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TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 148 14 NOVEMBER 2013 PAGES 16402 TO 16590

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[PROCEEDINGS ON 14 NOVEMBER 2013]
[09:05] CHAIRPERSON: The Commission resumes. Major-General, you're still under oath.
WILLIAM MPEMBE: Yes, Chairperson.
CHAIRPERSON: Mr Mpofu, I know you are pressed for time, so I'm going to try to adhere to time limits strictly today, and General, may I say this to you - and please don't take offence – when you give your evidence sometimes, and I can understand why but sometimes when you're asked a question you give your answer and then you say "As I have said in my testimony," and then you repeat what you said before. That's not necessary; it's on record. We are pressed for time and it will save time if you don't – look, if there's something that you feel it necessary to explain, you have the fullest right to do that, but you don't have to say "As I said in my testimony," and then repeat your testimony which we've already heard. You understand?
MAJOR-GENERAL MPEMBE: Yes, Chairperson.
CHAIRPERSON: If you feel that it's necessary for you to say something to make sure what you're now saying is understood, you can do so. So in other words, I don't want to hamper you in your evidence, but please bear that in mind. Mr Mpofu –
MR MPOFU: Thank you very much,

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Chairperson.
CHAIRPERSON: Are you ready to proceed?
CROSS-EXAMINATION BY MR MPOFU (CONTD.): I'm ready. Thank you very much, thanks, Chairperson, for that intervention, or pre-emptive strike. Good morning, General.
MAJOR-GENERAL MPEMBE: Good morning, Advocate.
MR MPOFU: We were, or when we finished on Monday, or rather Tuesday, we were dealing with that bazooka, the Scorpion, and what I wanted to ask you to –
CHAIRPERSON: Sorry, before you carry on about that, did you request further information from the SAPS on –
MR MPOFU: Yes, we've had a discussion, Chairperson. What we'll do is when we have information that looks like it's in agreement with each other, we'll just submit it to the –
CHAIRPERSON: Yes, yes. No, no, I understand, but you haven't got information yet?
MR MPOFU: No, not yet. I got some verbal information from Mr Mathibedi, but after that we agreed that we would do it the way that I have just referred to –
CHAIRPERSON: Alright, anyway so you

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won't go back on those aspects now in your cross-examination –
MR MPOFU: Yes, as to whether –
CHAIRPERSON: You're asking something else?
MR MPOFU: - it can destroy a building and all that, I won't deal with that, yes.
CHAIRPERSON: Can you, just for the sake of those of us who are going to read the record later, which I take it means all of us, identify the exhibits which depicts this Scorpion that you're talking about?
MR MPOFU: I think it's 55, HHH55, Chairperson.
CHAIRPERSON: I see, thank you.
MR MPOFU: It's one of three photographs.
MR MPOFU: HHH55 has three profiles of the same –
CHAIRPERSON: Thank you. Alright, carry on.
MR MPOFU: Thank you, Chairperson. General, I know that you said this was not your decision to bring the STF, so obviously the Scorpion which came with the STF was also not your decision, but you must understand that when I'm questioning you, I'm also questioning you in your capacity as the CEO of the operation, so to speak, for

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your responsibility and accountability at that level. You understand?
CHAIRPERSON: You're referring to the expression "overall commander."
MR MPOFU: Overall commander, yes.
CHAIRPERSON: They have CEOs in broadcasting corporations, but not in the police.
MR MPOFU: No, those are the group CEOs. It's more important, Chairperson. Right, you understand, thank you, General. Now having said that, so that I'm not unfair to you, what I want to say, was it in your view really necessary to bring those kinds of big guns and snipers even for the purposes of scaring of the community?
CHAIRPERSON: [Microphone off, inaudible] community is the right expression. You mean the strikers?
MR MPOFU: Well okay, the strikers. I'm sure the community was equally scared, but let's confine it to the strikers.
CHAIRPERSON: I don't know about that, but anyway, let's carry on. Time is precious, Mr Mpofu.
MR MPOFU: Ja. You understand the question, General?
MAJOR-GENERAL MPEMBE: Maybe my answer will demonstrate whether I understand or not.
CHAIRPERSON: [Microphone off, inaudible]

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MR MPOFU: Yes.
CHAIRPERSON: [Microphone off, inaudible] let's see if you understand the question.
MAJOR-GENERAL MPEMBE: Yes, Chairperson.
MR MPOFU: Yes, it was necessary. It was really necessary? Remember my question, was it really necessary to bring such big guns and snipers and people of that nature even for the purposes of scaring of the strikers. Is your answer yes to that, or did you not understand the question?
MAJOR-GENERAL MPEMBE: I said yes, Chairperson.
MR MPOFU: Okay.
CHAIRPERSON: It was necessary as part of the show of force to do what was done in that regard?
MAJOR-GENERAL MPEMBE: Correct, Chairperson.
MR MPOFU: And are you aware that this Scorpion big gun that we saw was still being utilised even during the stage 3 of the operation and that we saw it, I think in the video EEE16 for example, rushing next to the kraal? Are you aware of that? So it was not confined to scare tactics or whatever you call it, show of force.
CHAIRPERSON: I'm not sure that question is firstly correctly phrased. I think I know what you

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mean, but I'm not sure you've expressed it correctly. What Mr Mpofu is asking you is we had the show of force, which was at a definite stage, I think it was part of stage 2. When you were into stage 3 you weren't endeavouring simply by show to influence the strikers to act in a particular way. You were actually dealing with the situation which had arisen, in a sense I suppose at that stage reacting to what was thought to be – whether it was or not is another matter we'll decide later, but what was thought to be a threat to the police, and what Mr Mpofu wants to know from you is do you think it appropriate for this Scorpion weapon to be – is the weapon mounted on the Scorpion actually? – to be used for that purpose. That's his question.
MR MPOFU: That's correct. Thank you, Chairperson.
MAJOR-GENERAL MPEMBE: My answer will be no, Chairperson, no any other Scorpion vehicle or, has been used during the dispersal because stage 3 to me is a dispersal action and we don't even use live ammunition in dispersing the strikers.
MR MPOFU: Okay, so can I take from that answer that you're saying the role of the Scorpion should have been confined to the so-called show of force and not in the operation itself?
MAJOR-GENERAL MPEMBE: Correct,

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Chairperson, and General Annandale went in detail about that, what was the reason why the STF was there.
MR MPOFU: Thank you very much. You keep on saying this, that whenever we talk about the STF we should ask General Annandale. Did you yourself disagree with the bringing in of the STF into this operation?
MAJOR-GENERAL MPEMBE: I've already said no, Chairperson, I didn't disagree.
MR MPOFU: Did you agree with it?
MAJOR-GENERAL MPEMBE: If I didn't agree, I think I could have raised it with him.
CHAIRPERSON: It sounds by implication as if you either agreed or you were prepared to bow, as it were, to the perhaps superior knowledge of General Annandale as to when the STF is appropriate or not. So you either agreed or you didn't actually have an opinion, but you didn't feel in a position to disagree with him because he's got more expertise in that field than you have. It's one of those, I would imagine. Which of the two is it?
MAJOR-GENERAL MPEMBE: Chairperson, I didn't disagree, taking into account that that was not a normal crowd management. That's the first thing. The second issue is that General Annandale was there as a specialised head and those are the main two reasons, but the most appropriate one is that it was not a normal crowd

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situation.
CHAIRPERSON: If you had disagreed, if you had thought that STF was inappropriate in the circumstances, would you have raised that with General Annandale and told him to take them away?
MAJOR-GENERAL MPEMBE: Yes, Chairperson.
MR MPOFU: And if General Annandale hadn't called the STF, would you have called them yourself as CJOC?
MR MPOFU: Yes, Chairperson, I did say there was a time where STF was used in one of my operations.
CHAIRPERSON: But that's not an answer to the question, you see. The question is if General Annandale hadn't brought the STF along, would you on your own initiative have said, 'We need the STF, General Annandale, would you please bring them?' or would you not have done that?
MAJOR-GENERAL MPEMBE: I could have done that. Yes, Chairperson, I could have done that.
CHAIRPERSON: I know you could have done it. The question is, would you have done it? That's what Mr Mpofu wants to know.
MR MPOFU: That's correct, Chairperson.
CHAIRPERSON: I know it's a hypothetical

question because the situation didn't arise and if you can't answer, you can't answer, but can you help us – it's something Mr Mpofu wants to know, if General Annandale hadn't brought the STF, would you, looking back, have said, 'Hey, we need the STF, please bring them," or would you have left the matter?

MAJOR-GENERAL MPEMBE: I could have said they should be brought.

CHAIRPERSON: I don't think we'll get any further with that –

MR MPOFU: We won't get further. That's still not –

CHAIRPERSON: I don't know whether you'll get any further than that.

MR MPOFU: For the record, that's not an answer to the question, but we'll leave that for argument, General. I think the Chairperson has tried –

COMMISSIONER HEMRAJ: Well General, if you were planning the operation, would you have included the STF in the units that you would have had on the scene, if you were planning the operation and if you were in General Annandale's place?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Okay, well of course if you're

in General Annandale's place you would have done exactly what he did. That's not what I was asking. I'm saying if, let's assume General Annandale didn't exist, would you on your own initiative, looking at the situation, have ordered or requisitioned, or whatever the correct word is, the bringing of the STF from wherever they are based, on an own initiative, no Annandale, no nobody?

CHAIRPERSON: I think that's merely a repetition of what Adv Hemraj asked and she got the answer, so –

MR MPOFU: Ja, no it's not the –

CHAIRPERSON: If you don't like that answer then of course you could do something about it. If it suits you, then maybe it's sensible to move on.

MR MPOFU: Ja, I will, Chairperson. I just didn't want it to be amended as if that was my question –

CHAIRPERSON: No, but you're giving an opportunity to the witness to amend his answer by asking the question again. Some cross-examiners quit when they're ahead, or when they think they're ahead.

MR MPOFU: No, Chairperson, all cross-examiners that I know, I teach cross-examination for 15 years, I've been teaching it, is if a question is changed and I leave it, then I'm not going to leave it, whatever

the free lessons are –

CHAIRPERSON: It's not an appropriate forum for us to debate –

MR MPOFU: Ja.

CHAIRPERSON: - what is and what is not good cross-examination, but you carry on with yours.

MR MPOFU: Then thank you, I agree with that last remark, Chairperson. Now General, again, I just want to say this again for you so that it's clear; you heard the Chairperson correcting me when I used the term CEO, but as the overall commander you would agree that one of your responsibilities was to see to it that things are done by the book, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: And when we say one of your responsibilities was to make sure that things are done by the book, the book in that sentence would mean the prescripts, correct?

MAJOR-GENERAL MPEMBE: Standing Order 262.

MR MPOFU: Yes. Well ja, when I say things should be done by the book, I mean the prescripts as a unit. In other words, let me help you, I mean, when I say the prescripts I mean the Constitution of the Republic of South Africa, (1), okay? I mean the legislation and the

common law. That's (2), okay. And (3), I mean the Standing Orders. (4), I mean the plan that was devised, in other words things also had to be done according to the plan, and fifthly I mean the, what one might call ethics, professional ethics, rules of common decency and that kind of thing. You understand? So when I say the prescripts I mean that body of things that you had to follow.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Are we together? Yes, so when you, your job was to make sure things are done by the book, it encompassed those things, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Right, now were you aware for example that Colonel Scott, who was the architect of the plan, did not even know what rule 262 entailed until after Roots, or at Roots?

CHAIRPERSON: I don't think that's an entirely accurate statement.

MR MPOFU: Well, that's what he said –

CHAIRPERSON: He did say he wasn't aware of what that actually, what that document said. He was aware of what its predecessor had said and he assumed that the context of 262 was more or less in line with the previous, but you are correct insofar as you say that he

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wasn't acquainted specifically with the contents of Standing Order 262, and that's the question you're asking. Do you understand that? Colonel Scott admitted that his knowledge of Public Order Policing rules was based upon the previous standing orders which preceded 262, and he wasn't aware of the actual terms of 262. Were you aware of that?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: Thank you.

MAJOR-GENERAL MPEMBE: And I just want also to explain again, very short, Chairperson, Colonel Scott did not plan for the operation. We planned for the operation and I think it was said also to the Commission. He was there to compile, and I did explain to the Commission if Captain Bembe was there, he could have done the same work.

MR MPOFU: Alright, I'll leave that for argument. Let's go back to what I had said to you about things being done by the book. Or no, before we get there; that's going to be the kernel of my cross-examination with you this morning, so I just want to, I'll ask you just a few loose ends before we get to it, ja. You would agree there's a whole debate which doesn't really involve you about the characterisation of the whole operation. All I want from you is your own confirmation that this operation had two main components to it, and was neither one nor the

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other. In other words, would you agree – let's start with this; would you agree that at the root of the problem was a wage dispute?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: And would you agree that it would also not be fair, or even correct to just say then it was just a wage dispute? Yes, there was a wage dispute at the root of it, but there was also the security aspect. Those were two components of the issue. Is that correct?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, as far as killings and damage to properties.

MR MPOFU: Yes, and that it would be incorrect, to say the least, for anyone to characterise the problem either as just a labour issue or just a security issue? It was a combination of both, correct?

MAJOR-GENERAL MPEMBE: It is correct, Chairperson. What I wanted also to explain is that the police were only concentrating on the other part of the security issue.

MR MPOFU: Ja, no I accept that, but you agree with the combination that I've put to you?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

[09:24] MR MPOFU: So much so that at L114 the police presentation and I'm sure you'd agree with this,

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it's in the police presentation L114, the last dash. It says, "this was not only a security issue and the root of the conflict was outside the mandate of the police." You would agree with that?

MAJOR-GENERAL MPEMBE: Chairperson, I'm just requesting the page –

MR MPOFU: 114, L114. Slide 1, L114.

CHAIRPERSON: I think what he said – actually what he said in his evidence a moment ago. He said the police were only concentrating on the security side. What he said there as we can see now from the screen, the last bullet, this is at the JOCCOM briefing on the morning of Wednesday the 15th at 6am. This was not only a security issue which is the point you make, and the root of the conflict, the very words you used was outside the mandate of the police.

MR MPOFU: Yes, that's why I used those words. You would go along with that, General, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Then you said something in, I think on Friday or on part of the other cross-examinations. Effectively you are saying if the parties had done what they did after the tragedy which was to get together and talk then the tragedy would not have happened. Is that your view?

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MAJOR-GENERAL MPEMBE: Chairperson, I'm just requesting may I be appraised with the –

CHAIRPERSON: Sorry, never mind whether he said it before, do you say it now? When he said it before is a matter, in our ledger we can look at our leisure. We can look for the reference, but never mind that. Sitting there now today, Mr Mpofu asks you looking back is it your opinion that if the negotiations and discussions and so forth which took place after the tragedy which led to the peaceful or relatively – I'm afraid that's not entirely – but a relatively peaceful situation has prevailed since then – if those – if parties had behaved before the tragedy the way they did afterwards in those discussions and that agreement they came to, do you think that this tragedy would still have happened or do you think it would not have happened. That's Mr Mpofu's question. Is that right?

MAJOR-GENERAL MPEMBE: It could not have happened, Chairperson.

MR MPOFU: Thank you, Chair. And from – I'm sorry, you wanted to -

MAJOR-GENERAL MPEMBE: Yes. I'm sorry, Chairperson. Will the parties also include the strikers themselves?

MR MPOFU: Well –

MAJOR-GENERAL MPEMBE: The definition of these parties, will it include strikers themselves?
MR MPOFU: Ja. Yes, it does because they were also involved in the talks afterwards –
MAJOR-GENERAL MPEMBE: No –
MR MPOFU: That's exactly what I'm going to get into right now.
CHAIRPERSON: Yes, I'm sorry to intervene. I take it when you gave your answer yes, you were including the strikers. I mean it didn't require, as I understood you, it didn't require what one can call unilateral action from the employer. It required a particular attitude and response from the strikers as well. I take it that's what you said. That's what you meant, is that right?
MAJOR-GENERAL MPEMBE: Correct, Chairperson. I only wanted to inquire whether it's a broad understanding for the commission also.
MR MPOFU: Yes, ja.
CHAIRPERSON: - as you see I understood it and I think Mr Mpofu did as well. So we're all on the same page at the moment.
MR MPOFU: Thank you, General, but that's a very pertinent question that you're asking. Would you also agree that from your own interaction with the

strikers, starting from the 13th up to the 16th, your own interactions and those of other people, that it was the consistent view of the strikers that they wanted to talk to management?
MAJOR-GENERAL MPEMBE: I just wanted clarity, Chairperson. I don't understand the question.
CHAIRPERSON: I'll try to explain it to you. What Mr Mpofu says is from your understanding based upon what the strikers had told you and what you understood the strikers' attitude to be before the tragedy, what they were saying was, amongst other things, we want to speak to the employer. I think at some stage they actually wanted Mr Farmer, who I think wasn't available, but they wanted Mr Farmer who was the CEO of Lonmin to talk to them. Alternatively, they wanted somebody else representing Mr Farmer to speak to them. That's Mr Mpofu's question. Did you understand that to be part, at least, of the attitude of the strikers prior to the tragedy?
MAJOR-GENERAL MPEMBE: Yes, Chairperson.
MR MPOFU: Thank you, General. And would it be fair to say that – would it be fair to say that you, among other people, were frustrated, if I'm not putting it too high, by the absence of reciprocation from Lonmin on that request?
MAJOR-GENERAL MPEMBE: I just want to

understand the reciprocal role of Lonmin.
MR MPOFU: Ja, you remember the – we've agreed that the strikers wanted to talk. So for the situation that happened after the tragedy to take place, the Lonmin would've had to reciprocate and –
CHAIRPERSON: Reciprocate – I'm not sure reciprocate is the right word. What you mean I think is respond.
MR MPOFU: Ja.
CHAIRPERSON: To indicate a willingness on their side –
MR MPOFU: Ja.
CHAIRPERSON: - to talk to the strikers at least –
MR MPOFU: Accept their offer, ja.
CHAIRPERSON: No, hang on. I am not sure whether offer is the right word either. No, let's get it formulated correctly. I think what you want – what you are asking is what was lacking from Lonmin's side according to what you are putting, was an appropriate response to the requests or desire on the part of the strikers to talk to them. Is that correct?
MR MPOFU: Yes, in fact, Chairperson, maybe –
CHAIRPERSON: Engage with them perhaps in

the Lonmin –
MR MPOFU: - we know engage is –
CHAIRPERSON: Alright, we leave that. Engage is an unfortunate word. But I think I put it correctly. What was lacking, you say, was that – I'm not sure whether Lonmin would agree. I see the Lonmin light is on, but we'll get to you in a moment – your question is based upon the proposition that certainly as seen by this witness there was a lack of a, shall we say, an appropriate response by Lonmin to the desire communicated to them by the police –
MR MPOFU: Yes.
CHAIRPERSON: - that the, they the strikers wanted to talk to someone in a higher position in Lonmin about their wage demands. Is that –
MR MPOFU: Ja. Chairperson, you have covered an aspect which I had left out which might turn off the lights. Did you when you received those messages from the workers, convey them to Lonmin?
CHAIRPERSON: Now before you answer the question, we've got an objection from Lonmin. Let's hear what the objection is.
MR SHOZI: Well it's off for now, I want to hear the question.
MR MPOFU: Ja. The question is did you,

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after – now when I say you once again, I mean you and SAPS, ja. Did you, after receiving these numerous requests from the strikers convey them to Lonmin?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: And we know that Lonmin was not prepared to speak to the strikers, correct?

MR SHOZI: No, Chairperson, it's incorrect. Lonmin never said that. Lonmin is on record as having said on the 15th of August we are prepared to speak to the strikers if they lay down their weapons. So the premise of the question is incorrect.

MR MPOFU: Okay.

CHAIRPERSON: I don't if that's quite correct. Part of Lonmin's attitude, as I understand it – I know this is the time to debate it, we will debate it when your witnesses are in the witness box more fully, my understanding was they were prepared to negotiate through the recognised union structures. The recognised union structures meant they were prepared to negotiate about this wage claim or demand with NUM because the recognised union structures only accorded bargaining rights in respect of wages to NUM. That I think is a fairly consistent stance that was adopted by Lonmin. Whether it's – was appropriate or not is a matter that will be debated later, but is my

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state and facts correct or not?

MR SHOZI: It is correct, Chairperson.

CHAIRPERSON: Yes. So now that now we know or at least I think we know that the strikers didn't want to proceed or they claim they didn't want proceed through the union channels, they wanted to negotiate as RDOs, not wearing any trade union hat or cap or beret or whatever trade unionists wear. And so if your client's stance was we're only prepared to talk through the recognised union structures and if that means we're only prepared to talk through NUM, then the point that Mr Mpofu is putting is not incorrect. So I think I will allow – overrule your objection insofar as you still persist in it and let him carry on, but we will both listen carefully to his subsequent questions and if he steps out of line we'll deal with it. Alright?

MR MPOFU: Yes. That's correct, Chairperson. To be fair to Lonmin, General, is it your understanding that Lonmin had put two preconditions to talking. One was that arms had to be laid down and the other one was that they would only speak to recognised unions. You remember that?

MAJOR-GENERAL MPEMBE: Chairperson, the Lonmin's response is in terms of, the way in which I understand it, is in terms of Exhibit 004, page 27, it's

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paragraph 16 –

MR MPOFU: Well –

MAJOR-GENERAL MPEMBE: - until to page 28.

MR MPOFU: Yes, General, I don't want to go to that because of time. I'm saying a nutshell, including 004 and 00 whatever, did you understand that the Lonmin had put two preconditions to talking. One being that they had to lay down arms and two, that they would only speak to the recognised unions in general.

MAJOR-GENERAL MPEMBE: Yes, it's part of them, but there are others also that they did put in. Not in the mountain, without weapons, in a safe environment.

MR MPOFU: Yes. No. I understand that. I'm saying the – when the discussions – well I'm telling you now that I'm putting it to you as a fact, if you know, you know, if you don't, you don't. You can tell us. That are you aware that when the subsequent negotiations happened which you referenced earlier, that the strikers were still bearing arms and that Lonmin spoke, not only with the recognised union but with the delegation of the workers themselves.

MAJOR-GENERAL MPEMBE: Chairperson, I was told that –

MR MPOFU: Yes.

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MAJOR-GENERAL MPEMBE: - Lonmin at one stage, in that meeting by Mr Mathunjwa that there was a stage where Lonmin spoke to the RDOs –

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: - but I don't have personal knowledge of it.

MR MPOFU: No. Exactly. That's what I'm trying to say. That's what you meant when you said if they had done what they did subsequently earlier. In other words to speak to the RDOs and to speak to them even though they had not laid down their arms. Now but the question really that I wanted to ask you was –

CHAIRPERSON: Carry on, unless the question I'm going to ask anticipates yours in which case tell me. You were asked about whether you felt frustrated about Lonmin's attitude. Now there are very – as you say there are various aspects of it. One of them relates to their reluctance and unwillingness, or put it more accurately, refusal, to negotiate with the strikers in circumstances where the strikers were armed. They didn't want to negotiate with people who were armed. Right?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

CHAIRPERSON: Were you frustrated about that or did you consider that a reasonable attitude for Lonmin to take up? Was it reasonable for Lonmin to say

we're not prepared to negotiate while you people have got weapons in your hands? We haven't got weapons in our hands, we don't think it appropriate if you have weapons in yours. Would that have been an appropriate thing for Lonmin to say? Do you understand the question?

MAJOR-GENERAL MPEMBE: I understand the question, Chairperson, and my question was on both. My approach was on both as they put it to me. Yes, on the other hand I saw it as a frustration because the police were there, they could escort them to go there.

CHAIRPERSON: Yes.

MAJOR-GENERAL MPEMBE: On the other hand I could see they themselves, when they say it and I mean with such dangerous weapons and what has happened to the securities, on the other hand I saw it as reasonable.

CHAIRPERSON: So that was a reasonable request, but of course they went further than that. They didn't just say we want – if you put your weapons down, we'll talk to you. They said, as I understand it, even if you do you put your weapons down we still won't talk to you. We'll only talk through the recognised union representatives and that appears from statement of Mr Kwadi, let's get his name right, Mr Kwadi, Peter Fanyana Kwadi, Exhibit KK, page 9 where he says in paragraph 9.1, he's talking about what he said to Mr Mathunjwa on the 16th

in the morning. He says, "I advised Mathunjwa that Lonmin management was not prepared to discuss the strikers' demands or grievances outside of collective bargaining structures and therefore would not recognise AMCU's collective bargaining agent for the strikers." Now that means that if it was to be done within the framework and only in the framework of collective bargaining structures meant that AMCU couldn't take part. The only union representatives who were part of the collective bargaining structure at that stage were those from NUM. So Lonmin's attitude was this – we're not prepared to talk to the strikers. We're only prepared to talk to union representatives. We're not prepared to talk to AMCU about their wages. We're only prepared to talk to NUM. That is their attitude. Now that meant, I would assume, that the police had very little to offer the strikers by way of an inducement to accede to the request that they lay down their arms and come and talk in a normal way to Lonmin because Lonmin wasn't going to talk them. They were only going to NUM, the representatives and they didn't want to represent them and there's another history which we don't have to go into at this stage. Now did you find that frustrating?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Thank you. And I'm just going

to read you extracts just to save time which would – which come from Exhibit L, that I will argue later in support of that, Chairperson. If you go to L96, Exhibit L96 at the last bullet, you say, the last two bullets. The representatives stated that the protestors wanted the mine management to give them an increase to ensure that their salaries were R12 500 per month and the next bullet you say – or rather not you, the document says, "the group was informed that their requests would be forwarded to the JOC and the SAPS could not force the mine to negotiate with them." Remember that?

MAJOR-GENERAL MPEMBE: I see, Chairperson.

MR MPOFU: Yes, and then if you go to L109, I'll just read them successively. L109, the bullet just before the last one. You say, "the mine's management were still not prepared to engage in negotiations." And then if you go to L113, second bullet, "Lonmin stated that the mine would not negotiate with the striking miners as there was a two year wage agreement in place with all the unions." Then if you go to L117, at the last bullet, "the representatives asked if the mine's management was present and they were informed that the mine had indicated that they would not negotiate with them unless the workers put down their weapons and returned to normal duties."

Remember that being said? General?

[09:44] CHAIRPERSON: Were you present at that meeting on the 15th of August between SAPS management and Lonmin, representatives of Lonmin, which took place at half past 5 in the morning on the 15th, which is dealt with in that slide 113.

MAJOR-GENERAL MPEMBE: Chairperson, to that meeting I was present.

CHAIRPERSON: Yes.

MAJOR-GENERAL MPEMBE: But I think this one it was said on the, on Monday, or –

CHAIRPERSON: My recollection is that it was, Lonmin had said on a number of occasions from the 13th onwards when these matters were raised with them by the police, that there was a two-year wage agreement in place, and that was one of the reasons they gave for their attitude. I think that's correct, isn't it?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Ja, and we also know – although I don't know whether you know, but we also know that the – because this was the evidence, that the local representatives of NUM took the same stance and they communicated to the rock drill operators and others that there was nothing they could do in respect of the wage

1 claims that were being raised because of this two-year
2 agreement. I don't know whether you were aware of that,
3 but that was NUM's attitude also.
4 MAJOR-GENERAL MPEMBE: I'm not aware of
5 that, Chairperson, but what I'm aware –
6 CHAIRPERSON: You can take it from me,
7 that was the evidence we got.
8 MAJOR-GENERAL MPEMBE: Okay, thanks,
9 Chairperson.
10 CHAIRPERSON: Mr Zokwana, the president
11 of NUM, when he came said that that attitude of NUM's as
12 expressed to the workers was not correct, that they
13 mightn't have been able to strike, but they certainly could
14 negotiate about it; there as nothing preventing negotiation
15 and he referred to an incident in the past where there had
16 been negotiation for a wage increase despite the fact that
17 there was a two-year or three-year agreement in place. So,
18 but anyway, you didn't know about that, but of course now
19 that you do know about it, it makes it worse because not
20 only had Lonmin said we don't want to negotiate, we won't
21 negotiate partly because there's a two-year agreement, but
22 NUM, the only people with whom Lonmin indicated they were
23 prepared to negotiate on behalf of the RDOs, had also said
24 that there can be no negotiation during the two-year
25 period. Now if you had known that, would you have been

1 even more frustrated than you were?
2 MAJOR-GENERAL MPEMBE: Correct,
3 Chairperson, but that was also shown when I called them in
4 that meeting.
5 CHAIRPERSON: Yes, yes. No, I
6 understand.
7 MR MPOFU: Yes, but –
8 CHAIRPERSON: Sorry, there's a further
9 point that I can put to you, just to clear the ground for
10 Mr Mpofu. According to, also according to exhibit KK, the
11 statement of Mr Kwadi, in paragraph 3.7 on page 4, this is
12 what happened on the 10th – you weren't there yet, but you
13 remember part of the history of this is that there was a
14 march to the Lonmin offices on the 10th and there were
15 discussions between a group of people who went inside and
16 people from Lonmin, and what appears here in the second
17 part of paragraph 3.7, Mr Kwadi speaking, he says, the
18 crowd intimated they were illiterate. They were asked for
19 their demands in a memorandum and they said we can't give a
20 memorandum because we're illiterate. "The crowd intimated
21 they were illiterate. They wanted to address the
22 management orally about their demands. They were informed
23 their request would not be acceded to." So as early as the
24 10th of August Lonmin said we're not prepared to negotiate
25 orally with the strikers about their demands, and then I've

1 put the later passages to you.
2 Now, and then on the same day, paragraph 3.3,
3 that's the page before the one I read from, page 3, Mr
4 Kwadi says he had various telephone interactions with Mr
5 Mokwena and Mr Kgotle about the appropriate response to the
6 situation. This was after Mr Mathunjwa had said to him
7 that the striking employees were acting of their own accord
8 and they weren't members of AMCU. He says he had, I repeat
9 what I read a moment ago, "I had various telephone
10 interactions with Mokwena and Kgotle about the appropriate
11 response to the situation. A decision was taken that no
12 person from management should receive any memorandum in
13 respect of the demands as both AMCU and the National Union
14 of Mineworkers advised they had no knowledge or involvement
15 in the impending march. Both unions advised their members
16 were not involved in the events at hand." So I don't know
17 if you knew that at the time, but if you had know, would
18 that also have increased your frustration?
19 MAJOR-GENERAL MPEMBE: Correct,
20 Chairperson.
21 MR MPOFU: Thank you –
22 CHAIRPERSON: Mr Mpofu, I'm sorry if I've
23 trespassed onto property, onto ground you were intending to
24 cover. Accept my apologies.
25 MR MPOFU: It was done in [inaudible]

1 fashion, Chairperson.
2 MR NTSONKOTA: Sorry, Chair, before Mr
3 Mpofu continues, for the record again, name is Thando
4 Ntsonkota on behalf of NUM. Chair, my recollection of the
5 evidence on this aspect of the wage agreement goes a little
6 bit further than what the Chair has expressed. If I
7 recollect accurately, the position was that notwithstanding
8 the two-year wage agreement, as it had happened in the past
9 NUM could have been in a position to negotiate it.
10 However, because the strikers as early as June had
11 expressed to Mr Da Costa that they do not want any unions
12 involved, so even if we wanted to negotiate – and we could
13 – we most likely would not have been in a position to
14 because we didn't have any mandate that we could have gone
15 to put to management.
16 CHAIRPERSON: No, no, the mandate point
17 is correct. You are entitled to clarify that, but what I
18 put was also right, that the evidence of the chairman of
19 the NUM branch at Lonmin was that they at meetings actually
20 told the workers there's nothing we can do about this wage
21 demand while the two-year wage agreement is in place, and
22 Mr Zokwana when he came said that may have been what they
23 said, but it's not correct, there was something we could
24 have done; we could have negotiated it. There was a
25 previous case, I think he said it's something like 2004

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where despite the fact that there was an agreement covering a period, there had been a change in circumstance and we raised that in negotiations and in fact succeeded in getting an increase. So what the chairman of the local branch of NUM had told the workers at meetings was in fact incorrect. So that's necessary to get the whole picture before us. But anyway, these matters will be covered presumably more fully when the Lonmin witnesses give evidence, but what we're busy with at the moment, or rather what Mr Mpofu is busy with at the moment is trying to illustrate from the mouth of the overall commander that the police had a measure of frustration not only with the strikers because of their behaviour, or misbehaviour, but also with Lonmin for the reasons that he's busy exploring, and I think that's permissible questioning and I'm going to allow him to continue. Mr Mpofu?

MR MPOFU: Yes, Chair –

CHAIRPERSON: But the fuller attitude of NUM has been correctly stated.

MR MPOFU: That's correct, Chairperson.

CHAIRPERSON: You could proceed on the basis that we're all aware of that.

MR MPOFU: Yes, thank you, Chairperson.

MR NTSONKOTA: Thank you, Chair.

MR MPOFU: Thank you, Mr Ntsonkota. No,

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it's okay. Not to belabour the point, because I think the Chairperson did cover it, you would agree that what was stated in that last bullet which I've just read to you, they wouldn't negotiate with them unless the workers put down their weapons and returned to normal duties, that that would amount to capitulation on the part of the workers?

MAJOR-GENERAL MPEMBE: Chairperson, I just wanted to get the last bullet in the exhibit L –

CHAIRPERSON: He's referring to the second-last bullet, or the penultimate bullet on slide 113.

MR MPOFU: No, no, I'm sorry, Chair, I'm referring to the last bullet on 117. That's the last one I read, which says the mine hasn't –

CHAIRPERSON: Yes, I'm sorry, it says the same, virtually the same as the penultimate one on 113, but yes, I was wrong, you then read the later slide which contains –

MR MPOFU: The capitulation –

CHAIRPERSON: - effectively the same statement –

MR MPOFU: No, not really. The significant difference is that the other one is merely a capitulation, which is the point I'm making to you, that they would lay down their weapons and come back to work, then they would talk to them. Do you understand the

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difference?

MAJOR-GENERAL MPEMBE: Chairperson, I just want to understand the term "capitulation," what does it mean?

MR MPOFU: Alright –

CHAIRPERSON: Capitulation really means surrender, I suppose, giving up the attitude that you've adopted.

MR MPOFU: Yes, let me – I'll also attempt, and I'll take one step back. I promise I won't give you a long – Mr Magidiwana gave us a very crash course in collective bargaining. What he was saying is that what would break the impasse was that if they were sitting at the mountain, the chimneys wouldn't work, to use his words, and therefore one of the two parties had to give something. Now what I'm saying, what was being asked for here was effectively end the strike, put your weapons down, come back to work, then we'll talk to you. What I'm saying is that in that, that would no longer be now a bargaining, it would be giving up, as it were. Do you understand?

MAJOR-GENERAL MPEMBE: I understand, Chairperson.

MR MPOFU: Ja. Right –

CHAIRPERSON: I think the further point that the strike was an unprotected strike, and this is a

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matter which presumably will be explored later when the Lonmin witnesses give their evidence.

MR MPOFU: Yes. You do understand that it was an unprotected strike, but an unprotected strike is part of legitimate collective bargaining. All it does is that you don't get protected under the Labour Relations Act. You can be dismissed. But it's an accepted part of collective bargaining. Do you know that? Or maybe you don't?

CHAIRPERSON: I'm not sure that you put it quite accurately that it's legitimate, because if you can be dismissed by the employer and the employer can't be forced to take you back, then I'm not sure the word "legitimate" is entirely appropriate. But the point is it's not a crime to take part in an unprotected strike. It's not even illegal.

MR MPOFU: Yes.

CHAIRPERSON: So to that extent what you said is the correctly stated position.

MR MPOFU: Well, Chairperson, I'm a thousand percent sure what I've said is correct, without any qualification. The legitimate way of collective bargaining, just like an employer can lock out – and this might be found later to have been fair or not fair, that's a different matter, but the right of a human being to

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withdraw their labour is sacrosanct. What the legal consequences are, are defined in the Labour Relations Act, but our Constitution guarantees your right to withdraw your labour at any time, without any warning. You can simply walk out.

CHAIRPERSON: [Microphone off, inaudible]

MR MPOFU: Well, it is.

CHAIRPERSON: [Microphone off, inaudible] what you mean by the word "sacrosanct" because if you –

MR MPOFU: Constitutionally speaking.

CHAIRPERSON: No, no, you have a right to do it. You're not guilty of a crime, but the sacrosanctness of it is subject to a very substantial qualification, namely that you can't do it with impunity because you can be dismissed and there's nothing you can do about your dismissal if it's an unprotected strike. So, but maybe it's a semantic debate we're engaging in, which isn't going to give us very much assistance in answering the questions the President has sent to us to answer, but anyway, carry on with your questioning.

MR MPOFU: You said to a previous question to the Chairperson, you said the issue about the arms you understood, or I think you said it was reasonable. Now the question I want to put to you is, do you also think it was reasonable to say the preconditions that are being

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put are basically capitulate and just come back to work and then we'll talk to you? Do you also think that is – I can understand the issue of the arms –

CHAIRPERSON: No, Mr Mpofu, we've gone over this ground before. You –

MR MPOFU: Well, those are things –

CHAIRPERSON: No, no, no, give me an opportunity then I'll give you an opportunity also. The ground we've gone over is where a question is asked which the Commission is in a good a place to answer as the witness, then the question won't be allowed because it's just a waste of time, but if you, you were dealing earlier with the question of the police response to the attitude of Lonmin and I allowed that and I'll continue to allow it. You got him to concede, with a bit of help from me, but you got him to concede that there was a substantial element of frustration on the part of the police at the attitude of Lonmin. So you can go on asking questions about the unprotected strike, and so forth, in that context, but don't ask him whether it was reasonable for Lonmin to do it because that's not a matter which we are bound by his answer and which his answer doesn't really help us. But if you want to ask along the lines that you are previously dealing with, namely the difficulties it occasioned the police in trying to do the job they were doing, please

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proceed.

MR MPOFU: Yes, I'm sorry, Chairperson, but as I say, I learned from the best. You asked him just now whether it was reasonable for them to say that the arms should be put down. All I'm doing now is to say I'm accepting the answer that it was reasonable for them to say the arms should be put down. I'm asking whether does he also, to follow your question, Chairperson, does he also think it was reasonable to ask them to capitulate. It was your question.

CHAIRPERSON: I may have been wrong in asking the question that I was, but –

MR MPOFU: Well, then I'll disallow it, Chairperson.

CHAIRPERSON: In view of the fact that I asked it, I'll allow you to ask your question, but let's not have a long debate with him on his answer.

MAJOR-GENERAL MPEMBE: Chairperson, for the first part of put down their weapons, it was reasonable, and returned –

CHAIRPERSON: And Mr Mpofu accepts that. Yes, carry on.

MAJOR-GENERAL MPEMBE: - and returned to work, I could say it will amount to – I mean that word, which I don't understand, and my argument is based

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constitutionally, as he said, in turn because people are not allowed in terms of the Constitution to protest while armed, and also they have the unions, so I didn't see any necessity of them arming themselves because they have the people that they can talk for them.

CHAIRPERSON: Mr Mpofu, I think you've achieved what you wanted to achieve –

MR MPOFU: I have.

CHAIRPERSON: So you've got enough on record to argue the point.

MR MPOFU: That's correct.

CHAIRPERSON: Whether it's a good point is a matter we'll see later, but carry on.

MR MPOFU: We'll see, Chairperson. And is it also correct that it was your view that Lonmin as the employer have a duty to act in such a way as to control or quell the situation? And to be fair to you, because I think that's how you've put it, not only Lonmin, but other people also had duties, but Lonmin had a primary duty as the employer to ensure that the situation was quelled.

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Thank you. Okay, just for the sake of completion, I'm not really going to ask you a question; I'm just going to make these references for the benefit of the Commissioner. In L –

CHAIRPERSON: Do you have to give us the references now? Can't you give them to us in argument? We've all studied L over and over again, backwards and forwards and sideways, but I'm sure that if there's something in it that you feel we have to have our attention specifically directed to, you can do so at the appropriate time. I don't think you should -

MR MPOFU: No, it's fine, Chairperson, I would have finished by now –

CHAIRPERSON: I don't think you should spend your time but I want you to spend it profitably on this today.

MR MPOFU: That's fine. I would have finished the references by now, but so I'll leave them. Alright, now let's then go back to what I said would be the main theme of my cross-examination for you this morning. You remember we had agreed about the cluster of prescripts?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Right, now I'm going to show you that there were many, dozens of –

MAJOR-GENERAL MPEMBE: I'm sorry, Chairperson, I just want to say I did understand what the Advocate is saying, not that necessarily that I agreed, because I was going to be –

CHAIRPERSON: Yes, yes, yes, no he says he was talking about playing it by the book.

MAJOR-GENERAL MPEMBE: Yes.

CHAIRPERSON: And then he was asked what do you mean by the book, and he gave us the sort of table of contents of the book he's referring to, chapter 1 was the Constitution, and he told us what was in the other chapters as well. There were six, as far as I remember.

MR MPOFU: Five. There was the Constitution, legislation and common law, Standing Orders, the plan, and professional ethics.

CHAIRPERSON: I see. Sorry, there were only five chapters, but –

MAJOR-GENERAL MPEMBE: Thanks, Chairperson.

MR MPOFU: Okay, so let's start with the first chapter, as the Chairperson calls it. Are you aware that in the operation the Constitution was breached at least in one respect, and I'll be the first one to admit that it was not a material respect in respect of the context of what happened. When I say it's not material, it probably didn't make much of a difference, but are you aware that the - your plan, the fact that your plan incorporated the use of members of the South African National Defence Force and their equipment without the

President having approved it, was in breach of the Constitution. Are you aware of that?

[10:04] CHAIRPERSON: That is a subject that was covered already. It's a matter for debate, but just to cut it short, there's a contention, which will have to be ruled on later, that the use of the defence force helicopter for example, without the President's permission, was a breach of the Constitution. Now I ask you to accept for the sake of the answer that that may be right. Were you aware that there was a possible breach of the Constitution in that regard?

MAJOR-GENERAL MPEMBE: No, Chairperson.

CHAIRPERSON: So I think we can move on to chapter 2.

MR MPOFU: We're still on chapter 1, and I wanted to move on but I have to deal with this qualification now, in case I forget them. In fact it's not a matter of any conjecture. Section 201 –

CHAIRPERSON: Mr Mpofu, you've raised the contention earlier with, I think General Annandale, and I think with, I think it was with the National Commissioner as well, certainly with her. Now that's a legal contention that you're going to advance that the Constitution was breached. The witness has already told us that – and I've asked him to accept for the sake of the argument that the

Constitution was breached. Was he aware of it? The answer he gives is he wasn't. If there was a breach of the Constitution, that's a matter you will be able to argue. The relevant facts are before us. We will have regard to what the Constitution says and we will deal with it, but I don't think there's any profit to be gained from asking this witness further questions about something he says he wasn't aware of. He isn't as well equipped as you are to analyse the Constitution, and in any event, he hasn't the benefit of the ruling that we're going to give at the end as to whether it was or was not a breach of the Constitution. He simply says if it was so, if it was so, he wasn't aware of it. So I think you can move on. I'm concerned to save your time, Mr Mpofu.

MR MPOFU: Yes. Was it your duty to be familiar with the applicable prescripts or not?

MAJOR-GENERAL MPEMBE: Yes, Chairperson, it is my duty.

MR MPOFU: Thank you. Alright, now are you also aware that the Constitution requires that members of the police force, police service, among others should act impartially when there's a dispute between third parties?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: And are you aware that the Constitution also – or let me put it this way – that in terms of the constitutional structure of the division between the operational management and the political management of the SAPS, you are aware that it would be wrong for operational decisions to be influenced politically, or by political considerations, correct?

MAJOR-GENERAL MPEMBE: I need the clarity on that, Chairperson, because I didn't know of any political interference –

CHAIRPERSON: I must profess, I share your difficulty in understanding the question, and I understand my colleague, both my colleagues share our difficulty. Mr Mpofu, I'm afraid you're going to have to reformulate the question so that we can understand it.

MR MPOFU: Yes, I'll assist all who are confused.

CHAIRPERSON: And we'll be grateful for such assistance that you can give us. I must also say that on the assumption that you are correct that there was improper political interference in what amounts to an operational decision, I'm not quite sure what advantage could be derived from covering the matter with this witness. I think I understand where you're going. I can understand the arguments that you're going to advance. I

can also understand questions you may ask of other witnesses who are to come, but you will remember that we have in the witness box a deputy provisional commissioner, who was admittedly the overall commander of the operation, but these – perhaps we can cut it short either way. Were you aware, yourself, of any political interference in relation to the decisions that were taken or manner in which decisions which were taken were implemented at Marikana?

MAJOR-GENERAL MPEMBE: No, Chairperson. The Commission knows what I said in terms of my HHH3, that what I briefed the Provincial Commissioner about.

MR MPOFU: I'm afraid it's not as easy as all that, Chairperson, with respect. I'm afraid it's not as easy as all that. The question is this; as the overall commander, as it has already been said, should you have been aware of all the considerations that led to the killing – not to the killing – that led to the advancement to stage 3? Should you as the overall commander? Please answer the question.

MAJOR-GENERAL MPEMBE: No, Chairperson, I don't know of any other reasons –

CHAIRPERSON: No, no, no, no, that's not the question. Repeat the question again. The witness says he wasn't aware of other considerations, but that's not the

question you asked him. So repeat the question so he understands it.

MR MPOFU: Yes. Thank you, General, I'll assist you. As the overall commander, the big chief, should you have been aware of all the considerations that were influencing, or that would influence the decision to move to the dangerous stage 3?

MAJOR-GENERAL MPEMBE: No, Chairperson.

CHAIRPERSON: You shouldn't have been, or you weren't?

MAJOR-GENERAL MPEMBE: I wasn't.

CHAIRPERSON: Mr Mpofu says, he's putting the question slightly differently. He says should you have been aware, not whether you were, but should you have been aware of all the considerations which prompted the decision to move to stage 3 as it was formulated at the 1:30 JOCCOM meeting. That's his question. Now what's your answer to that? In other words, if there were other considerations – let me reformulate the question. If there were other considerations which led to the decision to implement stage 3, which as he says is a very risky stage, but if there were other considerations which led to that decision which you were not aware of, which were not communicated to you, would you regard that as inappropriate and incorrect? Is that your question, Mr Mpofu?

MR MPOFU: That's correct, Chairperson.

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I could have seen them inappropriate.

CHAIRPERSON: Yes, and presumably if there were other considerations which were operating which you weren't aware of, which you thought were bad considerations, you would then have wished to communicate that to whoever was concerned to say no, no, that's not a reason to implement stage 3, for these reasons, if that were so. I know it's a hypothetical question, but that must be right, surely?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Thank you very much, Chairperson. That then deals with the, what I call the breaches of the Constitution, which we will deal with in argument. Now before I move on to the next cluster, chapter, as the Chairperson calls it, which is legislation and the common law, maybe – Chairperson, I see that I'm ahead of myself –

CHAIRPERSON: Mr Mpofu, we have the same problem again that what the law is, is a matter for this Commission to take notice of. Whether the law was broken or contravened or not complied with has got two sides to it. The one is what the law is. The other was the underlying facts upon which the contention that there was a

1 breach or contravention or non-compliance rests. Now I
2 haven't got a problem with your putting the second part to
3 the witness, endeavouring to establish facts which will
4 found an argument that there was a breach or contravention
5 or non-compliance with the law, but I'm not interested in
6 whether the witness thinks those facts amount to a breach,
7 contravention, or non-compliance; that's for us to decide.
8 But the facts underlying that, obviously you can ask and I
9 won't stop you, but please stick to that.
10 MR MPOFU: Thank you. That's all I'm
11 canvassing, Chairperson. That's why I said I'd leave the
12 rest to argument, just now. Now when it comes to – and I'm
13 assuming you're familiar, as you said, with the prescripts,
14 but of course, as the Chairperson says, it's not with the
15 precision of a lawyer. I'm just saying that you would be
16 generally familiar with the prescripts. Is that a fair
17 assumption?
18 MAJOR-GENERAL MPEMBE: Correct,
19 Chairperson.
20 MR MPOFU: Yes.
21 CHAIRPERSON: [Microphone off, inaudible]
22 that Mr Mpofu said it, but never mind, you've accepted the
23 assumption, so we can carry on.
24 MR MPOFU: Now you are aware, are you
25 not, that in terms of the Police Act at least, in terms of

1 the Police Act – and I'll argue, you can, don't worry about
2 the other part, I'll argue that also in terms of the common
3 law, that the police are enjoined to employ nothing more
4 than minimum force, correct?
5 CHAIRPERSON: They are enjoined not to
6 use force at all unless it's necessary, and insofar as it's
7 necessary it must be minimum force. What minimum is of
8 course depends on the circumstances.
9 MR MPOFU: I know. Ja well, you can
10 answer my question or the one that comes from the Chair.
11 MAJOR-GENERAL MPEMBE: Minimum force
12 proportionate to the situation.
13 MR MPOFU: Yes, and you are aware in that
14 context, or one of the areas of your expertise is that you
15 were teaching Criminal Law, correct? At some stage,
16 correct?
17 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
18 MR MPOFU: Ja, now –
19 CHAIRPERSON: I'm not sure that his
20 knowledge of Criminal Law, whether derived from his
21 teaching activities or otherwise, is relevant for us,
22 surely.
23 MR MPOFU: Well, then we should not have
24 been told about it. I got it from the papers.
25 CHAIRPERSON: Well, if necessary we can

1 strike it out of the papers, but let's carry on with the
2 cross-examination for the moment.
3 MR MPOFU: Ja, okay, now I'm saying that
4 you are aware that there are no circumstances where the
5 police are allowed to use maximum force?
6 MAJOR-GENERAL MPEMBE: Chairperson, I
7 don't understand the word "maximum force."
8 MR MPOFU: Well, it's the opposite of
9 minimum force.
10 MAJOR-GENERAL MPEMBE: Yes –
11 CHAIRPERSON: Mr Mpofu, there can be a
12 situation where in the particular circumstances there's no
13 difference between minimum force and maximum force –
14 MR MPOFU: Except for those circumstances
15 which are, must be rare, do you accept that –
16 CHAIRPERSON: Sorry, this matter was
17 debated at length with previous witnesses. It's all on
18 record. I don't propose to allow you to have a debate on
19 the matter again –
20 MR MPOFU: I'm not debating it. I just
21 asked one question, Chairperson. Is he aware or is he not
22 aware that –
23 CHAIRPERSON: No, he says that –
24 MR MPOFU: If he says he's not, he's not,
25 I move on.

1 CHAIRPERSON: He said he didn't know what
2 maximum force meant –
3 MR MPOFU: No, he said he doesn't know
4 what it means.
5 CHAIRPERSON: And I then endeavoured to
6 explain that in certain circumstances minimum force and
7 maximum force can amount to the same thing. But I think
8 what Mr Mpofu is saying is if there are two ways of
9 handling a situation and you have to deal with it with the
10 use of force, there are two ways of dealing with it in that
11 manner. One would amount to maximum force and the other
12 would amount to minimum force. I take it you're aware of
13 the fact that you've got to go the minimum force route and
14 not the maximum force route. Do you agree with that?
15 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
16 as I said before that it will depend upon the situation.
17 CHAIRPERSON: Never mind what the
18 situation is. If the situation is that there are two ways
19 of doing it, one involving force but of a minimal nature,
20 and other using force of a more severe nature, which one
21 could describe as a maximum nature, you've got to go the
22 minimum route and not the maximum route. Do you agree with
23 that?
24 MAJOR-GENERAL MPEMBE: I agree with that,
25 Chairperson. I can just illustrate it quickly to say in

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the dispersal, and when you disperse the crowd you use minimum force.

MR MPOFU: And is there any suggestion that you know of where you must use maximum force?

CHAIRPERSON: Is his knowledge relevant? I mean we can think of hostage situations and some of these threats to life, situations of that kind. We can imagine them. Whether he can, does it –

MR MPOFU: Well, the legislator didn't imagine it, Chair. It would have said you must use minimum force except in hostage situations –

CHAIRPERSON: No, it doesn't say –

MR MPOFU: Law, section 13(3)(b) –

CHAIRPERSON: No, no, no, Mr Mpofu, I'm not going to argue the law with you now, but we agreed earlier that there are circumstances where minimum force and maximum force coincide because there's nothing short –

MR MPOFU: No, I did not agree to that, Chairperson.

CHAIRPERSON: Well, perhaps you should have. There will be circumstances where it's not possible for any force to be used except what amounts to maximum force, which is equal to minimum force in those circumstances. But I don't know if it's a profitable debate for us to have now –

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MR MPOFU: Anyway –

CHAIRPERSON: And I'm not sure if it's going to take your cross-examination of the witness any further, so let's carry on.

MR MPOFU: Anyway, let me just short-circuit this. Are you aware that according to what you – well, and again I'm using the word "you" liberally – what you stated before the versions were – I'm trying to put this nicely – refined at Roots, that –

MR MATHIBEDI SC: Sorry, Mr Chairman, what's the basis of saying the versions were refined at Roots?

CHAIRPERSON: I think he's referring to some of the ground that was covered in Mr Chaskalson's cross-examination where various versions of what happened, the working papers were presented from which one can follow the evolution of what amounted to the final police presentation, but I think that's what he's referring to, but if it's anything more than that, you can raise it again and we'll call him to order, but for the meanwhile I think you can carry on, on that basis. I think the General understands the question.

MR MPOFU: Yes –

CHAIRPERSON: And there was an exercise at Roots, wasn't there, where various versions were

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presented and they were, working documents were produced and they were worked on and there were changes and modifications and so on. The nature of those modifications we don't have to deal with at the moment, but that's a fact, isn't it though, and you weren't here when Mr Chaskalson cross-examined Colonel Scott, but all that material was put before us. I think that's what Mr Mpofu is referring to, but that was a bit of an aside which probably wasted more time than anything. What you are being asked about is really before Roots, are you referring to what he said before Roots?

MR MPOFU: No, I said you in the broad sense, are you aware that before Roots, with the help of some of the people who were working under you or yourself, I don't know, the National Commissioner made a statement to the public and the media to the effect that maximum force had been used? Were you aware of that?

MAJOR-GENERAL MPEMBE: Chairperson, if I may be referred to the document?

MR MPOFU: I think it's FFF4.

CHAIRPERSON: [Microphone off, inaudible] FFF4, it's one of the documents to which you were referred when you were told the nature of the cross-examination Mr Mpofu will be addressing.

MR MPOFU: Can you go to –

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CHAIRPERSON: [Microphone off, inaudible] FFF4, have you got it? Document headed "Civil unrest incident Lonmin Mine, Marikana, North West Province, internal brief" – no, no, FFF4 is the –

MR MPOFU: Is the President's one, yes.

CHAIRPERSON: This is the President's one.

MR MPOFU: Yes, I'm talking about FFF5.

CHAIRPERSON: FFF5 is the public one.

MR MPOFU: Thank you, Chairperson.

CHAIRPERSON: Are you dealing with – but the one you gave notice of that you were going to deal with in cross-examination is FFF4, is that right?

MR MPOFU: Yes, well then it means I made –

CHAIRPERSON: No wait, no let's be clear so the witness can follow. Are you going to question him about FFF4 or FFF5?

MR MPOFU: Let me just check. It's FFF5, so I missed – they're more or less the same document.

CHAIRPERSON: No well, there's a significant difference which may be relevant later. We've been through this –

MR MPOFU: Not according to this question – I mean not in relation to this question.

CHAIRPERSON: No, no, no, if you're going to refer to FFF5, the question is whether the witness has had an opportunity to see it.

MR MPOFU: Well, it's two words – maximum force.

COMMISSIONER HEMRAJ: Do you have the document, General?

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I do have it. I just wanted maybe to check with the –

CHAIRPERSON: You were referred to it as well. It's headed "Media statement from the South African Police Service, Corporate Communication, National Media Centre." Is this the document you're referring to?

MR MPOFU: And the part I'm referring to is page 2.

CHAIRPERSON: It's page 2 at the foot of the page, it's the last line of the penultimate paragraph. You see the paragraph that begins "The dispersion action had commenced." If you go down to the end of that paragraph you'll see the sentence which reads, "Police retreated systematically and were forced to utilise maximum force to defend themselves." Do you see that?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

CHAIRPERSON: That's the sentence that Mr Mpofu is going to ask you about.

MR MPOFU: Thank you, and then after Roots, you can go to L282.

MR MPEMBE: I just want to find the slide

[10:24] MR MPOFU: L282, General. First bullet which says, "The South African Police entered into this conflict situation at Marikana Lonmin Mine with the pure intention to try their utmost to resolve it peacefully through the negotiation, and if necessary, the absolute minimum force." You see that?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Thank you. That –

CHAIRPERSON: In fairness I think you should then put to him the last sentence of the second bullet in slide 283 so that he gets the complete picture of the police presentation. What the police presentation says is they went there, this is 282, with what's described as "the pure intention to try their utmost to resolve it peacefully through negotiation, and if necessary, the absolute minimum force." And then that's expanded on and then in the last sentence of 283 it says, "The unfortunate reality was that the aggression of the crowd left the SAPS with no other choice than to act in private defence, defending their own lives and the lives of others." So those are the two passages that have to be read together, I

would think, but the point that's going to be put to you based on these passages will now be put to you by Mr Mpofu.

MR MPOFU: Yes. Well, let me put it this way; I thought you and I had agreed before that private defence also encapsulates minimum force, but that might be a matter for legal argument. So the statements are really the same, that they would act with absolute minimum force, or they would act in private defence, which also requires minimum force. You understand?

MAJOR-GENERAL MPEMBE: I do not understand, but –

CHAIRPERSON: I'm not sure that you stated it correctly, Mr Mpofu –

MR MPOFU: No –

CHAIRPERSON: - because in circumstances of private defence a person defending himself or defending another may be obliged to use what amounts to maximum –

MR MPOFU: No.

CHAIRPERSON: Yes, yes, yes, maximum force. A person dealing for example with a hostage situation or a cash heist or something of that kind might be obliged to shoot the assailant and that would be, would constitute killing someone in those circumstances, would constitute maximum force, but that's the question –

MR MPOFU: Ja, that was the –

CHAIRPERSON: The question of the application is a matter we needn't debate with the witness.

MR MPOFU: Ja.

CHAIRPERSON: You can debate it if you want to later on, but –

MR MPOFU: Ja, well for the record, Chair –

CHAIRPERSON: Sorry, give me a chance. Let's not have things put to the witness that aren't entirely accurate, but I hope in the light of what I've now said he understands the position and he will be able to answer the question you're going to put to him.

MR MPOFU: Well, Chairperson, I'm sorry, I have to do this because one of us is inaccurate, so it must be clear which one. I'm saying the common law requirement of private defence, one of them is that you must use as much force as is necessary. What is necessary has been translated by our courts to mean that you, that word "necessary" is actually what is captured by the legislation in section 13(3)(b) of the South African Police Act, which is that you must use as much force, the minimum force necessary. This is basically –

CHAIRPERSON: Well, there is no way –

MR MPOFU: If you are killing hostages it's not private defence; you are stopping a hostage

1 situation. That's a different thing altogether.
2 CHAIRPERSON: Well, it could be private
3 defence because you could be defending the hostage, but
4 perhaps we can state the same proposition saying you can
5 use as much force as you need, but no more.
6 MR MPOFU: Yes.
7 CHAIRPERSON: Right. If we -
8 MR MPOFU: That's minimum force,
9 otherwise known as minimum force.
10 CHAIRPERSON: As much as you need may in
11 fact involve quite a lot, but anyway, let's not debate
12 the –
13 MR MPOFU: Anyway, I'll leave it.
14 CHAIRPERSON: Let's not debate that
15 further. If you want to make a point to the witness,
16 please put it to the witness –
17 MR MPOFU: [Microphone off, inaudible]
18 move on to something else, Chairperson.
19 CHAIRPERSON: Yes, it might be more
20 profitable to do so.
21 MR MPOFU: Ja, I think so. You also –
22 CHAIRPERSON: Sorry, if you're moving on
23 to another point, Mr Mpofu, I was intending to take the tea
24 adjournment at 10:30 –
25 MR MPOFU: Can I just, so that I finish

1 this chapter, as you called it –
2 CHAIRPERSON: Yes, yes, of course.
3 MR MPOFU: Ja. Do you also accept that –
4 just one more question – do you also accept with your
5 knowledge or absence of it, of Criminal Law, that for there
6 to be a situation of private defence, there must be an
7 attack? Do you accept that?
8 MAJOR-GENERAL MPEMBE: There must be an
9 attack?
10 MR MPOFU: Yes, or an imminent attack.
11 MAJOR-GENERAL MPEMBE: Correct, yes.
12 MR MPOFU: Thank you.
13 CHAIRPERSON: Yes, we'll take the tea
14 adjournment at this stage.
15 [COMMISSION ADJOURNS COMMISSION RESUMES]
16 [10:56] CHAIRPERSON: The Commission resumes. Major-
17 General, you're still under oath.
18 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
19 MAJOR-GENERAL MPEMBE: s.u.o.
20 CHAIRPERSON: Mr Mpofu, I take you have a whole
21 quiver full of questions still to ask the witness.
22 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
23 Thank you. General, following on the question that I asked
24 you, you would then obviously agree that if it is not
25 established that there was an attack, any attack on the

1 police then –
2 CHAIRPERSON: No, I'm sorry, Mr Mpofu. You put
3 the question differently before the adjournment. You put
4 it correctly then. You spoke about an attack or an
5 imminent attack and that was correct, so I suggest you
6 repeat the question the way you did before the adjournment.
7 MR MPOFU: Yes, okay. Would you
8 therefore agree, given your answer before tea, that in the
9 absence of an attack or an imminent attack on, that
10 threatened the life of anybody, the issue of self-defence
11 would not arise at all because it's a prerequisite, as we
12 agreed.
13 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
14 CHAIRPERSON: That ignores the application of the
15 doctrine of putative defence but I take it that's not a
16 matter that need be debated with this witness.
17 MR MPOFU: And it's not a matter that's
18 an issue in this Commission. That has not been raised by
19 anybody but be that as it may –
20 CHAIRPERSON: I'm not sure about that. If, at the
21 end of the day, the facts indicate – I don't say they will,
22 they may well not and I certainly haven't even got a prima
23 facie view on the matter at the moment but if the facts at
24 the end of the day indicate that the principles of putative
25 defence apply, we will say so, but if they don't, we won't.

1 MR MPOFU: Ja.
2 CHAIRPERSON: And I know the police didn't raise
3 that in their opening statement but this is not a trial
4 with pleadings.
5 MR MPOFU: Well, I'm certainly not
6 raising those esoteric issues with the witness. I'm simply
7 just saying no attack, no defence really. Okay, anyway –
8 or even in English you defend yourself against an attack,
9 in simple English. Okay, now you yourself did not observe
10 any attack on the police.
11 MAJOR-GENERAL MPEMBE: Chairperson, I
12 would like that clarity. Is it on the 13th or the 16th?
13 MR MPOFU: No. I'm sorry, yes, no - no,
14 fair enough.
15 CHAIRPERSON: Referring to the 16th now?
16 MR MPOFU: Yes.
17 CHAIRPERSON: Because he finished the 15th
18 yesterday. On the 16th –
19 MR MPOFU: Yes.
20 CHAIRPERSON: At the time of the shooting at scene
21 1 where you were, you were – I think you had just got into
22 the helicopter when you got up in the air, is that correct?
23 MAJOR-GENERAL MPEMBE: Correct,
24 Chairperson.
25 CHAIRPERSON: I think your evidence was, long ago

when you were in the witness box, that when you got to the helicopter you heard something on the radio about people proceeding to the – the strikers, or some of them proceeding to attack the TRT, I think you said and you then got in the helicopter and went up in the air, is that right?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Did you – so that was just before the shooting. Did you, when you were in the air did you observe any attack on anybody by anybody else?

MAJOR-GENERAL MPEMBE: No, Chairperson. I already said to the Commission very shortly that I saw it on the video.

CHAIRPERSON: What did you – yes, after the event obviously when you came down again but did you see it on the video that same day or did you see it subsequently? We're talking about scene 1 now.

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I've seen it on a subsequent –

CHAIRPERSON: No, I know, we all have but did you see it on the 16th of August or only subsequently?

MAJOR-GENERAL MPEMBE: Only subsequently, yes.

CHAIRPERSON: Alright. And did you see from the

air anything that happened at scene 2 where some of the strikers were killed or injured?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: When you saw the attack on the video, what exactly did you see?

CHAIRPERSON: What he saw on the video – we've all seen the video ourselves. What he saw, what his impressions were, I don't know if that's going to take the investigation any further. If he'd been an eye witness to the actual event it would be different but he saw on the video what we've seen on the video. If there are points which are relevant, you will doubtless point them out to us at some stage but I don't know if there's any point in asking him what he saw on the video, surely.

MR MPOFU: So sorry, Chairperson, this is such a key point in the case, if there was an attack that he saw and we know that some videos have been withheld. He might have seen a video where he saw the attack, I don't know. If he says he saw it on the video, he must surely tell us what he saw or where he saw it and we'll determine if it was –

CHAIRPERSON: Does it matter what he saw or didn't see on the video?

MR MPOFU: Well –

CHAIRPERSON: He is not going to decide whether

there was an attack. He is not going to decide whether there was an imminent attack. He is not going to decide whether the principles of self-defence or private defence apply. He may have his own views on the matter. You say he used to lecture in criminal procedure, he may have fairly informed views but his views won't bind us. In fact, without intending any disrespect towards him, I'm not interested in his views on that matter. We will form our own views based upon what we've seen and it will be evidence of eye witnesses and so on.

MR MPOFU: Chairperson, maybe I didn't put this clearly. I'm not canvassing that with him. I'm saying to you, Chairperson, if he saw a video that you may now have seen, I would assume that you are interested to see that video. If you are not, then I'll move on but –

CHAIRPERSON: Can I ask a question? Do you know what videos are on the police hard drive?

MAJOR-GENERAL MPEMBE: I will not know the exhibit number but it was played here when I was giving my evidence-in-chief.

CHAIRPERSON: So the videos you've seen, videos or video – is it one or more?

MAJOR-GENERAL MPEMBE: It's one video that was played by Adv Ngalwana when he showed me.

CHAIRPERSON: I see.

MAJOR-GENERAL MPEMBE: Yes.

CHAIRPERSON: Okay, so the video you saw to which you were referring is a video that the Commission has already seen?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Thank you, yes. That was the question I was going to ask. Alright, thank you, General. Now the next, what you call, the next chapter that I want to deal with is what I call the standing orders and those kinds of things and here I want to start with – I've already done this to kind of preface why I'm asking you these questions but just to make double sure, if you go to SS2 which is regulation 250. I'll just read it out, I'm sure you're familiar with it. The portion that I want to concentrate on is paragraph 8 thereof which says, "The divisional, provincial or area commissioner must ensure that the C-JOC is designated and that he or she is conversant with this order and the relevant legislation and is well-trained to take responsibility for the operation." You know that?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Then number 2 says, "The C-JOC is in overall command of the specific operation for which he or she is designated and is responsible for all actions

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taken." You know that?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: And then 9(1) says, "The appointed C-JOC is responsible – again – "for well-planned and co-ordinated action for the duration of an operation." You are aware of that?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Thanks, okay. Now you know I've already accused you, fairly or unfairly, of having just been not the real C-JOC but a token C-JOC. I'm just going to canvass a few issues – and you've denied it – I'm just going to canvass a few issues around that topic, okay. On the 13th you have testified that one of the reasons that drove you to go on the ground yourself was to save lives, correct?

MAJOR-GENERAL MPEMBE: It would be amongst them, yes, Chairperson.

MR MPOFU: Yes and another reason why you went yourself to the ground was the fact that, in fact you put it this way, the fact that you didn't send Calitz and went yourself was the fact that you understood the language and the culture of the people and your own intervention as opposed to his, would have had a positive effect, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson, I –

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MR MPOFU: Sorry.

CHAIRPERSON: I think you did say that, you know. You said you went yourself, you didn't send Brigadier Calitz although he was the operational commander and you gave the reason, you said that you spoke the vernacular language that was required to be used and you understood the culture of the people. That's what you said. Now you've already agreed to that and I take it, it follows from that that you felt that you had a contribution to make, inter alia to save lives, et cetera, which you thought you were better able to make than Brigadier Calitz, through no fault of his own but for the reasons you've stated. That's correct too, isn't it?

MAJOR-GENERAL MPEMBE: Correct, Chairperson. What I was saying, I didn't speculate what would have happened if Brigadier Calitz goes.

CHAIRPERSON: No, we could speculate but it's an unprofitable speculation. We will never know the answer. He might have agreed with Colonel Merafi's attitude for example, it's a possibility, and if Colonel Merafi's plan had been adopted there might or might not have been far more serious consequences than in fact there were but that again is a matter, to some extent, of speculation, isn't it?

MAJOR-GENERAL MPEMBE: Correct,

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Chairperson.

MR MPOFU: And yet on the 16th where you were dealing with a much bigger and probably more serious operation involving more people, more guns, big guns and so on, you did the exact opposite. You elected to send Brigadier Calitz and you remained behind, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson, it's not the opposite.

MR MPOFU: Well, it is the opposite in that limited sense that on the 13th you decided not to send Brigadier Calitz and go yourself and on the 16th you decided to send Brigadier Calitz and remain behind, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson.

CHAIRPERSON: I think your answer doesn't do justice to your case. I think Mr Mpofu is right in saying that on the Monday the 13th you left Calitz behind at the JOC or in fact he first went in a helicopter to direct you to where to go, then he went back to the JOC and you then were both the overall commander and the operational commander on the ground on the 13th, that's correct. On the 16th you, there may well be reasons why you did it but that's what he is trying to elicit from you, on the 16th you did it differently. You in fact stayed behind in the JOC until the time when you went in the helicopter and you allowed Brigadier Calitz to act – to function, is a better

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word – to function as the operational commander, which is the position to which he'd been appointed. Correct? So that is the opposite of what was done on the 13th. Now, there may well be reasons for your doing that. Now did you have any other responsibilities to attend to on the 13th when you went to the railway line, that you had to attend to then and there at that time?

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I –

CHAIRPERSON: On the Monday.

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I did also indicate that my reasons on Monday –

CHAIRPERSON: You've given us your reasons. Your reasons were, you felt from a linguistic point of view and a cultural point of view you could better deal with the situation.

MAJOR-GENERAL MPEMBE: And the other one is that I wanted to rely on my experience because by then, the Chairperson will remember that by then it was the only contingency plan that was drawn on Saturday so –

CHAIRPERSON: Yes.

MAJOR-GENERAL MPEMBE: That's the main issue also, but for the 16th and I think Chairperson is correct to say that then there was, then we had the time of planning and everything was in place, there was the

interpreter there, I had many reasons. The only difference that I wanted to show now when I disagree with the Advocate, it was only to say yes, on the 16th I was comfortable because there was, structures, everything was put in place.

CHAIRPERSON: Yes. Anyway, Mr Mpofu I think may explore that point further but he is interested in the contrast between what you did on the 13th and the 16th. Mr Mpofu, I take it you want to carry on with the point.

MR MPOFU: Thank you, yes Chairperson. As far, I'm just limiting it to what I will call the language and culture reason. Brigadier Calitz didn't suddenly acquire the knowledge of the languages and the culture in the three days. He still had that handicap, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: Oh, so he had – what did he do, a crash course in two days in Zulu or Fanagolo?

MAJOR-GENERAL MPEMBE: There was a Fanagolo interpreter and he was also interpreting the actions of the minds. He was well-armed in terms of not, armed in terms of the people who can assist him.

MR MPOFU: Well, are you talking about the interpreter from Lonmin?

MAJOR-GENERAL MPEMBE: Correct,

Chairperson.

MR MPOFU: Can you envisage a situation where the interpreter from Lonmin, for example, would have given the necessary warnings in the languages that were necessary?

MAJOR-GENERAL MPEMBE: Chairperson, he could have interpreted them.

MR MPOFU: No, remember the warnings that were given to the people, the 3 000 gathered, in their languages. That's what the prescripts say, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Ja, now I'm asking you a question, whether can you as the C-JOC envisage a situation where those warnings which were to be given to the 3 000 people or so in their own languages would have been given by the Lonmin interpreter or not, according to the prescripts 262?

MAJOR-GENERAL MPEMBE: In Fanagolo, Chairperson, correct. And there were so many POP members that could have spoken all the languages that were there.

MR MPOFU: Yes, but we know that the warning, or rather when you decided that because of your language proficiency you should go yourself and be the operational commander and the C-JOC, there were also many POPs who could speak the language, isn't that correct?

Isn't that a neutral fact?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, but there was no Fanagolo speaking person.

MR MPOFU: Yes, but we know now the Fanagolo speaking person was the Lonmin guy that we have discounted just now.

CHAIRPERSON: On the 13th there was no Fanagolo person. They actually asked for one and Lonmin for some reason declined to provide one. So the witness, according to his evidence, then spoke basically in isiZulu which, being an Nguni language, could be understood fairly easily by Xhosa speaking, isiXhosa speaking people but the Lonmin man speaking Fanagolo wasn't there. He asked for, I think he asked the Lonmin representative to arrange for – Mr Blou, I think it was, and Mr Blou refused. So there is that difference between the 13th and the 16th.

MR MPOFU: Ja, well, he didn't know that before he went there.

MR SHOZI SC: Chair, for the record, we didn't decline to provide a Fanagolo interpreter on Monday. That's not our case, we dispute that.

CHAIRPERSON: Let's get, let's ask – yes, I hear what you say. Let's ask the witness. My understanding may well have been wrong. Am I – what was the position on the 13th? Did you ask for the Lonmin representative to provide

a Fanagolo interpreter?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: And did the Lonmin representative provide a Fanagolo interpreter?

MAJOR-GENERAL MPEMBE: No, Chairperson.

CHAIRPERSON: What was his response to your request?

MAJOR-GENERAL MPEMBE: Chairperson –

CHAIRPERSON: What was his response to your request in regard to the provision of a Fanagolo interpreter?

MAJOR-GENERAL MPEMBE: If they, they said they are not prepared to negotiate.

CHAIRPERSON: Mr Shozi, your objection falls away. Carry on, Mr Mpofu.

MR MPOFU: Thank you. Really General, I don't want to go around in circles on this. The gist of my question is this, that while you thought, among other things, that your understanding of the culture of the people – I suppose that includes their body language – and on the day that we spoke about, on Tuesday, you could even understand the meaning of the words in the songs which are all, as I said on Monday, admirable reasons why you chose to go yourself, I'm saying those admirable considerations

you did not take into account on the 16th. That's all, and I'd like your comment on it.

MAJOR-GENERAL MPEMBE: Chairperson, on the 13th I already said, I'll be very quick, there was no negotiator. On the 16th there was, negotiators were provided for Brigadier Calitz, there was a Fanagolo speaking person. There were many POP members who can speak different languages that could assure that the operation goes well.

[11:16] MR MPOFU: Alright, well we'll leave that for argument.

COMMISSIONER HEMRAJ: But weren't some of the negotiators able to speak some of the African languages as well? Some of the negotiators that were with Colonel McIntosh on the 16th.

MAJOR-GENERAL MPEMBE: I'm not sure, but I think I was relying also on the officers, but maybe if we check the names of the negotiators, because I know that they were four, but as on the 13th they were not there.

MR MPOFU: Thank you, and also we've already established that – once again, just to be fair, let me – I'm now giving you instances which I'm going to argue at the end show that you were, after the 13th you were no longer the real CJOC and you had either been removed or you had disengaged yourself. I'm not interested which one it

is, but –

MR MATHIBEDI SC: Sorry, Mr Chairman, he had been removed, the witness had been removed by who?

MR MPOFU: Okay, by whoever –

CHAIRPERSON: Sorry, what Mr Mpofu is doing is he's giving a preliminary statement as to the ground he's going to cover in the cross-examination for the next few minutes, so I take it the details that you ask for will be provided when he deals with the specific point that he has dealt with in his summary. So am I right, Mr Mpofu?

MR MPOFU: That's correct, Chairperson, and –

CHAIRPERSON: So, but the point that is taken is one you'll bear in mind, as Mr Mathibedi has said, you say he was removed, he wants to know by whom. When you get to that question under this topic I hope you will include that information in the question you ask, alright?

MR MPOFU: Yes, I'll do it immediately, Chairperson. And in fairness to Mr Mathibedi, maybe I should – well, I should also use the word that I did use on Tuesday, which was that you were "sidelined," so when I say removed, I mean it in that sense. Do you understand, General?

MAJOR-GENERAL MPEMBE: I do understand, Chairperson.

MR MPOFU: Yes, not that you're agreeing with it, ja. Okay, I'm saying, look, there are two possibilities, at least you've introduced two possibilities, or the second possibility. The first one which I canvassed with General Annandale was that he just upped and left in Pretoria and drove to the Marikana area, and I think the word I used was "uninvited." The second possibility, which is what you raised, was that he could possibly have been called up by the Provincial Commissioner. What I'm saying is that for the purposes of this question I'm not, I don't mind which of those is true, we'll argue that in due course. The gist of what I'm going to be talking to you about is that you were sidelined and General Annandale was installed, either by himself or by someone else, in your place. That's all. So we don't have to go to the wherefores and whys. You understand?

MAJOR-GENERAL MPEMBE: I understand, Chairperson.

MR MPOFU: Thank you. Now you also, I think you did confirm that – okay, sorry, that is a repetition. We've spoken about the chairing of meetings and so on. But would you agree that Colonel Scott effectively reported to General Annandale, and I'm taking a globular view of his evidence; I can't pinpoint a particular section, but would that be fair?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: Okay, would it be fair to say that according to the records at least, after the 13th up to the 16th you did not utter a single word, or issue any instruction that is in the minutes of the JOCCOM meetings that took place?

MAJOR-GENERAL MPEMBE: No, Chairperson, I did utter, and also speak or give instructions, but in my understanding is that not everything that is discussed in the meeting by whom it will be recorded, only important decisions.

MR MPOFU: Yes –

CHAIRPERSON: Can you give us an example of one or other, one or two of the instructions you gave to which you're referring?

MAJOR-GENERAL MPEMBE: Chairperson, I did give instructions in terms of detention facilities, processing of arrested people, arranging various activities that could take place on that day.

MR MPOFU: We'll get to the arresting of people. Can you remember any other instructions that you gave in that three days?

MAJOR-GENERAL MPEMBE: I do not understand the question.

MR MPOFU: Well, can you –

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CHAIRPERSON: You've given examples, you've given us examples of instructions that you gave during that period in your capacity, I take it, as overall commander. What Mr Mpofu wants to know is can you give us any other examples. Is that right, Mr Mpofu?

MR MPOFU: That's right, Chair. Thank you, Chairperson.

MAJOR-GENERAL MPEMBE: Chairperson, on the 14th I said I chaired the meeting when the plan was debated, I was chairing that meeting. There were changes that were made to the plan. I think I said it in detail in –

MR MPOFU: Okay, I'll leave that for argument. But what we do know for sure is that – or rather, one of the issues that I'm going to argue is an indication of your being sidelined is that we know for sure that the time of the operation on the 16th was determined not by you but by General Annandale, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: And we know that when you wanted to see for yourself, to put it mildly, you had to ask General Annandale for transport, correct?

MAJOR-GENERAL MPEMBE: Chairperson, I did explain that in any operation, whether it's even in the normal situation, even the Provincial Commissioner, I just

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want to make an example, you have a deputy responsible for resources and that person knows where, which resources are available. It's in the same way that happened in that operation. In that sense it's correct, not that I couldn't have gone anywhere without the authority of General Annandale.

MR MPOFU: Yes, but you did not even know, but he knew, that all the choppers were gone and the only one that he could have assisted you was with the Lonmin chopper, otherwise known as the Coin Security chopper.

MR SHOZI: No, it's a Protea chopper, otherwise known as Lonmin chopper.

MR MPOFU: The Protea chopper, otherwise known as the Lonmin chopper.

CHAIRPERSON: Come on, we don't have to get involved in a debate about that. We know that Coin were, it was the Coin helicopter. It was there pursuant to a contract between Lonmin and Protea. Lonmin were paying for the use of the helicopter. We know all those facts, but you're just making a point about it, it may irritate Mr Shozi, let's just call it the Coin helicopter.

MR MPOFU: No, Chairperson –

CHAIRPERSON: We know what's meant. You can argue later that it was really a Lonmin chopper for the

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reasons I've given, but let's not get bogged down on that issue now. You've got more important questions to ask, haven't you?

MR MPOFU: Chairperson, there's no need for us to be bogged down. That's why I used the exact words of Mr Shozi, so that we don't get bogged down. I was giving in actually. He provided for you what Mr Shozi calls the Protea chopper, otherwise known as the Lonmin chopper, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I just want to give – not, a short explanation. Chairperson, as I have said, he was always in the JOC. He could also be able to detect any emergencies where the chopper could have been needed.

MR MPOFU: Yes, okay. That's the reason. Okay, I was just interested in the fact. Ja, okay. You would accept that in the regulations there's no such thing as a deputy CJOC, or the parts that I read you. It says the CJOC must be in overall command of the specific operation for which he or she is designated, and is responsible for all actions taken. And then says the appointed CJOC is responsible for well planned and coordinated actions for the duration of an operation. It doesn't foresee a so-called deputy CJOC, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson.

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MR MPOFU: Thanks. And you've already testified – I'm sorry to repeat this, but I'm using it in this particular context – that the decision to bring the STF into the picture was taken by General Annandale. Just confirm that. We've gone through that, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Are you aware that – alright, and you've already testified that you would expect as a CJOC to be informed of all the major considerations taken into account to launch an operation to the stage 3. You remember that?

MAJOR-GENERAL MPEMBE: Correct, Chairperson. That was in relation to political –

MR MPOFU: Yes, yes, including that, ja. Now if you were the real CJOC, would it – or let me put it this way. Would it surprise you that the Provincial Commissioner would discuss some of the considerations being taken, including political considerations, with a representative from Lonmin, but not with you as the big chief of the JOC?

MAJOR-GENERAL MPEMBE: Chairperson, I am a junior to Lieutenant-General Mbombo. She has no obligation to say anything to me. She is my commander and I have no obligation in terms of hierarchical structure to tell her what to do.

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MR MPOFU: No, General, I'm sure you understand the question. It's not that. I know the hierarchy. I'm saying to you as the CJOC, the man who has been appointed to be all the things I've read to you, who must take responsibility ultimately for all actions, as I've read it out to you, okay, would it be consistent with a person of that statute if they were really holding that position, that your immediate superior, the Provincial Commissioner, in relation to the very operation that you are in overall command of, would discuss some of the considerations which would influence the movement to a dangerous stage of that operation with someone who's – forget the ranks, who's not even a member of SAPS, with someone who is an employee of Lonmin as opposed to the big chief?

MAJOR-GENERAL MPEMBE: I did not know about the situation, Chairperson.

MR MPOFU: Well, assume that I'm correct. Now you know, would it surprise you?

CHAIRPERSON: Sorry, let me ask a question before Mr Mpofu proceeds. Have you read the transcript of the discussion which took place on the Tuesday between, I think it was more than one representative of Lonmin –

MR MPOFU: Mr Mokwena and another one.

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CHAIRPERSON: Yes, representatives of Lonmin on the one hand and the Provincial Commissioner, Lieutenant-General Mbombo on the other. Have you – it's an exhibit before us. Have you had an opportunity to read it?

MAJOR-GENERAL MPEMBE: No, Chairperson, it's the first time that I hear.

MR MPOFU: Ja, okay –

CHAIRPERSON: So I think that's an explanation for some of the mystification that the witness has shown in response to the questions you asked. Maybe you can, if you consider it necessary, put a few short extracts from the transcript in question, which really formed the underlying and assumed basis of the questions you asked him, which he didn't understand –

MR MPOFU: Yes, fair enough, Chairperson. So -

CHAIRPERSON: So then you may or may not get a meaningful answer.

MR MPOFU: Yes. No, thank you, Chairperson, I think yes, I was, as it were, trying to short-circuit, because –

CHAIRPERSON: No, I think I'm correct in saying you assumed he'd read it.

MR MPOFU: Yes.

CHAIRPERSON: And you assumed he knew

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what you were talking about.

MR MPOFU: Yes, yes.

CHAIRPERSON: Now we know that that assumption isn't correct and you've got to approach the matter certainly from a different angle.

MR MPOFU: Yes, I think it's JJJ192.

CHAIRPERSON: If there is a particular passage to which you wish to refer –

MR MPOFU: Yes.

CHAIRPERSON: - and if the witness hasn't got a copy, I suppose it will have to be put up on the screen.

MR MPOFU: Yes. Yes, thank you, Chairperson.

MR SHOZI: Chair, of course the contents of this transcripts are yet to be agreed upon between the parties. So if Mr Mpofu could have regard –

CHAIRPERSON: Yes, Mr Mpofu –

MR MPOFU: I'll bear that in mind.

CHAIRPERSON: The caveat that's been expressed by Mr Shozi is correct, that there is still some controversy as to the accuracy of the transcription, and so subject to that caveat you can proceed, but the witness must understand there may be an argument about the precise correctness of what's been transcribed, but I presume the

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general gist of it is beyond controversy.

MR MPOFU: Yes, thank you, Chairperson. Yes, I'll bear that in mind, Mr Shozi. The parts that I'm going to refer to are quite clear, with respect. One is page 9, the printed page 9.

CHAIRPERSON: What line are you referring to, or the passage to which you will refer the witness –

MR MPOFU: Yes, I'm trying to get it.

CHAIRPERSON: - at what line does it begin?

MR MPOFU: Yes, thank you, Chairperson. Yes, okay, there's a part that says, it's line 29, I suppose, Chairperson, General, this is a discussion between Mr Mokwena and the SAPS Commissioner. When we say SAPS Commissioner, it's Provincial Commissioner. I think that's common cause. It says, "But when I was speaking to Minister Mthethu," who I –

CHAIRPERSON: That's obviously a transcription error.

MR MPOFU: Mthethwa.

CHAIRPERSON: Yes.

MR MPOFU: - "he mentioned a name to me that is also calling him, that is pressurising him. Unfortunately it is a politically high .." Mr Mokwena says, "It is Cyril, SAPS Commissioner?" "Cyril Ramaphosa,

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yes. Now remember now when I was talking to the National Commissioner last night, she said to me, 'Look General, who are the shareholders here?' So I said I do not know the shareholders, but I know that when I spoke to the Minister he mentioned Cyril, and then she says, 'Now I got it.' You know why she said she got it? Remember Cyril was in the appeal committee of Malema. Remember?" Mr Mokwena, "Yes." "And he was very strong in terms of the decision that was made." "Yes." "And remember that in Impala Malema came with our Premier and spoke to those people about that they should make their demands, but in a way that – and after that we ourselves as the police, we managed, you know, manage the situation after Malema came. Now our discussion with the National Commissioner was around this thing that say is this thing now happening such that again Malema come and defuse this thing so that it becomes as if Malema has taken charge of the mining, the mine." Mr Mokwena, "Yes." "Once again remember Malema's view that the mines should be.." Mr Mokwena, "Nationalised." SAPS Commissioner, "nationalised and all that, so it has got a serious political connotation that we need to take into account, but which we need to find a way of defusing. Hence I told these guys that we need to act such that we kill this thing." "Immediately, yes."

[11:36] CHAIRPERSON: That's Mokwena speaking,

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"Immediately, yes, Mr Mokwena. SAPS Commissioner, When tomorrow we have to move in if today we do not find co-operation n these people, we need to move in such that we kill it because we need to protect a situation where any jig and jive from a political area, .." Okay and it goes on, or rather then they talk about somebody else.

CHAIRPERSON: The PAC leader, I take it, Mr Godi.

MR MPOFU: Ja, the APC actually of Mr Godi, which is a variation of the PAC.

CHAIRPERSON: Thank you, I accept your guidance on that.

MR MPOFU: Thank you, Chair. And then there's somewhere else, I'm sorry I can't find it on hand now but you can take my word for it on this one, there's somewhere else where she also says that there's a financial consideration, this thing must end today or soon because she had to pay for it. This is the question, the Chairperson was correct, this is a matter we'll canvass with the other witnesses. So all I'm asking you is, if those considerations, one, that there was pressure from shareholders, two, that you did not want to get Malema to be seen to be the person defusing the situation and three, the payment, this thing was now costing money and so on, if those considerations weighed heavily in coming to the decision, was that something that should have been shared

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with someone holding the position of C-JOC who is, after all, responsible for all the actions at the end of the day?

MAJOR-GENERAL MPEMBE: Chairperson, before I respond I just want to state very shortly

CHAIRPERSON: State?

MAJOR-GENERAL MPEMBE: Very shortly, is to say I am not aware of this. It's the first time that I see it and I see there they say it's the SAPS Commissioner. I know sometimes they will say it's the top cop only to find it's a constable.

CHAIRPERSON: Yes, well, we are told that the reference to the SAPS Commissioner is a reference to Lieutenant-General Mbombo.

MAJOR-GENERAL MPEMBE: Yes.

CHAIRPERSON: We must assume that that's correct. We're also told that the transcription is not necessarily entirely correct and there is ongoing discussions between the SAPS and Lonmin about that, but the general gist of it I take it is correct and – but I think we must accept, until we're told it's not so, that the reference to the SAPS Commissioner is a reference to Lieutenant-General Mbombo. Sorry, I was interrupting you but that's in response to the point you were making.

MAJOR-GENERAL MPEMBE: Yes, Chairperson, that whatever I say now it will be a matter of speculation,

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of not correct, not correct, but as I've said earlier on I was not there, I don't have any knowledge of this and I cannot say that General Mbombo – and as I've indicated, if General Mbombo spoke there, she has no obligation to ask permission from me.

CHAIRPERSON: That's not Mr Mpofu's question. Mr Mpofu's says obviously she didn't have to ask permission but he asked you, as I understood his question, for your view as to the appropriateness of her discussing matters of this kind with an outsider from Lonmin. And it might well be embarrassing for you to express an opinion on that and it may well be that it's for us to decide whether that was appropriate, but perhaps – you know there have been times in the past, you remember Brigadier Mkhwanazi was asked questions too, to comment on things that the National Commissioner said and he asked not to be pressed on that point which, in effect, said something but without saying it. I think you're putting him in an embarrassing position –

MR MPOFU: No –

CHAIRPERSON: - asking him to comment on the appropriateness of –

MR MPOFU: No –

CHAIRPERSON: - his senior in this regard. It's a matter for argument which you will doubtless raise with us

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at the appropriate time, is that correct, Mr Mpofu?
MR MPOFU: No, I'm afraid not, Chairperson. I accept that – that's why I'm saying to him I'm not going to canvass the whys and wherefores. I'm asking this for a very limited purpose which I've made clear. For the third time, I'm going to make it for the third time. The question, General, is simply, would you as the Chief JOC or the big person who is responsible for all the actions and so on, would you find it strange that major consideration for when the operation should get to a particular stage and concluded, are not discussed with you? Forget that they were discussed with Mr Mokwena, that's just a secondary part, that they're not discussed with you but what is more, they are discussed with someone who is not even a member of SAPS. That's just for emphasis. The real question is about you, sir.
MAJOR-GENERAL MPEMBE: Chairperson, I am on record. I don't want to go in deeper detail, that I briefed the Provincial Commissioner and from that point of view I believed that what I briefed about going to stage 3, it was that one. And as I say, this is the first one, I really don't have comment.
CHAIRPERSON: Well, you told us – we covered that before, I don't propose doing it again – you told us before in one of your statements that, and later in your evidence

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that you briefed her on the Thursday. Now this discussion takes place on the Tuesday, so it's said, and we see the person who we are told is Lieutenant-General Mbombo saying to someone else that you would have to move in on Wednesday, that's tomorrow, and the reason, among the reasons given would seem to be the need, as she puts it, to kill this thing because otherwise the same thing will happen that happened at Impala, Mr Malema will come and Mr Malema will claim the credit for having – it's not put as clearly as that but that, I take it, is what it amounts to – for having defused the situation. Now, that's what the questioning is about. Now I take it the idea of getting in before Mr Malema can come and do anything was not discussed with you, is that correct?
MAJOR-GENERAL MPEMBE: Yes, Chairperson, but including the whole discussion, I didn't know about it.
CHAIRPERSON: Obviously you weren't at, you weren't at the discussion but I take it we can accept that Lieutenant-General Mbombo didn't say to you, by the way, we've got to act quickly because we've got to sort the thing out before Mr Malema comes. That was never put to you, was it, by anybody? Am I correct?
MAJOR-GENERAL MPEMBE: Correct, Chairperson.
CHAIRPERSON: And she also said that, or so it

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appears, that there had been a telephone conversation with the Minister of Safety and Security who had said he was being pressurised by someone who was identified as Mr Ramaphosa. Now whether there was such a conversation, whether there was any pressure of that sort is a matter that we will presumably be wiser about later when the Minister and Mr Ramaphosa testify, but the question I think Mr Mpofu wants to know from you is, did the Provincial Commissioner at any stage say to you what she allegedly or apparently said to Lonmin, that this information that there was this alleged pressure by Mr Ramaphosa exercised on the Minister, did she ever tell you about that or was that something that she did not mention to you?
MAJOR-GENERAL MPEMBE: No, there was no discussion between myself and General Mbombo about Mr Cyril Ramaphosa and the Minister and –
MR MPOFU: Thank you, Chairperson, that's enough. Sorry, Commissioner, to put –
COMMISSIONER TOKOTA: General, do I understand you to be saying, look, I'm not in charge of the police, General Mbombo is in charge. I have no control over her actions, discussing things with certain people and she has no obligation to report to me what she has discussed, what plans she had and I can't question that. So therefore in this regard I can't help you. Is that the

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way I understand, is it correct?
MAJOR-GENERAL MPEMBE: Exactly correct, Commissioner.
MR MPOFU: You couldn't have put it better, I'm sure, but did – we've now dealt with those two considerations. A third consideration that also arises from this conversation is on page 15 where she says, r rather –
CHAIRPERSON: Could we have page 15 please and while you're getting it, Mr Mpofu will tell us what line he's referring to.
MR MPOFU: Yes.
CHAIRPERSON: Have you got a copy of the document?
MAJOR-GENERAL MPEMBE: I have it here. Somebody put it here but it, immediately when the question was asked it disappeared.
CHAIRPERSON: Have you found it again? It reappeared. The case of the disappearing and reappearing document. It has now reappeared.
MAJOR-GENERAL MPEMBE: Yes, Chairperson.
CHAIRPERSON: We are told by Mr Mpofu, whose instructions in this regard we will comply with, that we must look at page 15. What line must we look at, Mr Mpofu?
MR MPOFU: From 10 onwards. "That is what I was saying. You know, the other key challenge is

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that all these members that are here, I have to pay them so how much am I going to cough out for all these days. I mean I have to, I have given them now up until the weekend if we cannot sort this thing but my hope is that by tomorrow the latest or you get the gist." What she's really saying is that because of financial considerations the thing should be ended soon, not later by the weekend but preferably tomorrow. Was that key challenge discussed with you, the consideration for moving at a particular time as opposed to another?

MAJOR-GENERAL MPEMBE: No, Chairperson, but according to my personal knowledge the dispersal and the evidence before this Commission is that the dispersal didn't go on Wednesday, it actually happened on another day.

MR MPOFU: Yes, which was the same week. That's why she said, "I give them until this weekend, if we cannot sort this thing but my hope is that by tomorrow" – so it could have been Wednesday, Thursday, Friday, until the weekend, you understand that?

MAJOR-GENERAL MPEMBE: No Chairperson, I don't understand.

MR MPOFU: Do you know what the weekend is? It means Friday, Saturday, Sunday, any time between the time she was talking and Friday, Saturday, Sunday,

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correct?

MAJOR-GENERAL MPEMBE: No -

CHAIRPERSON: I would interpret "until the weekend" as probably – Mr Mpofu, do me a favour, just keep quiet while I'm speaking –

MR MPOFU: I didn't say anything –

CHAIRPERSON: I would interpret "until the weekend" as meaning until the end of Friday but I may be wrong in that regard, but were you told at any stage by Lieutenant-General Mbombo that there was any time limit that she was imposing, that she was expecting the problem to be sorted out by any particular time?

MAJOR-GENERAL MPEMBE: No Chairperson, as I said earlier on that she did not prescribe to me the time, the day.

CHAIRPERSON: She didn't say it has got to be sorted out by such and such a date.

MAJOR-GENERAL MPEMBE: No Chairperson, and she listened to me, Chairperson, if you remember very well after I spoke to the unions to say I am going to give negotiation the chance, I've got the unions of, the presidents, and that's it and –

CHAIRPERSON: Remember this you said, this conversation allegedly took place on the Tuesday and we saw already that she was talking about acting on the following

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day, the Wednesday. In fact no action was taken to sort out the problem on the Wednesday by the Lieutenant-General. You were the one who took action in arranging for the presidents of the unions to come and address the strikers, is that right?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, and I told her this is what is going to happen and she didn't disagree with me, she agreed with me.

MR MPOFU: Ja, well, okay we've already covered that point that she, although she said preferably the following day but her timeframe was until the weekend, so I'm not going to go through that again. Okay, let's go to page 8. A fourth consideration that seems to have played a role on when and how the operation should be done is contained – Chairperson, I think we can start at line, page 8 line 15, well, where it says "SAPS Commissioner." The second, the third SAPS Commissioner on the page. "You see I want us to, I want us, you remember last night, Albie, I raised this thing that when we were dealing with Impala we had a lot of allegations and rumours and some of these allegations they were pointing to the management, that the management is colluding with AMCU and so on and so forth and at some point, at some point ourselves, we were asking ourselves questions to say but these rumours that we are getting, these issues are being said, they might find

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truth somehow because we were looking at how the management was moving forward in terms of taking action, in terms of, you know, because what we believe is, is that whether there is this unrest, this unrest now, this unrest does not withdraw our policy. Our policies are still intact. They need to be implemented in the best way and the unrest situation, they should take its own form but like I said yesterday that once we are on the site as the cops then we take control of the security issue but the administrative issues should also take their own life, so at the end of the day when we were dealing with these issues we ended up ourselves not being comfortable in terms of understanding whether the Impala Mine management really is colluding with the mine. But also remember from a political point of view there was even this feeling that, you know, the mining sector wants to replace NUM, you know, with a new face and maybe that is why these things are erupting. So I think yesterday, Albie, you will recall, you will recall that when this discussion with the National Commissioner came she also, from the discussion that she raised with you and you know, and some of these questions that she raised, you remember I raised them in the morning in our meeting and she also felt you know it is difficult to separate management from giving these people a leeway and if management gave these people this type of leeway, how do we

separate them from the allegation that can come and say but they are supporting them? So I want us to, when you said people must be arrested, I want us to be very clear that any information that we get, we should get so that we arrest people, that is our interest because yourselves here as management you will clear yourselves from this Mr Mokwena perception, SAPS Commissioner, you know Mr Kwadi here. You will clear yourself by ensuring that you defuse the situation" and so on and so on. The gist of this is that, and this goes directly to the fact that you remember the people I represent were arrested, some of them, you understand that? Do you know that I represent people who were arrested in the operation?

MAJOR-GENERAL MPEMBE: No, I understand Chairperson, but I need just maybe to bring this to the attention of the Commission to say I find it really extremely difficult for me to comment on something that I am told in the Commission, it talks about my senior and I was never being given before and now I am expected to answer questions and really I find it extremely difficult for me.

MR MPOFU: Okay General, once again I must preface whatever I am going to say with an apology for that situation, you are quite right, but just remember all I'm asking you about is not the details of who said what

and why and so on. All I'm saying is that you as C-JOC, if these were some of the considerations that were taken to influence the direction, let's leave it neutral like that, of the operation, that when those considerations were being discussed, not with you as the C-JOC but with outsiders, is –

CHAIRPERSON: I'm sorry, Mr Mpofu, I understood what you were saying in relation to the earlier considerations that you put. I'm not quite sure where this one takes you –

MR MPOFU: Well –

CHAIRPERSON: Sorry, can I just – I think I understand what the Commissioner allegedly said to Lonmin but I'm not quite sure about, firstly about the question that you are asking about it, perhaps you could make that clear to us.

MR MPOFU: Ja.

CHAIRPERSON: And we can then see whether, in the circumstances, we can expect the witness to give an answer. You will remember we have ground rules here. One of them is that a person to be cross-examined should be given prior notice of what, the matters to be covered, in particular documents to be covered and he is at a disadvantage, as he points out, that this document wasn't given to him and that was an unfortunate oversight but let's first see – and we

must bear that in mind too, but let's hear. What precisely do you want to ask him about this allegation? Sorry, before you answer the question can I just put it to you, the way I see what the Commissioner was saying, the Provincial Commissioner. She was saying in the case of Impala and from Impala onwards there was the suggestion that the mine owners were in fact trying to undermine NUM and replace them with another union, namely AMCU, and there was the suggestion that that was part of the explanation for what was happening.

[11:56] And she is now saying there was this allegation. We've got to know whether that's correct or not and she seems to be linking her question to the fact that Lonmin wasn't giving a lot of information to the SAPS in regard to the people who were on the koppie, people whose faces could be seen on the photographs and that kind of thing. And she seems to be suggesting that look here if you don't give us this information, I'm saying I'm not sure if she's saying it directly, but if you don't give us this kind of information we will be strengthened in the perception that you people are really in a sense trying to help AMCU to undermine NUM and which in effect affects the effectiveness of our operation. That's what I understand her to be saying. Whether I'm right or not is another matter. But if that's so, what questions you want to ask this witness

about that.

MR MPOFU: Yes, thank you, Chairperson. Well with respect, Chairperson, I think this – that's why I was asking the last question. This aspect is more – 100 times more relevant than even the other three aspects that we covered, for me. Because I represent people who were arrested. What has been suggested here –

CHAIRPERSON: Yes, I understand that, Mr Mpofu.

MR MPOFU: Can I finish?

CHAIRPERSON: The question is the relevance of asking the question of this witness.

MR MPOFU: No.

CHAIRPERSON: I'm sure you will ask questions of Lieutenant General Mbombo when she comes about this, but what question are you asking this witness about?

MR MPOFU: Well I'm asking the same question - this is the fourth time now. I'm asking the same question that I've asked in respect of the other three issues namely whether if there was a consideration of killing, to use that unfortunate word, a perception that the management was helping AMCU and if the way to kill that perception was by arresting people so that it can be seen that they are not assisting AMCU?

CHAIRPERSON: I don't understand the

commissioner to be saying that. What I understand is –

MR MPOFU: Well I –

CHAIRPERSON: Can I just put this to you first? My understanding was she was saying that you will quote "kill" unquote this perception if you give us the information and if you don't give us the information then you won't kill the perception and the perception will still be there.

MR MPOFU: No.

CHAIRPERSON: But anyway, now you and I have debated it, let's see what precisely formulated question –

MR MPOFU: Ja.

CHAIRPERSON: - you have to ask this witness based on the passage –

MR MPOFU: Yes.

CHAIRPERSON: - that you read to him from the transcript.

MR MPOFU: Thank you. Okay, to do that, General, I'll just read the lat two sentences, not that whole long thing. "So I wondered when you said people must be arrested, underline arrested, so when you said people must be arrested, I want us to be very clear that any information that we get we should get so that we arrest people. That is our - because yourselves there as manager

you will clear yourself from this perception, from this perception," and so on. So it's very clear that the perception by arresting people, the perception that there is assistance to AMCU will thereby be undermined and I'm saying to you that since I represent people who were arrested, for this reason or for any other reason, I don't know, the only question really that's relevant to you – I'll ask the other questions to the provincial commissioner – the only question that's relevant to you is if this was a consideration, the killing of the pro AMCU perception, was it discussed with you? If not, do you find it strange?

MAJOR-GENERAL MPEMBE: Chairperson, I've already said that nothing here was discussed with me but whether I said is that I did give considerations that I discussed with Provincial Commissioner Mbombo and they are on record. And the other thing is General Mbombo did not effect any arrest. Arrests were effected by members and whereby they gave statements for crimes that those people have committed.

CHAIRPERSON: Yes. I think at this stage we can – if it's convenient for you, Mr Mpofu, we take the comfort break and then you can proceed with the matter thereafter.

MR MPOFU: Thank you, Chairperson.

[INQUIRY ADJOURNS INQUIRY RESUMES]

[12:20] CHAIRPERSON: The Commission resumes. Major-General, you're still under oath.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MAJOR-GENERAL MPEMBE: s.u.o.

CHAIRPERSON: Mr Mpofu, you were going to take this question that's dealt with on pages 8 and 9, I think it is, of the exhibit further with the witness.

CROSS-EXAMINATION BY MR MPOFU (CONTD.): Yes. Thank you, Chairperson, if I can just make an enquiry. Sorry, sorry General. Okay, I won't revisit the issues that I've discussed with you. All I think I can just say to you is that I'm going to argue at the end of the case that these indications that I've given of what seems to be serious operational matters having a bearing on the operation for which you were responsible or for which you carried the overall responsibility, those matters being discussed not with you but with someone who is not even a member of SAPS are clear indications of the extent to which you were sidelined and to which nobody really took you seriously as the real C-JOC.

CHAIRPERSON: I'm sorry, why do you say – I understand the first part of your question but why do you say no-one took him seriously?

MR MPOFU: Well – [microphone off,

inaudible].

CHAIRPERSON: No, I think you should actually.

MR MPOFU: Ja.

CHAIRPERSON: Alright, repeat the question minus that section so that the witness and I can follow you.

MR MPOFU: Ja. I'm asking for your comment to this proposition, General, that these considerations, these facts, if they are true, that these major considerations which have a bearing on the operation, its timing and its nature are matters which should have been discussed with someone who was the real C-JOC and who, according to the prescripts, is overall responsible for all actions. What is your comment to that?

MAJOR-GENERAL MPEMBE: Chairperson, as I said before, these – I don't know whether, I don't want to use the so-called considerations but what has been said there –

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: It has never been considered in the implementation of dispersal. Two, is that it's known what I have briefed the Provincial Commissioner about and three, I had no knowledge of this.

MR MPOFU: Yes, no, I accept that you had no knowledge of the desire to kill it, whatever that means, because of these considerations. I'm simply, that's

exactly the point that you had no knowledge when you should have because these were matters that concerned what I'm calling loosely your operation, if you were the C-JOC.

MAJOR-GENERAL MPEMBE: Chairperson, I repeat again, this has never been used to disperse on the 16th. According to me they were never being a consideration for the dispersal. the considerations that were considered were the ones that I briefed the Provincial Commissioner about and which is in front of the Commission.

MR MPOFU: Ja, well, that's even worse, General. It means that if the, or rather when General Mbombo was listening to your five points which you told him the following day, she was just going through the motions. There already were other considerations which had been taken into account.

CHAIRPERSON: How can he answer that, Mr Mpofu?

MR MPOFU: Well –

CHAIRPERSON: I can understand that that's a question that you want to ask Lieutenant-General Mbombo –

MR MPOFU: No –

CHAIRPERSON: But if you, how can you put it to him that she was just going through motions? How does he know from his own knowledge whether she was going through the motions? I can understand it's a legitimate question to ask her.

MR MPOFU: Yes.

CHAIRPERSON: But I have problems with your putting it to this witness.

MR MPOFU: Well, Chairperson, if he knows now, which he didn't know then, that the decision was already taken, surely that must be a big thing. If at that time he thought all this is being done because of what I've said and it turns out now, as I'm explaining to him, that there were other considerations, how can that be irrelevant to a person who believed genuinely, I can understand from his point of view, that it was his say-so or rather considerations that were taken into account and when it turns out there were four other considerations which he no clue about that were taken into account. How on -

CHAIRPERSON: How is he - I'm sorry, how is his response to that proposition, in fact it's far more complicated than you put it but I won't go into that with you now, but how can his response to that help us here in deciding, in answering the questions we've been asked to answer.

MR MPOFU: Okay, I'll move on. General –

CHAIRPERSON: Before we move on can I deal with something? Mr Mathibedi, when we came back after the comfort break we found on the table here what purports to be another statement by General Mpembe, Major-General

Mpembe. I don't know why it was given to us. Do you know anything about it?

MR MATHIBEDI SC: We know nothing, Mr Chairman.

CHAIRPERSON: Sorry?

MR MATHIBEDI SC: We know nothing, it was not made available to us.

CHAIRPERSON: Mr Chaskalson, can you help us?

MR CHASKALSON SC: I think it was given to you, Chairperson, because Mr Mpofu indicated that he wanted to use it and I suggested that a copy be given to the Commissioners and the witness before it gets used. Where it comes from, it's one of the statements in the statements directory on the SAPS master hard drive.

COMMISSIONER HEMRAJ: And it's not been before –

MR CHASKALSON SC: And it's not yet an exhibit.

MR MPOFU: Ja -

CHAIRPERSON: Are you going to deal with it?

MR MPOFU: Yes, I'm moving on –

CHAIRPERSON: We'd better give it an exhibit number then.

MR MPOFU: Chairperson?

CHAIRPERSON: We'd better give it, if it's not

previously an exhibit we'll have to give it an exhibit number.

MR MPOFU: Yes.

CHAIRPERSON: Is this the appropriate stage to do so?

MR MPOFU: Yes.

CHAIRPERSON: Or – alright.

MR MPOFU: Chairperson, when I was saying I'm moving on, I was going to it.

CHAIRPERSON: Okay, no, I understand. It's HHH –

MS PILLAY: 62, Chair.

CHAIRPERSON: Sorry?

MS PILLAY: 62.

CHAIRPERSON: HHH62. Alright, I'd better make a note in my book. Exhibit HHH62, statement by General Mpembe dated – unsigned statement by General Mpembe dated August 2012. So in other words this is a pre-Roots statement. If the date at the end is correct it's a pre-Roots statement, is that correct, Mr Mpofu?

MR MPOFU: That's correct, Chair.

CHAIRPERSON: Does the witness have a copy?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: On the screen.

CHAIRPERSON: You can have mine in the meanwhile. Oh, you're getting someone else's. My one is, my offer is

spurned, alright. Ms Pillay, thank you very much for giving a copy to the witness. Now this statement isn't signed by you but it's got your name on it. Have you seen it before? You see this is also a problem in respect of the requirement that people get prior notification of documents so that they can study them. I haven't seen the document before either. I don't know what new material is in it or possibly what material isn't in it. May I ask you this question, Mr Mpofu, assuming you hold this cross-examination, were to hold this cross-examination over till after lunch so that the witness has an opportunity to study the document and so do we, the Commissioners, would that prejudice you in the presentation of your cross-examination?

MR MPOFU: Chairperson, if you can just allow me one question and then it will be clear and then I will, depending on the answer.

CHAIRPERSON: [Microphone off, inaudible]

MR MPOFU: Thank you, Chairperson.

CHAIRPERSON: - put his clarifying question first.

MR MPOFU: Yes.

MR MATHIBEDI SC: Sorry, Mr Chairman, we also would like to have a look at the statement before, you know, any questions can be put to the witness.

MR MPOFU: Ja.

CHAIRPERSON: It's suggested that subject to this question we're going to hear in a moment, that this matter could stand down till after lunch and possibly Mr Mpofu can use some of his other cross-examination –

MR MPOFU: Yes.

CHAIRPERSON: - material in the meanwhile, but let's first hear what his question is.

MR MPOFU: I promise I won't refer to the statement, Chairperson. General, did you at any stage attend the – you remember that on the 15th in the evening the NUM, or rather AMCU was ready to go to the mountain, the NUM was reluctant and then at some stage they wanted to have a caucus, remember that?

MAJOR-GENERAL MPEMBE: I remember, Chairperson.

MR MPOFU: Did you at any stage attend the NUM caucus?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: Okay. Alright, then we'll deal with it after lunch. Thank you, Chairperson.

CHAIRPERSON: You're moving on to your next point?

MR MPOFU: Yes.

CHAIRPERSON: That gives Mr Mathibedi also a chance to study the document, and the witness as well.

MR MPOFU: Yes, that's correct.

CHAIRPERSON: Did you – let's just get this out of the way. Can you recall having made a typed statement such as the one that I have in my hand which is now exhibit HHH62, in August of this year, of last year?

MAJOR-GENERAL MPEMBE: Chairperson, the statement that I made it was the manuscript which maybe could have been typed.

CHAIRPERSON: I see. In any event, you can't answer the question then either at this stage.

MAJOR-GENERAL MPEMBE: Yes.

CHAIRPERSON: That's the sort of question you can be asked after lunch when you've had a chance to study the document. Alright, okay. Mr Mpofu?

MR MPOFU: Thank you very much, Chairperson. I apologise again, Chairperson. I have to ask this in a careful way because I know you have refuted my premise but if –

CHAIRPERSON: I don't know what your premise is but I suspect he may not have refuted it, he may simply have rejected it. Whether it's a successful rejection so that the proposition –

MR MPOFU: Exactly.

CHAIRPERSON: - stands refuted, is a matter we may have to decide later.

MR MPOFU: Thank you, Chairperson.

That's why I'm saying if, if ultimately the Commission agrees with my contention that you were just a figurehead type of C-JOC without the authority, I think is the correct word that the Chairperson had given me, would you agree that that would constitute yet another deviation from the prescripts because of what I read to you of what a C-JOC should be saddled with?

MAJOR-GENERAL MPEMBE: Chairperson, I don't know whether I'm asked to give an opinion or to speculate.

MR MPOFU: No

CHAIRPERSON: No, let's approach it this way. Mr Mpofu has suggested to you that you were sidelined, you weren't the real C-JOC, you were – I don't know what the correct word would be but you were the nominal, titular C-JOC, the real C-JOC was General Annandale. Now you've denied that, you say that's not the way you see the matter and it's not your understanding of the situation at all but he's asking you now to assume for the sake of the answer that what you deny is in fact correct, that you were the titular C-JOC, that the real C-JOC was General Annandale. And he says if that is so, only if that is so, do you accept that that would be a deviation from the prescripts, particularly the requirements of, I take it, standing order 262 paragraph 8 because paragraph 8 says there's got to be

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a C-JOC and it spells out his responsibilities but that must be a real C-JOC who has really got the responsibilities and is able to appropriately take those responsibilities because he is clothed with the necessary authority. So that's the question he is asking. Do you understand the question?

MAJOR-GENERAL MPEMBE: I –

CHAIRPERSON: I know you reject the assumption on which it rests, so if you answer the question you won't be taken to have impliedly accepted the assumption but he says if you accept that assumption, which he knows you don't, what is your answer in respect of the further point that he has put to you? Am I putting it correctly, Mr Mpofu?

MR MPOFU: Thank you, Chairperson, very much, yes.

MAJOR-GENERAL MPEMBE: That's why I'm saying, Chairperson, I don't believe so that it was like that but I think when the Provincial Commissioner appointed me as the C-JOC I did believe that I am the real C-JOC. I never thought that she could make me a token C-JOC.

MR MPOFU: Yes. No, that I accept, General, and I'll move on just now if – this is my last attempt. I accept, one, that you saw, must have seen yourself as the real C-JOC or that appointment to be what it purports to be. I also accept that nobody said to you,

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listen here, you are not the real C-JOC, just sit here and say nothing, but all I'm saying to you is that if, if the Provincial Commissioner, between the Provincial Commissioner and General Annandale there was a situation where he was installed, without your knowledge, as the real C-JOC, that would be a deviation from a regulation that says the C-JOC, he or she is designated and is responsible for all actions taken. That would be a deviation from that, would you agree?

MAJOR-GENERAL MPEMBE: No, Chairperson, in the sense that the standing order says that the C-JOC is appointed by the Provincial Commissioner. If in the same assumption, Chairperson, it must be put in the same assumption, if it was that it was General Annandale he should have been appointed by somebody else so that that could still be within –

MR MPOFU: Fair enough. That's the answer, okay. Thank you, General. Now, when you said in your statement and I'm paraphrasing now, when you said in your statement, I think it's paragraph 51 of HHH12 – is it GGG12? GGG12. What paragraph did I say? 51. What did you want to communicate to the Commission when you said at GGG12 paragraph 51, "At all times while I was in the helicopter, which was a period of about 20 minutes, I was accessible by radio both to the operational commander

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Brigadier Calitz and to the JOC. As overall commander I could only give direction when that direction was sought, either from the JOC or from the operational commander. Neither sought direction." What did you want to communicate to the Commission when you included that in your statement?

MAJOR-GENERAL MPEMBE: Chairperson, it's explained in terms of exhibit HHH page 11, paragraph 28.

MR MPOFU: Okay General, we're going to get there just now. I'll rely on the screen. HHH3 paragraph 28, please.

MAJOR-GENERAL MPEMBE: Page 11.

MR MPOFU: Page 11.

MAJOR-GENERAL MPEMBE: Paragraph 28, Chairperson.

CHAIRPERSON: Yes, you see the paragraph? Oh, it's not on the screen yet. It's page 11 of the statement, supplementary statement, page 11 para 28. Para 28.

MR MPOFU: Thank you very much.

[12:40] CHAIRPERSON: I'll read it out for the benefit –

MR MPOFU: Yes.

CHAIRPERSON: - of people who haven't got the screen in front of them. "I should add to what I say in paragraph 51 of my original statement," that's the

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paragraph that was read by Mr Mpofu, "that as overall commander I am the soundboard to the operational commander and the JOC when problems arise, and they inform me through the radio or cell phone of those problems and seek my guidance. This did not happen. It is not the function of the overall commander to usurp the functions of the operational commander, particularly when the operational commander is better positioned, has been on the ground and experiencing action first-hand." That's what you say.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: A couple of questions arise from that, which Mr Mpofu may well ask you, but I'd like to ask you one at the outset. In the last sentence you say, "It is not the function of the overall commander to usurp the functions of the operational commander," and then you say "particularly when the operational commander is better positioned, has been on the ground and experiencing action first-hand." I'm not quite sure why you use the word "particularly" because if being in the air and able to see what was happening below you were in fact in a better position to see what was happening and see if things which should be attended to, would it not have been appropriate for you to have intervened, as it were, and if necessary issued some kind of instruction even though the operational

commander didn't seek guidance from you? What do you say about that?

MAJOR-GENERAL MPEMBE: I did say it's correct what the Chairperson is saying. But in this case I couldn't say anything when I didn't see anything wrong, or when there was nothing reported to me.

MR MPOFU: Yes, and in any event the operational commander is always, or let's say usually would always, or usually be in a better position than anyone sitting in the JOC because the operational commander would be on the ground. So the prescript that says you must communicate to the overall commander obviously assumes that the operational commander would always be in a better position from that point of view. Do you understand what I'm saying?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: I'm saying isn't it so that by definition the operational commander, who would be on the ground, would always be in a better position to make assessments than someone, albeit senior, who is not on the ground?

MAJOR-GENERAL MPEMBE: In that aspect, yes, Chairperson.

MR MPOFU: Yes, so that the duty to communicate with the overall commander is imposed, despite

the fact that the operational commander would always be in a better position. Do you understand that?

MAJOR-GENERAL MPEMBE: I do understand what the Advocate is trying to say; provided that there is something that I see or I hear from the radio, that is not in accordance with the plan.

MR MPOFU: Yes. Okay, again short-circuiting, my reading - and you can comment - of your paragraph 51 either in the original form or this form, is that you were criticising the operational commander and the people in the JOC for not seeking your direction, I think is the word that you used, despite the fact that you say you were accessible by radio.

MAJOR-GENERAL MPEMBE: Not correct, Chairperson –

CHAIRPERSON: I don't see where the criticism is, Mr Mpofu. I understand the point that they never asked for guidance and therefore he didn't give any, but I'm not sure that I see any criticism. Perhaps you can direct me to what I should see in that regard?

MR MPOFU: Alright, you wouldn't just out of the blue say to the Commission, 'Look, if direction was asked from me I would have given it, but as it happens, it was never asked from me,' if that was meant to be a compliment.

MAJOR-GENERAL MPEMBE: I still do not understand the question, Chairperson.

MR MPOFU: Well, okay, we'll leave it for argument. Anyway, that argument is going to –

CHAIRPERSON: Sorry, can I ask a question flowing from your question? If you had seen something from the air which required immediate attention and which wasn't receiving attention, because you could hear on the radio what instructions Brigadier Calitz was giving, I take it – that's right, isn't it?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

CHAIRPERSON: Now if you'd seen something which you thought required an instruction from him, which he was not giving, even though he didn't seek guidance from you, would you have said to him, 'Look here, Brigadier Calitz, there's this problem, you'd better deal with it, or you'd better issue an instruction along these lines'?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: So from the fact you didn't do so can we infer you didn't see anything which required in your opinion an intervention of the kind I've mentioned?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: And I will also argue that you

were also still trying to convey the same criticism or commentary when you referred in paragraph 56 of HHH – or rather, GGG12, or if I'm wrong you'll tell us what you wanted the Commission to understand by that. You said, "I wish to state" – sorry, are we there? Paragraph 56 of GGG12, there you said, "I wish to state that if I had been told immediately after scene 1, but before scene 2, that people had been killed, I would have directed that police members do a show or force and contain the situation while attending to the scene around the kraal. Effectively I would have directed that we would do the same thing that I had done on Monday, the 13th." Let's just deal with the first part of that. I think that the significance of this is – and I don't want to put it higher, I think we've already had that debate – the significance of this is that had this happened and had you intervened, I think the Chairperson previously corrected me, there could have been two outcomes; you could have said go ahead, or you could have said don't go ahead with scene 2. Can we accept that as a, just as a statement of general fact?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: So the pause or break that you might have called for if you had been called between scene 1 and scene 2, could not have resulted in either you saying yes, go ahead with scene 2, or saying don't go any further.

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Are you saying none – which one of those two could not have eventuated?

MAJOR-GENERAL MPEMBE: None of them, Chairperson, and the inference that can be drawn there is that it's purely a situational appropriateness that Brigadier Calitz could have applied and I need also to state that in my testimony I even said that should also be taken into account with regard to exhibit FFF1, and paragraph 5.2.8.

MR MPOFU: Okay, I'll also leave that for argument. Thank you –

CHAIRPERSON: Sorry, let's take this point further. In 56 you say that what you would have done if you'd been told immediately after scene 1, but before scene 2, that people had been killed. So a number of points flow from that. The first is you've told us that you were not told and you did not know immediately after scene 1, before scene 2, that people had been killed. That's correct, isn't it? You didn't know.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Secondly, the people to whom you refer in 52, to whom you would have responded if they had – sorry, 51, if direction is required, were Brigadier Calitz and those in the JOC. Now according to

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the evidence we've heard so far - whether that's correct or not is a matter that may be debated later – those in the JOC didn't know about scene 1 at that stage. So if that's correct they couldn't have told you. If they did know, they should have told you, I take it, but they didn't. Is that right?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: As far as Brigadier Calitz is concerned, I think it's his statement – we'll be hearing his evidence next, but as far as I can see from his statement we've got he says he didn't know about that scene 1 had happened before scene 2. Whether that's correct we will see. Whether he was culpable in not knowing is also a matter that may well be investigated, but as far as what we have at the moment is concerned, the position is that as far as we know he didn't know. So therefore he couldn't have told you either. Is that right?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: But if he had known, you would have expected him to have told you?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: And if he did know and he

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didn't tell you, then that's something for which you can't be held responsible.

MAJOR-GENERAL MPEMBE: Correct, Chairperson, and Chairperson, just in addition, as I said before I did also explain what I meant in paragraph 56, again exhibit HHH3, paragraph 29.

MR MPOFU: Ja, no, that's fine. It's not necessary.

MR MATHIBEDI SC: Sorry, Mr Chairman, the purpose of exhibit HHH3, as clearly set out in paragraph 3, was to address the criticisms that were levelled against the police by the expert. That should be taken into consideration.

MR MPOFU: Okay.

CHAIRPERSON: Yes, yes, that's not an objection though, that's an observation you could make at the appropriate time. I think we must allow Mr Mpofu to continue. If he asks a question to which objection can be taken, you can object, but I don't like comments being added in –

MR MATHIBEDI SC: Sorry, Mr Chairman, if I could be allowed to say something.

CHAIRPERSON: You may.

MR MATHIBEDI SC: This deals with the issue as to whether the witness was criticising the conduct

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of the police in not informing him of the situation on the ground.

CHAIRPERSON: [Microphone off, inaudible] that and he did say that his understanding is they didn't know and therefore they can't be criticised. But as I understand it, if they did know, that's a different matter, but he's not saying that and we're not able during his cross-examination to determine whether the people who didn't communicate with him had knowledge which they should have communicated. I think that's the situation. So I think the point you make is not an invalid point, but I don't think, with respect, it need be made. But anyway, thank you for making it all the same, but please don't interrupt unless there's an objection to be raised in future. Carry on, Mr Mpofu.

MR MPOFU: Thank you very much, Chairperson. Just a quick aside –

CHAIRPERSON: No, no, no asides, just questions, please.

MR MPOFU: Well, okay, I'm just trying to structure the argument, Chairperson, so that he knows I'm dealing with a different topic. I'm helping the witness. Outside of what we were discussing now, can you confirm that the – you said you saw the attack, what you call the attack, on television. Can you confirm that that so-called

attack happened almost immediately before the shooting of the people?

MAJOR-GENERAL MPEMBE: I just wanted to say when? Was it the 13th or the 16th?

MR MPOFU: 16th.

MAJOR-GENERAL MPEMBE: Or the 16th, or whether was it imminent or was in progress or what? I just wanted to find out –

MR MPOFU: Ja, whether it's imminent or whatever, but that it happened almost back to back. There was what you saw on television as what you call the attack, and almost immediately thereafter was the defence, correct?

MAJOR-GENERAL MPEMBE: Chairperson, I don't know what is correct there. I just wanted to find out the question correctly.

CHAIRPERSON: It doesn't matter what he saw on the television. We went through that -

MR MPOFU: Yes, it –

CHAIRPERSON: We went through that before. We've seen it –

MR MPOFU: No, Chairperson, this is a different question, with greatest respect. The fact that we mention the same thing doesn't mean I'm asking it for the same purpose. I'm just simply, I'm asking the witness whether when he saw the so-called attack it was immediately

followed by the private defence or not.

CHAIRPERSON: Does it matter what he saw? We can see it –

MR MPOFU: Well, it's going to matter when you know what my next question is going to be, Chairperson. You can't know it prophetically. As I said, I'm dealing with a different topic.

CHAIRPERSON: Is there any prejudice to your telling me what the next question is before I rule on this question?

MR MPOFU: Yes, Chairperson. There will be, yes.

CHAIRPERSON: [Microphone off, inaudible]

MR MPOFU: Yes, Chairperson. Well, you asked me the question.

CHAIRPERSON: It's quite a serious allegation to make.

MR MPOFU: Well, you made the allegation, Chairperson. You asked me. I'm just answering honestly. [Microphone off, inaudible] in my cross-examination. I'm only putting it, I'm not –

CHAIRPERSON: Yes, I know, I –

MR MPOFU: - [inaudible] by the witness.

CHAIRPERSON: I am conscious of the fact that I must be fair to you and allow you to cross-examine

in a manner which does justice to your clients' cause. I understand that. Without wishing to set a precedent, I'll allow you to ask this question, but don't quote it to me again next time you try to do the same thing.

MR MPOFU: I won't. I promise, Chairperson. General, in fairness, I think in any event you didn't understand the question, in fairness, so I'll just repeat it. All I'm asking you is whether you have testified here that you have – and we all know you were not there, but that subsequently you saw the, what you call the attack. For now I'm accepting that as a fact. I'll dispute it on another occasion. All I'm asking you is simply whether the attack that you saw was followed almost immediately by the defensive action of shooting the attackers on a –

CHAIRPERSON: Is it the attack or the imminent attack?

MR MPOFU: Whatever.

CHAIRPERSON: Remember you covered that ground before.

MR MPOFU: Ja, whatever. Okay –

CHAIRPERSON: So the question is the attack or imminent attack that you saw, was it followed immediately by the response which is characterised by SAPS as being an exercise of either self-defence or private

defence, from what you saw on the television, the video that you saw?

MAJOR-GENERAL MPEMBE: Chairperson, I just want to find the question, is that there, was it an imminent or was attack in progress or, and then followed by an action of the police, or what precisely that I need to answer? Or was it an imminent or an attack in progress?

MR MPOFU: I don't know, General. You said you saw an attack. Whether, was it imminent, the one you saw on television, or was it an attack? How do I know that?

MAJOR-GENERAL MPEMBE: So I'm still not getting the question clearly.

CHAIRPERSON: Let me try. Let's start at the back. You saw police action on the video which Mr Ngalwana showed when you were giving evidence-in-chief, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

CHAIRPERSON: Now what did you see before that action by the police? What were the people at whom the shots were fired, what were they doing immediately prior to the shots being fired, that you saw?

MAJOR-GENERAL MPEMBE: What was the conduct of the police?

CHAIRPERSON: No, no, no, no, the

strikers. You see, the police fired. You saw the police firing, right?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Now before the police fired you saw the strikers, didn't you?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Right, now what were the strikers doing?

MAJOR-GENERAL MPEMBE: Oh, they were charging at the police.

MR MPOFU: Yes, and that charging, was it almost immediately followed by the firing? That's the question really. Yes or no?

MAJOR-GENERAL MPEMBE: Which firing? Because there were so many firings that happened.

MR MPOFU: The one that the Chairperson was talking to you about two questions ago. The big one, you remember, when people were mowed down, that firing.

MAJOR-GENERAL MPEMBE: Chairperson, I testified that I was also informed that all minimum force was used and that one was the last one. But the last force that was used I could see it on the screen.

MR MPOFU: Okay, I'll accept that for

now. When that minimum force was being applied, was it applied almost immediately after what you saw as the attack?

MAJOR-GENERAL MPEMBE: Firstly what I know and what I was informed is that the minimum force was used.

MR MPOFU: Yes, when that minimum force – let's accept that for now, and I must emphasise, only for now – when that minimum force was used, and you say it's being used, was it almost immediately a few seconds after what you saw the charging attackers?

[12:59] MAJOR-GENERAL MPEMBE: The minimum forced was used first and the last resort it was the one that I saw.

MR MPOFU: Ja, when the last –

CHAIRPERSON: Sorry, what do you mean by the minimum force?

MAJOR-GENERAL MPEMBE: Chairperson, I'm referring the use of the teargas, the use of the stun grenades.

CHAIRPERSON: Yes, the less than lethal force which the POP members –

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Is that what you mean? So

you say you saw that and then you saw what you've described.

MAJOR-GENERAL MPEMBE: Chairperson, what I say is that I was told that that one was used first but, yes.

MR MPOFU: General Mpembe, I'm not talking about what you were told, you told this Commission that you saw something, okay. Forget about what you were told for now. I'm saying to you when you saw what you call the last resort force that was used, was it almost immediately preceded by the attack or not, or the charging?

MAJOR-GENERAL MPEMBE: The charging came first, Chairperson.

MR MPOFU: And was it immediately followed by the minimum force, last resort? Correct?

MAJOR-GENERAL MPEMBE: There was the teargas used, Chairperson.

MR MPOFU: No, I'm not going to leave this one. Forget the teargas, forget what the police call incident 1 or incident 2 or wat nogal.

CHAIRPERSON: But why must he forget the teargas?

MR MPOFU: Because I'm not talking about it.

CHAIRPERSON: Sorry, just give me an

opportunity. You asked him about a video, I already indicated to you I'm not impressed with questions directed to him about what he sees on the video because we see the video as well. But I said I'd allow you to do it because you said your next question is important and you can't ask it in the earlier questions asked. But we won't go into that for the moment, but the video we saw did show us rifles being fired without a recoil which we were told meant rubber bullets. We also saw teargas, we saw these things happening as I understand it, before live ammunition was used. So to say to the witness, when you're talking about the video, forget about the teargas is asking him to do something which may not be appropriate in the circumstances. You may like to think about that over the adjournment. It's now 1 o'clock, we're now going to adjourn until 2. The witness is going to read the statement in the meanwhile, so will we, and you can resume your questioning on this topic after -

MR MPOFU: I appreciate that, Chairperson. Can I just say this? Chairperson, thanks, if I may just say this, so that we don't leave it hanging. I appreciate what the Chairperson has said. Please, when I say forget about the teargas and so on I was not being funny. All I was saying is that I accept that there was teargas, I accept that there was water, I accept that there

was stun grenades and so on. The incident that I'm talking to you about is when live ammunition was used by the TRT and we'll talk about it after lunch. But that's really – I was not saying forget in the sense that I'm dismissing it. I'm simply saying surely if we're talking about self defence and last resort you know that we're talking about the fatal shooting. So after lunch that's what we'll talking about. It was only in that context and if you took it differently I apologise.

COMMISSIONER HEMRAJ: Mr Mpofu, Mr Mpofu, I'm not sure when last the witness looked at the video, would it assist you if during the lunch adjournment you direct his attention or his counsel's attention to that part of the video that you're referring to? So that he might look at it and then be better positioned to answer your questions after lunch. Would that assist?

MR MPOFU: Well it wouldn't assist me because I don't know, he said he saw an attack on television. I don't know, it might assist him because he's the one who saw the attack. I don't know when –

CHAIRPERSON: I'm sorry to interrupt you. He did say that he saw a video which Mr Ngalwana showed.

MR MPOFU: Yes.

CHAIRPERSON: You remember that was a long time ago and it may well be that it would be helpful

for him –

MR MPOFU: It will assist him, ja.

CHAIRPERSON: Ja, so –

MR MPOFU: Thank you. I think he must then identify that attack for us, thank you.

CHAIRPERSON: That's a matter for Mr Mathibedi and obviously though the General is under cross-examination, there can be no objection from anybody to Mr Mathibedi speaking to the witness about this during the adjournment and making the necessary arrangements if the witness and he consider it appropriate.

MR MATHIBEDI: Thank you, Mr Chairman.

[COMMISSION ADJOURNS COMMISSION RESUMES]

[14:19] CHAIRPERSON: The Commission resumes. I apologise to those who were affected by the fact that we are beginning late, later than the time I indicated, but we had various matters to attend to in chambers, which took longer than I anticipated. Major-General, you're still under oath.

WILLIAM MPEMBE: Correct, Chairperson.

CHAIRPERSON: Mr Mathibedi, I understand you wish to make a statement.

MR MATHIBEDI SC: Thanks, Mr Chairman. Mr Chairman, I think it's very critical and fair to both our witnesses and ourselves that, you know, we've laid down

rules as to what should follow. Parties should make available questions and indicate which statements are going to be used in cross-examining witnesses. Now we have a situation wherein, you know, General Mpembe was given a statement during the course of the day and we've also received a second one. Now that being the case, it cannot be expected of the witness to fairly and properly prepare for answering questions because it may mean he may have to read other documents, and if things go on as they are continuing, Mr Chairman, we really submit that it's unfair and we are being prejudiced. Thanks, Mr Chairman.

CHAIRPERSON: Mr Mpofu, this is one of the matters that we discussed in chambers. I understood you to say that unless the witness indicates after tea that he's happy to be cross-examined today on these matters, you don't propose asking him any questions about it today. You hope, as I understand it, to be able to finish this afternoon, but if you don't, then other things will have to be done, but clearly Mr Mathibedi is right that we have to be fair to the witness and it is unfortunate that the rules we lay down in respect of prior notice of documents and so on haven't been complied with, but to some extent that's water under the bridge. But I wish to express the hope, and I'm not just speaking obviously to you but everybody, that that rule that we issued in the hope of promoting

fairness and also expeditious dealing with matters will be complied with in the future. Yes, Mr Mpofu?

MR MPOFU: Thank you very much, Chairperson. I must say, as I've already said to the General, that I have to apologise; I think all of us are trying to adhere with the rules, but as we know, cross-examination sometimes takes its own direction and the one document that I have presented, I literally had wanted to refer to one sentence, and I made it clear to Mr Mathibedi over the lunch. The other one, yes, is quite new and in respect of both in any event, even the one where there's one sentence, I've said that one of two things; if the witness, Mr Mathibedi has asked for 15 minutes, so I said instead of wasting time now, let the witness decide after tea if the 15 minutes is enough. If he still feels that he needs more time, then we'll deal with it that way, ja.

CHAIRPERSON: Yes, we will be in the witness's hands effectively. Now has the video clip aspect been sorted out?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, I did speak to the technician, even though it's not the precise one, but that is more or less what I've been shown.

CHAIRPERSON: [Microphone off, inaudible] Mr Mathibedi and your cross-examiner, are we in a position

now to see the video, or would you want to deal with it in re-examination or what exactly is the way forward as you see it, as far as this video is concerned?

MR MATHIBEDI SC: Mr Chairman, I'm also going to ask that this aspect should stand down, because as the General was trying to read the statement, at the same time we were trying to locate the relevant video, but we only, you know, located it recently. So we would like to have that opportunity of looking at it.

CHAIRPERSON: That seems fair in the circumstances. All witnesses are important, but this witness is particularly important, I think, and we always try to be fair to the parties and to the witnesses, and so I think we must –

MR MPOFU: Chairperson, yes, what I was going to –

CHAIRPERSON: I'm not suggesting that you're being unfair, Mr Mpofu.

MR MPOFU: No, no, of course. What I was going to suggest to, in respect of the video, was actually, because in my list I had included EEE16 which I suspect contains what the witness – but I don't want to take a chance and then it turns out that I'm wrong, because EEE16 was on the list, but it's a bit longish. So I'll go along with what Mr Mathibedi is saying.

CHAIRPERSON: I've already reminded you, you're under oath. Mr Mpofu, do you wish to continue with your – I take it you wish to continue with your cross-examination.

CROSS-EXAMINATION BY MR MPOFU (CONTD.: Thank you, Chairperson. Right, General, because of this discussion I'm going to move to something new, not what we were busy with previously. I'm now going to deal – remember we were busy dealing with what I claim are deviations from the prescripts, broadly defined. Ja, okay. Okay, now I'm now dealing with the section that deals with deviations from the plan, okay.

MAJOR-GENERAL MPEMBE: Yes, Chairperson, I'm still listening.

MR MPOFU: Which is chapter 4 of our book. Right, what may be a very important deviation, I just want to check your awareness of it, you can accept that evidence was led with Colonel Scott about this, but one of what I will argue at the end was a key deviation was the fact that the barbed wire which had been planned to be rolled out simultaneously, was rolled out sequentially. You understand that question?

MAJOR-GENERAL MPEMBE: I understand, Chairperson.

MR MPOFU: Yes, and one of the results of

that was that it took about, or rather it would have taken about 12 minutes – these are not exact estimates, because as it happened, the other two didn't even roll out, but one of the results is that what could have taken two or three minutes if it was done simultaneously, was now bound to take about 12 minutes, 10 to 12 minutes. Understand me?

MAJOR-GENERAL MPEMBE: Yes, I do understand, Chairperson.

MR MPOFU: Yes, now the importance of this, and I want your comment, I'm going to argue at the end that this was a crucial deviation in the sense that one could not have expected when you were planning that the strikers were just going to stand there and fold their arms for 12 minutes, whereas if it was done simultaneously, the situation could have been contained. As it happened now, they were running all over the show. There was just a much longer period which was an unnecessary deviation from the plan. There might have been good reasons to do it, but I'm just saying the impact of it was that it then allowed for a much longer time for the strikers to kind of be all over the show, if you get what I'm saying.

MAJOR-GENERAL MPEMBE: I'm just listening to the question. Is that I must comment?

MR MPOFU: No, no, you're quite right, it's quite a long speech that I made. Let me break it

down. The reason why you wanted to do simultaneous rollout was for the rapidity, so that the rollout happens within a short space of time, correct?

MAJOR-GENERAL MPEMBE: I'm still listening, Chairperson.

MR MPOFU: Now it's a question now. I'm saying was the reason that according to the plan, which you accepted or endorsed, the rollout was meant to be simultaneous, was the reason that it would have then taken a shorter time?

MAJOR-GENERAL MPEMBE: Chairperson, the how part of it, it was left to the operational people because you couldn't well plan and determine what will happen, because that is depending completely on the mechanism of the barbed wire itself, and according to the plan that I know, that was probably so left to the operational people, and I think Brigadier Calitz and Brigadier Makhubela, they will be able to explain if there was any deviation they will be able to say why that could, deviation was there.

MR MPOFU: Yes, okay. I accept both of those statements, and this is my final attempt. I accept that if there's a reason it will be given by the operational people. All I'm asking you is – and we also know that according to the plan, it was supposed to be done

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simultaneously. All I'm asking you is was one of the reasons why it had to be done simultaneously as opposed to sequentially because it would have taken a shorter period of time to complete the rollout, or not, if you know?

MAJOR-GENERAL MPEMBE: Chairperson, I just want to be appraised particularly in the plan where it speaks about simultaneous and the rollout.

MR MPOFU: Okay –

CHAIRPERSON: The trouble is, you see, there wasn't a written, much of a written plan for reasons that were explored in depth with Colonel Scott, and it was a concept, as he explained to us, and at about 2 o'clock at the JOC meeting he says he was then asked to explain how he saw the matter going forward, and he then later went down, went to the forward holding area, first forward holding area I think it was, and spoke to the commanders and all he could do was show them on his laptop, because there weren't even any hardcopy documents to show, so I don't know that Mr Mpofu can show you in the plan, because there's nothing to show. What happened subsequently was that in order to assist the Commission, as he explains, Colonel Scott then subsequently produced the documents that would have been present, that would have been available if there had been time on the 16th, and these had been made available to us. But he fairly conceded that these weren't contemporaneous

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documents, they were documents that were compiled later. So Mr Mpofu, have I answered the question that was put to you correctly?

MR MPOFU: Yes, Chairperson, but I'll just move on just for the sake of time economy, but maybe before I do that, I'll give what – with your permission, Chairperson, I'll do just one final attempt. General, the premise of my question is the fact that Colonel Scott himself – so this is common cause – Colonel Scott has testified that it was intended that there would be a simultaneous rollout and that it did not happen that way, and as I said to you, there might be good reasons and we'll deal with those with Brigadier Calitz and so on. So you can accept that that's Colonel Scott's evidence, that it was intended to be simultaneous, but as it turned out, it become sequential. So all I was asking you, if you accept that and if you know, is was the reason that it was meant to be done simultaneously to ensure that you minimise the reaction time, if there's such a thing, of the crowd as opposed to rolling it sequentially for 12 minutes and they are supposed to be watching all this, if you understand. If you don't, I'll move on, I promise.

MAJOR-GENERAL MPEMBE: Thanks, Chairperson. Why I wanted the quotation to the plan, because I approved the plan, and secondly, I might not be

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sitting here then I think that that is what in the plan which I approved, whereas Colonel Scott while he was testifying, he was testifying about his thinking, but not necessarily what was contained in the plan.

MR MPOFU: Okay, fair enough. Alright –

CHAIRPERSON: The point is he didn't say that you approved the plan. The way he gave the evidence was this; that there was a concept that had been worked out basically between him and General Annandale, but there wasn't much detail attached to it, and that at the end of the first section of the JOC meeting at half past 1 he was then asked, then there was questions how this concept should be implemented and no-one else volunteered and he then stood up and expounded it orally as he saw it should be done, and he said this was then approved and he was then dispatched to the forward holding area 1 to explain it to the commanders, and he didn't have any hardcopies; there wasn't time to prepare hardcopies, so all he did was he took his laptop with him and he sat in the Vito with the door open, and 20 commanders stood next to him and then he showed them on the screen of his laptop – that was his evidence, you see. So on his version there wasn't any detailed plan to be approved by you or anybody else before the JOC began, JOCCOM meeting began. I think that's an accurate summary of what he said.

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MR MPOFU: It is, Chairperson. But don't worry about it, General. Maybe let me move to my next point. Unfortunately they are linked, but I'll also abandon it if I'm confusing you. Let me maybe put it this way; what I'm going to argue is that a deviation that was consequent upon the sequential rollout of the barbed wire, which took longer, which also had a major impact on the fate of the operation, was the fact that what was – well, firstly you can confirm what was, if things had been equal and everything had gone well, it's correct, isn't it, that after the rollout of the barbed wire then there would have been the first warning according to the regulations. You remember there are two warnings that you have to be given. So the first warning in their language, saying what it is that is demanded of them, or whatever, would have then followed. Do you understand? Or rather, do you agree?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Yes, and so where I'm going with this is to say what robbed us – and I mean all of us, the police and the protesters and everyone – what robbed us of that opportunity for the communication, which is crucial, of saying put down your weapons, if you want to go this way, don't go this way, warra-warra, is the fact that the more prolonged rollout of the barbed wire then made

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that to disappear, whereas had the rollout been rapid, as planned, we might have had a situation where the communication would have happened. Do you see where I'm going?

MAJOR-GENERAL MPEMBE: I see, Chairperson.

MR MPOFU: Yes, and do you agree?

MAJOR-GENERAL MPEMBE: I don't agree, Chairperson.

MR MPOFU: Okay.

MAJOR-GENERAL MPEMBE: And shortly is to say one might not be in a proper way to comment on the implementation of the barbed wire when I was not there, but according to the Standing Order you need to put first the defensive mechanism.

MR MPOFU: Okay, I'll argue that later. Thank you, General. Just on this question of warnings, you would agree that at the time just before the fatal shooting, I'm talking about the live ammunition, it would have been a good idea – I won't put it higher than that – to communicate to the strikers to say put down your weapons, or something of that nature, before the actual fatal shooting happened. Would that have been a good idea?

MAJOR-GENERAL MPEMBE: Chairperson, as I've said sequentially in terms of the Standing Order you

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first put a defensive mechanism, and I am now told that while the defensive mechanism was placed and something happens, which actually after the defensive mechanism then the warning could have followed.

[14:39] MR MPOFU: Yes. No, I get you exactly what you're saying, but all I'm saying is that let's assume that things now have gone as they have gone; if there was a two minute break, which there was, between what you, the police, call incident 2 and incident 3 which was the fatal one, would it have been a good idea to use that time to say to the strikers, assuming the means were there and the opportunity was there, to say to them, put down your weapons or don't use the road or whatever, just so that to avoid bloodshed?

MAJOR-GENERAL MPEMBE: Chairperson, I'm not in a position to comment on this one, hence I was not there. Otherwise it would be a question of speculation but I think Brigadier, I think probably Brigadier Makhubela and those that were there, they might be in a position to explain.

MR MPOFU: Okay, I'll approach it differently. Is the reason why communication is highlighted as such an important thing in the prescripts, is it because it's important for both sides to know what is expected by the other side? Yes, no?

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MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: Thank you. Now if that is such an important consideration, because we all know if people, if this one is assuming this and that, that's just a recipe for chaos. It's better to say do this or don't do this or I'm giving you five minutes or I'm giving you two minutes because then at least you know we are talking about the same thing. That's a desirable thing. That's one of the benefits of communication, isn't it, because you say I give you five minutes then you know, rather than I assume that I've given you five minutes and you assume I've given you three minutes because that's a recipe for disaster, correct?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, but in this case that chance couldn't be there, as I am told.

MR MPOFU: Yes, okay. Would your answer to that change if I say that what we have observed from the videos and when we get to your video I'll also cover this point, is certainly that there was certainly enough means, meaning the loudhailer, and opportunity to give a warning – I'm using the term loosely now – to the media to say just before the fatal shooting, "Media go away, media go away." What I'm saying is that could those means and that opportunity have been used to say put down your weapons,

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put down your weapons, instead of "Media go away?"

MAJOR-GENERAL MPEMBE: I don't understand the one of the media going away.

MR MPOFU: No, okay, I'm sorry –

MAJOR-GENERAL MPEMBE: And who made it.

MR MPOFU: No, once again just accept it from me that when we play the video, it's common cause that shortly before the fatal shooting there's a voice, I'm not sure if it's Brigadier Calitz, it might be somebody else. I think there was speculation about that but it doesn't matter for the purposes of this question. There's a voice that, it is common cause, says at least twice, "Media go away, media go away" and then the strikers emerge and then there's the shooting. Just accept that for now, just trust me.

CHAIRPERSON: Mr Mathibedi?

MR MATHIBEDI SC: Mr Chairman, where was the police officer when he requested the media to move away, because we cannot use that to determine whether there was or there wasn't sufficient time, you know, for the protesters to be warned.

MR MPOFU: Well, Chairperson, with respect, I hear where Mr Mathibedi is coming from. I don't think it's relevant where the person who was saying that is. All we can accept is that that person was certainly in

a good position to be able to see that the media was in the wrong place, so to speak, and that they must be told not to be in that place. I can't, when we get to Brigadier Calitz maybe we'll get to those details. All now I'm talking about is simply just the opportunity to use the loudhailer and to warn a particular constituency, if you like.

CHAIRPERSON: What I understand your question to be, I'm not sure if the witness can answer it but anyway that's another matter, that why was a warning not given to the strikers to put down their arms, desist than what they were doing rather than a warning to the media to go away. Is that your question?

MR MPOFU: Yes.

CHAIRPERSON: I don't know –

MR MPOFU: Not the full question but it –

CHAIRPERSON: I'm not sure we need to know the position of the policeman who gave the one order rather than the other for the question to be answered, so – let's see, I'm not sure that the General can answer the question anyway. Let's just see.

COMMISSIONER HEMRAJ: But I think Mr Mathibedi's point might have some merit because there's a lot of noise on that video at that particular time, Mr Mpofu, the video that you're referring to when the voice is heard saying "Media go away."

MR MPOFU: No, that's true, Commissioner, but if the person was confident, despite the noise, to warn the media then he should have been confident, despite the noise, to warn the strikers.

CHAIRPERSON: I would suspect the witness can't answer. Can you answer that question, General?

MAJOR-GENERAL MPEMBE: Chairperson, as I say, I was not there. I'm not in a proper position to answer that but what I do know, even according to the plan, is that we had Captain Adriao, that he was always supposed to be with the media. Whether it's him who warned that, I'm not sure and –

CHAIRPERSON: I see. If it is, he is the person to whom Mr Mpofu can address the question he has now addressed to you, namely, why didn't he rather say to the strikers, lay down your arms, stop doing what you're doing rather than say to the media, get away. Is that effectively what you're saying?

MAJOR-GENERAL MPEMBE: What I'm saying is normally when the operation is in motion like that, it's either the operational commander or one of the operational section commanders that can warn the protesters, rather than somebody else. So I don't know, I was just saying maybe it might have been Captain Adriao who warned the media, who is actually responsible for the media safety.

CHAIRPERSON: It sounds like a question that may usefully be put to Brigadier Calitz, so obviously this witness can't help us. So you had better move on to the next point, Mr Mpofu.

MR MPOFU: Thank you, thank you, Chairperson. One of the contentious issues in this case, for me at least, is the question when it comes to scene 1, is whether or not as the strikers claim – I am now talking about the point at which they were shot – whether or not, as they claim, once they had reached the road they were going to turn left and go to Nkaneng or, as the police feared, when they got to the road they would cross it and kill them or whatever they feared. And that is quite frankly the only question that might need to be answered. Now I'm going to ask you questions around that issue, you understand?

MAJOR-GENERAL MPEMBE: I understand, Chairperson.

MR MPOFU: Yes. Now another deviation in my book, it might or might not be a valid one, is around the fact that the TRT according to the plan was always supposed to be 100 metres away from, at least 100 metres away from the POP line that they were supposed to protect, agreed?

MAJOR-GENERAL MPEMBE: Agreed,

Chairperson.

MR MPOFU: Yes. Now, and according to Colonel Scott, one of the reasons for that 100 metre distance was to enable the TRT to have response time, that's why they're called the tactical response team, to have response time within which, in that 100 metres if anyone was attacking them they would give them warnings and decide what to do and so on and that's why that 100 metre distance. And in any event the weaponry that they carry has more than 100 metre range so it wouldn't really affect their effectiveness. Do you agree broadly with that?

MAJOR-GENERAL MPEMBE: Chairperson, I understand the understanding of Colonel Scott according to the crowd management policy. TRT and the STF and even according to the plan, they were at 100 metres because they are not part of the dispersal group.

MR MPOFU: Correct.

MAJOR-GENERAL MPEMBE: And then they will only come to the fore when the lives of the POP were in danger.

MR MPOFU: No – no. I hear that. What I'm suggesting to you is that the 100 metre distance was sufficient for them to respond to a life-threatening situation which might face the POP. That's one of the functions of the 100 metre distance, agreed?

MAJOR-GENERAL MPEMBE: No, Chairperson.
MR MPOFU: I'm sorry, can you go to L72, last bullet. It says there – sorry General, are you there?
MAJOR-GENERAL MPEMBE: Correct, Chairperson. Yes, L means there –
MR MPOFU: Exhibit L72 yes –
MAJOR-GENERAL MPEMBE: Slide 72.
MR MPOFU: Slide 72.
MAJOR-GENERAL MPEMBE: That's correct, Chairperson.
MR MPOFU: Ja, okay. I'll read it out to you. If you agree with that sentiment or you want to qualify it you'll let me know. It says there, "The members of POP in the armoured vehicles would have a response group of members of the TRT approximately 100 metres to their rear to respond and assist their colleagues should the protesters threaten the members of POPS line to the point where they could not escape or were forced to exit their armoured vehicles." Is that a correct statement of what the plan was intended to be like?
MAJOR-GENERAL MPEMBE: Correct, Chairperson.
MR MPOFU: And if you go to L138, the bottom slide and the last small block says that, it's about the TRT neutral area response team. The response team, as

we know, is the TRT – "to remain 100 metres behind the POP monitoring and negotiation group." And after that jump one slide, I mean one bullet, "and respond to attacks on POP line on command from the operational commander when the safety of POP members or others has been compromised to the extent that where lives may be lost in the absence of a tactical response." Do you see that?
MAJOR-GENERAL MPEMBE: I see, Chairperson.
MR MPOFU: Yes. So is it correct that then all these actions of saving lives and so on, according to the two slides I've shown you, could and should have been done from a 100 metre distance? Or rather with the TRT remaining within 100 metres.
MAJOR-GENERAL MPEMBE: Not remaining, Chairperson, but only coming to the fore when the life of POP members is threatened.
MR MPOFU: Okay, so what does the word "remain" in that first bullet want to tell us? "Remain 100 metres behind the POP monitoring," what do you read into that?
MAJOR-GENERAL MPEMBE: Chairperson, it has to be understood that while the other, the place of the barbed wire, warning of the people, they should not be part of the dispersal group. Hence there is that monitoring and

negotiation because the teams were divided according to their roles.
MR MPOFU: Okay. Do you accept, whether or not you agree with Colonel Scott, let's put it on the side now but do you agree that one of the benefits of such a 100 metre distance would be, could be a life saving one in the sense that there would be time between any perceived attack and the point of danger, if you get what I mean? I can unpack it if you want. In other words, there would be time if you – just logically, if you're going to have to travel 100 metres before you are threatening to me, it's better than if you only have to travel 15 metres before you are a threat to me. Would you agree with that?
MAJOR-GENERAL MPEMBE: I agree, Chairperson, but that was not the only reason and as I said, they were not part of the dispersal group because it's not a POP crowd management policy that you use live ammunition in the dispersal, so we wanted it must be very clear.
MR MPOFU: Okay, I don't think you've answered my question but I'll move on, on this vein. No, we'll do that once when you've seen the video but maybe let me ask you from your memory now and if your memory is not good we'll wait for the video, do you remember that the TRT members actually ran, ran towards the point at which they

did the basic line, if you know what I mean.
MAJOR-GENERAL MPEMBE: I remember that, Chairperson.
MR MPOFU: Yes, okay. And you would agree also that that action of run – sorry, sorry General.
MAJOR-GENERAL MPEMBE: Chairperson, just also to place this on record that the exhibit L page 138, it was made for the Commission, it was not part of the plan.
CHAIRPERSON: Well, you know that's half right because the evidence of Colonel Scott is he made it for the Commission to tell the Commission what the plan was. I understand your point, the document didn't exist at the time the plan was approved and so on and even an attempt was made to carry it out, but Colonel Scott says that was the plan. The purpose of preparing this document for the Commission was to tell the Commission what the plan was. So that's why I say your answer is only half right but perhaps I'm usurping Mr Mpofu's prerogative. I'm sorry, Mr Mpofu.
MR MPOFU: No, Chairperson, thank you very much. In any event I'm going to move on. I accept that, General. We accept that both the plan that was presented to you at half past one and the one that existed before that, is not exactly what was implemented but I

think Colonel Scott was just telling us what was being planned. In any event, the purpose of this question is that – I think you've answered the question, that the 100 metre distance was meant to create this response time but you said that was not the only reason, correct? So that's fine.

CHAIRPERSON: I was proposing to take the tea adjournment at about 3 o'clock, Mr Mpofu, so when it's convenient for you please let me know.

MR MPOFU: Thank you very much, Chairperson. No okay, I'll also leave this for when the video is here. To your knowledge, let me put it this way, to your knowledge was it foreseeable from the point of view of the TRT members who were involved, the shooters – that's what we call them just for short.

[14:58] Was it foreseeable that the strikers were going to go for that gap towards the road in order either to go to Nkaneng or to attack them, whatever. But was it foreseeable that they would go for that gap?

MAJOR-GENERAL MPEMBE: No, Chairperson, but I need also to explain that I'm not in a better position to explain whether it was foreseeable for them.

MR MPOFU: No, fair enough,, but was it foreseeable for SAPS, for you, to SAPS as such, you as the big planners and so on that the – maybe let me put it

clearer, that there would be an advance towards the informal settlement on the part of the strikers? Was that foreseeable?

MAJOR-GENERAL MPEMBE: That they will advance to the barbed wire or to the informal settlement?

MR MPOFU: No, that they would advance towards the informal settlement.

MAJOR-GENERAL MPEMBE: Chairperson, there is one part of the informal settlement that we called it a negative attraction, that one I could say it was, that's why we had to have a plan, a contingency plan for that. But that they will advance when the barbed wire was placed it was not foreseeable.

MR MPOFU: No, General, yes, okay I think I understand what you're saying. Remember I'm asking you now in relation to, we all now because they were shot dead and injured, have to second guess what they would have done once they got to gap and the road. But what I'm saying is was it foreseeable that they would advance towards the informal settlement and when you answer that question bear in mind that there was a particular Nyala that was positioned to prevent exactly that.

MAJOR-GENERAL MPEMBE: Chairperson, I think I answered the question to say informal settlement was part of a negative attraction that when the dispersal

takes place they might go there. But it was not foreseeable, Chairperson, this is what I want to emphasise while the barbed wire was placed they will advance even when the barbed wire was placed. That to me is critical.

MR MPOFU: No, I accept that, but then - okay it might be unfair to ask you. By the way have you, as the overall commander, spoken to any of the shooters since the 16th?

MAJOR-GENERAL MPEMBE: I testified that I only spoke to the commanders and I also said what commanders told me.

MR MPOFU: Okay, so that would mean then it might be not fair to ask you that if it was not foreseeable that the strikers would go to that gap then why were the TRT people running towards that gap and forming a basic line even before the strikers emerged?

MAJOR-GENERAL MPEMBE: Chairperson, according to the plan I said TRT was only there, that they will come to the fore when the lives of the POP was in danger. And my answer is when they ran to the fore it was when the life of POP was in danger.

MR MPOFU: Okay, so if they went to form a basic line in front of that gap before the strikers had even rounded the kraal it would mean that they did so prematurely, agreed? Or one, or that it was foreseeable

that the strikers are going to come there?

MAJOR-GENERAL MPEMBE: Chairperson, they couldn't have been there because they are not part of the dispersal group.

MR MPOFU: Okay, thank you.

COMMISSIONER HEMRAJ: That's assuming that the TRT went there without the POPs members in front of them.

MR MPOFU: I'm sorry, Commissioner?

COMMISSIONER HEMRAJ: Your question is based on the premise that TRT members went to that area without the POPs members being in front of them.

MR MPOFU: No. Remember this is linked to the 100 metre gap.

COMMISSIONER HEMRAJ: Yes.

MR MPOFU: I'm saying if they ran towards the danger so to speak and thereby closed the gap to about 15 metres, I think that's what Mr Chaskalson and I were – it has not been measured properly and closed the gap, the 100 metre gap and made it shorter. But the crucial part of this question is if they did that before the strikers even approached that gap it would mean that they knew that they can only be going there. Because why would you just stand at some place with a cocked gun if nobody is ever going to come to that place? That's really the gist of the

question. In any event why they ran there is not something you would answer. I really just wanted to establish you see that the 100 metre gap was one of the mechanisms by which lives could be saved, that's all. Okay and maybe just to complete this particular aspect which I won't belabour because I raised it with Colonel Scott as well, slide L139. The first slide, the bullet just before the last one says "the northern" are you there, General?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, I'm there.

MR MPOFU: So the northern Nyala is to angle slightly towards the west to assist in protecting a possible advance towards the informal settlement. Was that, according to you, part of the considerations forming part of the plan?

MAJOR-GENERAL MPEMBE: I'm sorry, Chairperson, I might have been looking at the wrong slide. Is it slide 39?

MR MPOFU: 139, sorry, General.

MAJOR-GENERAL MPUFO: Oh, thanks, thanks. Ja, I see what is being written there, Chairperson.

MR MPOFU: Does it help you to answer a question as to the foresee ability or otherwise of an advance to the informal settlement?

MAJOR-GENERAL MPEMBE: Chairperson, I

said informal settlement it was considered as negative attraction.

MR MPOFU: Okay. Yes, Chairperson, this will be an appropriate time.

CHAIRPERSON: All right, we'll now take the tea adjournment.

[COMMISSION ADJOURNS COMMISSION RESUMES]

[15:27] CHAIRPERSON: The Commission resumes. Major-General, you're still under oath.

WILLIAM MPEMBE: Yes, Chairperson.

CHAIRPERSON: You were asked whether, it was suggested to you, you might like to read the two statements and tell us if you were ready to be questioned on them, but if the answer is you're not, then it can be arranged that you be cross-examined subsequently when you've had a chance to read them. But in any event, Mr Mpofu, have you got other material to cover in cross-examination –

MR MPOFU: If the General is not ready, yes, Chairperson. General, you've now read the statements, correct?

MAJOR-GENERAL MPEMBE: Yes, I did have the statements of Brigadier Engelbrecht and my –

MR MPOFU: And also yours, one of –

MAJOR-GENERAL MPEMBE: And my statement.

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: Chairperson, my humble request is that I be given enough time.

CHAIRPERSON: That seems a fair request in the circumstances.

MR MPOFU: Thank you.

CHAIRPERSON: We don't want to deal unfairly with you, and I hope to think we've dealt fairly with you so far, but if so, we'll try to persist to the end of your evidence in that manner.

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: Thank you, Chairperson.

MR MPOFU: And General, just to complete that discussion, there is video evidence which is on the list, it's EEE16, so while you are dealing with the statements, can you just check that video as well? If it contains the part that we are looking for about the attack and so on, then we might as well use that because I was going to use it for another purpose, but if it's not there, then you can introduce your own video whenever it is. Okay, thank you.

MAJOR-GENERAL MPEMBE: Thanks, Chairperson. I'll do so.

CROSS-EXAMINATION BY MR MPOFU (CONTD.):

Right, am I correct, is it my correct understanding on my part that the only, according to the plan at least the only time that the TRT were – no, I'll start with another topic. We'll get to this. It's correct that one of the key assumptions which informed your plan and your planning was that some of the strikers were going to refuse to leave the koppie, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson. I'm sorry, Chairperson, it was not an assumption; it was an intelligence.

MR MPOFU: Yes, based on the intelligence you assumed that some of the strikers would not leave the koppie?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: And it turned out that that was the wrong intelligence, or in fact if there's such a thing. It shouldn't be called intelligence. The real issue is that as it happened, all the strikers left the koppie, correct?

MAJOR-GENERAL MPEMBE: Chairperson, I was not there, but I was informed that others, while the barbed wire was placed, then that's the time that they came. Others they did disperse.

MR MPOFU: Sorry, I'm going to refer you to a slide and if you can't make it out, we'll deal with it

with someone else. Slide 200 I think would be sufficient for – 200 or 194 or both. Would you accept, General, if you can - and as I say, I can't press you because both you and I were not there – that at the stage of slide 194 and 200 it would seem that there were no longer people gathering at the koppie, at the big koppie, at least.

MAJOR-GENERAL MPEMBE: The indications by slide is that others were dispersing, but there are other lines, the yellow line as well as the red line, that's showing other strikers that were, as is allegedly being said, that they were attempting to approach the police line.

MR MPOFU: Yes, I accept that, but in any event, nobody seems to be saying we're staying at the koppie, no matter what. They might have been attacking or whatever, or going to the barbed wire, but there was no, nobody stayed at the mountain itself, correct?

MAJOR-GENERAL MPEMBE: At that one according to the slides, correct, Chairperson.

MR MPOFU: Thank you. And that leads me to the next question, to the question I wanted to ask you just now. Based on that assumption, to your knowledge, if you know, is it correct that the only time that it was envisaged that the TRT would be involved in so-called close quarter confrontations, was if the strikers had indeed

refused to leave the mountain and they had taken, I think it was called a high position at the mountain, such that they would have to be cleared. Only in that, strictly in that situation was TRT according to the plan expected to be involved in so-called close quarter confrontations. Is that in accordance with your – and I'm not trying to trick you; you can just go to L80, just so that we short-circuit – exhibit L80, the second bullet, Chairperson. You see what it says there? "TRT, NIU, and STF would also be responsible for close-quarter confrontations to approach groups armed with sharp-edged weapons that refuse to disperse, and move to higher ground where the armoured vehicles and water cannons could not access them." You see that part, General?

MAJOR-GENERAL MPEMBE: Correct, Chairperson, I do see it.

MR MPOFU: Yes, all I'm saying to you is that these people were, all these people mentioned here were armed with live ammunition. I'm saying this situation envisaged here where people refused to disperse and move to the higher ground, which is the top of the mountain, I assume, it's the only situation where people with live ammunition were envisaged to be involved in so-called close-quarter confrontation, as opposed to the 100-metre distance that we discussed, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: Was there any other situation that you know of where the people with live ammunition, including STF, NIU, and TRT, would be involved in close-quarter confrontation? I'm assuming that means what it should mean in English.

MAJOR-GENERAL MPEMBE: Chairperson, the role of the TRT and the STF, other than the one that I've already said, it was also to clear up even after dispersals. It, to clear up in terms of checking what could have been left behind. Chairperson, may I also state that the bullet 1 and bullet 2, they should be also read together, but this one that the Advocate is saying now, it was the role of that TRT.

MR MPOFU: Yes. No, I accept that, and the bullet 1, the reason I didn't read it is because we dealt with it before tea. It's where I was questioning you about how far back the response teams were going to be, remember?

MAJOR-GENERAL MPEMBE: I remember, Chairperson.

MR MPOFU: Yes.

CHAIRPERSON: Slide 80 relates to the operational plan as it existed on Tuesday, the 14th.

MR MPOFU: Chairperson, are you –

CHAIRPERSON: It may be that despite the fact that that slide relates to the plan as it was, or as it allegedly was on the 14th, that it may have been carried over later, maybe. Perhaps, can you help us on that?

MAJOR-GENERAL MPEMBE: Chairperson, you are correct, because according to the calendar it shows the 14th, but this, it could also be the one that was intended on the 16th, because on the 14th, Chairperson, if the Commission can recall, nothing happened on the 14th.

MR MPOFU: Yes.

CHAIRPERSON: According to Colonel Scott, on the 14th the plan was still the encirclement plan, but, so that what's in exhibit L has to be read subject to that correction that he explained.

MR MPOFU: Yes, the Chairperson is right, but obviously this stage you are talking about now where people are standing on higher ground and the STF is being deployed, even if it was being spoken about on the 13th or the 12th, but it was envisaged in stage 3. So let's forget the date. This kind of thing would happen in stage 3, correct? On whichever date it might have eventuated.

MAJOR-GENERAL MPEMBE: The dispersion –

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: Correct, Chairperson, that is stage 3.

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MR MPOFU: Thank you. I'm just going to ask you about – to round off the last chapter of the prescripts, if you remember, it was that catchall which is the professional ethics, rules of common decency and Ubuntu and all that. Now would you accept that according to the professional standards which might be expected from the police, it would be important that when they communicate with stakeholders in a situation such as the one we are discussing, that they do so honestly and truthfully, and play open cards. Would that be a fair assumption?

MAJOR-GENERAL MPEMBE: I don't understand "open cards" because there is a time where the other information is confidentiality, when it comes to –

MR MPOFU: Intelligence, no fair enough.

MAJOR-GENERAL MPEMBE: Yes.

MR MPOFU: Ja, okay. But truthfully and honestly, excluding the situations where there might be intelligence considerations.

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Thank you. Now did I understand you correctly that – and I think the Chairperson asked you this at the end of your evidence – did I understand you correctly that your evidence was that when you said to the union leaders that – and I'm paraphrasing –

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to want to disarm people carrying axes with guns would lead to bloodshed, that you yourself did not believe that you were just using it as a ploy of some sort?

MAJOR-GENERAL MPEMBE: I don't understand the "ploy," but what I said, it was the strategy also of also making them to be aware that this was a serious situation that they will have to attend, but, and I made it clear that I did not foresee so many people dead on the 16th. That I could not foresee.

MR MPOFU: And when you said to Merafe for example that should his version of what should have happened take place, a possible Tatane situation may occur, can you accept that you were then by saying that foreseeing real bloodshed, not a simulated one?

MAJOR-GENERAL MPEMBE: Chairperson, when I spoke about Tatane I was speaking about the possible violence. It's totally different from what happened on the 16th.

CHAIRPERSON: In the Tatane incident, I think I'm correct in saying only Mr Tatane died, but that was bad enough, one person. Am I correct?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

CHAIRPERSON: Never in your wildest dreams did you imagine that 34 people would be killed. Is

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that right? You never foresaw in your wildest dreams that 34 people would be killed.

MAJOR-GENERAL MPEMBE: Correct, Chairperson, I could not even foresee that.

MR MPOFU: And the bloodshed which you really, or not really did not foresee in, or rather which you claimed to have foreseen in, when you were talking to the unionists, what scale of bloodshed? About 20 people dead?

MAJOR-GENERAL MPEMBE: Chairperson, I did explain that I was also referring to what was happening since Sunday, but I did not foresee that 16 people will be dead on Thursday.

MR MPOFU: If it can be shown – big if – if it can be shown that some of the actions of the members of the police there were influenced by a motive such as revenge for what had happened on the 13th to their colleagues, that would also be a deviation from a professional point of view of what would be expected from them, correct?

MAJOR-GENERAL MPEMBE: I'm unable to answer, Chairperson, because I don't know where –

CHAIRPERSON: He's not saying it happened. He says if it can be shown – IF it can be shown that some of the actions of some of the police on the 16th

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were actuated by considerations of revenge, that would not be in accordance with the plan; that would be a deviation from the plan. Is that your question, Mr Mpofu?

MR MPOFU: Yes, or from the prescripts, yes. Or from what would be expected from them from this catchall professional ethics –

CHAIRPERSON: Yes, let me reformulate it. Question he's asking you is this; if, and he stresses the word "if," if it can be shown that some of the actions of some of the police on the 16th were actuated by considerations of revenge for what had happened on the 13th, that would be a deviation from the general standard of professional ethics, professional behaviour, which would be expected from members of the police service at all times. Is that correct?

MR MPOFU: Thank you very much, Chairperson.

MAJOR-GENERAL MPEMBE: Correct, Chairperson, on speculation.

[15:47] MR MPOFU: Yes, I'll accept that. And I'm now going to talk to you about, in the same vein about the removal of weapons from the scene, from among the dead bodies and the injured people, and I'm just going to ask you one question there, which is this; am I understanding what was planned correctly that one of the reasons why the

investigators were to be kept in one of the holding areas – I don't know which one, whether it was 1 or 2 – until after the operation was exactly so that the people who might be involved in the investigation are not the same people who were involved in the operation, so as not to contaminate the scene, and I'm asking you the question bearing in mind your background as one of the things you lectured in your life was the crime scene management? Am I correct?

MAJOR-GENERAL MPEMBE: There is a crime scene management, but I just want to get clarity in terms of precisely what should I answer.

MR MPOFU: Yes, no sorry, it was a compound question. I'm saying accepting that you have some expertise of whatever nature in crime scene management, and as a person who knows what was being planned, was one of the reasons why the investigating team – the IDs, I don't know if they're still called that – were kept at one of the holding areas with the intention that they would only come after the operation, was one of the reasons for that to maintain the integrity –

MR MATHIBEDI SC: Sorry, Mr Chairman –

MR MPOFU: Sorry.

MR MATHIBEDI SC: I think it should be after the crowd management –

MR MPOFU: Oh, ja, I'm happy with that –

MR MATHIBEDI SC: - not operation –

MR MPOFU: Okay, let's not call it the operation. Let's call it crowd management. That they would only subsequently come. One of the reasons was to maintain the integrity of the scene so that it would be different people who would be investigating the scene to those who had participated in the crowd management.

MAJOR-GENERAL MPEMBE: Correct, Chairperson, but not necessarily that those who participated in the crowd management could not be there because they could be playing a different role rather than the role of the detectives and the LCRC.

MR MPOFU: Okay, then let me just ask it bluntly. Do you think it was appropriate that the people who were involved in the shooting exercise were also the same people who were involved in removing the weapons and taking them away from the scene and piling them in a particular place? Is that what you teach in crime scene management?

MAJOR-GENERAL MPEMBE: No, Chairperson, that the scene is not supposed to be tampered with.

MR MPOFU: Okay.

MAJOR-GENERAL MPEMBE: But there will be under certain circumstances, but that should be under very strict supervision, video being taken, and so on.

MR MPOFU: Yes. No, I'm happy with that. And in terms of the rules of crime scene management and also what I call the professional ethics, it would be a deviation therefrom, wouldn't it, to, once these weapons have been removed, replace them at a later stage?

MAJOR-GENERAL MPEMBE: Replacement, Chairperson, I will start with that one; yes, it will be seen not to be correct, but the removal might not necessarily be incorrect in the sense that if it's for the sake of safety it has to be recorded properly and it has to be managed correctly.

MR MPOFU: Yes. No, no, I accept that. Let's accept that for now. Let's say there might be safety considerations regarding the removal; all I am saying is that one that has been done it would not be property, would it, for someone to come, let's say an hour later, and try and work out whether this knife was facing this way or that way, and seek to place it back and then take a picture, pretending that that is how the scene was.

MAJOR-GENERAL MPEMBE: I've already said no, Chairperson.

MR MPOFU: Yes, thank you. And I think we did deal with this one yesterday, or the other day, that not to attend to injured people for a period of about an hour when there were helicopters available, and I'm

comparing it to the situation on the 13th when there was one helicopter which was used to evacuate an injured person, that would also not be according to what is expected professionally from the police, and once again I have to qualify that by saying there might have been valid reasons why that is done. I'm just saying at face value to just stand there when people are twitching around and is not something that would be ethically inconsistent with the values of Ubuntu, professional ethics, and just human decency, common human decency.

MAJOR-GENERAL MPEMBE: Chairperson, normally, and police wise it's not done that when somebody is injured then the police can transport that person with a police van, because that involves litigation problems later if it should, if the person died and it's found that he was actually not die because of, he died because of being handled improperly. That it's the first thing that the police should consider whenever, and if it's found that at least there is a person who can say they can be transported, and that's why normally the ambulances and the others are put in – are put nearer, but also if, I just want to explain that. Other than that, yes, you can transport the people to comply with Ubuntu, but not taking the risk of putting the organisation into dispute or having litigation problems. I just wanted to explain that.

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MR MPOFU: Yes. No, that's fair enough, but all those considerations were, is covered when it came to the paramount issue of saving Lieutenant Baloyi's life on the 13th, correct?

MAJOR-GENERAL MPEMBE: Chairperson, as I said, it was done, but those that, who did it, they can say under what circumstances.

MR MPOFU: Yes, fair enough. Thank you. Right, now I'm sorry to do this; I'm jumping back to something that I thought I had passed. When Major-General Mpembe, Mbombo, sorry, when Major-General –

CHAIRPERSON: The Provincial Commissioner is a lieutenant-general.

MR MPOFU: Lieutenant-General, let's call it –

CHAIRPERSON: This witness is Mpembe, he's a major-general.

MR MPOFU: That's correct, yes. So I got both my ranks and my surnames mixed up. When the Provincial Commissioner – let's just say that – at the meeting of the 16th, the 1:30 meeting, when she reported to that meeting that she had been in a meeting with Mr Mathunjwa for the whole morning, you knew that that was not true, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson.

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MR MPOFU: Well, in the morning you had been with the Provincial Commissioner when she was going to the press conference. You also had witnessed the brief conversation that she had had with Mr Mathunjwa, correct?

MAJOR-GENERAL MPEMBE: Chairperson, the testimony when, my testimony is that there was a time where Mr Mathunjwa came and I introduced him to the Provincial Commissioner. By that time, my understanding was that Provincial Commissioner is referring to that time.

MR MPOFU: Yes, okay. So that introduction of yours between Mr Mathunjwa and the Provincial Commissioner, did you regard that as a meeting of the whole morning, as it was reported at the 1:30 meeting?

MAJOR-GENERAL MPEMBE: Not necessarily the whole morning, but as I'm saying, my understanding, Chairperson, was that she was referring to that time.

MR MPOFU: General, surely you know what a meeting that lasts the whole morning means, don't you? So if somebody says in your presence something that is to your knowledge false, all I'm saying is that you knew that that statement was at best an exaggeration because you had spent time with the Provincial Commissioner, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson.

MR MPOFU: Okay, well that would then

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answer the next question, which is you didn't correct the Provincial Commissioner or point out to anybody that she had in fact not had a meeting with Mr Mathunjwa the whole morning. It figures if you didn't see anything wrong then you didn't correct it, correct?

MAJOR-GENERAL MPEMBE: Chairperson, it's the testimony in this Commission that those minutes, there was no time that they could be corrected. If the Provincial Commissioner saw that and she had an opportunity to correct it, she might have corrected it, but my understanding at that time when she was speaking, I'm saying she was referring to that, but it's already been an evidence before the Commission.

MR MPOFU: Okay, now according to the, one of the key elements of the plan was that stage 3 should be proceeded with as a matter of last resort, correct?

MAJOR-GENERAL MPEMBE: It was actually a last resort.

MR MPOFU: Yes, and the meaning of that was among other things that all negotiations must have failed or been terminated, correct?

MAJOR-GENERAL MPEMBE: Chairperson, I just want to say, as I elucidated it in terms of my HHH3 –

MR MPOFU: Chairperson, if you'll just bear with me, I've just lost my – now the negotiations that

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were taking place included the intervention of Mr Mathunjwa, correct?

MAJOR-GENERAL MPEMBE: Yes, Chairperson.

MR MPOFU: And limiting ourselves to that specific intervention, then stage 3 should have been advanced when the success or otherwise of his intervention had been determined, correct?

MAJOR-GENERAL MPEMBE: I just want to get – his success or what?

MR MPOFU: Ja, no, remember we've agreed that one of the conditions, pre-conditions for stage 3 is that the negotiations must have failed. That's what is meant by it being a last resort –

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Yes, now I'm saying therefore logically it would mean, if we are limiting ourselves now to Mr Mathunjwa's intervention, stage 3 could only be rolled out once the success or otherwise of that particular intervention was determinable, or determined, correct?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Right, so knowing that, which we agree, you and I now, if you had been at the scene – and again forgive me for going into the area of speculation –

if you had been at the scene, would it be fair to say that you would have enquired as to whether Mr Mathunjwa's efforts have borne any fruit or not before getting into the dangerous last resort stage, correct?

MAJOR-GENERAL MPEMBE: Correct, Chairperson.

MR MPOFU: Yes, but even more so, if Mr Mathunjwa – let's assume you didn't have time to talk to him for some reason or another, but as soon as he was leaving you could see that some of the people who according to the police did not want to be involved in any trouble were actually leaving, if you could see that happening, without even talking to Mr Mathunjwa, would you have allowed that process to take its course for people to leave voluntarily, assuming that they have now been convinced by Mr Mathunjwa?

MAJOR-GENERAL MPEMBE: Chairperson, in, without any speculation –

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: - I think Brigadier Calitz is in a better position, because if he could have realised that Mr Mathunjwa was successful, surely he could have, not have continued that stage 3 be implemented.

MR MPOFU: Yes.

MAJOR-GENERAL MPEMBE: So I'm talking about Brigadier Calitz was physically there, who could have made an assessment, as I normally say an operational commander is there to make an assessment.

MR MPOFU: No, that's fair. So you agree with me that if he could see that Mr Mathunjwa had had some success, he should have not rolled out stage 3? Are we agreed on that?

MAJOR-GENERAL MPEMBE: Chairperson, I'm saying Brigadier Calitz, he's in a better position to answer because he was there.

MR MPOFU: Okay. Is there any reason for you to have avoided going to the scene on the 16th even – well, we've already dealt with the period before the tragedy. My understanding is that you did not immediately go there even after you had learned more or less about what had happened, correct?

MAJOR-GENERAL MPEMBE: Correct, Chairperson. I also testified why I didn't go to the scene.

MR MPOFU: Ja, you said you were arranging cells, correct?

MAJOR-GENERAL MPEMBE: No, Chairperson, not only that.

MR MPOFU: Was that one of the reasons

was that you were arranging for cells for the arrestees?

MAJOR-GENERAL MPEMBE: I don't know, Chairperson, whether I'm now allowed to elaborate something that I've already said.

MR MPOFU: Yes, once you've answered the question –

MAJOR-GENERAL MPEMBE: Because I thought that is already on record where, what I said.

CHAIRPERSON: Yes, Mr Mpofu, I understand that you're not going to finish by half past 4. Is that right?

MR MPOFU: Yes, Chairperson, definitely not.

CHAIRPERSON: And I understand that you're not available tomorrow.

MR MPOFU: Yes, Chairperson, thank you.

CHAIRPERSON: Ja well, we won't go into that, but you're not available tomorrow, and in any event the witness needs time to study these extra statements and so on that have been provided.

MR MPOFU: Yes, and the video, Chairperson.

CHAIRPERSON: And the video, to identify the video, and so forth. So in the circumstances it seems best therefore for us to take the adjournment now until

tomorrow. I understand that counsel for the evidence leaders has certain questions they wish to ask the General in any event, so we won't waste all of tomorrow. I don't know how long that questioning will take, but it's difficult to predict these things in any event.

[16:07] So what I'm proposing is we adjourn now until tomorrow morning at 9 o'clock and that at that point the evidence leaders will interpose their supplementary questioning of the witness in the light of some of the material that's become available since he was last in the witness box when he was cross-examined on behalf of the evidence leaders, and that you will resume your cross-examination on Monday. Is that your understanding?

MR MPOFU: That's my understanding, Chairperson.

CHAIRPERSON: And you're content that that should happen –

MR MPOFU: I'm more than content. I'm grateful, Chairperson.

CHAIRPERSON: Can you give us an indication – I know these things are difficult, but can you give us an indication more or less, subject to things over which you have no control, such as what we colloquially call injury time, can you give us an indication as to how long you're likely to be on Monday?

MR MPOFU: At worst until lunch, Chairperson. I'm not saying on which day. No, I'm joking, Chairperson. On Monday.

CHAIRPERSON: Yes, you know, I don't like that expression "at the worst," because that creates assumptions which I don't think are satisfactory.

MR MPOFU: Yes, round about lunchtime.

CHAIRPERSON: You are here to question the witness, to elicit as much, many facts as you can on behalf of your clients to put their case properly before the Commission –

MR MPOFU: I appreciate that, thanks.

CHAIRPERSON: It's your duty to do that and to suggest that we should go on longer than a certain time which is at the worst, is an unfortunate way of looking at it.

MR MPOFU: Yes. No, Chairperson, okay, let's rather put it then as a target rather than as a restriction. I will try to finish by lunchtime, Chairperson, but you're quite right, I might stray a little bit further than that.

CHAIRPERSON: Alright, thank you for that. We will adjourn now until tomorrow morning 9 o'clock.

[COMMISSION ADJOURNED]

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