that that's one of the dockets opened as a result of the shooting of the 13th of August?

MR NGALWANA: Chair, we're a bit handicapped because we don't have the statement to which our learned friend is referring.

MS PILLAY: Chair, the team was furnished with a copy of the Kellerman statement, but I can get them another copy, if I'm just given 30 seconds.

COMMISSIONER HEMRAJ: You can have my copy, Mr Ngalwana.

MR NGALWANA: Thank you, Commissioner Hemraj.

MS PILLAY: Now you will see, General, that Mr Kellerman is employed as a senior – or was at the time employed as a senior security officer for mining security at Lonmin Platinum Marikana Operations. He says



in paragraph 2 that on Monday, the 13th of August, he was on duty at Lonmin Marikana Operations. They encountered a group, a crowd marching towards the K3 Shaft. The crowd was stopped next to the railway line. They were dispersed by members of Lonmin Security. As they were marching back towards the gathering they were stopped by SAPS in order to negotiate. Mr Kellerman says in paragraph 3, General, that they stayed behind on the bridge to keep observation on the movement of the crowd, and when SAPS dispersed the crowd they tried to follow the movements of the people, and he says that they then saw a group of five people moving towards the K4 concentrator. He says in paragraph 4 that they rushed towards the K4 concentrator and shouted at the people to move away from the concentrator area. He says the Lonmin Security team shot a warning round with rubber ammunition towards the suspects.

MR NGALWANA: Chair, I must apologise. I notice my learned friend is paraphrasing. There's some excerpts that she doesn't read. I'm not sure if that creates an accurate picture for the witness.

CHAIRPERSON: Has the witness got the document in front of him?

MS PILLAY: Chair, the witness was also given notice a few days ago that we intend relying on this document.



MR NGALWANA: All I'm asking is that perhaps she should read the document, Chair, inasmuch as this seems to be misleading.

MS PILLAY: Chair, I'm very conscious of the commitment I made as to time. I did give notice to the SAPS team of my intention to rely on this document. I think in the circumstances it's unreasonable to expect me to read every word on the page. I think the witness will correct me if I'm not accurately portraying what's on the statement.

CHAIRPERSON: I think go on as you are for the moment, but I'll keep an eye on it and if I think that you're skipping over things that are relevant I'll raise the alarm, and Mr Ngalwana will do the same if he thinks so. We were busy with para 4. "We rushed towards the concentrator and shouted at the people to move away from the concentrator area." That's where you were, was it?

MS PILLAY: That's correct, Chair. They kept on coming and members of the security team shot a warning round with rubber ammunition towards the suspects to deter them from entering the concentrator area. In paragraph 5 Mr Kellerman states that the suspect ran into the veld behind the concentrator and disappeared behind the small mounds of earth which are situated behind the

concentrator. He says then that the concentrator security superintendent had a high vantage point and directed him to where the suspect disappeared behind the mound. In paragraph 6, General, Mr Kellerman then says, and the sharp point of what he says in paragraph 6 is that Superintendent Botha, who was covering him, shot the suspect with rubber 12-gauge rounds to deter him from coming towards Mr Kellerman.

MR NGALWANA: Well, it also says that the superintendent was covering him, Chair. That's been left out. Surely that gives a –

CHAIRPERSON: I don't know if that's a material omission, though. The point is that these rounds were fired. Please carry on, Ms Pillay.

MS PILLAY: He states then that the suspect changed direction and tried to run away in the direction of Superintendent – I'm not sure what that word is, it looks like Segwai to me. He then decided to shoot the suspect on the legs in order to stop him from escaping. He indicates that he shot the suspect with rubber rounds and that when he fell, he apprehended the suspect. I think in the remainder of the statement, General, Mr Kellerman indicates that he then apprehended the suspect and took him to SAPS, where he was then arrested and where he received medical treatment. Now the point is, General, that this



incident occurred on the 13th of August and yet in the summary of events of the 13th of August that's set out in exhibit L, there is no mention that any of the strikers were shot with rubber bullets by Lonmin Security.

CHAIRPERSON: The same point applies, you see. If you were present when the draft of L was presented, and if you knew about this – or let me put the question, then you can make your point – and you knew about this, why didn't you raise your hand and say hey, but this isn't complete, we should include this? That's the question, Ms Pillay?

MS PILLAY: That's correct, Chair.

CHAIRPERSON: Now I think there may be an objection from the Lonmin side to that. You put your light on, did you?

MR SHOZI: Chair, it's not an objection as such. We seek clarity from Ms Pillay in two respects because it's important for us to follow the debate since they concern Lonmin. The first aspect in respect of, we seek clarity in regard to the statements of Mutengwane and Bulelani Dlomo. We would like to know whether Ms Pillay intends to call them as witnesses. Secondly, we would like to know whether the statements are being relied upon to prove this alleged toxic collusion between Lonmin and SAPS, or is she now dealing with a separate subject matter?



Thank you.

COMMISSIONER HEMRAJ: The statements are not the only place where there's reference being made to shooting by Lonmin security guards; there are other statements as well which refer to it.

CHAIRPERSON: In answer to your first question, you will remember the ruling said that if a party to whom a version is put, or I suppose who's affected by a version wishes to do so, they can apply for the person whose version was put to be subpoenaed. So it's not incumbent upon Ms Pillay to say that she will definitely call this person. If the version is relevant, you may – and you want the person concerned to come – you can apply for the person to be subpoenaed, and if it's a relevant issue, the person will be subpoenaed. So that's the answer to the first question. She doesn't have to say whether she's going to call the person.

The second point is as to why it's put, that I think is something you're entitled to ask. Is it put to check this witness's knowledge and the fact that he appears to have refrained from asking that this point be included in exhibit L? If that's the purpose, then that's really the end of the matter. If on the other hand it's put forward as evidence from which a toxic collusion or something approximating thereto can be inferred, then I



suppose you're entitled to know the answer to that. So what's the answer to the second question, Ms Pillay, put by counsel for Lonmin?

MS PILLAY: Sorry, just repeat the second question.

MR SHOZI: The question really is whether the statements are being relied upon as part of proving this so-called toxic collusion between Lonmin and SAPS, or whether you're now dealing with a separate subject matter altogether.

MS PILLAY: The statements are put within a broader theme of an improper relationship between SAPS and Lonmin, as further indicia of an improper relationship between SAPS and Lonmin.

CHAIRPERSON: It can't be as simple as that. The mere fact that a Lonmin official allegedly fired – he admitted he did, actually, or so he appears to in the statement – fired rubber rounds at a person who was injured, that in itself doesn't prove a toxic collusion between the police and Lonmin. But the fact that in the official police presentation this incident, which would have a bearing on that aspect, was not disclosed, and if this witness knew about this incident and didn't raise up his hand at the exhibit L preparatory discussion, then inferences can be drawn, I take it. So in itself it

Page 13178

1 doesn't prove the collusion, but the fact that this
2 incident was, as it were, not disclosed in L when there was
3 knowledge of it, might lead to some kind of inference. So
4 I think - Ms Pillay, I don't want to put words in your
5 mouth – that seems to be the way the point presents itself
6 to me –
7 MR NGALWANA: No –
8 CHAIRPERSON: Am I reading it correctly?
9 MS PILLAY: That's correct, Chair.
10 CHAIRPERSON: Now you know the answer to
11 you question.
12 MR NGALWANA: Chair –
13 CHAIRPERSON: [Microphone off, inaudible]
14 points put is that there are really a number of preliminary
15 points that should be established before the inference can
16 be drawn.
17 MS PILLAY: Chair, we are well aware of
18 that. The witness indicated that there were limitations to
19 how far he could take this, and we will certainly put it to
20 further witnesses who come and testify before the
21 Commission.
22 CHAIRPERSON: Alright, so we just need to
23 get the short answer to the question then. Were you aware
24 of this incident?
25 MAJOR-GENERAL MPEMBE: No, Chairperson.

Page 13179

1 Chairperson, maybe to say that [microphone off, inaudible]
2 –
3 CHAIRPERSON: Ms Pillay, isn't that the
4 end of it as far as this witness is concerned? He says he
5 didn't know. If he didn't know about it, he couldn't be
6 expected to have stood up at the exhibit L discussion
7 meeting and said this incident should be included for the
8 interest of completeness, because if he didn't know about
9 it, obviously he couldn't be expected to do that. That's
10 his answer.
11 MS PILLAY: We agree with that, Chair.
12 We simply felt it necessary to put it to this witness,
13 given that he is the overall commander, give him an
14 opportunity to answer -
15 CHAIRPERSON: You've got his answer.
16 [15:10] MAJOR-GENERAL MPEMBE: Chairperson, I
17 need also to add that in that is a CAS number where, I
18 think it's one of the - where the police officer was
19 killed, so the statement was taken and placed in the
20 docket, but however, I need also to state that Brigadier
21 Van Zyl, who's heading the Detective, he didn't also bring
22 this to my attention at that time.
23 MS PILLAY: General, just the final point
24 that I intend to deal with in my cross-examination is to
25 draw to your attention that when Mr Mpofu was cross-

Page 13180

1 examining General Annandale, he described seven indications
2 of the fact that the operation was hijacked – in his terms
3 – by Hawks, who are more militant members of SAPS from what
4 he called the Doves, and in this analysis you were cast as
5 a Dove.
6 Now the proposition put was that the Hawks, the
7 more militant members of SAPS, were really General
8 Annandale, Lieutenant-Colonel Scott. On the other hand,
9 you represented the Doves, and the proposition put by Mr
10 Mpofu was that you were sidelined, deliberately sidelined
11 during the operation by the Hawks, and he referred to a
12 number of factors which he submitted demonstrated the fact
13 that you were sidelined.
14 Now there are five such factors, General, and I'd
15 just like to briefly put them to you and just to record
16 your response. The first factor is the statement by Mr
17 Mathunjwa that you informed him that you were not in charge
18 of the operation. General, can I have your response to
19 that?
20 MAJOR-GENERAL MPEMBE: Chairperson, in
21 terms of my statement HHH3 I did deny that I, I did not
22 tell Mr Mathunjwa that I'm no more in charge of the
23 operation, and when I introduced him to the Provincial
24 Commissioner I said it's the Provincial Commissioner of the
25 province, and I don't see any reason why I could have lied

Page 13181

1 to Mr Mathunjwa. Chairperson, maybe I may be explaining
2 this proposition, what is meant by the Dove and the Hawk.
3 MS PILLAY: General, the Hawks are the
4 more militant members who adopted a more militant approach,
5 and the Doves are the peacemakers, those that adopted a
6 more passive approach. The second factor, General, which
7 was advanced as an indication of the fact that you were
8 sidelined is your statement in GGG12, paragraph 51, that
9 you could only give guidance if it was sought, and that on
10 the day guidance was not sought.
11 MAJOR-GENERAL MPEMBE: Chairperson, the,
12 I did respond in terms of my HHH3. If I heard the question
13 correctly in terms of paragraph 28, page 11, to say that I
14 should add to say on my original statement that as an
15 overall commander, I understand the importance of the
16 operational commander in the JOC when problems arise and
17 they inform me through the radio or cell phone of those
18 problems and seek my guidance. This did not happen. It is
19 not the function of the overall commander to usurp the
20 functions of the operational commander, particularly when
21 the operational commander is better positioned as being on
22 the ground and experienced action, best action, but that it
23 doesn't mean that I was sidelined.
24 MS PILLAY: General, the third factor was
25 the fact that death threats were made against you on the

13th of August and that Colonel Vermaak proposed to remove you from the scene on the 13th.

MAJOR-GENERAL MPEMBE: Chairperson, as I said, I don't, I didn't see anyone who threatened me, maybe is he coming from the Hawk or from the Dove. So it will very difficult for me maybe – maybe I may say this, whereas it was actually coming from the Dove where I was falling. So I, if I knew who were the one that threatened me, I might be in a position, because as I said, I was also told when I was in Potch that the people who actually threatened me, it was Captain Tupe and Merafe. So I don't know whether they're classified as Doves or as Hawks, but that I was also told and I did not see them doing that.

MS PILLAY: The fourth factor, General, is the fact that at the JOCCOM which took place at 1:30 on the 16th, General Mbombo gave the instruction to General Annandale, and not to you, to execute stage 3 of the operational plan. Do you agree, General, that this is evidence of you being sidelined during the operation?

MAJOR-GENERAL MPEMBE: No, Chairperson, what I would – in my response I did respond in terms of my original statement, paragraph 12, GGG12, I'm sorry, and also on my HHH3. Major-General Annandale, since from his arrival on the 13th he has been always in the JOC and he was a JOC commander. He was chairing most of the meetings and



I explained why I did choose him to be a JOC commander, and in my absence he will also assume my responsibilities. So in the South African Police we don't see ourselves as Hawks or as Doves. We work as a team and as officers, but if there was any other thing that I would not have agreed, I would have stated it.

CHAIRPERSON: I'm not sure it's as simple as that. If you look at slide 67 of exhibit L, you'll see we get the designated command position. Have you got that? Slide 67, exhibit L. Now your role, you were the commander of the JOC and your role was overall commander of the operation. General Annandale was your chief of staff and his role was to coordinate the running of the operation by managing the JOC with the designated role players representing each field, and he explained also - and you've said that it's so too - that he was to chair the meetings of the JOCCOM. But inasmuch as you are described as the person in overall command, and his role was simply to coordinate the running of the operation by managing the JOC and carrying the JOC, I would have not expected him to have been instructed to implement stage 3. Surely the person to implement stage 3 would have been the person in overall command, namely yourself, or possibly the operational commander, Brigadier Calitz, who was going to coordinate the operation on the ground. But somehow we find Major-



General Annandale being instructed by the Provincial Commissioner to implement stage 3. That doesn't quite make sense to me, I must tell you, but I'd be interested to hear your comment on it.

MAJOR-GENERAL MPEMBE: Chairperson, notwithstanding what the Provincial Commissioner might also say, because the instruction came from her, but my understanding at the time, it was that because Major Annandale was often the, he was the one that was normally chairing the meetings of the JOC.

CHAIRPERSON: Anyway, I just wonder if this would not be a question we should ask her, why she did what she did. You can merely speculate, really, as to what she had in mind. Sorry, Ms Pillay, I interrupted you. Please forgive me.

MS PILLAY: Chair, just a final factor, General, which was advanced as a further indication that you were sidelined during the operation is the absence of specific mention in the minute of the crucial meeting, that's the 1:30 JOCCOM on the 16th, there was an absence of specific mention of input from you in the minute.

MAJOR-GENERAL MPEMBE: Chairperson, when the, there were some inputs that I did make on the 16th and inputs like the resources that there has to be utilised, for example, if I have to give an example, the taskings



that were given to Brigadier Seboloke, Brigadier Van Zyl, and as a result that Major-General Annandale was coming from head office, then some of the issues in terms of how they should be done and which police stations, they were done by me. But they did not appear in the minutes. My understanding was that for the fact that they did not appear in the minutes, they seem not to be the decisions because I do understand that in the minutes in most of the times the decisions are what's being recorded, but not everything that was said in the meeting. But as I'm saying, Major-General Annandale came from head office; surely he could not have known anything that could have been happening in the province. So I was there to, also to play that role.

MS PILLAY: Chair, I have no further questions.

CHAIRPERSON: Thank you. [Microphone off, inaudible] who wishes to cross-examine the witness? No. Mr Ngalwana, you did indicate to me, I think –

MS PILLAY: Chair, if I may just –

CHAIRPERSON: Sorry, I beg your pardon.

MS PILLAY: If I may just ask for a 30-second indulgence; one of my colleagues just wants to draw something to my attention. General, there's just one further proposition that I need to put to you, and the

proposition is the following, and I preface the proposition with the following, that we as yet do not have a statement from the witness, who is Brigadier Seboloke, but if he testifies the following, and I'd just like to hear your comment if the Brigadier does come to this Commission and testifies –

MR NGALWANA: If the question is going to start like that I'm already objecting, Chair. She must rephrase it.

MS PILLAY: All we want to do, Chair, is give the witness the benefit of commenting on this evidence, which we believe will be placed before the Commission in due course.

CHAIRPERSON: From the Brigadier?

MS PILLAY: From the Brigadier, that's correct.

CHAIRPERSON: Well Mr Ngalwana, you know, I understand where you are coming from, that there should have been a statement filed and he should have had notice of it so he could deal with it. I understand that. On the other hand, if we are going to say the question can't be put because there wasn't a statement, and they then get the statement and it's immaterial, I don't know what the answer is going to be – the question is going to be, then we'll have to get, and if it's important to get the witness's



response to it then we have to get him back. So isn't it practical and convenient for the question to be put and he can say well I, he can either say I can't answer it or I don't know, or answer it, or not, as the case may be? Maybe he'll give an answer that's so decisive on the matter that the point will be dead from now on. Isn't it practical to do it that way? Or would you want to be impractical? You must tell me.

MR NGALWANA: Chair, my objection is not about the absence of a statement. It's the uncertainty about whether or not he is going to come and testify. If so and so is going to come and testify, I mean –

CHAIRPERSON: I get the impression, and I may be wrong, that the evidence leaders have interviewed him and he's told them something and they are fairly confident that he's going to come and say that –

MR NGALWANA: Then why don't they put the question when he's done so, Chair?

CHAIRPERSON: Then we have to get the witness back. That's the point.

MR CHASKALSON SC: Mr Chairperson, I wonder if I could add something to this debate? We sit with a real difficulty as evidence leaders in this respect. In order to cooperate with SAPS we have hitherto interviewed their witnesses in their presence and haven't



insisted that the witnesses sign statements immediately. We have sent notes back to SAPS with draft statements. In some cases those draft statements have waited for months on end and still haven't come back. If the ruling is going to be that we cannot put what SAPS witnesses say to us in consultations unless we have a statement, then we'll have to reconsider our relationship with SAPS in this regard and insist that witnesses who consult with us sign statements immediately.

MR NGALWANA: Well, Chair, with respect, maybe they should because we've had witness statements prepared by the evidence leaders which the witness themselves are not prepared to sign. So I mean, this suggestion that we should agree to an arrangement where the evidence leaders interview or consult with witnesses whom they are going to cross-examine and then present a witness statement to that witness to sign, is ridiculous, with respect.

[15:29] But that doesn't deal with the issue that we are concerned with here. Here there is no clarity about whether or not the evidence, or the version, the witness whose version is sought to be put here is going to come and testify. Now –

CHAIRPERSON: Well, I'm reluctant to deal with the matter now by way of a ruling one way or the other



because it seems to me that it may well have important implications for our way forward. What is suggested by Mr Chaskalson is that if necessary the evidence leaders when they interview members of the police, in the present of legal representatives of the police - that's the important point – may well then insist that the statement be signed. Obviously if the witness isn't happy to sign the statement that's proffered to him, he can change it, but that will alter the whole way of working. I prefer to leave it open for the moment for discussions perhaps with the legal representatives of the police, Mr Semenya and Mr Budlender and others, and then so at the moment if we have to have this witness coming back if the Brigadier gives the evidence that the evidence leaders thinks he'll give on this particular issue, then so be it. We'll have wasted a bit of time, but there's nothing we can do about it. So the matter can stand over and if need be, the witness can be recalled on this point. That's the end of your questioning, Ms Pillay?

MS PILLAY: That is it.

CHAIRPERSON: Mr Ngalwana, I understand that you need time to prepare for re-examination. So I suggest we take the adjournment now and start again at 9 tomorrow.

MR NGALWANA: Not so much to prepare for

it, Chair, just to streamline my questions [inaudible] –

CHAIRPERSON: You see, I meant that. Obviously you've got a lot of material to work through. You'd like to coordinate it and put some pieces in the wastepaper basket and others at the top of the pile, but that can be quite a lengthy process. It will streamline the resultant re-examination. That's what you want to do.

MR NGALWANA: Yes, thank you, Chair, that's it.

CHAIRPERSON: 9 tomorrow be good enough?

MR NGALWANA: That's perfect, Chair. Just one housekeeping matter which has been brought to my attention; it appears the statement of Mr Kellerman, I don't recall it having been entered as an exhibit. Perhaps I'm wrong.

MS PILLAY: Chair, I think it's HHH52.

CHAIRPERSON: My recollection, you may be [microphone off, inaudible]. I think it was referred to as exhibit HHH52, but I didn't mark it and I hasten to remedy that omission and I've now done [microphone off, inaudible].

MR NGALWANA: No, Chair, thank you.

CHAIRPERSON: Sorry, we will adjourn now until 9 o'clock tomorrow morning.

[COMMISSION ADJOURNED]

**A**
**aan** 13109:12,14
**aanduiding** 13109:11
**Abey** 13143:15,16
**abide** 13080:7 13134:7
**able** 13085:17 13087:3 13087:11 13110:24 13111:4,5 13115:7,7 13129:10 13131:5
**ably** 13152:10
**absence** 13078:7 13091:5 13108:21 13183:2 13184:18,20 13187:10
**Absent** 13091:21
**absolutely** 13093:15 13164:25
**accent** 13109:8
**accept** 13103:21 13104:9
**acceptable** 13127:21
**accepted** 13130:1 13151:8
**accepting** 13116:7
**accord** 13145:4
**account** 13104:16
**accurate** 13172:20
**accurately** 13173:9
**accused** 13100:16 13106:15 13108:8 13114:5,9
**accused's** 13106:11
**accusers** 13107:22
**achieve** 13119:24 13124:23 13131:10 13135:12
**achieved** 13118:5 13123:15,16
**achievement** 13116:7
**acquitted** 13107:25
**act** 13114:1,19 13151:6 13151:9,9,9,14 13161:2
**acted** 13126:15 13127:17,24
**acting** 13139:23
**action** 13138:24 13181:22,22
**actions** 13101:5 13138:25
**activities** 13160:20
**actual** 13094:13
**ad** 13084:10 13153:5
**add** 13123:14 13131:11 13141:10 13179:17 13181:14 13187:22
**addition** 13127:4 13130:12 13131:11
**additional** 13161:19
**addressed** 13161:14
**adequacy** 13095:10,12 13095:21 13096:16 13096:17
**adequate** 13084:20 13091:20
**adequately** 13095:6
**adjourn** 13087:5 13113:10 13134:14 13190:23
**ADJOURNED** 13190:25
**adjournment** 13078:20 13086:15 13113:7,9 13113:15 13114:4 13134:11,17 13146:8 13146:15 13159:11 13159:20 13189:23
**ADJOURNS** 13087:7 13113:18 13134:23 13146:17 13159:13
**admitted** 13103:20 13177:17
**adopted** 13181:4,5
**Adv** 13082:15 13141:13,18,19 13142:9,14,14,18 13143:7
**advanced** 13144:1 13181:7 13184:17
**advancing** 13126:17 13127:12
**advantage** 13090:12 13145:8
**adverse** 13130:2
**advise** 13130:14
**adviser** 13114:19
**advocate** 13098:9 13103:5 13104:1
**advocates** 13099:3 13103:3,24
**affect** 13104:17 13150:2
**affidavit** 13079:16 13082:4 13092:18,22 13093:14,17 13100:23 13112:11 13120:24 13121:1,8,8 13123:22,25 13125:12,13,13
**afforded** 13111:16
**afgelê** 13109:10
**Africa** 13084:15
**African** 13088:7,10 13140:15 13154:15 13183:3
**ago** 13172:24
**agree** 13090:20 13152:14 13179:11 13182:18 13188:14
**agreed** 13078:18 13151:3 13183:5
**agreement** 13155:21
**ahead** 13082:15 13154:7
**aid** 13084:14,15,17,21 13084:24 13095:4,11 13095:15,16,18 13096:3,12 13103:4 13106:13 13124:9
**aim** 13096:15
**air** 13112:14
**alarm** 13173:14
**alerting** 13152:7
**alive** 13148:10
**allegation** 13164:9,11 13170:7,19
**allegations** 13129:24 13130:12,15,17,19,24 13153:24 13164:10 13165:1,19 13167:2 13168:12
**allege** 13166:13
**alleged** 13099:24 13101:12 13151:15 13175:24
**allegedly** 13119:16 13129:22,23 13177:16
**allow** 13106:13 13123:1 13135:22 13140:1 13154:5
**allowed** 13114:5 13139:24,25 13140:7
**allowing** 13138:10
**alright** 13094:6 13146:14 13164:21 13178:22
**alter** 13189:9
**alternative** 13085:1 13124:6
**alternatively** 13082:22 13148:23
**alternatives** 13140:20 13141:7
**altogether** 13177:10
**AMCU** 13086:8 13097:12 13098:5 13132:6,6,8
**amended** 13081:15 13082:20
**amending** 13149:22
**American** 13088:9
**ammunition** 13172:16 13173:21
**amount** 13081:9 13084:25 13088:5 13102:17 13106:5 13146:24
**amounted** 13146:6 13151:19
**amounts** 13112:15
**analysis** 13137:14 13180:4
**anders** 13109:12
**and/or** 13084:16 13101:12 13126:19
**anew** 13112:4
**animal** 13116:8,13
**Annandale** 13151:17 13180:1,8 13182:17 13182:23 13183:12 13184:1,9 13185:2,11
**answer** 13135:9 13136:15,25 13137:9 13141:20 13143:19 13143:22,22 13146:7 13160:5 13167:4 13168:11 13176:6,15 13177:1,2 13178:10 13178:23 13179:10 13179:14,15 13186:23 13187:3,4,5
**answering** 13135:6
**anybody** 13080:20 13082:25 13083:2 13134:9 13140:1
**anymore** 13133:24
**anyway** 13104:13 13184:11
**apart** 13128:2
**apologies** 13083:16 13124:5
**apologise** 13172:17
**apparently** 13167:16 13170:22
**appeal** 13110:10 13111:1 13120:14 13122:25 13133:7
**appear** 13127:11 13151:23 13185:5,7
**appears** 13163:3 13176:20 13177:17 13190:13
**appellant** 13111:24 13112:1
**appellante** 13109:9
**appellants** 13110:2
**applicant** 13097:12 13103:13 13104:24 13106:4 13114:25 13115:2 13124:4 13127:9 13128:1,12 13128:19
**applicants** 13084:16,21 13085:12,15 13086:7 13086:12 13092:3 13095:25 13096:13 13096:13 13097:2,5 13098:7 13099:16 13101:1,4 13102:3 13103:1,5,17,25 13105:16,23 13122:10,16 13124:4 13124:13,15,25 13125:3,4 13128:12 13128:14 13129:5,8,9 13130:11,22 13131:1 13131:14 13132:11
**applicant's** 13128:7
**application** 13079:10 13079:25 13080:3,6,7 13080:13,18,19 13081:2,7,25 13083:23,25 13084:8 13084:8,9,11 13086:4 13086:22 13090:17 13090:21 13092:2,20 13093:9 13095:15,25 13096:15 13100:14 13105:11,17,19 13106:12 13111:21 13120:16 13122:1 13123:23 13124:2,3 13132:7,13,20 13133:1,2,4,6 13134:4,6
**applications** 13100:12 13105:20
**applied** 13137:19
**applies** 13150:4 13175:5
**apply** 13097:3 13106:13 13176:9,13
**appointed** 13154:14
**appointment** 13152:22 13154:10
**appreciate** 13083:1 13121:7 13134:22
**appreciated** 13087:15
**apprehended** 13174:21 13174:23
**apprised** 13134:3
**approach** 13116:1 13149:23 13181:4,6
**approached** 13088:21 13088:21 13119:10
**approaches** 13137:22
**appropriate** 13081:5 13113:9 13134:18 13146:8 13152:3,4,15
**approval** 13114:24
**approximating** 13176:25
**appèl** 13109:18
**April** 13085:16
**apropos** 13162:1
**area** 13153:5 13172:14 13173:17,22
**areas** 13156:10
**argue** 13081:25 13082:4 13086:11
**argued** 13148:5 13151:12
**arguing** 13092:6 13120:21
**argument** 13121:4,5
**armed** 13163:5
**arms** 13096:16 13163:10
**arrange** 13082:12
**arranged** 13158:19,20
**arrangement** 13145:5 13155:22 13157:5 13158:25 13188:14
**arrangements** 13086:10 13124:6 13156:4 13157:1
**arrest** 13100:7
**arrested** 13086:7 13094:12,16,17 13096:22 13097:20 13097:21 13100:9 13101:23,24,25,25 13103:2 13108:8 13123:20 13148:18 13148:24 13149:4,11 13153:14 13159:2 13174:24
**arrests** 13100:7

13166:20
**arrival** 13078:19 13182:24
**arrive** 13078:7 13156:17
**arrived** 13078:5 13087:9
**arrives** 13145:1
**articulated** 13147:18
**aside** 13115:2 13128:4
**asked** 13078:3 13083:16,19 13109:19 13125:5 13136:6,9,10 13137:12 13140:11 13140:12,13 13145:7 13160:19 13162:10 13168:1
**asking** 13097:25 13098:4 13111:18 13136:20 13139:21 13164:12 13173:1 13176:21
**aspect** 13117:13,16,21 13132:25 13175:19 13177:22
**assault** 13101:13
**assaulted** 13168:10
**assert** 13105:23
**asset** 13155:20,23
**assist** 13088:23,24 13095:23 13107:22 13157:14 13158:9,11
**assistance** 13102:18
**assisted** 13098:9 13136:2 13145:4
**assisting** 13088:12
**associated** 13119:17
**assume** 13097:8 13133:13 13183:2
**assumed** 13086:6 13137:2
**assumption** 13102:9 13137:13
**assure** 13107:19 13121:24
**assured** 13079:6
**attack** 13127:3 13129:7
**attacked** 13164:4 13168:9,23
**attainment** 13083:24 13086:25 13087:17 13087:22 13093:8 13133:3
**attempt** 13114:12
**attempted** 13101:12 13127:3
**attempting** 13126:22
**attend** 13153:18 13159:12,22
**attended** 13153:16 13160:3
**attention** 13086:21 13161:17 13166:4 13167:5,21 13179:22 13179:25 13185:24 13190:13
**attitude** 13080:22
**attorney** 13083:18
**attorneys** 13078:21 13098:9 13100:11
**attributed** 13110:5 13148:3
**August** 13078:1 13080:4 13101:5,10 13101:16 13104:9 13124:17 13128:17 13153:16 13165:19 13166:14 13167:1 13171:11 13172:1 13175:1,2 13182:1
**available** 13079:7 13082:17 13132:15 13132:20 13159:1 13161:18
**averment** 13079:17
**averments** 13079:5 13102:6
**avoided** 13138:19
**await** 13078:15
**awaiting** 13090:11 13104:23
**aware** 13116:20 13161:21 13162:23 13165:18 13168:2,7 13168:15 13169:12 13178:17,23
**Ayesha** 13119:3

**B**

**B** 13084:10 13114:3
**back** 13088:1 13089:24 13089:24 13090:6,10 13091:24 13117:18 13118:22 13122:2 13123:4,8 13133:14 13147:13 13149:4,5 13167:8,15 13172:5 13187:1,20 13188:2,4 13189:13
**background** 13137:25
**backs** 13121:15
**bail** 13100:10,12,15
**bakkie** 13170:6
**balancing** 13121:23
**bane** 13115:23
**Bar** 13104:22 13105:8
**barbed** 13161:19 13162:2,11
**based** 13087:24 13101:3 13103:10,15 13105:21 13106:4 13132:7 13153:2,7
**bases** 13105:10
**basis** 13080:10 13081:1 13082:2,7 13092:19 13097:5 13111:2 13121:10 13134:3 13136:7 13155:18 13164:11
**basket** 13190:5
**Bayer** 13114:14
**bear** 13085:4 13116:21 13146:14 13152:18
**bearing** 13177:22
**BEE** 13121:17
**beg** 13134:5 13185:21
**began** 13137:5
**beginning** 13107:16 13125:10 13137:6
**behalf** 13080:25 13114:18 13123:19 13127:8 13129:16,23 13130:24 13134:5 13144:1,2
**behartig** 13109:16
**belabour** 13117:11
**belief** 13107:11
**believe** 13087:18,21 13127:1 13142:5 13165:6 13186:12
**believed** 13130:7
**belongs** 13171:8
**benadeel** 13109:17
**benefit** 13145:24 13186:11
**best** 13107:6 13114:20 13114:23 13132:1 13135:8 13144:25 13181:22
**better** 13097:7 13135:23 13140:22 13156:9 13181:21
**bevind** 13109:14
**beyond** 13092:11 13117:2
**bind** 13151:2
**Bishop** 13145:1
**bit** 13092:15 13147:12 13167:8 13168:1 13171:12 13189:16
**black** 13107:2,3 13119:4
**blatant** 13108:24
**Bloemfontein** 13083:18
**blow** 13091:15
**blush** 13122:14
**Board** 13084:14 13095:15 13096:12 13124:9
**bonus** 13118:10
**books** 13120:6
**Botes** 13153:6,6,16 13156:7,12,16,22 13159:22
**Botha** 13174:6
**bound** 13080:5
**brave** 13140:11,24
**breadwinners** 13126:2
**break** 13115:14 13147:4
**breakdown** 13103:17 13103:24
**breath** 13089:1
**bridge** 13078:17 13150:1 13172:8
**briefed** 13154:21
**briefing** 13153:17 13156:20,21,23
**briefings** 13153:19 13160:2
**briefly** 13106:7 13149:18 13180:15
**Brigadier** 13159:8 13162:12 13179:20 13183:24 13185:1,1 13186:3,5,14,15 13189:13
**bring** 13086:21 13117:18,23 13126:5 13133:19 13140:13 13140:14 13145:23 13179:21
**bringing** 13145:4
**broader** 13177:12
**brothers** 13126:1 13131:4
**brought** 13124:3 13126:12 13132:2 13147:11 13161:4,12 13167:4,5 13190:12
**brutal** 13126:21 13130:5
**bucket** 13088:4
**buckets** 13088:3
**Budlender** 13080:11 13082:10 13083:10 13090:16 13132:23 13132:24 13133:17 13133:19 13148:12 13148:14 13189:11
**building** 13134:16
**Bulelani** 13166:3 13175:21
**bullet** 13108:19 13164:16,18
**bullets** 13129:2 13175:4
**Burger** 13152:9
**buses** 13087:14
**busy** 13078:8 13088:14 13101:19 13120:21 13138:1 13173:15
**butterflies** 13105:9

**C**

**C** 13109:7 13111:23 13114:15
**calamities** 13098:25
**Calitz** 13162:12 13183:24
**call** 13088:4 13091:25 13098:11 13102:1,7 13105:8 13114:12 13115:23 13122:11 13175:22 13176:12 13176:17
**called** 13078:15 13084:15 13087:19 13096:3 13110:3 13119:2 13140:24 13149:3 13151:16 13158:11 13180:4
**calling** 13114:21
**calls** 13088:18 13104:22
**can't** 13177:15 13186:21 13187:3
**Cape** 13110:14 13114:15
**capital** 13114:3
**Captain** 13143:1 13182:11
**carried** 13138:6
**carry** 13082:24 13086:19 13110:24 13121:3 13134:12 13149:1 13152:19 13174:14
**carrying** 13138:3 13183:20
**CAS** 13179:17
**case** 13085:23 13090:10 13091:19 13106:8 13107:1 13108:5 13109:3,4 13111:8,12,13,14 13114:14,15,16 13115:3 13125:15 13126:17 13127:1 13128:8 13138:8 13141:4 13148:20,25 13155:3 13156:2,9 13157:13 13164:1 13170:15,16 13187:4
**cases** 13081:23 13106:2 13109:4 13114:6,11 13119:1 13126:2 13156:1 13168:12 13188:3
**cast** 13180:4
**CAS118** 13171:9
**CAS69/08/2012** 13170:22
**category** 13094:10
**cause** 13078:19 13108:13 13115:18 13116:3 13129:4 13150:7
**caused** 13099:1
**causes** 13101:14
**CC** 13153:3 13155:19
**cell** 13115:9,11,11 13181:17
**cent** 13088:7
**central** 13127:20
**certain** 13130:8 13139:5 13153:9
**certainly** 13080:13 13096:19 13178:19
**chairing** 13182:25 13184:10
**Chairman** 13136:16
**chambers** 13078:15 13146:23
**chance** 13122:6
**change** 13083:17 13145:23 13189:8
**changed** 13128:24 13140:4 13174:16

**changes** 13165:15 13168:4
**changing** 13141:9
**character** 13122:16,17
**charge** 13128:20 13180:17,22
**charged** 13107:5,14,21
**charging** 13126:18
**Chaskalson** 13187:21 13189:3
**check** 13141:17 13144:14 13161:9 13176:20
**checked** 13166:19
**chief** 13148:12 13183:12
**choice** 13116:4
**choose** 13183:1
**chopper** 13153:9,21 13160:6
**circulate** 13083:13
**circumscribes** 13105:10
**circumstances** 13106:10 13108:15 13110:9 13114:22 13137:24 13141:8 13168:24 13173:7
**cited** 13086:5
**citizen** 13139:7
**citizens** 13088:22
**Citizens4Marikana** 13088:18
**civil** 13126:8 13131:24
**claims** 13126:8 13131:24
**clarified** 13145:14
**clarify** 13096:11
**clarity** 13097:23,24 13132:25 13133:5 13175:17,20 13188:20
**classified** 13156:24 13182:12
**clear** 13102:16 13111:22 13130:4 13133:19 13148:1 13167:15
**clearly** 13108:21 13110:9 13126:10 13132:22 13133:12 13137:5 13144:15
**client** 13114:21
**clients** 13078:4,15 13086:12 13087:9,25 13115:6
**client's** 13114:20
**close** 13145:25 13146:4
**closure** 13097:18 13119:7 13126:5
**coin** 13088:7 13153:8 13156:25 13157:2,2
**coins** 13088:6
**colleague** 13083:16 13097:11
**colleagues** 13090:16 13094:25 13148:15 13185:23
**collected** 13088:5
**collection** 13088:2,11
**collision** 13099:1
**collusion** 13151:16 13152:15 13160:12 13175:24 13176:24 13177:8,19 13178:1
**collusive** 13151:19
**Colonel** 13140:25 13141:1,1,4,5,17 13142:13 13143:1,6,7 13144:11,14,22,25 13182:1
**combination** 13089:3 13099:2
**come** 13078:22 13086:15 13088:1 13089:2,24,24 13091:24 13110:13 13119:14 13122:12 13122:18 13123:4 13127:25 13133:14 13134:16 13141:13 13141:17 13149:5 13156:22 13176:13 13178:20 13186:5 13187:11,12,16 13188:4,22
**comes** 13088:20 13096:18 13098:10 13133:5 13144:18 13147:13
**coming** 13090:6,10 13139:1 13160:23 13165:5 13170:1,23 13173:20 13174:7 13182:5,7 13185:2 13186:18 13189:13
**command** 13130:4 13156:7 13183:9,18 13183:23
**commander** 13099:6 13128:20 13146:2 13153:20 13160:9 13165:9 13166:23 13179:13 13181:15 13181:16,19,20,21 13182:25 13183:1,10 13183:11,24
**commemoration** 13088:3
**commence** 13079:13
**commenced** 13085:9
**commencing** 13078:3
**comment** 13136:9 13137:13 13148:13 13149:16 13152:16 13154:1 13184:4 13186:5
**Commentary** 13113:24
**commenting** 13186:11
**Commissioner** 13089:6 13089:10,12,17 13090:8 13144:16 13150:14,17,21 13154:21 13162:1 13171:18,20 13176:2 13180:24,24 13184:2 13184:6
**commissioners** 13078:14 13091:4 13100:14 13118:9 13159:12
**Commission's** 13085:12,18 13126:10 13128:2 13131:2,16
**commit** 13138:13
**commitment** 13173:5
**committed** 13091:12 13130:5
**committing** 13138:15
**common** 13108:12 13129:3
**communicated** 13089:23
**communication** 13160:23
**compact** 13100:6
**Comparatively** 13140:8
**compare** 13135:20
**compile** 13165:6
**compiled** 13165:7
**compiler** 13165:6
**complainants** 13170:21
**complaining** 13168:22 13168:23
**complaints** 13168:8
**complete** 13094:21 13135:9 13169:6 13175:10
**completely** 13169:6
**completeness** 13179:8
**completion** 13097:10
**complexion** 13090:18
**comply** 13139:5
**composed** 13092:19
**compromise** 13138:11
**compromised** 13091:17 13091:23
**concede** 13104:19
**conceded** 13147:3
**concentrator** 13172:12 13172:13,14 13173:16,17,22,24 13174:1,1
**concern** 13097:4 13147:3,4,6 13175:19
**concerned** 13079:2 13080:12,22 13089:25 13104:11 13123:24 13144:22 13145:20 13176:13 13179:4 13188:20
**conclude** 13134:10
**concluded** 13135:6,9
**concluding** 13113:13 13121:9
**conclusion** 13100:16 13121:9 13131:14
**concur** 13162:17
**conditions** 13100:15
**conducive** 13137:19 13140:5 13141:24
**conduct** 13084:12 13110:8 13130:16,20 13151:2
**conducted** 13118:8 13129:4
**confidence** 13121:18
**confident** 13187:16
**confirm** 13141:5 13143:7 13145:16 13171:9
**confirmed** 13156:14
**confirms** 13161:25
**conflict** 13136:8,19 13137:20 13138:6,22 13140:22 13144:4 13157:24
**confusing** 13157:21
**conjunction** 13100:18
**conscious** 13173:4
**consequences** 13131:16
**consider** 13079:20 13112:1 13120:16 13139:14 13147:12 13152:4
**considerate** 13141:11
**considered** 13112:4 13147:19
**considering** 13106:23
**considers** 13152:3
**Constitution** 13161:2
**Constitutional** 13085:6 13085:7,19 13086:6 13091:16,17 13096:14 13102:23 13104:6 13132:19
**constitutions** 13107:17
**construction** 13158:22
**construed** 13122:1
**consult** 13188:8,15
**consultation** 13147:23
**consultations** 13188:6
**consulted** 13109:3 13147:9,15
**contained** 13094:4 13102:24 13148:2
**CONTD** 13135:4 13160:10
**contemplate** 13108:3
**contended** 13150:3
**contention** 13144:1
**contents** 13168:2
**contested** 13102:23
**context** 13085:5 13106:20 13136:8,24 13144:5
**contingent** 13085:18
**continuation** 13108:14
**continue** 13108:20 13122:10,21,24 13124:10,12,25 13129:19 13140:21 13144:12 13156:23
**continued** 13140:23
**continues** 13091:5 13122:19 13123:1
**continuing** 13122:7,17
**continuous** 13155:17
**contracted** 13157:3
**contradicts** 13127:15
**contrary** 13127:25 13129:12
**contribute** 13090:4,5,6
**contributed** 13118:15
**contribution** 13145:6
**control** 13161:5 13165:8
**convenience** 13093:20
**convenient** 13187:2
**conventional** 13088:16 13090:20
**convey** 13083:16,19 13143:2 13160:20,22
**conveyed** 13141:3,15 13147:16 13160:24
**conviction** 13106:14 13114:10 13115:1
**cooperate** 13187:24
**coordinate** 13183:13 13183:19,24 13190:4
**copies** 13082:11,12,16 13082:16,18,23,24 13083:1,3,11 13136:10
**copy** 13079:11 13082:16,22 13083:2 13083:2,9 13162:3 13171:16,17,19
**correct** 13095:4 13096:23 13097:1,6 13098:22 13100:5 13105:7 13133:21 13135:1,11 13145:11 13146:20 13149:15 13150:10 13151:11 13159:16,21 13162:25 13163:18 13163:18 13166:8 13167:10,18,23 13169:1,10,20 13170:3 13171:5 13173:9,19 13175:12 13178:9 13186:16
**correction** 13104:9 13170:5
**corrections** 13169:18
**correctly** 13090:14 13137:5 13178:8 13181:13
**cost** 13103:4 13117:2
**costs** 13084:24 13090:1 13103:22
**couldn't** 13144:12 13179:5,9
**counsel** 13107:14 13146:23 13148:21 13148:24 13177:3
**count** 13123:11,12

13137:5
**counted** 13088:8 13137:11
**counter** 13131:2,7
**counterweighing** 13113:1
**counting** 13137:7,9
**countries** 13107:15
**country** 13139:6 13142:3
**couple** 13090:7 13116:2 13123:11,11
**course** 13094:24 13103:21 13110:25 13112:17 13115:22 13120:16 13134:15 13147:10 13149:8,19 13186:13
**court** 13081:18 13085:6,7,19 13086:6 13086:10,22 13087:18 13089:7,14 13089:14 13091:16 13091:17 13096:2,13 13096:14,15 13102:23 13104:6 13114:23,23 13133:4 13133:6,8 13150:4
**courts** 13107:9,12
**cousins** 13126:1 13131:5
**cover** 13083:5,11 13085:10
**covered** 13090:7 13099:13,16,19,23,25 13106:7
**covering** 13090:1 13174:6,10
**covers** 13108:10
**created** 13149:12 13160:14
**creates** 13172:20
**credibility** 13090:19 13091:15
**crime** 13107:5,14,22 13138:15
**crimes** 13130:6 13138:13
**criminal** 13101:22 13106:20 13107:9,12 13108:7 13113:24 13130:15,20
**criminally** 13101:11
**critical** 13124:13 13128:13,16
**cross** 13078:18 13136:6 13149:25 13150:23 13179:25
**crossing** 13078:16
**cross-examination** 13135:4 13147:6 13150:13 13160:10 13179:24
**cross-examine** 13111:6 13147:15 13185:18 13188:16
**cross-examined** 13162:7
**cross-examining** 13135:3
**cross-referenced** 13151:22
**cross-referencing** 13081:22
**crowd** 13101:9 13138:21 13172:3,3,9 13172:9
**crucial** 13117:4,7 13118:2 13128:8 13138:9,17,20 13184:19
**crude** 13093:23
**crudely** 13092:18
**cure** 13108:24
**current** 13096:17 13103:10
**currently** 13099:9 13101:19 13128:21 13147:6,9
**curtail** 13086:24

**D**

**Daar** 13109:11
**daily** 13153:17,19 13160:2
**damage** 13101:15 13116:4
**damages** 13138:19
**dan** 13109:12
**danger** 13116:1
**dangerous** 13135:14,16 13135:19 13138:3,12 13138:12 13139:4,8
**dared** 13109:19
**dat** 13109:8,10,11,13
**date** 13084:4,25 13089:7,14 13126:25 13127:8 13128:21
**dates** 13089:4
**day** 13103:1,3 13118:12 13124:20 13127:18 13128:23 13129:15 13135:13 13136:12 13137:14 13137:25 13138:4 13139:8,19 13140:8,8 13140:19,23,24 13141:22 13142:7 13155:14 13157:9,18 13163:4 13181:10
**days** 13084:15 13117:9 13172:24
**De** 13088:19
**dead** 13131:4 13187:6
**deal** 13086:19 13091:14 13097:15 13104:14 13116:15 13116:17 13149:3,7 13151:4 13152:2,13 13154:5,8,9 13162:12 13179:24 13186:20 13188:19,24
**dealing** 13099:20 13113:25 13115:16 13142:16 13144:19 13147:4 13152:9 13159:19 13175:25 13177:9
**deals** 13101:22
**dealt** 13109:3,5 13113:25 13137:4,21 13149:8 13150:24
**death** 13181:25
**deaths** 13101:11,15 13126:12 13131:23
**debate** 13095:20 13117:14,15 13175:18 13187:22
**deceased** 13086:8 13096:10 13097:17 13124:9 13125:8 13129:25 13130:20
**deceased's** 13094:25 13095:3 13097:14
**decide** 13096:3
**decided** 13174:18
**decision** 13080:8 13091:8,9,14 13107:2 13120:15 13133:8
**decisions** 13185:7,9
**decisive** 13187:5
**Declaring** 13084:12
**deemed** 13107:14
**defence** 13098:20,20,23 13110:7,8 13111:4 13114:23 13126:20
**defences** 13107:7
**defend** 13107:10
**defendant** 13107:20
**defendants** 13107:5,8
**definitely** 13176:11
**degradation** 13131:3
**deliberately** 13180:10
**demanded** 13111:17,19
**demonstrate** 13141:7
**demonstrated** 13180:12
**deny** 13115:17 13180:21
**denying** 13126:15
**department** 13079:10 13079:20 13155:2
**Departments** 13132:18
**departure** 13134:15
**depend** 13080:15
**depending** 13141:8
**depends** 13165:5
**deploy** 13155:14
**deployment** 13153:5
**deprived** 13114:25 13131:21 13132:1
**described** 13094:9 13096:21 13101:22 13150:25 13151:5 13180:1 13183:17
**describes** 13139:11
**designated** 13183:9,14
**designed** 13107:18
**desperate** 13137:1 13139:12
**detail** 13095:18
**Detective** 13179:21
**deter** 13129:3 13173:22 13174:7
**determination** 13091:4
**determine** 13100:21 13101:19
**determined** 13113:1 13137:22
**devastating** 13131:17 13131:17
**Development** 13132:19
**devise** 13088:15
**de-escalate** 13136:2
**diametrically** 13127:22
**didn't** 13122:17 13142:18 13145:8,13 13159:25 13167:15 13167:17 13169:13 13175:9 13177:23 13179:5,5,8,21 13182:4 13190:19
**die** 13109:9,9,18
**died** 13117:19
**difference** 13170:18
**different** 13118:18,19 13139:15 13141:8 13155:16,17 13165:5
**differently** 13137:3 13139:14
**difficult** 13089:17 13132:9 13146:11 13182:6
**difficulties** 13122:5
**difficulty** 13121:22 13149:18,19,20 13187:23
**dignified** 13134:14
**dignity** 13126:7 13131:19
**dimension** 13143:25
**direct** 13101:14 13124:16
**directed** 13174:2
**direction** 13127:12 13128:24,25 13129:3 13174:16,17
**Director** 13114:14
**disappeared** 13173:24 13174:3
**disarm** 13140:6
**disclosed** 13177:22 13178:2
**discretion** 13120:17
**discussed** 13147:7
**discussion** 13108:13 13120:11 13177:24 13179:6
**discussions** 13189:10
**dismissal** 13106:12
**dispersed** 13172:4,9
**disposal** 13144:3
**dispute** 13098:14,16 13127:20 13129:5 13130:10,24
**disputes** 13098:15
**disputing** 13129:13
**disruption** 13078:20
**disruptive** 13086:18
**distinction** 13097:14
**distinctly** 13152:9
**distribute** 13082:13
**disturbing** 13086:16
**divorces** 13142:17
**Dlomo** 13166:3,12 13175:21
**Dlomo's** 13166:9
**docket** 13164:4 13165:18 13169:21 13169:23,25 13170:1 13170:2,22,24 13179:20
**dockets** 13168:12 13169:19 13171:10
**document** 13084:10 13119:1 13166:18 13170:25 13172:22 13172:25 13173:2,6
**documents** 13081:12 13151:2 13153:9
**doesn't** 13082:25 13093:22 13104:17 13104:19 13106:21 13108:2 13117:17 13134:11 13168:21 13172:19 13176:16 13177:19 13178:1 13181:23 13184:2 13188:19
**doing** 13078:25 13083:10 13100:11 13111:17,19 13138:2 13156:20,21 13159:5 13182:13
**dollar** 13088:9
**dominant** 13092:1 13093:19
**don't** 13078:17 13082:11,21 13092:15 13095:8 13096:6 13098:15 13100:20 13113:5,7 13116:21 13117:10 13122:23 13125:19 13127:1 13134:16 13146:4 13162:9,17 13162:19 13163:11 13163:22 13171:13 13174:12 13178:4 13180:25 13182:4,11 13183:3 13186:23 13187:4,17 13190:14
**Dove** 13180:5 13181:2 13182:5,7
**Doves** 13180:4,9 13181:5 13182:12 13183:4
**dozen** 13102:6
**draft** 13168:7,13 13169:4 13175:6

13188:2,3
**draw** 13161:16 13179:25 13185:23
**drawn** 13098:15 13130:3 13166:3 13167:21 13177:25 13178:16
**dreamt** 13119:25
**drive** 13166:2
**drop** 13135:16
**Du** 13113:23
**due** 13115:4 13127:13 13127:15 13130:8 13149:8 13186:13
**duty** 13133:14 13151:6 13151:8 13161:3,6 13172:2

**E**

**E** 13107:4
**eager** 13088:1
**earlier** 13089:4 13099:21 13124:8 13157:12 13165:4
**early** 13143:16
**earth** 13173:25
**ease** 13140:12
**easily** 13099:5
**easy** 13091:8 13119:14
**economical** 13155:11
**EEE** 13155:11
**een** 13109:9,10
**effect** 13079:4 13090:18 13105:13 13125:1 13126:6 13152:11 13157:22 13161:24
**effective** 13115:1 13128:7,9
**effectively** 13081:8 13090:23 13092:9 13098:20 13105:19 13129:10 13131:6,15
**effectiveness** 13155:11 13155:12
**efficiency** 13155:11,11
**effort** 13088:12,23 13089:19 13090:6
**efforts** 13099:21
**eie** 13109:15
**eighth** 13153:9
**either** 13079:24 13083:24 13094:9 13105:15 13123:6,7 13139:3 13147:20,24 13148:19 13152:2 13170:18 13187:3
**Ek** 13109:8
**elect** 13144:20
**electricity** 13158:15,21
**electronically** 13083:13 13132:17
**element** 13139:25 13161:12
**elevation** 13104:5
**eleventh** 13153:15
**Elias** 13166:2
**emergency** 13156:2
**emphasis** 13107:17
**emphasise** 13147:2
**emphasised** 13143:20
**employ** 13102:19
**employed** 13084:23 13171:23,24
**employee** 13153:10
**employees** 13164:8
**employer** 13121:16 13154:18 13155:3 13161:3
**empowered** 13126:13
**en** 13109:10,17
**enable** 13091:7 13114:5,8 13134:14 13134:15 13155:4,20
**enabled** 13131:15
**enabling** 13131:9
**encircle** 13162:4
**encountered** 13172:2
**enforce** 13142:3
**enforcer** 13142:2
**engagement** 13083:18
**England** 13107:1
**English** 13109:22
**enquire** 13163:1
**enquiries** 13166:18
**enshrined** 13105:25
**ensure** 13091:20 13117:12,19 13121:25 13122:25 13142:4 13161:4
**ensuring** 13117:16 13132:1
**entails** 13114:19
**entered** 13190:14
**entering** 13173:22
**entire** 13112:2
**entitled** 13079:21 13086:11 13101:2 13111:15,25 13176:19 13177:1
**entity** 13085:13
**entrusted** 13110:7 13111:4
**environment** 13137:18 13137:21 13140:5 13141:24 13156:8,11
**equal** 13107:20
**equality** 13096:16
**equally** 13117:17
**equitable** 13084:21
**Eric** 13088:19
**ernstig** 13109:17
**escaping** 13174:19
**escorted** 13128:24
**essence** 13125:19
**essential** 13107:15
**essentially** 13125:3 13153:1
**establish** 13117:8 13141:18 13154:24 13155:7,9
**established** 13156:15 13178:15
**establishment** 13153:1
**Estate** 13142:1
**estimate** 13102:21 13103:6,7,9
**estimated** 13094:11,13
**estimates** 13102:25
**eternal** 13087:19
**event** 13086:19,23 13087:17 13095:24 13123:7 13130:22 13149:21
**events** 13084:4 13119:6 13123:7 13128:3 13164:24 13166:25 13175:2
**eventually** 13161:19
**eventuate** 13119:21
**everybody** 13082:13,23 13121:23
**everyone's** 13081:22
**evidence** 13079:6 13080:3 13082:17 13083:2 13099:8 13103:9,14,18 13104:1,14,25 13105:6 13110:3 13114:22 13115:4 13118:25 13124:16 13126:24 13127:7,13 13128:11,14,22 13129:8,14,22 13130:1,2 13132:16 13136:5 13147:7,17 13147:21 13148:12 13148:17 13157:19 13157:22 13161:22 13161:24 13162:13 13176:24 13182:19 13186:12 13187:14 13187:23 13188:12 13188:15,21 13189:3 13189:14,14
**evidential** 13149:1
**exact** 13088:5
**exactly** 13079:15 13103:19 13157:6,7 13158:24
**examination** 13150:24
**examined** 13136:7
**examining** 13180:1
**example** 13128:16 13129:20 13130:3 13137:20 13139:21 13141:23 13145:23 13184:25,25
**examples** 13128:16
**excerpts** 13172:19
**excused** 13134:13
**execute** 13182:17
**exercised** 13120:18
**exhibit** 13143:23 13152:4,7,17 13164:14,15,17,23 13165:4,10,13 13166:24 13168:2,8 13168:13,16,17,21,21 13169:14 13170:23 13175:3 13176:22 13177:24 13179:6 13183:8,10 13190:14 13190:19
**exhibits** 13169:25
**exists** 13151:8
**expect** 13157:15 13173:7
**expected** 13139:8 13179:6,9 13183:20
**expenses** 13085:11
**experience** 13119:22 13136:19 13144:4,23
**experienced** 13144:3 13145:2 13158:16 13181:22
**expert** 13136:7
**explain** 13119:9 13120:12
**explained** 13095:18 13097:13 13098:5,12 13133:1 13139:20 13183:1,15
**explaining** 13181:1
**explanation** 13127:10
**explode** 13137:2
**extended** 13085:19,22 13103:25
**extension** 13103:16
**extent** 13086:10 13096:3
**extra** 13082:16
**extract** 13111:12 13150:15
**extracted** 13151:1
**extracts** 13113:23
**extreme** 13138:22
**extremely** 13130:13 13135:17 13138:3 13140:22 13141:10
**eye** 13128:6 13173:12

**F**

**face** 13107:22 13120:9 13122:5
**faced** 13116:4
**faceless** 13154:23
**facie** 13149:15
**facilitated** 13146:6 13158:7
**facilitating** 13145:2,5
**fact** 13087:25 13089:18 13098:7,13,24 13099:4,8,12,15,19 13099:23 13100:14 13100:17 13101:3,6 13102:1 13108:20 13110:5 13118:6,11 13134:6 13135:13 13136:17 13151:15 13152:8 13153:2,6,11 13153:15 13169:21 13176:20 13177:16 13177:20 13178:1 13180:2,12 13181:7 13181:25 13182:15 13185:6
**factor** 13180:16 13181:6,24 13182:14 13184:16
**factors** 13160:11 13180:12,14
**facts** 13079:2 13080:16 13090:24 13092:10 13092:19 13093:23 13093:23 13094:1,2,3 13094:8 13098:2
**factual** 13079:4,17 13082:5 13102:6 13105:10 13151:18
**fail** 13107:6 13123:3
**failing** 13084:16 13123:3
**failure** 13110:4 13114:8
**fair** 13084:20 13091:22 13102:18 13106:11 13107:15,19 13115:3 13133:11 13146:4 13149:9 13169:1,5,6
**fairly** 13094:4 13147:18 13187:15
**fairness** 13106:20,21 13108:4,5 13109:1 13135:5
**faith** 13116:3
**falling** 13094:10 13182:7
**falls** 13096:4
**families** 13086:8 13094:25 13095:3 13096:4,10,11 13097:2,14 13123:19 13124:8,14,22 13125:2,21 13132:8 13144:2
**family** 13086:9 13131:9 13131:16
**Fanagalo** 13153:10 13157:14,16,20,25
**far** 13078:16 13079:1 13080:4,11 13089:25 13104:10 13105:6 13144:21 13145:20 13152:17 13178:19 13179:4
**fashion** 13130:7
**fatal** 13091:15
**fateful** 13117:9
**fathers** 13126:1 13131:4
**fault** 13115:6
**favour** 13114:21
**favourite** 13088:8
**fear** 13148:5 13157:7
**February** 13095:19,22
**feel** 13121:21 13122:16 13154:8 13161:3
**feeling** 13127:18 13140:2

**fees** 13090:2,3,6 13103:3
**fell** 13174:21
**fellow** 13101:11
**felt** 13139:19 13161:5 13179:12
**field** 13183:15
**fifth** 13153:4
**figure** 13085:24
**figures** 13102:8 13103:2,19
**file** 13125:13 13170:21
**filed** 13123:22 13170:21 13186:19
**final** 13168:20 13179:23 13184:16
**finalise** 13091:25
**finalised** 13168:3,4
**finally** 13131:25
**final-final** 13133:16
**financial** 13102:14
**find** 13100:17 13112:17 13121:20 13125:23 13135:21 13141:18 13183:25
**finding** 13111:24 13126:10
**fine** 13083:14
**finish** 13102:10 13115:24
**finished** 13120:5 13159:19
**finishing** 13116:6
**fire** 13170:6
**fired** 13170:15,17 13174:14 13177:16 13177:18
**firms** 13098:11
**first** 13084:2,13,19 13092:25 13093:11 13103:12 13104:24 13114:4 13118:12,12 13121:21 13122:14 13124:2 13127:8 13128:1,7,12,14,16 13128:18 13129:5 13130:11 13133:5,13 13133:15 13153:24 13161:17 13166:2 13175:19 13176:6,16 13180:16
**firstly** 13084:7 13087:24 13111:11 13111:13 13152:22 13171:8
**fitting** 13103:19
**five** 13078:20 13085:22 13087:4,5 13100:9,10 13100:12 13104:1 13140:11,24 13159:11 13172:11 13180:14
**flavour** 13088:11
**flight** 13083:17
**follow** 13142:13 13172:10 13175:18
**followed** 13142:15
**following** 13084:11,12 13109:7 13111:12,20 13140:8,19 13157:18 13162:22 13186:1,2,4
**follows** 13133:7 13148:16
**footage** 13127:5,11 13129:15
**footages** 13126:25
**force** 13129:1
**forced** 13131:6
**forget** 13117:16
**forgive** 13120:20 13184:15
**form** 13129:2 13148:19 13148:20
**formal** 13080:14
**forward** 13081:1 13153:5 13176:24 13189:2
**fought** 13163:20
**found** 13088:9 13106:3 13110:5 13119:13
**foundation** 13085:13 13134:4
**founding** 13079:16 13092:18,22 13093:14,17 13112:11 13120:24 13121:1
**four** 13104:24,25
**fourth** 13084:13 13153:3 13182:14
**framework** 13151:1
**free** 13147:24
**friend** 13170:8 13171:14 13172:18
**front** 13102:24 13171:4 13172:22
**full** 13128:7,9
**fullness** 13123:9
**fully** 13129:10 13131:5 13131:15
**function** 13181:19
**functionary** 13091:19
**functions** 13181:20
**fund** 13096:17
**fundamental** 13106:11 13107:15
**funded** 13096:12
**Fundi** 13119:3,4,7 13120:11
**funding** 13083:24 13084:1 13085:12,14 13085:16,18,25 13086:2 13089:9,13 13093:8,9 13124:9 13133:3
**fundraising** 13088:15 13088:17 13089:19 13099:21
**funds** 13086:25 13087:17,22
**furnished** 13142:10 13171:15
**further** 13078:6 13102:13 13128:11 13132:8 13143:24 13144:13 13161:16 13165:17 13167:8 13168:1 13169:16 13177:13 13178:20 13184:17 13185:15 13185:25
**future** 13084:22 13104:11 13126:8

**G**

**G** 13111:11
**gainsay** 13127:7
**Gallagher** 13142:1
**gap** 13120:7
**gathering** 13172:6
**geen** 13109:11
**gemeld** 13109:8
**general** 13099:5 13105:16 13115:18 13117:1 13134:15 13135:5 13136:4,13 13136:22,24 13139:11,14 13141:15 13143:24 13147:16 13148:2,3 13149:23 13150:13 13150:23,24 13151:3 13151:7,12,17,17,24 13152:21 13153:23 13153:24 13154:7 13160:11 13161:15 13162:21 13163:2,4 13164:13,22 13165:9 13165:18 13166:11 13166:23 13169:15 13171:3,8,9,22 13172:7 13174:4,22 13174:25 13179:23 13180:1,7,14,18 13181:3,6,24 13182:14,16,16,18 13183:12 13184:1,17 13185:24
**generis** 13105:19
**gentleman** 13143:15
**George** 13153:10
**geregtigheid** 13109:17
**geroep** 13109:10
**geskied** 13109:18
**gestures** 13112:21
**getting** 13083:12 13090:25 13155:16
**getuienis** 13109:10
**getuies** 13109:10
**gevolglik** 13109:18
**GGG12** 13163:14,15 13181:8 13182:22
**GGG15** 13163:4
**GGG4** 13145:20 13161:9
**ghastly** 13108:2
**Gideon** 13107:1,3,24
**give** 13092:8,10,14,25 13095:2 13124:16 13126:6 13128:14 13129:22 13141:23 13146:10 13149:2 13152:4,6 13163:8,12 13163:13,22 13173:5 13179:13 13181:9 13184:25 13186:11 13187:5 13189:14
**given** 13079:8,11 13081:11 13082:12 13103:6,7 13106:7 13118:24 13127:7,10 13129:8 13132:16 13136:20 13142:13 13162:9 13171:17 13172:24 13179:13 13185:1
**gives** 13148:17 13162:13 13174:11 13189:13
**giving** 13093:13 13128:22 13134:21 13150:7
**globally** 13152:3
**go** 13120:6 13136:2 13137:4 13140:1,1,2 13143:6 13150:6 13151:20,23 13154:7 13154:19,19,24 13156:5 13158:11 13162:2 13173:11
**God** 13144:5
**goes** 13086:17 13108:2 13108:15,21 13115:11,19 13165:17 13167:7 13168:1
**going** 13078:21,25 13079:2 13080:1 13081:8,24,25 13090:23 13092:8,10 13092:11,25 13102:11 13103:16 13109:24 13110:15 13118:25 13119:1 13129:22 13140:9 13142:20 13159:10 13159:18 13162:6 13176:17 13183:24 13186:7,21,24,24 13187:11,12,16 13188:4,16,22
**good** 13144:23 13157:25 13158:6 13190:10
**government** 13089:2 13102:2 13107:7 13121:16
**grant** 13114:8
**granted** 13095:15,17 13096:4,5
**granting** 13091:13 13105:13 13115:17
**gratification** 13116:5
**great** 13107:17
**grenades** 13129:2
**gross** 13106:5
**ground** 13091:11 13115:2 13148:8 13181:22 13183:25
**grounds** 13080:15,19
**group** 13168:5,13 13172:3,11
**gruesomeness** 13119:10
**guard** 13119:4
**guards** 13118:21 13176:4
**guidance** 13181:9,10 13181:18

**H**

**hadn't** 13098:4
**half** 13078:13 13104:7 13104:8
**hand** 13088:20 13100:20 13137:7 13139:7,16 13163:19 13165:25 13169:5 13175:9 13176:23 13177:24 13180:8 13186:21
**handicapped** 13171:13
**handle** 13139:20
**handled** 13137:3 13139:13
**handling** 13137:1 13139:12,15
**hands** 13082:19 13112:14
**happen** 13102:11 13117:17 13122:23 13147:13 13150:1 13181:18
**happened** 13090:12 13117:8 13118:1,12 13119:8 13122:9 13124:16,19 13125:23 13126:3 13128:3 13137:25 13138:20 13139:9 13140:17,20 13144:15 13156:2 13157:9 13158:3 13160:20 13164:3 13167:6,16
**happening** 13084:4 13090:9 13138:14 13141:25 13185:13
**happens** 13084:2 13089:20 13093:11 13117:13,20
**happy** 13189:7
**harassment** 13099:24
**hard** 13166:2
**Hassan** 13119:4
**hasten** 13190:19
**haven't** 13092:22 13170:7 13187:25 13188:4
**Hawk** 13181:2 13182:5

**Hawks** 13180:3,6,11 13181:3 13182:12 13183:3
**head** 13147:11 13185:3 13185:11
**heading** 13179:21
**healing** 13126:5 13131:10
**hear** 13119:7 13184:3 13186:4
**heard** 13080:13,18 13081:1 13091:21 13119:14 13122:7 13137:5 13181:12
**hearing** 13084:1 13087:23 13089:3 13093:10 13134:21
**held** 13100:16 13101:10 13114:25
**helicopter** 13153:8 13156:25
**help** 13080:1 13155:3 13170:8
**Hemraj** 13082:15 13089:6,12 13090:8 13144:16 13150:14 13150:17,21 13162:1 13171:18,21 13176:2
**het** 13109:8,9,11,15,17
**hey** 13169:5 13175:9
**he'll** 13187:5 13189:14
**he's** 13078:5 13134:16 13136:7,24 13142:17 13145:2,24 13187:15 13187:16,18
**HHH3** 13139:20 13180:21 13181:12 13182:23
**HHH49** 13152:18
**HHH50** 13166:7 13169:8,25
**HHH51** 13166:10 13170:7
**HHH52** 13171:1,3 13190:16,19
**hide** 13133:15
**hierdie** 13109:12,16
**high** 13081:18 13087:18 13089:14 13096:2,13,14 13133:4,6,8 13174:2
**highly** 13130:4 13156:24
**highway** 13137:8
**hijacked** 13180:2
**Hilani** 13114:24
**hindsight** 13145:24
**hire** 13107:6,9,10
**hires** 13107:8
**historians** 13123:10
**hitherto** 13187:24
**hold** 13081:21 13143:18
**holding** 13088:25 13153:5
**home** 13120:6
**hope** 13113:15 13121:19 13126:4
**hopefully** 13078:21 13119:21
**hopes** 13126:11
**hostile** 13137:23
**hour** 13078:14 13146:13
**hours** 13127:18 13161:10
**housekeeping** 13079:19 13083:6,15 13190:12
**hul** 13109:13,14,15
**hulle** 13109:10,11,13 13109:13,14,16
**hulself** 13109:13
**human** 13083:8 13086:9 13100:23,25 13126:6 13131:19
**husband** 13119:17
**husbands** 13126:1 13131:4
**husband's** 13119:8

**I**

**idea** 13114:17
**ideal** 13107:21 13108:15
**identified** 13154:17
**identifying** 13152:25
**idle** 13110:23
**iets** 13109:12
**illustrious** 13121:20
**immaterial** 13186:23
**immediately** 13188:1,9
**impact** 13091:10 13115:21
**impacted** 13126:10
**impartial** 13107:19 13151:7,10,15
**impatient** 13137:10
**implement** 13108:23 13183:21,22 13184:2
**implementing** 13116:18
**implications** 13189:2
**importance** 13090:8 13120:12 13181:15
**important** 13094:12 13099:6,9 13111:18 13115:25 13116:25 13117:9,18 13135:17 13140:6 13145:6 13149:9,12 13160:18 13175:18 13186:25 13189:1,5
**importantly** 13114:12
**imposed** 13112:1
**impractical** 13187:8
**impression** 13187:13
**improper** 13153:25 13160:14 13177:12 13177:13
**inadequate** 13096:4
**inasmuch** 13138:9 13173:2 13183:17
**inaudible** 13093:25 13109:21 13110:1 13117:2 13162:18 13163:23 13178:13 13179:1 13185:18 13190:1,18,21
**incident** 13128:17,19 13129:14 13131:19 13164:2,3 13175:1 13177:21,23 13178:2 13178:24 13179:7
**incidents** 13162:24 13169:7
**include** 13083:8 13101:8 13133:7 13175:10
**included** 13105:2 13121:1 13176:21 13179:7
**includes** 13102:15
**including** 13084:24 13114:6 13119:8 13126:25 13129:14 13165:14 13168:6,13
**incorporated** 13125:12
**incriminating** 13130:18
**incumbent** 13176:11
**incurred** 13084:24 13085:11
**inderdaad** 13109:17
**indicate** 13089:25 13137:16 13140:13 13156:13 13160:11 13185:19
**indicated** 13080:2,3,7 13087:24 13114:16 13121:19 13132:18 13133:11 13139:4 13157:12,17 13158:3 13165:4 13168:17 13169:12 13178:18
**indicates** 13122:2 13174:20,23
**indication** 13079:24 13089:23 13107:11 13110:4 13137:10 13146:11 13181:7 13184:17
**indications** 13151:18 13151:18 13180:1
**indicia** 13177:13
**individuals** 13152:25
**indulgence** 13078:13 13087:13 13125:18 13185:23
**industry** 13136:19
**inference** 13178:3,15
**inferences** 13130:2 13177:25
**inferred** 13176:25
**inform** 13159:24 13181:17
**informal** 13128:25
**information** 13141:14 13155:4
**informed** 13078:5 13079:9 13163:5 13180:17
**informing** 13079:19
**infringed** 13106:11 13131:19
**initiated** 13088:17 13140:10,15
**initiative** 13140:18
**injured** 13086:7 13094:10,16 13096:22 13097:19 13097:20 13098:17 13101:23 13103:2 13123:20 13147:8 13148:18,24 13149:4 13149:11,19,22 13177:19
**injuries** 13101:15
**input** 13184:21
**inputs** 13165:4 13184:23,24
**Inquiry** 13131:22
**insist** 13188:8 13189:6
**insisted** 13188:1
**inspection** 13129:4
**instance** 13133:13,15 13138:21
**instant** 13116:5
**institute** 13131:25
**instructed** 13124:21 13183:21 13184:1
**instruction** 13182:16 13184:7
**instructions** 13080:9 13124:11
**insufficient** 13162:2
**intangible** 13118:14
**intend** 13079:15 13131:24 13172:24 13179:24
**intended** 13120:3 13124:23 13133:6
**intends** 13102:4 13175:22
**intention** 13173:6
**interest** 13114:20 13117:1,10 13125:23 13126:9 13179:8
**interested** 13093:4 13184:3
**interests** 13115:5 13121:23 13129:17 13131:24
**interim** 13087:23 13089:8,13
**international** 13088:11
**interpret** 13110:16,22 13116:11
**interpreter** 13153:11
**interrupt** 13082:10 13113:6,8 13120:19 13142:8 13150:22
**interrupted** 13184:14
**interruption** 13152:1
**intervened** 13158:4
**interview** 13188:15 13189:4
**interviewed** 13187:14 13187:25
**intimated** 13090:15
**introduce** 13169:22
**introduced** 13145:22 13180:23
**introduction** 13092:12
**invalid** 13084:18
**investigating** 13101:4
**investigation** 13101:9
**investigations** 13166:20
**invincible** 13130:8
**invisible** 13130:7
**involved** 13087:20 13132:10 13145:9 13160:13,16 13170:20
**involvement** 13125:2,2
**involves** 13100:8 13114:21
**irregular** 13106:15 13148:7
**irregularity** 13091:11 13106:6,15 13109:5 13150:3
**irreparable** 13116:4
**irrespective** 13117:25 13118:1,6 13119:24
**irretrievably** 13112:9
**isn't** 13169:5,6 13175:10 13179:3 13187:1,6 13189:7
**issue** 13086:3,23 13092:1 13093:19 13098:13 13099:23 13108:7,12 13109:5 13117:14 13147:5 13155:2,10 13156:19 13176:15 13188:19 13189:15
**issues** 13083:5 13086:20 13102:7 13128:13,16 13161:12 13185:3
**item** 13154:5
**it's** 13080:24 13081:5 13081:22,23 13082:20 13084:11 13084:15 13086:18 13086:18 13089:17 13091:2 13093:7,7 13094:20 13096:18 13098:19 13100:1 13102:25 13104:6,16 13105:22 13107:2 13108:12,17,25 13111:18 13113:3 13119:20,23 13121:4 13121:13 13122:1,7 13125:11 13133:16 13134:12,18 13136:12 13137:7,15 13138:10 13140:14

13142:15 13143:14 13143:15,25 13146:11 13164:18 13164:23 13169:21 13170:10,25 13173:7 13175:16,18 13176:10,14,18,23 13179:18 13180:24 13183:7,16 13186:23 13186:25 13187:10 13190:16
**I'd** 13093:20 13116:21 13133:17 13180:14 13184:3 13186:4
**I'll** 13091:24,25 13092:14 13111:10 13136:13 13163:13 13164:19,20 13173:12,13
**I'm** 13088:25 13089:10 13089:19,25 13090:25 13091:2 13093:4,11 13096:1 13097:3,14,25 13106:10,16,17 13107:4 13109:7 13112:13 13113:6 13132:15 13137:9 13142:8 13161:10,21 13166:16 13167:14 13168:25 13169:20 13169:22 13171:17 13172:19 13173:1,4,9 13174:17 13180:22 13182:22 13183:7 13185:10 13186:8 13188:24 13190:15
**I've** 13089:20,21 13091:18 13093:2,3 13106:7 13108:11 13110:1 13111:13 13112:25 13136:10 13137:12 13139:19 13143:25 13160:12 13166:3,22 13169:12 13190:20

**J**

**J** 13106:8 13107:3 13111:10 13114:16
**ja** 13092:23 13098:1 13104:4 13105:4
**jaw** 13119:9
**JOC** 13141:13,16 13153:1,2,7,16,21 13155:7,9 13156:12 13156:14,15,17,18,18 13159:23,24 13160:8 13181:16 13182:24 13182:25 13183:1,11 13183:14,19,20 13184:10
**JOCCOM** 13182:15 13183:17 13184:20
**joining** 13121:20
**joint** 13153:3,4
**joke** 13122:14
**journalists** 13128:5
**judge** 13111:23
**judgment** 13085:8 13090:11 13104:24 13106:8
**judicially** 13120:18
**jump** 13111:20 13114:7
**jumps** 13094:24
**justice** 13079:10,20 13084:14 13102:8 13110:10 13116:8 13119:21 13123:14 13126:12 13129:17 13131:18 13132:3,18
**justifications** 13127:21
**justified** 13114:22

**K**

**kan** 13109:12
**keep** 13102:4 13136:16 13139:1 13172:8 13173:12
**keeping** 13086:5
**Kellerman** 13171:4,16 13171:23 13172:7 13173:23 13174:4,8 13174:22 13190:13
**kept** 13173:20
**Kgotle** 13143:15,16
**kill** 13126:21 13127:4 13135:18
**killed** 13098:17 13119:5 13126:2,16 13126:19,23 13127:24 13128:18 13132:2 13158:4 13164:4 13179:19
**killers** 13119:17,18
**killing** 13126:9 13127:22 13138:1
**killings** 13127:19 13128:23
**kind** 13087:20 13092:2 13105:19 13107:13 13113:12 13178:3
**kinds** 13120:3
**klaarblyklik** 13109:17
**Kluvet** 13166:3
**knew** 13142:14 13156:8 13157:12 13164:4 13169:3 13175:7,8 13177:23 13182:8
**know** 13078:17 13080:4 13088:14 13089:17 13091:18 13098:8 13102:8,11 13108:8 13115:23,25 13120:17 13121:15 13121:21 13122:25 13125:24 13126:23 13134:16 13135:18 13135:19 13136:16 13138:1,14 13141:22 13142:9,18 13144:17 13145:3,16 13146:2 13146:11 13152:1 13154:18,22 13155:15 13157:24 13157:25 13162:5 13165:15 13167:17 13168:6,11,19 13174:12 13175:21 13175:23 13177:1 13178:10 13179:5,5,8 13182:11 13186:17 13186:23 13187:4
**knowing** 13097:18
**knowledge** 13136:18 13160:2 13176:20 13178:3
**known** 13132:5 13145:21 13185:12
**knows** 13091:13 13138:8
**koppie** 13129:7 13153:13 13162:4
**Kwadi** 13153:11 13158:1,6
**K3** 13172:3
**K4** 13172:12,13

**L**

**L** 13164:14,15,17,23 13165:5,10,13 13166:25 13168:2,8 13168:13,16,17,21,21 13169:2,4,14 13170:23 13175:3,6 13176:22 13177:24 13178:2 13179:6 13183:8,10
**labour** 13158:2,3 13161:5
**lack** 13096:17 13097:7
**ladies** 13125:8
**lady** 13119:3
**laid** 13107:17
**large** 13106:23
**largely** 13151:4
**larger** 13115:21
**lasting** 13116:7
**lastly** 13102:6
**late** 13078:14 13146:22
**law** 13098:11 13105:20 13107:20 13135:19 13138:11 13142:2,3
**lawfully** 13127:24
**laws** 13107:17
**lawyer** 13107:22 13142:18
**lawyers** 13088:13 13102:5 13107:6,8,9 13107:10,11 13111:3
**lay** 13135:21 13138:18
**laying** 13135:24 13138:18
**lead** 13114:9 13130:1,2 13178:3
**leader** 13148:12
**leaders** 13080:3 13082:17 13083:2 13099:8 13103:9,14 13103:18 13104:2,14 13104:25 13105:6 13115:5 13129:23 13132:17 13145:19 13145:21 13147:7,17 13147:21 13187:14 13187:23 13188:12 13188:15 13189:3,14
**learned** 13083:16 13090:15 13094:24 13097:11 13111:23 13170:8 13171:14 13172:18
**leave** 13079:23 13115:12 13165:23 13166:16 13167:9,15 13167:17 13169:13 13189:9
**led** 13099:7 13106:14 13128:22
**Ledingwane** 13086:9
**leeway** 13092:15
**left** 13120:7 13174:10
**legal** 13079:17 13082:5 13082:7 13084:14,15 13084:17,21,24 13085:10 13088:24 13091:25 13092:19 13094:5 13095:4,11 13095:15,16,17 13096:3,12 13100:24 13101:2,14 13102:3 13102:16,22 13103:4 13105:21,24 13106:3 13106:5,13,24 13110:6 13111:15 13112:7 13114:5,9,19 13115:1 13119:1 13123:2 13124:9 13130:14 13150:25 13151:1,1,6 13189:5 13189:10
**legally** 13114:17 13122:5 13127:21 13135:20
**legitimacy** 13131:13
**legitimate** 13129:18 13131:24
**legitimise** 13128:8
**legs** 13174:19
**lends** 13117:15
**lengthy** 13190:6
**Lesotho** 13088:10
**letter** 13107:4 13109:7 13111:11,22 13114:3
**letters** 13111:22
**let's** 13078:11 13085:22 13086:17 13086:18 13090:10 13111:22 13118:10
**let's** 13152:16,17
**liability** 13101:23 13108:7
**liable** 13101:11
**liaison** 13152:22 13154:11,11
**lied** 13180:25
**Lieutenant-Colonel** 13157:20 13180:8
**life** 13088:22 13103:15 13131:20
**lifespan** 13103:10,12
**lift** 13088:19
**light** 13147:10 13175:14
**limitations** 13178:18
**line** 13096:18 13103:21 13114:11 13116:6 13136:10 13139:10 13172:4
**lines** 13150:18
**list** 13121:20 13159:18
**listen** 13082:14 13131:6 13137:7
**literally** 13121:7
**litigation** 13123:7
**little** 13092:11,14 13147:14
**lived** 13124:18
**living** 13129:25
**loco** 13129:4
**locus** 13097:3 13132:21
**long** 13090:2 13136:16 13146:11
**longer** 13113:15 13118:25
**Lonmin's** 13142:21
**Lonmin's** 13153:2
**look** 13108:18 13112:7 13123:10 13138:11 13147:14 13155:10 13164:14,14,23 13166:24 13169:21 13183:8
**looked** 13093:20
**looking** 13089:8,15,15 13113:1
**looks** 13174:18
**looms** 13106:22
**lordship** 13111:9
**lose** 13125:19
**lost** 13120:4 13123:9
**lot** 13087:9 13105:20 13114:10 13118:15 13138:19 13190:3
**loved** 13125:24 13126:9,11,16,18,20 13126:23 13127:3,17 13127:22,24 13129:16 13131:3,20 13131:22 13132:2
**lower** 13119:9
**LRC** 13086:8
**lunch** 13146:8,15 13147:4
**Lusu** 13106:9
**luxuries** 13107:12

**M**

**Madam** 13089:16
**Madlanga** 13104:4,6 13105:1
**madoda** 13140:11,24
**Magidiwana** 13108:18 13127:9,13
**magistrate** 13112:3
**Mahlangu** 13110:17,19 13116:10,15,16,19 13126:14
**maim** 13135:18
**main** 13084:8 13094:8 13098:14 13105:10
**Major** 13149:22 13183:25 13184:8
**majority** 13091:6 13120:2 13132:11
**Major-General** 13128:20 13134:25 13135:11 13137:15 13139:18 13142:12 13143:5,10,13 13144:10,21 13145:12,15 13146:19,20 13147:22 13149:20 13150:8,10 13151:11 13153:22 13154:3,10 13157:23 13159:3,7 13159:15,18,21 13160:17 13163:25 13165:3,12,22 13166:15 13167:3,10 13167:18,23 13168:14 13169:11 13171:5 13178:25 13179:16 13180:20 13181:11 13182:3,20 13182:23 13184:5,22 13185:2,11
**making** 13083:11 13096:1 13100:12 13120:15 13124:5 13150:6
**Maloti** 13088:10
**man** 13107:21 13144:5
**manage** 13152:23 13154:12
**management** 13138:21 13141:2,4 13160:21
**managing** 13183:14,19
**manner** 13122:1 13125:25 13127:17 13129:19 13137:22 13138:4 13139:21,23 13151:7,10,15 13156:24
**march** 13085:15 13089:18 13135:22 13138:10 13142:4,4
**marched** 13135:20 13136:1
**marching** 13172:3,5
**Marikana** 13101:16 13119:6 13122:11,12 13122:14,22,24,25 13124:17,24 13126:4 13151:13 13165:20 13171:9,25 13172:2
**mark** 13084:4 13112:15 13166:7 13190:19
**marked** 13081:20 13084:10 13166:10
**massacre** 13099:7
**material** 13153:4 13162:8 13174:13 13190:3
**materially** 13145:4
**Mathunjwa** 13145:25 13146:4 13180:17,22 13181:1
**matter** 13079:18,21 13083:15 13089:2 13090:17 13095:12 13097:4 13099:13,15 13099:19 13100:6 13104:14 13105:12 13106:21 13108:25 13112:3 13120:17,21 13121:9 13139:20 13150:5 13175:25 13176:23 13177:9 13187:5 13188:25 13189:17 13190:12
**matters** 13113:1
**maximum** 13146:13
**Mbombo** 13182:16
**McIntosh** 13140:25 13141:1,5,6,17 13142:13 13143:1,7 13144:11,14,22,25 13157:20
**mean** 13089:25 13091:20 13114:18 13115:4 13181:23 13187:12 13188:13
**meaningful** 13124:14
**meaningfully** 13091:7
**meaningless** 13097:21 13125:3 13131:8
**means** 13088:10 13125:2 13127:2 13129:14
**meant** 13149:6,6,7 13181:2 13190:2
**measure** 13126:5 13131:10
**measures** 13108:22 13109:6 13114:13
**media** 13119:12
**medical** 13153:5 13155:24 13174:25
**meeting** 13080:4 13143:18 13158:8,10 13159:23 13160:3 13179:7 13184:19 13185:10
**meetings** 13153:17 13161:7 13182:25 13183:16 13184:10
**member** 13142:11 13143:14
**members** 13101:13 13126:15 13131:9,17 13132:11,12 13139:1 13160:3 13172:5 13173:20 13180:3,7 13181:4 13189:4
**memorandum** 13155:1
**memory** 13169:13
**men** 13126:21
**mention** 13106:2 13145:18 13164:25 13167:1 13168:21 13169:7 13175:3 13184:19,21
**mentioned** 13089:22 13110:1 13143:2 13168:16 13169:2 13170:5,5,11
**Merafe** 13182:11
**mere** 13118:6,10 13177:16
**merely** 13184:13
**message** 13141:3
**microphone** 13093:25 13109:21,25 13163:23 13178:13 13179:1 13185:17 13190:18,20
**militant** 13180:3,7 13181:4,4
**million** 13102:12,13,14 13102:17 13103:7,8 13103:10,13,14,14,14 13103:17,18,18,19,20 13103:22
**mind** 13116:21 13146:15 13150:4 13152:18 13184:14
**mine** 13140:16 13158:11 13163:20 13163:20 13164:7 13165:20
**miners** 13096:24 13139:16 13144:1,6,8 13147:8,23,25 13149:20,22 13153:14 13160:13 13160:16,19,23,24,24 13161:13 13162:23 13162:25 13163:5 13164:7,10 13165:1 13168:22
**mines** 13157:24
**mini** 13119:20
**minimum** 13087:3
**mining** 13136:8,19 13144:5 13171:24
**Minister** 13084:14 13102:8 13103:20
**ministers** 13121:17
**minus** 13085:25
**minute** 13078:20 13118:13 13184:19 13184:21
**minutes** 13087:4,6 13113:16 13127:19 13159:11 13185:5,7,8
**misleading** 13173:3
**missed** 13089:11
**missing** 13119:8
**modern** 13115:23
**moet** 13109:18
**moment** 13083:12 13092:11 13118:19 13118:23 13120:23 13123:24 13150:6 13169:25 13173:12 13189:10,12
**moments** 13118:17
**Monday** 13154:21 13156:17 13157:17 13172:1
**money** 13088:8,9 13102:15 13107:9 13122:20
**Moneykana** 13122:22
**month** 13085:14 13103:1,4,10,12,15 13123:9
**monthly** 13103:6,8
**months** 13085:23,23,25 13086:1,1 13188:3
**Moolman** 13141:1,5 13143:1,7,7
**moral** 13151:6
**morning** 13078:3,25 13079:9 13120:11 13124:6 13132:16 13143:16 13147:11 13159:5,6 13161:18 13190:24
**Mosikidi** 13083:18 13096:9,9 13097:7,15
**motion** 13079:4 13081:9,16 13082:21 13092:9,25 13096:7
**mound** 13174:3
**mounds** 13173:25
**mouth** 13178:5
**move** 13078:22 13113:22 13172:14 13173:16
**movement** 13172:9
**movements** 13172:10
**moving** 13112:11 13128:25 13129:3 13150:15 13172:11
**Mpembe** 13099:5 13128:20 13134:15 13135:1,11 13137:15 13139:18 13142:12 13143:5,10,13 13144:10,21 13145:12,15 13146:20 13147:16 13149:20,23 13150:10 13151:11 13153:22 13154:3,10 13157:23 13159:3,7 13159:16,21 13160:17 13163:2,25 13165:3,12,22 13166:15 13167:3,10 13167:18,23 13168:14 13169:11 13171:5 13178:25 13179:16 13180:20 13181:11 13182:3,20 13184:5,22
**Mpembe's** 13136:22 13163:4
**Mpofu's** 13078:4
**Mthetwa** 13111:12,14
**murder** 13101:13
**muster** 13156:10
**mustn't** 13122:11
**Mutengwane** 13166:2 13166:12 13175:20
**Mutengwane's** 13166:7
**muti** 13130:8
**M-O** 13122:22

**N**

**name** 13088:12
**names** 13118:13
**national** 13107:17
**natural** 13113:12
**nature** 13102:20 13106:16 13116:8 13130:5 13136:21
**nearer** 13155:9
**nebulous** 13117:21
**necessarily** 13082:3 13090:2,3 13100:1
**necessary** 13111:25 13112:7 13129:1 13152:8,12 13154:8 13179:12 13189:3
**necessities** 13107:9,12
**need** 13102:3 13125:24 13128:11 13137:16 13139:6 13140:13 13141:7,10,13 13142:3,3 13143:21 13145:17,22 13156:10,13,25 13161:16 13178:22 13179:17,20 13185:25 13189:17 13189:22
**needed** 13157:11
**needs** 13082:22 13114:20 13115:8 13161:24
**negotiate** 13139:23 13140:1,9,11 13142:6 13144:8 13172:7
**negotiating** 13145:3
**negotiation** 13135:13 13136:9 13137:17,18 13140:10,16,21,24 13141:23,25 13142:1
**negotiations** 13139:16 13144:13,20
**negotiator** 13144:4
**neither** 13085:17 13105:8

**never** 13117:12,19 13120:8 13124:22 13129:17 13167:5
**new** 13088:18
**Ngalwana** 13146:25 13147:1 13148:11 13149:15,17 13152:6 13152:19 13161:20 13162:15,18,20 13167:13 13169:17 13170:4 13171:12,19 13171:20 13172:17 13173:1,14 13174:9 13178:7,12 13185:19 13186:7,17 13187:9 13187:17 13188:10 13189:21,25 13190:8 13190:11,22
**nie** 13109:8,9,10,11,12 13109:15,16,18,18
**night** 13155:14
**ninth** 13153:11
**noble** 13107:20
**Noki** 13130:21,21
**Noki's** 13130:21,24
**non-governmental** 13085:13
**normal** 13116:22 13134:12 13137:18 13141:22
**normally** 13114:4 13138:5,6 13155:8,9 13184:9
**notably** 13088:17
**notes** 13188:2
**notice** 13079:4 13081:6 13081:9,16 13082:20 13092:9,25 13096:6 13162:7 13172:18,24 13173:5 13186:19
**notwithstanding** 13184:6
**no-one** 13129:15
**Ntsebeza** 13083:17 13095:18,23 13136:7 13136:14,15 13137:3 13148:6
**Ntsebeza's** 13124:5
**Ntsonkota** 13080:24,25 13134:1,2
**nullified** 13111:3
**NUM** 13080:25 13134:5 13153:18 13160:3 13163:7,10
**number** 13094:14,23 13095:1 13098:7,10 13099:8,12,15,15,19 13099:23 13102:1 13103:24 13104:21 13106:1,8 13109:4 13111:8 13114:25 13129:24 13130:6 13137:11 13142:10 13152:5,7 13153:15 13154:16 13155:6,19 13155:24 13156:7,25 13157:10 13158:1,13 13158:16 13159:19 13160:4,5 13178:14 13179:17 13180:12
**numbers** 13094:11,14 13141:12
**numerous** 13106:2,2
**Nungu** 13125:9 13132:4
**Nungu's** 13125:20
**nutshell** 13084:9 13100:7
**N-E-Y** 13122:23

**O**

**oath** 13129:9 13134:25 13146:19 13150:8 13159:15
**objecting** 13186:8
**objection** 13146:25 13147:2 13148:9 13152:7,19 13162:17 13162:18 13175:14 13175:16 13187:9
**objective** 13129:14
**objectives** 13123:13
**observation** 13147:3 13172:8
**observe** 13137:8
**obtain** 13111:15 13112:6 13114:5,9 13123:2
**obtaining** 13106:24
**obvious** 13101:18 13117:10
**obviously** 13080:5 13090:11 13093:20 13094:4 13103:4 13106:19 13111:18 13115:16 13117:15 13118:18 13119:11 13120:24 13132:7 13164:8 13179:9 13189:7 13190:3
**occasionally** 13153:18
**occasions** 13144:6
**occurred** 13175:1
**October** 13085:15,17 13102:10 13103:11
**office** 13185:3,11
**officer** 13154:11,13 13158:2 13171:24 13179:18
**officers** 13128:18 13154:22 13183:4
**official** 13139:7,19 13177:16,21
**officials** 13121:16 13155:16
**off-chance** 13089:1
**oh** 13083:15 13089:16 13093:2 13100:4 13104:4
**okay** 13083:4 13091:1 13109:18 13112:23 13150:21 13164:21
**om** 13109:15
**omission** 13174:13 13190:20
**omstandighede** 13109:16
**once** 13081:1 13082:12 13085:19 13094:14 13111:10 13112:5
**Onder** 13109:16
**ondervra** 13109:9
**ones** 13121:21 13125:24 13126:9,12 13126:16,18,20,23 13127:3,17,22,24 13129:16 13131:20 13131:23 13132:2 13144:12
**one's** 13114:18
**one-sided** 13131:12
**ongoing** 13099:24
**onverwags** 13109:13
**onwards** 13164:14
**OOO4** 13161:9
**OO4** 13143:23
**open** 13164:19 13189:9
**opened** 13164:5 13165:19 13170:6 13171:10
**operated** 13156:9
**operation** 13099:7 13128:21 13151:14 13154:1 13155:8 13156:23 13165:10 13166:23 13180:2,11 13180:18,23 13182:19 13183:12 13183:13,19,25 13184:18
**operational** 13181:16 13181:20,21 13182:18 13183:23
**Operations** 13171:25 13172:2
**opinion** 13127:4
**opportunity** 13078:4 13091:21,22 13106:13 13111:17 13111:19 13112:6 13132:1 13149:2 13179:14
**oppose** 13079:10,21 13080:2,10 13132:19
**opposed** 13127:23
**opposing** 13079:25 13134:6
**opsig** 13109:12
**optimism** 13087:24
**optimistic** 13087:20 13123:5
**optimists** 13087:19
**orally** 13078:25
**order** 13084:12 13096:5 13114:22 13129:2 13131:23 13155:4 13169:1 13172:6 13174:19 13187:24
**Ordering** 13084:19
**ordinarily** 13084:23 13091:18
**ordinary** 13108:9 13119:19
**organisation** 13088:18 13088:20
**organisations** 13088:23
**organised** 13130:4,6 13158:10,10
**organs** 13119:8
**orientated** 13155:18
**original** 13181:14 13182:22
**outcome** 13083:25 13084:7 13090:17,19 13091:15,16 13093:9 13112:8 13117:25 13118:6 13119:24 13121:25 13129:18 13133:3,6,7,12,14,16 13133:16
**outcomes** 13118:10 13120:3,8
**outline** 13093:23 13094:1
**outlined** 13079:15 13095:24
**outlining** 13081:6
**overall** 13099:6 13146:1 13153:20 13160:8 13165:9 13166:23 13179:13 13181:15,19 13183:11,18,22
**overheads** 13090:1
**overlap** 13094:20
**overriding** 13098:16
**owner** 13115:12
**o'clock** 13132:16 13159:23 13190:24
**o'clock** 13079:7

**P**

**page** 13102:24 13109:7 13111:11,20,23 13113:24 13114:13 13136:12 13139:10 13169:21 13173:8 13181:13
**pain** 13131:11
**painted** 13126:20
**papers** 13097:16 13098:12 13100:24
**para** 13173:15
**paragraph** 13085:7,9 13085:20 13106:17 13106:18 13114:2,7 13136:18 13163:14 13163:15,16 13170:9 13170:10 13171:7 13172:1,7,12 13173:23 13174:4,5 13181:8,13 13182:22
**paraphrase** 13109:19 13111:10
**paraphrasing** 13100:20 13172:18
**pardon** 13109:8 13185:21
**part** 13088:8 13089:11 13089:19 13111:18 13114:16 13118:2 13129:11 13131:13 13133:20 13134:10 13145:17 13151:6 13162:8,24 13177:7
**participants** 13101:9 13108:9
**participate** 13091:7 13117:24 13118:2 13124:10 13129:10 13131:5,15,21
**participating** 13124:10 13124:25 13125:22
**participation** 13085:11 13097:20,21 13120:2 13122:21 13124:14 13127:16 13128:7,9 13131:7
**particular** 13108:5 13124:8,18 13127:9 13130:19 13138:15 13164:16,18 13189:15
**particularly** 13118:7 13119:3 13130:11 13181:20
**parties** 13079:8 13080:5,21 13082:11 13084:25 13086:5,11 13099:2,17 13102:2 13113:3 13132:18 13160:25 13164:10
**partner** 13130:21
**partners** 13121:17
**partnership** 13152:24 13154:24,25
**party** 13080:2,22 13101:14 13128:2 13131:1 13134:13 13176:7
**Pasha** 13127:9,13
**passages** 13106:25
**passed** 13088:3
**passive** 13181:6
**patent** 13108:17
**patiently** 13082:14
**paused** 13116:1
**peace** 13116:7 13124:23 13145:4
**peacefully** 13142:5
**peacemakers** 13181:5
**pending** 13083:24 13093:8 13125:7 13133:2,4
**people** 13088:22 13094:16,16 13096:21 13097:17 13098:16,24 13099:11 13100:9

13101:24 13104:22 13108:5 13111:1,3 13117:9,16,19,23 13118:19 13119:16 13119:16 13121:14 13121:17 13122:4,5 13122:12,13 13124:16,18 13135:18 13142:4 13143:3,6 13144:11 13147:22 13148:3 13153:19 13154:17 13154:19,23 13157:14,16 13158:4 13158:17 13162:11 13165:5 13168:9,10 13168:23 13169:19 13170:6,11,20 13172:10,11,14 13173:16 13182:10
**perceived** 13091:15
**perception** 13121:14 13160:13,14,15,18
**perfect** 13190:11
**period** 13084:5,6 13085:15,16 13086:1 13086:24 13089:8 13090:9,11 13101:16
**periods** 13089:14
**permanently** 13153:7
**peroration** 13121:4
**person** 13111:15 13115:9 13141:16 13145:2 13149:11 13152:23 13154:11 13162:7 13176:9,12 13176:13,14,15,17 13177:18 13183:18 13183:21,22
**personnel** 13153:5 13155:25
**persons** 13094:8 13101:15 13123:20 13126:13 13127:6,6 13130:10,23 13148:18,25 13149:4 13159:2
**persuade** 13125:6 13142:6
**phase** 13100:18,22,24 13101:7,19,22
**Phiyega** 13150:13,24 13151:3,7,17
**phone** 13115:9,11,12 13181:17
**phoned** 13142:16
**phones** 13115:11
**photograph** 13162:14
**photographic** 13161:23
**picture** 13169:1 13172:20
**pictures** 13127:1
**pieces** 13190:4
**pile** 13190:5
**place** 13100:8 13102:17 13102:18 13110:10 13113:12 13133:17 13137:17 13142:1,2 13145:5 13147:8 13148:8 13154:19 13155:8,12,13 13156:18,19 13158:8 13158:18,22 13159:1 13164:24 13176:3 13182:15
**placed** 13179:19 13186:12
**places** 13155:15
**plan** 13156:4 13182:18
**planned** 13089:18
**planning** 13160:1
**Plasket** 13106:8
**Platinum** 13171:25
**play** 13185:14
**players** 13183:14
**plead** 13125:6
**pleading** 13145:19
**please** 13082:18 13092:15 13115:10 13121:10 13152:20 13163:12 13174:14 13184:15
**pleases** 13080:24
**point** 13086:3 13087:16 13091:24,25 13092:1 13095:24 13096:1 13097:10 13098:3 13104:20 13105:18 13108:10,11,11 13112:24,25 13113:8 13113:25 13115:14 13115:15 13119:10 13120:1,25,25 13121:22 13122:4,8 13133:19 13135:8 13136:5 13139:5 13150:2,7 13152:18 13152:24 13162:16 13162:21 13164:6 13168:20,25 13169:8 13170:4 13174:2,5,13 13174:25 13175:5,8 13176:18,21 13178:5 13179:23 13187:6,20 13189:6,18
**pointed** 13090:14 13124:8
**points** 13108:3 13113:22 13116:9,25 13120:10,13 13132:21 13151:21 13152:21 13154:8 13161:16 13178:14 13178:15
**police** 13083:1 13098:18,21 13118:20 13121:16 13126:3,18,19,21 13127:4,7,12 13128:18,21,24 13129:1,7,13 13138:21 13139:6,19 13140:10,15,17 13141:21 13144:3,17 13144:19 13146:23 13147:3,7 13152:15 13154:16 13155:16 13156:16,21 13157:15 13158:4,14 13158:21 13160:19 13161:2 13162:2 13163:22 13177:20 13177:21 13179:18 13183:3 13185:4 13189:4,5,11
**policies** 13138:21
**policy** 13155:7 13160:8
**poor** 13107:21
**portions** 13136:11
**portraying** 13173:9
**pose** 13164:20
**position** 13079:20 13080:12,12,14,18 13081:1 13085:7,20 13096:11 13097:12 13098:5 13115:5 13135:23 13140:22 13182:9 13183:9
**positioned** 13181:21
**positions** 13080:6
**possessing** 13135:18
**possibilities** 13089:4
**possibility** 13123:4 13148:10
**possible** 13078:22 13099:24 13105:13 13119:23 13126:8
**possibly** 13089:13 13094:16 13130:23 13147:17 13183:23
**posted** 13159:24
**postpone** 13125:6
**postponed** 13091:6 13132:7,13
**postponement** 13079:1 13083:23 13084:5,5 13086:24 13090:21 13093:7 13095:25 13105:14,19,21,22,23 13106:4,12,24 13111:25 13112:6,10 13113:4 13114:8 13115:18 13120:16 13123:1 13124:2 13133:2
**postponements** 13113:25
**postulated** 13085:21 13089:5 13107:13
**posture** 13086:6
**Potch** 13182:10
**potential** 13091:12 13092:3
**practical** 13086:10 13187:2,7
**prayer** 13085:5
**prayers** 13085:1,2,5
**preceding** 13127:19
**precise** 13170:14
**preface** 13186:1
**prefer** 13189:9
**prejudice** 13082:25 13092:2,3 13093:19 13105:15 13108:17 13108:24 13112:25 13113:2 13115:18,20 13117:1
**prejudiced** 13110:9 13131:25
**prejudicial** 13108:19
**preliminary** 13086:20 13178:14
**premeditated** 13130:6
**premises** 13153:3
**preparatory** 13177:24
**prepare** 13107:7 13189:22,25
**prepared** 13110:8 13137:19 13188:12 13188:13
**prescripts** 13150:25,25
**presence** 13123:16 13187:25
**present** 13099:5 13107:7 13108:14 13115:5,8 13169:1,4 13175:6 13188:16 13189:4
**presentation** 13177:21
**presented** 13126:24 13165:11,13 13168:3 13168:5,8,13 13169:4 13169:14 13175:7
**presenting** 13109:1,2
**presents** 13178:5
**President** 13084:14 13091:20 13153:12 13158:7
**presidents** 13161:8,12
**presumably** 13104:14 13162:13 13169:4
**Pretoria** 13141:14
**prevail** 13115:20
**previous** 13080:6 13137:25
**prima** 13149:15
**primarily** 13126:4
**principal** 13085:2
**principle** 13104:18
**prior** 13155:22,22 13156:3 13157:1,5 13158:19,20
**private** 13083:25 13093:8 13098:20,23 13102:4 13116:15,17 13126:20 13133:3
**privilege** 13134:3
**probably** 13095:1,2
**problem** 13147:19 13148:15 13155:10
**problems** 13087:13 13158:15 13181:16 13181:18
**procedural** 13107:18
**Procedure** 13113:24
**proceed** 13079:5 13080:10 13087:11 13087:12 13116:3 13121:11
**proceedings** 13078:1 13079:22 13084:17 13084:22 13085:12 13098:14 13099:18 13101:8 13106:6,14 13106:16,22 13107:13 13111:2 13112:8,8 13128:2 13131:2,16 13133:20 13134:10 13135:6
**process** 13115:16 13116:2 13117:24 13118:2 13124:24 13126:22 13138:6 13141:23 13148:7 13158:18,23 13166:19 13190:6
**processed** 13153:14 13158:17
**processing** 13159:1
**procured** 13085:12
**proffered** 13189:8
**proffering** 13082:15
**profound** 13090:13,18 13091:2 13097:16 13117:12 13118:24
**prohibitive** 13090:4
**promised** 13083:19
**promises** 13136:16
**proper** 13101:2 13112:2 13137:22
**properly** 13150:5 13155:24
**property** 13101:16
**propose** 13082:3
**proposed** 13084:5 13182:1
**proposes** 13102:9
**proposing** 13113:6
**proposition** 13136:23 13148:20 13166:22 13180:6,9 13181:2 13185:25 13186:1,1
**prosecute** 13107:8
**prosecuted** 13126:14
**Prosecutions** 13114:14
**prospects** 13087:2,21
**protect** 13130:14 13163:10
**protesters** 13088:1 13101:10,12 13127:10,14 13128:18,23 13129:24,25 13130:3 13130:4 13135:14 13138:3,15,16,23 13139:1 13141:2 13142:6
**prove** 13175:24 13177:19 13178:1
**provide** 13084:16,20

**provided** 13096:17 13127:14 13129:21
**province** 13180:25 13185:13
**provinces** 13155:17
**Provincial** 13154:21 13180:23,24 13184:1 13184:6
**proving** 13177:7
**provision** 13102:11
**provisionally** 13099:18
**provocative** 13138:25
**public** 13089:18 13105:16 13114:14 13117:1
**pulled** 13089:22
**purportedly** 13099:10
**purpose** 13091:22 13176:22
**purposes** 13106:24 13117:6
**put** 13078:11 13081:1 13082:4 13091:16 13099:10 13105:13 13105:17 13114:23 13120:6 13121:8 13123:7 13132:6 13136:5 13137:21 13139:5 13140:12 13144:14 13147:21 13148:2,18,21 13149:12,22 13150:18 13151:17 13160:12 13161:17 13162:6,15,22 13163:2 13165:7 13166:22 13169:5 13170:13 13175:7,14 13176:8,10,18,19,23 13177:2,11 13178:4 13178:14,19 13179:12 13180:6,9 13180:15 13185:25 13186:22 13187:2,17 13188:5,22 13190:4
**putting** 13143:25 13149:1

**Q**

**quarter** 13146:16
**quashing** 13114:10
**question** 13089:11 13092:2 13106:23 13108:16,22,24 13112:4 13115:19 13130:23 13133:11 13136:14,15 13142:9 13144:25,25 13145:7 13145:9,13 13150:5 13162:10,10,12 13164:6,11,13,20,22 13167:7,25 13175:8 13175:11 13176:7,16 13177:2,5,6 13178:11 13178:23 13181:12 13184:12 13186:7,21 13186:24 13187:2,18
**questioned** 13110:2
**questioning** 13189:19
**questions** 13111:6 13142:21,22 13185:16 13190:1
**quick** 13108:3
**quicker** 13087:22
**quickly** 13151:21,24
**quietly** 13078:22
**quite** 13087:9 13090:12 13093:7 13100:5 13151:21,23 13152:10 13184:2 13190:6
**quotation** 13112:15
**quote** 13100:24 13112:19,20 13119:1 13119:1
**quoted** 13091:18 13114:7
**quote/unquote** 13120:5
**quoting** 13119:3

**R**

**race** 13120:5
**radio** 13181:17
**railway** 13136:10 13137:17 13172:4
**raise** 13082:19 13112:14 13173:14 13175:9 13177:23
**raised** 13098:21 13132:21 13148:15
**raising** 13162:16
**Raith** 13085:13
**ran** 13173:23
**rates** 13084:24 13103:4
**reaching** 13116:6
**reaction** 13136:22
**read** 13081:9 13082:21 13085:5 13111:14 13113:23 13125:8,16 13125:19 13136:13 13150:19 13151:25 13172:19 13173:2,8
**reading** 13100:22 13106:17 13107:4 13109:7 13118:12 13178:8
**real** 13116:6 13120:8 13121:8 13187:23
**realised** 13107:21 13118:18 13158:20
**realising** 13138:10
**realistic** 13103:16
**reality** 13086:5,7
**really** 13094:1 13105:22 13108:12 13112:24 13114:4 13115:20 13117:3 13120:4 13121:4 13122:6,15 13124:18 13137:11 13149:5 13152:11 13176:22 13177:6 13178:14 13180:7 13184:13
**reason** 13078:13 13125:22 13128:6 13146:22 13155:25 13180:25
**reasonable** 13084:20 13084:24 13087:2,21 13111:19
**reasonably** 13111:17
**reasons** 13126:4 13132:8,12
**recall** 13145:19 13154:20 13190:14
**recalled** 13149:21 13189:18
**recalls** 13154:16
**receive** 13166:18
**received** 13084:25 13174:24
**receiving** 13095:4
**recollection** 13144:22 13159:4 13190:17
**recommendations** 13126:13
**recommended** 13104:21,23 13105:3
**reconciliation** 13119:13,21 13120:8 13123:15 13124:23
**reconsider** 13188:7
**record** 13078:11 13082:21 13098:8 13100:1 13124:21 13129:11 13132:6 13133:17 13134:5 13136:17 13148:9,17 13149:11 13151:23 13152:1 13169:19 13180:15
**recorded** 13143:23 13185:9
**recording** 13165:19
**records** 13166:25
**reduced** 13117:7
**redundant** 13125:4 13131:9
**reeds** 13109:8
**refer** 13081:13 13100:2 13128:15 13162:14 13162:15 13169:15 13176:5
**reference** 13094:9,11 13094:13 13101:21 13105:25,25 13117:6 13135:15 13163:9,12 13163:13 13176:3
**referred** 13114:24 13153:8 13169:8 13170:23 13180:11 13190:18
**referring** 13084:10 13136:24 13141:21 13141:22 13142:19 13164:1,1,2,17 13171:14
**reflected** 13122:15
**refrained** 13176:21
**refusal** 13091:12 13106:4 13112:9
**refused** 13112:6 13163:19
**refusing** 13084:16
**refute** 13130:16
**regard** 13126:9 13129:11 13132:9 13155:6,19,24 13156:3,7,11,13,24 13157:4,10 13158:1 13158:13 13160:5 13175:20 13188:7
**regarding** 13127:23 13134:7
**regsverteenwoordiger** 13109:14
**regulates** 13151:2
**relate** 13090:9 13127:19
**related** 13100:7 13158:3
**relates** 13096:21 13104:11 13117:22 13147:5 13153:2
**relation** 13086:4,22 13126:7 13128:13,19 13144:7 13151:13 13161:9 13162:11
**relations** 13158:2
**relationship** 13151:19 13152:23 13153:25 13154:4,12 13156:6 13157:8 13158:6,9,12 13159:25 13160:15 13161:7,8 13177:12 13177:13 13188:7
**released** 13100:10
**relevance** 13100:13 13110:25
**relevant** 13094:2,3 13109:6 13111:21 13114:16 13128:3,21 13136:11 13162:13 13173:13 13176:12 13176:14
**relied** 13107:1 13111:11,12,14 13175:23 13177:7
**relief** 13079:1 13080:15 13081:6 13085:1 13090:23 13092:9,25 13093:5,6,12 13096:15,19,20 13099:20,22 13104:10 13132:25
**reluctant** 13188:24
**rely** 13079:3 13090:24 13092:10 13097:18 13173:6
**relying** 13106:25 13114:13 13172:24
**remain** 13122:13 13124:24
**remainder** 13174:22
**remarks** 13113:13
**remedial** 13114:12,13
**remedy** 13190:19
**remember** 13100:22 13117:4 13143:17 13150:17,18 13152:9 13157:22 13159:2,7 13163:9,11 13168:16 13176:7
**remembered** 13108:6
**remind** 13093:22
**reminded** 13150:8
**remitted** 13112:3
**remove** 13182:1
**rendered** 13131:8
**Rensburg** 13111:10
**repeat** 13093:6 13177:4
**rephrase** 13186:9
**reply** 13086:11 13149:18
**reported** 13162:23
**reporting** 13165:23
**reports** 13165:1
**represent** 13087:25 13094:8,25 13096:10 13097:17 13098:8,17 13098:17,25 13099:11,17 13103:2 13104:1 13108:6 13111:5 13117:10 13119:16 13121:14 13122:4
**representation** 13088:24 13102:4,21 13102:22 13105:21 13105:24 13106:3,5 13106:25 13111:16 13112:7 13114:6,9,19 13115:1 13117:14 13123:2 13124:12
**representative** 13101:2 13102:3 13110:6 13125:20 13130:14 13153:12
**representatives** 13102:16 13139:22 13166:4 13189:5,11
**represented** 13098:9 13099:3 13114:17 13147:9,23 13148:4 13180:9
**representing** 13080:21 13086:8 13103:25 13109:1 13183:15
**represents** 13103:5 13132:5
**reputation** 13144:18
**request** 13134:4,7 13142:21 13143:3 13158:5
**requested** 13078:14 13085:25 13134:16 13139:7 13140:12,25
**requesting** 13141:11
**require** 13130:13
**required** 13128:14

**reserve** 13080:12,17 13081:2 13121:5
**residents** 13165:20 13167:2
**resolution** 13136:8 13138:6,22 13144:4 13157:24
**resolutions** 13137:20
**resolve** 13148:16
**resource** 13144:8 13157:11 13160:7
**resources** 13155:1 13184:24
**respect** 13084:17,21 13087:1 13096:6 13101:12 13110:4 13115:4 13152:10 13175:19 13187:23 13188:10,18
**respectful** 13129:16 13131:12
**respects** 13175:17
**respond** 13079:9 13080:14 13153:24 13181:12 13182:21
**respondent** 13084:23 13100:25
**respondents** 13084:13 13084:19 13086:5
**response** 13142:21 13144:9 13151:24 13180:16,18 13182:21 13187:1
**responsibilities** 13166:17 13183:2
**responsibility** 13101:14
**responsible** 13126:11 13139:7 13159:9
**rest** 13085:1 13119:6 13125:21
**restoration** 13123:14 13126:6 13131:10
**restorative** 13131:18
**rests** 13079:5
**result** 13111:5,24 13171:10 13185:2
**resultant** 13190:7
**resume** 13134:18 13146:12,16
**resumes** 13078:2 13087:7,8 13113:18 13113:19 13134:23 13134:24 13146:17 13146:18 13159:13 13159:14
**retain** 13163:10
**retrial** 13107:24
**return** 13087:23 13088:13 13089:4 13105:12 13125:7
**returning** 13089:7,13
**Reverend** 13136:6,14 13136:25 13137:9,13 13138:8 13139:11 13141:21 13144:18 13145:1,16,17,20 13157:13
**review** 13096:16 13148:8
**re-cross-examining** 13099:9
**re-examination** 13189:22 13190:7
**Ridder** 13088:19
**ridiculous** 13188:17
**right** 13097:6 13100:12 13105:24,24 13106:3 13106:5,11 13107:13 13116:18 13117:24 13117:25 13118:1 13126:6 13131:19,20 13131:21 13145:1,9 13157:22 13167:22 13169:9 13170:1
**rights** 13081:3 13083:8 13086:9 13100:23,25 13126:7 13131:18,23
**risk** 13101:18 13106:19 13106:20,22 13130:17
**rituals** 13130:9
**rivers** 13078:18
**role** 13183:10,11,13,14 13183:18 13185:14
**room** 13115:12
**round** 13136:4 13172:15 13173:21
**rounded** 13103:1
**rounds** 13115:14 13174:7,13,20 13177:18
**rubber** 13129:2 13172:15 13173:21 13174:6,20 13175:4 13177:18
**rule** 13162:5
**ruling** 13101:7 13116:24 13134:7 13176:7 13188:4,25
**run** 13130:17 13174:16
**running** 13103:22 13166:16 13183:13 13183:19
**rushed** 13172:13 13173:15
**R115** 13102:12
**R17** 13088:6
**R2** 13103:8
**R3** 13103:7,10
**R32** 13102:13
**R340** 13103:6
**R5-coin** 13088:7
**R83** 13102:13

**S**

**S** 13106:9 13114:24
**SACR** 13114:15
**safe** 13128:4
**safeguard** 13126:7 13131:23
**safeguards** 13107:18
**sake** 13097:10
**sang** 13138:4
**sangoma** 13130:9
**SAPS** 13099:1 13101:13 13103:7,13 13103:17 13104:1,24 13126:8,15,17 13127:5,15,24 13128:3 13129:23 13142:11 13151:2,6,9 13151:14,16,20 13152:23,24 13153:4 13153:7,18,25 13154:4,12 13156:18 13157:1,2 13160:3,15 13161:19 13166:1,5 13172:6,9 13173:6 13174:24 13175:24 13177:8,12,14 13180:3,7 13187:24 13188:2,5,7
**sat** 13118:7
**satisfied** 13112:3
**Saturday** 13156:15,16
**save** 13116:2
**saw** 13157:3 13172:11
**saying** 13087:18 13091:2 13093:19 13097:16 13105:14 13108:2,16,21 13112:5 13115:15,19 13116:16 13119:12 13119:15 13120:20 13147:14 13156:4 13162:2 13163:9 13166:16 13167:20 13185:11
**says** 13084:11 13085:8 13085:10 13091:18 13100:25 13109:6,8 13111:14,24 13113:24 13114:4,7 13114:16 13115:7 13119:15 13125:21 13136:15 13137:3,7 13139:13 13148:22 13155:7 13160:8 13161:2 13171:25 13172:7,11,12,14 13174:1,4,5,9 13179:4
**SC** 13080:9,11 13082:10 13083:10 13132:24 13133:24 13148:14 13187:21
**scale** 13084:22
**scanned** 13083:12
**scene** 13101:13 13127:11 13145:2 13182:2
**scheme** 13115:21
**scope** 13101:7
**Scott** 13180:8
**se** 13106:7,16
**search** 13091:22
**seasoned** 13144:3
**Seboloke** 13159:8 13185:1 13186:3
**second** 13084:13,19 13085:4 13086:23,23 13087:16 13089:11 13117:11,13,16 13124:4 13129:20 13145:17 13152:24 13156:7 13162:21 13166:3 13169:23 13170:1,2,4,16,24 13176:18 13177:2,4 13181:6 13185:23
**secondly** 13088:14,16 13102:20 13137:24 13138:8 13140:4 13141:17 13154:20 13155:8 13160:21 13161:1 13175:22
**seconds** 13163:14 13171:17
**section** 13114:1
**secure** 13085:16,18
**secured** 13085:14 13086:2
**securities** 13159:25 13164:3
**security** 13118:21 13119:4 13153:8 13154:14 13156:25 13157:2 13163:20,21 13164:7 13165:21 13166:13 13170:12 13170:16,17,19 13171:24,25 13172:5 13172:15 13173:20 13174:1 13175:4 13176:4
**see** 13081:11 13086:17 13086:18 13087:9 13089:4 13094:6,22 13094:22 13096:6 13105:2 13110:18 13112:22 13118:15 13124:12,18 13136:21 13139:2,10 13139:24 13140:25 13141:3 13143:2 13145:24 13146:14 13152:18 13155:25 13158:8 13163:17 13164:21,25 13165:10 13166:11 13168:20 13169:14 13171:7,22 13175:6 13180:25 13182:4,13 13183:3,8 13190:2
**seeing** 13126:11
**seek** 13079:1 13090:23 13092:9 13093:1,5 13096:15 13104:11 13126:3 13151:23 13175:17,20 13181:18
**seeking** 13097:23 13105:21,23 13106:4 13130:16
**seeks** 13100:19,20 13108:23
**seen** 13126:25 13132:10 13138:7 13170:7
**Segwai** 13174:18
**self** 13098:19,23 13117:25
**self-defence** 13098:18 13126:19
**Selikowitz** 13114:16 13115:7
**Semenya** 13080:9 13090:16 13133:21 13133:21,24 13189:11
**send** 13124:5 13132:17 13132:22
**senior** 13139:6,19 13154:13,22 13171:23,24
**seniority** 13104:20
**sense** 13117:18 13135:24 13158:20 13170:14 13184:3
**senses** 13089:2
**sent** 13188:2
**sentence** 13112:1,2,4 13114:4 13115:1
**Seoka** 13136:6,25 13138:8 13139:11 13141:21 13144:18 13145:1,16,17,21
**Seoka's** 13136:14 13137:9,14
**separate** 13175:25 13177:9
**separated** 13156:18
**September** 13084:2,9 13093:10 13099:14
**sequence** 13164:24 13166:25
**Seri** 13096:10 13109:3 13111:13 13132:5
**seriously** 13110:9
**serve** 13108:23
**served** 13082:23
**serves** 13159:4 13169:13
**service** 13088:3 13140:15 13154:16
**services** 13146:2,24 13157:17,18
**serving** 13079:16
**set** 13084:1,8 13093:10 13099:13 13101:20 13115:2 13168:24 13175:2
**sets** 13092:19
**setting** 13091:19
**settle** 13089:2
**settlement** 13128:25 13146:6
**seven** 13104:1,2 13108:19 13180:1
**seventh** 13153:7

**shaft** 13153:15 13172:3
**Shapiro** 13141:14,18 13141:19 13142:14 13142:14,18
**Shapiro's** 13142:9
**share** 13155:1
**sharp** 13174:4
**she's** 13176:17
**shoot** 13174:18
**shooting** 13127:5,11 13163:21 13170:9,20 13171:11 13176:4
**short** 13086:15 13093:7 13096:5 13115:23 13132:23 13134:11 13155:15 13159:11 13159:20 13178:23
**shortly** 13113:7,23
**shot** 13126:2,19,23 13127:24 13153:20 13163:6 13164:8 13165:2,20 13166:13 13167:2 13169:19 13170:6 13172:15 13173:20 13174:6,20 13175:4
**shots** 13170:15
**shouted** 13172:13 13173:16
**show** 13138:22 13156:6 13157:7 13159:25
**Shozi** 13080:17 13109:19 13123:21 13124:1 13125:14,17 13163:1 13175:16 13177:6
**side** 13111:7,23 13127:14 13128:10 13128:15 13175:14
**sidelined** 13180:10,10 13180:13 13181:8,23 13182:19 13184:18
**sides** 13092:4 13093:20
**sign** 13188:1,8,13,17 13189:7
**signed** 13189:6
**signs** 13112:15
**Sihari** 13114:6
**silence** 13118:13
**silk** 13104:23
**silks** 13104:21,21 13105:3
**silkworms** 13104:22 13105:7
**silly** 13115:17
**similar** 13088:15
**similarly** 13080:17 13107:5 13151:8
**simple** 13177:15 13183:7
**simply** 13091:3 13114:17 13115:4 13121:13 13127:1 13129:6,12 13131:13 13133:15 13179:12 13183:18
**Sinclair** 13143:14 13152:22 13154:11 13154:12 13156:8
**sir** 13123:21
**sit** 13131:6 13187:22
**sitting** 13088:19 13117:3
**situated** 13173:25
**situation** 13135:15,21 13136:21,23 13137:1 13137:16 13139:2,12 13157:11 13161:4 13169:2
**situations** 13141:9 13144:19
**six** 13085:14,25 13104:6,7,7,13
**sixth** 13153:6
**skewed** 13102:20
**skills** 13157:12
**skipping** 13173:13
**slaag** 13109:18
**slain** 13129:16
**slide** 13164:14,17,19,23 13183:8,10
**slides** 13165:1 13166:24 13167:1
**slow** 13116:8,13
**small** 13173:25
**societies** 13115:23
**solidarity** 13097:5,13 13123:19
**somebody** 13145:22 13162:12
**sonder** 13109:13
**song** 13138:4,5
**sons** 13126:1 13131:4
**sorry** 13082:10 13083:7,15 13089:10 13106:17 13112:13 13116:9 13120:19 13132:23 13142:8 13150:14,22 13153:12 13167:14 13177:4 13182:22 13184:14 13185:21 13190:23
**sort** 13089:7,14 13097:5 13153:25
**sorts** 13121:17
**sought** 13080:15 13086:2 13096:20 13133:1 13181:9,10 13188:22
**sounds** 13120:20
**sources** 13083:25 13086:25 13093:8 13133:3
**South** 13084:15 13088:6 13140:15 13154:15 13183:3
**Sowetan** 13119:2
**so-called** 13112:20 13124:3 13177:8
**space** 13155:16
**span** 13103:15
**speak** 13095:8 13098:7 13100:11 13111:4,7 13114:18 13117:21 13119:20 13120:5 13129:15 13130:23 13131:3 13143:3,8,13 13157:20
**speaking** 13090:5 13138:2 13140:8
**specialised** 13136:18
**specific** 13108:24 13126:13 13130:12 13130:15 13184:19 13184:21
**specifically** 13101:22 13109:6 13144:6 13151:5
**spectre** 13108:1
**speculate** 13184:13
**speedier** 13087:23
**spend** 13102:15 13103:7,8,12 13152:16
**spent** 13102:12,21 13103:9
**spoke** 13119:11,11 13135:15
**staatsgetuies** 13109:9
**staff** 13183:12
**stage** 13079:24,25 13080:1,22 13096:19 13113:7 13133:14 13146:5,8 13156:22 13168:7 13182:17 13183:21,22 13184:2
**stance** 13123:19 13132:6
**stand** 13114:18 13126:15 13189:17
**standi** 13097:3 13132:21
**standing** 13108:19 13117:25
**stands** 13107:20 13134:5
**start** 13078:7,19 13079:18 13081:5 13084:3 13093:21 13186:8 13189:23
**started** 13111:13 13116:16,17 13118:22 13119:25 13123:6 13128:25 13138:2 13158:4 13165:23
**starting** 13078:13 13105:18 13121:15 13123:5 13158:5
**state** 13080:21 13084:1 13087:1 13093:9 13102:1,4,9,19 13104:21 13107:16 13110:2 13111:9 13131:25 13141:6 13156:14 13157:1 13179:20
**stated** 13079:11 13163:18,19 13183:6
**statement** 13097:16,22 13125:8,19,20 13129:22 13132:3 13136:18 13141:6 13144:11,14 13148:19,22 13161:25 13162:14 13163:4,8 13166:7,9 13169:16 13170:13 13171:4,8,8,13,16 13173:10 13174:22 13177:18 13179:19 13180:16,21 13181:8 13181:14 13182:22 13186:2,19,22,23 13187:10 13188:6,17 13189:6,7 13190:13
**statements** 13148:2 13162:6 13166:1,1,4 13166:12 13168:24 13169:3 13170:21,24 13175:20,23 13176:2 13176:5 13177:7,11 13188:1,2,3,8,11
**states** 13173:23 13174:15
**State-appointed** 13131:22
**stating** 13101:18 13170:17
**station** 13158:14,21
**stations** 13185:4
**statistical** 13102:7
**stayed** 13172:8
**steps** 13084:20
**stood** 13179:6
**stop** 13147:14 13174:19
**stopped** 13172:4,6
**story** 13079:22 13120:1 13124:19 13127:14 13128:10,15
**strategies** 13137:19
**streamline** 13190:1,6
**strikers** 13143:3 13175:3
**stronger** 13101:6
**strongest** 13107:10
**structure** 13130:5
**struggle** 13087:20
**stun** 13129:2
**subject** 13097:11 13175:25 13177:9
**submission** 13129:17
**submissions** 13094:5
**submit** 13087:1
**submitted** 13102:22 13132:8 13148:19 13151:19 13180:12
**subpoena** 13147:25
**subpoenaed** 13176:10 13176:14,15
**subsequently** 13101:25 13145:3,5 13146:5 13149:4,5
**substantive** 13107:18
**subtle** 13117:22
**succeed** 13110:11
**succeeded** 13111:2
**sudden** 13125:25
**suddenly** 13128:23 13129:7
**suffered** 13105:15 13113:2
**suggest** 13091:11 13112:18 13151:25 13189:23
**suggested** 13189:2
**suggestion** 13188:14
**sui** 13105:19
**summarise** 13106:9
**summary** 13126:16 13164:23 13166:25 13175:2
**summed** 13085:19
**summing** 13085:6
**superintendent** 13174:2,5,10,17
**support** 13123:23 13124:2 13127:5 13132:6,10,12
**supporting** 13096:14 13125:12
**suppose** 13094:1 13176:8 13177:1
**supposed** 13143:18 13155:14
**sure** 13078:21 13097:3 13097:14 13100:1 13123:10 13125:18 13172:19 13174:17 13183:7
**surely** 13174:11 13183:21 13185:12
**surprising** 13128:1
**survivors** 13097:19
**suspect** 13173:23 13174:3,6,16,19,20 13174:21,23
**suspects** 13152:25 13172:16 13173:21
**sustainable** 13116:7
**sympathised** 13119:5
**system** 13088:5

**T**

**table** 13151:22
**tabulated** 13151:21
**tailor** 13080:1
**tainted** 13112:9
**take** 13080:14 13081:24 13083:9 13084:19 13086:14 13091:14 13092:15 13094:15 13095:2 13110:10 13113:6,9 13113:14 13117:1 13131:13 13132:23 13134:11,17 13140:17 13142:2

13145:8 13146:8,15 13149:24 13159:10 13166:6 13171:2 13177:25 13178:19 13189:23
**taken** 13082:16 13100:8 13104:16 13125:25 13153:13 13166:1 13179:19
**takes** 13116:8,9,24
**tale** 13124:19
**talk** 13084:7 13089:7 13137:6 13139:22 13141:14,16 13143:6 13157:9,15 13161:11
**talking** 13087:16 13089:8,12 13095:1 13119:22 13133:12 13148:1,3 13161:13
**talks** 13085:9 13114:15 13170:9
**targeted** 13136:1
**tariff** 13084:22
**task** 13091:3 13120:15 13121:22
**tasked** 13142:13 13158:6
**taskings** 13159:5 13184:25
**taught** 13119:22
**te** 13109:16
**tea** 13113:14
**team** 13147:3,7 13148:6 13171:15 13172:15 13173:6,20 13183:4
**teargas** 13129:2
**telephone** 13141:12 13142:10
**tell** 13078:25 13079:2 13079:12 13082:1 13090:23 13113:8 13116:21 13124:18 13124:19 13180:22 13184:3 13187:8
**telling** 13120:24
**temporary** 13099:21
**tempting** 13115:22,24 13116:5
**ten** 13150:25 13151:3
**tense** 13136:23 13137:16
**tenth** 13153:13
**term** 13085:18 13105:25
**termism** 13115:24
**terms** 13084:12 13094:9,11,12 13101:21 13104:20 13105:25 13115:20 13117:6 13138:21 13141:11,21 13145:19 13154:13 13154:17 13156:4 13158:18 13160:1 13161:2,6 13168:15 13180:2,21 13181:12 13181:13 13182:21 13185:3
**testified** 13127:8 13128:19,22
**testifies** 13186:4,6
**testify** 13128:5 13158:14 13178:20 13187:11,12 13188:23
**testifying** 13099:5
**testimony** 13097:19 13157:6
**texture** 13090:18
**Thabo** 13096:9
**Thando** 13080:25 13166:2
**thank** 13078:9,12,24 13079:14,19 13080:19,20 13081:3 13081:4 13082:9 13083:4,21 13086:13 13087:12,14 13089:16 13093:16 13093:18 13097:8,22 13097:23 13098:6,23 13100:4,6,21 13105:9 13109:23 13110:12 13110:13,20 13112:23 13113:17 13113:21 13115:13 13116:14,14,23 13121:12 13123:16 13124:1 13125:17 13132:13,22 13133:10,17,18,24 13134:2,8,20,21,22 13135:5 13142:25 13147:1 13148:11 13149:14 13150:6,12 13150:21 13171:20 13176:1 13185:17 13190:8,22
**thanks** 13078:12 13083:22 13086:19 13145:12
**that's** 13079:22 13081:20 13083:14 13085:23 13086:1,20 13093:11 13094:23 13095:25 13096:17 13097:4,6,25 13098:7 13098:11,20 13099:1 13103:7 13104:14 13105:3,4,5,8,22 13108:1,15 13110:13 13111:9,18 13125:15 13132:3 13133:11 13135:8 13137:10,12 13140:23 13144:24 13145:9,11,14 13163:22 13164:2,11 13166:8 13169:8,10 13170:2,18,22 13171:10 13173:17 13173:19 13174:10 13174:12 13175:2,10 13175:12 13176:15 13176:22,22 13178:9 13179:9 13184:20 13186:15 13187:5,20 13189:5,8,18 13190:7 13190:9,11
**theme** 13161:15 13177:12
**thereof** 13084:11 13096:16 13115:21
**thereto** 13176:25
**there's** 13082:18 13088:17,25 13089:1 13089:18 13102:17 13103:16 13105:20 13108:17 13110:3 13123:3 13143:24 13172:18 13176:3 13185:24 13189:16
**they're** 13078:16 13079:21 13080:5 13087:14 13097:5 13182:12
**they've** 13078:5 13097:3,22
**thing** 13086:21 13105:14 13118:12 13160:1 13161:11 13183:5
**things** 13089:21 13090:1 13099:10 13100:19 13101:20 13101:20 13115:21 13115:22,25 13117:7 13118:5,14 13119:24 13124:22 13126:15 13162:6 13173:13
**think** 13078:7,18 13082:21 13083:5 13087:3 13090:8 13094:10 13095:6 13097:15 13098:19 13104:3 13108:12 13114:24 13115:19 13116:10 13118:17 13118:24 13121:5 13133:18 13134:11 13135:8 13136:22,25 13141:6 13143:6,15 13145:9,16 13146:4 13147:12 13149:23 13150:7,7 13151:3 13159:17,19 13162:9 13162:11,15 13167:7 13167:20 13168:6,25 13169:8 13173:7,8,11 13173:12 13174:21 13175:13 13176:19 13178:4 13179:18 13185:19 13190:16 13190:18
**thinking** 13089:19 13122:18 13127:18
**thinks** 13173:15 13189:14
**third** 13084:19,23,25 13098:13 13152:25 13181:24
**thirdly** 13088:25 13140:19
**thirteenth** 13153:19
**thought** 13098:4 13148:8 13164:2
**threat** 13110:23
**threatened** 13182:4,8 13182:10
**threatening** 13137:10
**threats** 13181:25
**three** 13090:3 13104:25 13104:25 13105:6 13126:4 13128:17
**Thursday** 13100:8
**time** 13089:20 13092:15 13098:10 13098:10 13116:18 13123:9,10 13134:13 13137:2 13139:14 13141:9,9,12 13143:14,20 13146:2 13152:16 13153:21 13155:16 13156:16 13157:11 13158:14 13158:24 13159:4 13161:14 13162:13 13168:12,14,21 13169:3,14 13171:24 13173:5 13179:22 13184:8 13189:16,22
**timeframes** 13089:15
**times** 13118:19 13141:15 13168:17 13185:9
**today** 13081:25 13119:2 13151:5
**toe** 13109:13
**toegeskryf** 13109:12
**toevertrou** 13109:15
**Toit's** 13113:24
**told** 13086:12 13089:20 13128:10,15 13132:15 13134:18 13145:22 13163:23 13168:3 13182:9,13 13187:15
**tolerance** 13138:23
**tolerant** 13139:2
**tomorrow** 13079:7 13132:16 13189:24 13190:10,24
**tongue** 13119:9
**tool** 13157:3
**top** 13088:9 13169:21 13190:5
**torched** 13158:5
**torpedo** 13152:11
**touched** 13108:25
**Town** 13110:14
**toxic** 13099:1 13151:16 13151:19 13154:4 13156:6 13158:9,12 13160:11 13161:7 13175:24 13176:24 13177:8,19
**transcribe** 13112:22
**transcribed** 13079:3,6 13132:15
**transcribers** 13112:22
**transcript** 13079:16 13095:23 13100:2 13112:18 13132:22 13136:11,12
**transcription** 13079:12
**translate** 13109:22 13126:14
**transparent** 13160:21
**transpired** 13120:12
**transport** 13115:3
**travel** 13155:13
**TRC** 13119:20
**treated** 13118:11
**treatment** 13174:25
**trial** 13106:11,20 13111:16 13115:3
**trials** 13107:15,19
**tribunals** 13107:19
**tried** 13172:10 13174:16
**trigger** 13087:17
**trite** 13092:1
**triumvirate** 13098:11
**trivial** 13090:17
**true** 13119:13 13137:16
**trust** 13139:25
**trusted** 13144:5
**truth** 13091:22 13097:18 13117:8,15 13119:12,20 13123:14 13124:24 13125:23 13126:3
**try** 13078:22 13116:19 13124:6
**trying** 13088:15 13125:5
**Tswana** 13109:24 13110:22
**Tuesday** 13079:8
**Tupe** 13182:11
**turn** 13088:21 13115:10,10
**turned** 13121:15 13122:2
**TV** 13153:3 13155:19
**twelfth** 13153:17
**twin-cab** 13166:14 13170:6,16,18
**two** 13084:3 13089:21 13099:17 13100:11 13108:3 13112:14 13116:9,25 13117:7 13120:10,13 13123:6 13127:22 13128:15 13128:18 13139:21 13144:6 13147:20 13161:16 13163:14 13165:19,25 13168:9 13168:11,12 13169:7

13169:18,19 13170:5 13170:20 13175:17
**type** 13098:25

**U**

**ultimate** 13090:19
**umlungu** 13140:13,14 13140:25
**unable** 13085:16
**unarmed** 13142:5
**unbearably** 13131:11
**unbiased** 13151:7,10 13151:14
**uncertainty** 13187:10
**uncles** 13131:4
**unconstitutional** 13084:18
**uncontentious** 13151:4
**undeniable** 13113:3
**underestimated** 13118:3
**undergone** 13130:8
**undermines** 13106:6
**understand** 13082:8 13092:6,7,18,21 13093:3 13095:4 13133:20 13138:7 13145:7,13 13146:3,7 13148:14 13150:2 13160:18 13164:9 13167:8 13169:18 13181:15 13185:8 13186:18,20 13189:21
**understandable** 13116:3
**understanding** 13097:10 13155:1 13184:8 13185:6
**understood** 13090:22 13127:16 13135:7
**undertook** 13136:9
**unduly** 13113:6
**unenviable** 13091:3 13120:14,15
**unexpectedly** 13110:6
**unfair** 13130:13 13149:23
**unfortunately** 13078:17 13083:17 13111:21
**unidentified** 13129:21
**unintended** 13118:9 13120:3
**Union** 13153:12,12
**unions** 13140:16 13143:18,21 13145:20 13161:6,9
**unknown** 13124:25
**unlawful** 13084:18 13126:8
**unlawfully** 13126:16
**unpacking** 13084:3 13093:11
**unprofessional** 13137:1 13139:13
**unquote** 13112:19,20
**unreasonable** 13173:7
**unrepresented** 13147:22
**unrest** 13119:5
**unscientifically** 13085:21
**updated** 13168:18
**upheld** 13150:4 13162:17
**use** 13097:6 13102:15 13129:1 13135:17 13144:17,20 13145:8 13153:1,3,7,10 13156:25 13157:11 13157:16
**usual** 13085:1
**usurp** 13181:19
**utilise** 13144:22 13155:21,23 13156:1 13157:4
**utilised** 13138:13 13146:1 13184:24

**V**

**v** 13114:14
**van** 13109:9,10 13111:9 13159:8 13179:21 13185:1
**vantage** 13174:2
**varies** 13098:10
**various** 13151:1
**vehicles** 13158:5
**veil** 13119:4
**veld** 13173:24
**venture** 13091:9
**verdediging** 13109:14 13109:15
**Vermaak** 13182:1
**Veronica** 13130:21
**version** 13088:4 13098:24 13099:2,10 13109:2 13125:4 13127:5,7,15,25 13129:5,6,8,10,12,13 13131:2,7 13147:8,16 13147:18,21 13148:5 13148:17 13149:1,10 13149:11,22 13161:20 13163:2 13168:20 13169:6 13176:8,9,10,12 13188:21,22
**versions** 13127:19,23 13148:1,3 13165:7
**versuim** 13109:11
**versus** 13106:9 13107:1 13107:3 13111:9 13114:24
**victims** 13088:24 13091:6 13102:18,19 13117:23 13118:11 13118:21,23 13120:2 13123:3,16
**video** 13126:25 13127:4,11 13129:15 13136:21,24
**view** 13091:12 13101:1 13101:3,5 13102:2 13106:10 13124:15 13124:22 13127:2 13130:10 13131:3,12
**viewed** 13100:18
**views** 13136:20
**violation** 13131:20
**violence** 13136:3 13162:24
**violent** 13125:25 13126:21 13130:6
**virtual** 13093:17
**virtue** 13101:6 13154:15
**visit** 13146:23
**vitiates** 13106:6,16
**vitiating** 13106:22
**voice** 13122:3,6
**volatile** 13136:20
**volition** 13147:24
**volume** 13158:16
**voluntarily** 13147:24
**voorbereid** 13109:15
**vulgar** 13138:23

**W**

**Wainwright** 13107:2,3
**wait** 13078:3 13164:19
**waited** 13188:3
**Walker** 13157:13
**walks** 13088:22
**want** 13080:13 13083:2 13083:2,8 13086:14 13088:23 13095:8 13098:15 13100:2 13108:4 13110:15 13112:18 13113:5,8 13113:23 13115:24 13117:22 13118:15 13118:22 13120:25 13122:6,10,23 13125:24 13136:5 13141:3 13144:12 13147:15 13149:15 13149:17 13151:4 13163:22 13166:6 13176:13 13178:4 13186:10 13187:7 13190:7
**wanted** 13086:21 13112:24 13116:10 13119:7,7 13121:24 13126:21 13134:21 13135:12 13136:2 13140:2 13141:12 13163:9
**wants** 13082:18 13108:2 13110:21 13141:14,16 13144:17 13168:6 13185:23
**warning** 13172:15 13173:21
**wasn't** 13162:8 13167:21 13186:22
**Wasn't** 13157:19
**wasted** 13189:15
**wastepaper** 13190:5
**water** 13152:12
**wave** 13100:7
**way** 13092:12 13097:8 13105:13,18,24 13112:18 13118:8,10 13124:22 13129:6,13 13137:1,8 13139:3,11 13140:5 13147:19,25 13148:16 13149:18 13152:19 13156:9 13170:19 13178:5 13187:7 13188:25,25 13189:2,9
**ways** 13088:15,16 13139:15 13147:20
**weapon** 13139:8
**weapons** 13135:14,16 13135:19,22,25 13138:3,5,12,12,18 13138:18,24 13139:5 13139:17 13140:3 13163:19,22
**week** 13089:21 13101:5 13102:9
**weeks** 13090:3,7 13116:2 13123:11,11
**weighing** 13115:16
**weight** 13149:1 13150:2
**well-known** 13107:3
**went** 13115:10,14 13119:9 13141:1 13143:2
**Western** 13114:14
**we'd** 13081:2 13095:1
**we'll** 13078:20 13079:17,20 13086:19 13087:4,5 13087:12 13120:6 13123:4 13132:23 13134:11,12,14,17,17 13146:14,15,15 13186:24 13188:6 13189:15
**we're** 13078:13,24 13083:10,11,12 13087:11 13095:1 13123:24 13133:12 13170:1,23 13171:12
**we've** 13078:15 13080:13,18 13081:1 13081:11 13082:12 13085:21 13097:24 13099:12,16 13121:25 13134:3 13162:5 13166:24 13168:20 13169:24 13188:11
**We're** 13159:10
**We've** 13147:18
**whatsoever** 13149:2
**what's** 13098:5 13120:24 13144:8 13168:11 13173:9 13177:2 13185:9
**whichever** 13084:2 13093:10 13098:25 13133:4 13154:8
**who's** 13083:12 13088:19 13141:18 13176:8 13179:21
**who've** 13096:21
**widespread** 13107:11
**widow** 13119:4 13125:9
**widows** 13118:20 13119:22
**wie** 13109:14
**WILLIAM** 13135:1 13159:16
**willingness** 13145:8
**win** 13135:25
**win-win** 13135:14,24
**wire** 13161:19 13162:2 13162:11
**wish** 13080:21 13123:18 13133:22 13148:12 13162:22
**wished** 13163:5
**wishes** 13079:10 13132:19 13133:21 13134:9 13146:24 13176:9 13185:18
**withdrawn** 13099:18
**witness** 13099:4,6,9 13118:24 13129:21 13131:7 13136:17 13146:12 13147:5,5 13148:17,23 13149:2 13149:3 13152:2,13 13161:21 13162:9 13164:19 13170:8 13172:20,21,23 13173:8 13177:23 13178:18 13179:4,12 13185:18 13186:3,11 13187:20 13188:11 13188:12,16,17,21 13189:7,13,17
**witnessed** 13128:4
**witnesses** 13099:24 13110:2,3 13127:8,16 13127:25 13128:6 13130:22 13141:4 13147:15,18 13149:9 13149:13 13175:22 13178:20 13187:25 13188:1,5,8,15
**witness's** 13176:20 13186:25
**witness's** 13147:16
**wonder** 13152:12 13184:11 13187:22
**wondering** 13152:8
**Wonderkop** 13101:10
**won't** 13112:17,22 13142:22
**word** 13097:6,8

13109:12 13133:16 13173:8 13174:17
**wording** 13100:18
**words** 13084:23 13085:3,20 13106:19 13112:5 13125:20 13133:13 13138:23 13147:24 13178:4
**work** 13124:7 13134:12 13149:10 13154:13 13154:15 13155:5,15 13155:20,24 13156:11 13158:2 13161:1 13183:4 13190:3
**worked** 13103:1 13154:15 13156:15
**worker** 13137:6
**workers** 13087:25 13147:8 13168:22
**working** 13085:24 13160:14 13189:9
**worlds** 13135:8
**worms** 13105:9
**worst** 13090:7
**worth** 13122:7
**wouldn't** 13110:24 13118:9
**wounds** 13108:19
**written** 13079:4
**wrong** 13168:25 13169:20 13187:14 13190:15

**X**

**X** 13129:20,20 13130:15,19,24
**Xhosa** 13110:16
**Xolani** 13137:6

**Y**

**yawning** 13120:7
**year** 13102:13,14
**years** 13123:10
**Yelani** 13111:9
**yesterday** 13087:24 13099:23,25 13100:3 13108:13,25 13117:2 13118:20 13120:13 13122:9 13135:6,9
**yield** 13099:21
**you'd** 13082:4 13190:4
**you'll** 13100:22 13120:20 13145:18 13183:8
**you're** 13078:8,25 13079:2 13081:8,24 13081:25 13089:8,12 13092:6,8,10,11,24 13093:13 13100:5 13120:21,23 13134:25 13135:2 13145:7 13146:12 13159:15 13167:20 13173:13 13176:19 13177:1,9
**you've** 13098:5 13179:15 13183:15 13190:3

**Z**

**Zaneka** 13125:9
**Zyl** 13159:8 13179:21 13185:1
**Z1** 13136:24

**0**

**000** 13103:6
**09:31** 13078:2

**1**

**1** 13084:12 13085:9 13088:7 13094:8 13098:7 13100:18,22 13100:24 13101:7,8 13101:19 13106:8 13108:7 13114:15 13126:4 13127:11 13153:5,15 13171:7
**1A** 13081:20,21 13084:10 13102:24
**1st** 13104:8
**1-8** 13136:12
**1:30** 13182:15 13184:20
**10** 13083:3,7,11 13099:23 13100:8 13158:13 13159:19
**10th** 13165:19,23 13166:14,16 13167:1 13167:6,13,16,16
**10:02** 13087:8
**10:22** 13098:6
**10:41** 13106:2
**100** 13123:9
**11** 13102:1 13113:7 13166:24 13181:13
**11:29** 13113:19
**115** 13102:17 13103:20 13103:22
**12** 13086:1 13099:3 13105:10 13134:12 13160:4 13166:24 13182:22
**12-gauge** 13174:7
**12:09** 13130:10
**12:34** 13134:24
**12:54** 13143:13
**13** 13103:12 13139:10 13151:17,25 13152:21 13160:5 13166:24
**13th** 13128:17 13135:7 13136:10 13140:14 13140:20 13144:7 13154:17 13156:2 13162:23 13163:5 13164:24 13165:24 13166:17 13167:6,21 13171:11 13172:1 13175:1,2 13182:1,2 13182:24
**14** 13163:14,16,17
**14th** 13140:9 13153:13
**14:01** 13146:18
**14:20** 13156:13
**14:30** 13159:14
**14:50** 13168:11
**15** 13113:15
**15th** 13143:17 13158:8
**15:10** 13179:16
**15:29** 13188:19
**158** 13114:1
**16** 13101:5,16 13166:24
**16th** 13100:25 13101:10 13124:17 13144:6,15 13145:6 13146:7 13153:14,16 13156:3 13159:4,23 13161:18 13182:16 13184:20,23
**164** 13114:15
**18** 13085:23,25 13103:15 13136:12
**19** 13106:17

**2**

**2** 13084:18 13085:7,10 13101:13 13109:4 13126:7 13146:16 13154:16 13172:1
**20** 13103:1,3 13134:12
**2002** 13136:13 13139:11
**2003** 13114:15
**201.50** 13088:6
**2012** 13085:15 13101:5 13101:10,17 13128:17
**2012/2013** 13102:13
**2013** 13078:1 13084:2 13085:15,17,17
**2013/2014** 13102:14
**21st** 13080:4
**22** 13113:25
**22–28B** 13114:3
**22-28C** 13114:13
**24** 13103:14 13150:18 13161:10
**25** 13150:18
**25th** 13084:2 13099:13
**25/26** 13093:10
**250** 13094:13
**26** 13084:8,8
**26th** 13084:2 13095:18 13095:22 13099:14
**272** 13094:14 13100:15
**28** 13181:13
**28B** 13113:25
**29** 13078:1

**3**

**3** 13111:8 13114:25 13126:10 13136:18 13155:6 13172:7 13182:17 13183:21 13183:22 13184:2
**30** 13171:17 13185:22
**300** 13094:8,24
**34** 13101:11
**350** 13095:2
**36** 13103:18 13109:7
**39** 13103:13,14

**4**

**4** 13155:19 13170:9,10 13172:12 13173:15
**4.4** 13103:13
**43** 13164:14,17,23
**48** 13164:23

**5**

**5** 13155:24 13173:23
**51** 13169:8,25 13181:8
**54** 13103:18,18
**542** 13107:4

**6**

**6** 13099:8,12 13156:7 13159:22 13174:4,5
**6am** 13153:16
**6.1** 13103:17
**67** 13183:8,10

**7**

**7** 13099:15 13156:25
**78** 13094:11

**8**

**8** 13099:15 13106:1 13157:10
**806** 13111:11
**83** 13102:14

**9**

**9** 13079:7 13099:19 13101:5,16 13132:15 13158:1 13189:23 13190:10,24
**9th** 13124:17