

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 164

Lukmos
communications

07 JANUARY 2014

TRANSCRIPT PAGES 17235 TO 17291

1 **[PROCEEDINGS ON 7 JANUARY 2014]**

2 **[09:05] CHAIRPERSON:** The Commission resumes.

3 Brigadier, you are still under oath.

4 **ADRIAAN MARTHINUS CALITZ:** Thank you,

5 Commissioner.

6 **CHAIRPERSON:** Mr Chaskalson.

7 **CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.):**

8 Brigadier, I am going to pick up with your movements around

9 scene 2. We closed yesterday with your clarifying the

10 events that are described in paragraphs 122 to 125 of the

11 statement, and you'll recall that your group had arrested

12 strikers northwest of scene 2 and Warrant-Officer Nong was

13 photographing the arrested strikers. Together with

14 Lieutenant-Colonel Vermaak you were instructing the POPS

15 members in hill 3, that is in hill 3 itself, to get out

16 of their Nyalas under protection and to engage with the

17 support of the task force, and then Lieutenant Colonel

18 McIntosh saw Mr Mpumza apparently attacking a member and

19 shouted and headed off in the direction of the incident.

20 Now if I understand your evidence correctly, at the time

21 when you saw Lieutenant-Colonel McIntosh running off alone

22 you thought that he was at risk and you had to respond

23 immediately. Is that correct?

24 **BRIGADIER CALITZ:** Correct, Mr

25 Chairperson.

1 **MR CHASKALSON SC:** So you called Warrant-
2 Officer Nong back from his photographs and ordered him to
3 drive after Lieutenant-Colonel McIntosh. Is that correct
4 too?

5 **BRIGADIER CALITZ:** That is correct, Mr
6 Chairperson.

7 **MR CHASKALSON SC:** Did you get out of the
8 Nyala to call Warrant-Officer Nong?

9 **BRIGADIER CALITZ:** I do not think so. I
10 think I just stood in the door. If you look at the
11 photograph, the Nyala and the Canter is close by, so I
12 do not think it is a far distance.

13 **MR CHASKALSON SC:** So you could call to
14 Warrant-Officer Nong from your position?

15 **BRIGADIER CALITZ:** No, That is correct,
16 yes.

17 **MR CHASKALSON SC:** And did Warrant-
18 Officer Nong respond immediately to your call?

19 **BRIGADIER CALITZ:** Yes, he came to the
20 Nyala and then we drove to the direction of where Colonel,
21 or Lieutenant-Colonel McIntosh were.

22 **MR CHASKALSON SC:** Now were any other
23 members of your Nyala outside the Nyala involved in the
24 arresting or securing of the strikers who were on the
25 ground at that point?

1 **BRIGADIER CALITZ:** I cannot recall at this
2 stage. There might be there is two or three other members.
3 I need to look at their statements, so I cannot recall if
4 they all went with me there. That I cannot recall at the
5 moment, no.

6 **MR CHASKALSON SC:** When you went off, do
7 you recall whether most of your original team was with you
8 in the Nyala, or was the Nyala relatively empty?

9 **BRIGADIER CALITZ:** No, I think most of
10 them was there, that is why I am saying I am not sure if one
11 of the members – remember there was three police officials
12 that I testified in the beginning, I am not sure if one of
13 them stayed in the, and joined us later. I cannot recall
14 that at the moment.

15 **MR CHASKALSON SC:** And if I understood
16 your evidence correctly you were happy to leave the scene
17 where you had been because the members and the other vehicles
18 who remained behind were sufficient to control the scene.
19 There was not a risk in leaving the scene.

20 **BRIGADIER CALITZ:** Yes, it was only my
21 vehicle leaving. If you went back to the photograph again
22 of yesterday you will see that there was sufficient TRT
23 members as well on the ground giving protection to those
24 people busy with the arrests.

25 **MR CHASKALSON SC:** Now in the photographs

1 we see another armoured vehicle there, which is a Nyala,
2 and in some of the photographs we see a Casspir as well.

3 Were those vehicles also left behind?

4 **BRIGADIER CALITZ:** As far as I know it

5 was my vehicle driving off and then later on I testified I
6 think I was informed by Colonel Pitsi, who also joined us
7 at that stage where the body was found, who then informed
8 me about the situation of his Nyala. I think it was Pappa5,
9 if I am not mistaken.

10 **MR CHASKALSON SC:** Yes, but Pappa5 had
11 been with you up at the scene of the arrested strikers as
12 well.

13 **BRIGADIER CALITZ:** That is why I am saying
14 I think he was left behind until all the strikers was in
15 the Canter. I am not sure. I did not observe their
16 movements at that time.

17 **MR CHASKALSON SC:** When you deal with
18 what happened when you reached the body of victim C – or
19 first of all, by the time you actually caught up with
20 Lieutenant-Colonel McIntosh he was already at the body.
21 That is correct, is it not?

22 **BRIGADIER CALITZ:** When I climbed out of
23 the vehicle he was at a kneeling position at the body, yes.

24 **MR CHASKALSON SC:** And you quickly
25 established that both he and the SAPS member about whom he

1 had been concerned were alright, but Mr Mpumza was in fact
2 dead.

3 **BRIGADIER CALITZ:** I was told by Colonel
4 McIntosh that the person passed on, yes.

5 **MR CHASKALSON SC:** But there were no SAPS
6 member who was at risk any longer?

7 **BRIGADIER CALITZ:** SAPS member who was
8 what?

9 **MR CHASKALSON SC:** Who was at risk any
10 longer. You will recall Lieutenant-Colonel McIntosh went
11 off, we understood, or I understood from your evidence,
12 because he thought a SAPS member was being attacked.

13 **BRIGADIER CALITZ:** That is what he told
14 me, yes.

15 **MR CHASKALSON SC:** And when you got
16 there, there was no SAPS member who was still at risk or
17 injured?

18 **BRIGADIER CALITZ:** No, as I testified,
19 the person passed on, so there was no other attack on that
20 members there at that moment.

21 **MR CHASKALSON SC:** And from your
22 statement I understand that you realised that the death of
23 victim C was something that had to be reported to the JOC,
24 so you called Lieutenant-General Annandale at 16:47 to make
25 this report and this you say was the first time you found

1 out anything about the other shootings and deaths in the
2 operation.

3 **BRIGADIER CALITZ:** That is correct, Mr
4 Chairperson.

5 **MR CHASKALSON SC:** But it seems from your
6 statement that before you called Lieutenant-General
7 Annandale you had some exchanges with Captain Kidd and
8 Lieutenant-Colonel Pitsi at the scene of Mr Mpumza's body.
9 Am I correct in reading your statement that these exchanges
10 with Captain Kidd and Lieutenant-Colonel Pitsi happened
11 before you called?

12 **BRIGADIER CALITZ:** Yes, again like
13 yesterday I cannot say my statement is in sequence. I cannot
14 remember really the time that Colonel Pitsi told me about
15 the Nyala. I know when we were at, standing at the
16 position where the body was lying, I was approached by
17 Colonel Pitsi and informed that his Nyala was shot at
18 during what we call I think incident 2, but when it
19 happened before or after I made the call, I cannot really
20 tell you, but there were exchange, yes, because when I
21 arrived at the body I found the TRT members there, which I
22 saw for the first time.

23 **MR CHASKALSON SC:** Yes, if we look at 126
24 and 127, 126 you talk about the TRT members and you explain
25 that you instructed Captain Kidd to make a report to the

1 JOC. Then you say at about the same time Lieutenant-
2 Colonel Pitsi arrived at the scene. Now did he arrive in
3 his Nyala?

4 **BRIGADIER CALITZ:** That is correct, yes.

5 **MR CHASKALSON SC:** And did you actually
6 see his Nyala arrive at the scene?

7 **BRIGADIER CALITZ:** He showed me the
8 Nyala. I also saw there was marks on the Nyala and
9 therefore later on I have instructed the Local Criminal
10 Record Centre to take photographs of that Nyala and they
11 said to him he must not remove his Nyala from that scene
12 there.

13 **MR CHASKALSON SC:** But when you say
14 Lieutenant-Colonel Pitsi arrived at the scene, do you mean
15 that his Nyala actually arrived at the scene while you were
16 there, or that he came up to you while you were there and
17 then showed you his Nyala?

18 **BRIGADIER CALITZ:** We were standing there
19 where the body's position was, so the Nyala obviously drove
20 to where we were and then he climbed out, told me and we
21 saw the Nyala.

22 **MR CHASKALSON SC:** And you saw the Nyala
23 driving to where you were?

24 **BRIGADIER CALITZ:** The Nyala was a few
25 metres away from mine, yes, but I did not actually saw them

1 from where they were driving into my direction, no. But if
2 you look at the photographs of where we all were, I think
3 Pappa5, it is indicated on your photograph, I presume that is
4 from the position where he left to come to me.

5 **CHAIRPERSON:** Are you saying that you
6 did not see the Nyala arrive? I take it you were presumably
7 looking at Colonel McIntosh and looking at the body and so
8 on. You did not see the Nyala arrive, but after it had
9 arrived you saw it, you –

10 **BRIGADIER CALITZ:** That is correct.

11 **CHAIRPERSON:** You saw the damage marks
12 and so forth.

13 **BRIGADIER CALITZ:** Yes, no, that is
14 correct, Mr Chairperson.

15 **CHAIRPERSON:** And spoke to Colonel Pitsi?

16 **BRIGADIER CALITZ:** I definitely spoke to
17 Colonel Pitsi.

18 **MR CHASKALSON SC:** And when you arrived
19 in your Nyala had you seen any other Nyala at the scene of
20 victim C?

21 **BRIGADIER CALITZ:** No, not that I can
22 recall. As I said, I am not sure which time he arrived
23 or - I looked at him when they arrived, that is why I say
24 at about the same time, so I was busy with – remember there
25 was now a body who is dead, so I was talking to the TRT

1 people. I was trying to calm everybody down, so my
2 attention was there, not at which vehicles was there. I
3 did not really look at that, no.

4 **MR CHASKALSON SC:** Would you not have
5 thought that it was important to call the JOC immediately
6 to report the death of Mr Mpumza?

7 **BRIGADIER CALITZ:** The first opportunity,
8 that is why I said I called the JOC. I do not know if the
9 photographs indicated when I arrived there and when I
10 called what is the difference, but according to me after I
11 established what happened there with the facts then
12 immediately I called the JOC.

13 **MR CHASKALSON SC:** So your conversation
14 with Lieutenant-Colonel Pitsi about the damage to the
15 Nyala, which was something that could have waited until
16 after you had called the JOC.

17 **BRIGADIER CALITZ:** I have testified to you,
18 Mr Chairperson, that I was not aware if I talked to colonel
19 Pitsi before or after the phone call. It is
20 what I just told you, so if I talked to him
21 before, he showed it to me, or if I did afterwards
22 – I cannot tell you exactly what occurred
23 first.

24 **MR CHASKALSON SC:** Did you issue any
25 instructions about preserving the integrity of the crime

1 scene around Mr Mpumza's body?

2 **BRIGADIER CALITZ:** that is what I testified

3 to, I think 126, when Captain Kidd arrived at the

4 scene, "I instructed him to find out what

5 happened and to give the situation report to the JOC." It is

6 also true that they secured the scene.

7 **MR CHASKALSON SC:** Did you put anyone in

8 particular in charge of preserving that crime scene?

9 **BRIGADIER CALITZ:** I talked to Captain

10 Kidd, but his members on the scene, was sufficient.

11 they stayed there by the person, also I think Colonel Pitsi

12 said Nyala was also static there, if I remember correctly, until

13 late that evening.

14 **MR CHASKALSON SC:** But I am asking about

15 responsibilities. Was there someone who was given

16 responsibility for preserving that crime scene, an

17 individual who is responsible if anything went wrong with

18 that crime scene?

19 **BRIGADIER CALITZ:** I talked to captain

20 Kidd at that stage.

21 **MR CHASKALSON SC:** So Captain Kidd was

22 responsible for the integrity of that crime scene?

23 **BRIGADIER CALITZ:** He was the senior on

24 the scene, so that is how it normally occurs, yes.

25 **MR CHASKALSON SC:** Well, Lieutenant-

1 Colonel Pitsi, who was there, if not at the time of Captain

2 Kidd then shortly thereafter, was he not given

3 responsibilities about the crime scene?

4 **BRIGADIER CALITZ:** No, I told

5 Captain Kidd because his members were also present at

6 the shooting incident, so I gave him an order and told

7 him he must find out what occurred there, and when he has

8 all the facts regarding the situation, then he must give it

9 through to the JOC.

10 **MR CHASKALSON SC:** And then if I

11 understand your statement; Warrant-Officer Nong drove you

12 from victim C to your final position at hill 3. Is that

13 correct?

14 **BRIGADIER CALITZ:** That is now after

15 after I made the phone call- am I with you? You mean to say

16 after I have been to hill 3?

17 **MR CHASKALSON SC:** Sorry, you made the

18 call to Major-General Annandale. Did you make that from

19 the scene of victim C?

20 **BRIGADIER CALITZ:** Yes, That is correct.

21 **MR CHASKALSON SC:** And thereafter you

22 went in your Nyala to hill 3. Is that correct?

23 **BRIGADIER CALITZ:** That is correct. I

24 said "to the northern side," it is north-westerly

25 direction. If you look at the photograph, there is an

1 opening between the rocks where everybody was on the
2 ground, so my Nyala was positioned about, I would say a few
3 metres, 10, 20 metres in front of that, of hill 3, yes.

4 **MR CHASKALSON SC:** I wonder, maybe we
5 should look at a photograph so we can just point it out to
6 the Commissioners. To my mind, the best photograph to show
7 the position of your Nyala in its final position is
8 Lieutenant-Colonel Vermaak's photograph 4552. I have just
9 lost a reference, a JJJ reference for that.

10 **CHAIRPERSON:** It is already an exhibit?

11 **MR CHASKALSON SC:** Yes, it is already an
12 exhibit in the JJJ-series, but I am looking for its number.
13 It is JJJ10, 4552. JJJ10. Can we get JJJ10 up? 4552. We
14 want the file of 4552. There should be a folder of them.
15 Maybe to save time we can look at it later because we will be
16 able to point it out later and we can talk – Brigadier, you
17 can see it and I can see it, so I think we are going to need
18 a better copy of this. We are going to need the one that is
19 actually called up on screen, but Brigadier, let us quickly
20 run through the movements. We will go back to it once we have
21 got 4552 up on screen. Can I clarify with you that it was
22 Warrant-Officer Nong who drove you first from – well,
23 you have already confirmed that it was Nong who drove you
24 from the scene of the arrests to the northwest, to the scene
25 of victim C. What I now want to clarify is that he again

1 drove the Nyala from the scene of victim C to its final
2 position. Can you answer that question?

3 **BRIGADIER CALITZ:** Yes, the only answer I
4 can give you is it must have been him. I cannot think of
5 anybody else that would climb in my Nyala –

6 **MR CHASKALSON SC:** Well you see, why I
7 ask –

8 **BRIGADIER CALITZ:** There was no
9 communication there, but yes, it must have been him.

10 **MR CHASKALSON SC:** Why I ask, Brigadier,
11 if Warrant-Officer Nong was also taking photographs. So we
12 can plot some of his movements and the times of his
13 movements with reference to when he got out and took
14 photographs. Therefore, it is important for us to know if anybody
15 else at any stage was moving you around because we do not
16 want to say well, Warrant-Officer Nong was now in this
17 position having got out of the Nyala there and it turns out
18 somebody else was driving the Nyala. But to the best of
19 your knowledge he was the only person who drove your Nyala
20 that day?

21 **BRIGADIER CALITZ:** To the best of my
22 knowledge, yes. If there was another person jumping in and
23 driving, I mean where my concentration was, was not really
24 with the driver at that stage. But according to me, to the
25 best of my knowledge it must have been him, yes.

1 **MR CHASKALSON SC:** We have got the
2 photograph up, Brigadier. Do you have a pointer?
3 **CHAIRPERSON:** Can we be told where north
4 were? I think I can work it out by reference to the shadows
5 of the vehicles, but that would be a rough guess really.

6 Do we know where north is?

7 **MR CHASKALSON SC:** Broadly, Chairperson,
8 north is on the left-hand side of this photograph.

9 **BRIGADIER CALITZ:** Yes.

10 **MR CHASKALSON SC:** This is later in the
11 afternoon, so the shadows are cast from west to east.

12 **CHAIRPERSON:** So if one looks, the
13 picture we are looking at now, there are two vehicles near
14 the foot of the page in the middle. The shadows are behind
15 them. So I take it that is an easterly direction, the
16 direction of the shadows.

17 **MR CHASKALSON SC:** That is slightly sort
18 of – it is probably east-northeast, or east, east-northeast.

19 **CHAIRPERSON:** Anyway, you are saying north
20 are on the left-hand side. Do we know where body C was?

21 **BRIGADIER CALITZ:** I think body C, at this
22 stage, Mr Chairperson, is at the back of my Nyala,
23 positioned at 6 o'clock, at the back of the
24 vehicle.

25 **CHAIRPERSON:** But can you perhaps show me

1 your Nyala on this?

2 **BRIGADIER CALITZ:** I have a

3 pointer. If you look at – it will be my, I assume “body

4 C” will be in this position –

5 **CHAIRPERSON:** Okay, I see. Thank you.

6 So it is actually the vehicle the closest to the bottom left

7 corner of the photograph?

8 **BRIGADIER CALITZ:** That is correct, Mr

9 Chairperson.

10 **CHAIRPERSON:** Thank you. Do you say body

11 C is close to that?

12 **BRIGADIER CALITZ:** He is not visible

13 in this “picture,” but I assume,

14 he will be at the 6 o’ clock of the Nyala,

15 at the back, just out of sight in the picture, in a

16 north-westerly direction.

17 **CHAIRPERSON:** So what you are indicating I

18 think is just beyond the bottom left-hand corner of the

19 photograph. Is that right?

20 **BRIGADIER CALITZ:** I do not know if it can

21 be zoomed out more, or is this the furthest?

22 **MR CHASKALSON SC:** I think that is as far

23 as it goes.

24 **BRIGADIER CALITZ:** Yes, so it is just out

25 of picture, Mr Chairperson, on the left side

1 in the bottom corner of the photo, just out of the picture.

2 **CHAIRPERSON:** But close to the bottom

3 left-hand corner of the photograph, but off the picture,

4 beyond the frame, as it were.

5 **BRIGADIER CALITZ:** That is correct, Mr

6 Chairperson.

7 **CHAIRPERSON:** Thank you.

8 **[09:25] MR CHASKALSON SC:** Brigadier, I just want

9 to take issue with that because I think body C is in fact a

10 bit more – I would put body C broadly on a line, if you

11 take this line of the shadow in one direction through your

12 vehicle and you run that run in the opposite direction I

13 would put body C closer to that line, but we have other

14 photographs and that is where we can –

15 **CHAIRPERSON:** It is not a fact, it is in

16 that vicinity.

17 **MR CHASKALSON SC:**

18 **BRIGADIER CALITZ:** Mr Chairperson, I

19 think on the previous photo, where our Nyalas were together,

20 where you see the red dot, now -

21 **MR CHASKALSON SC:** That is correct.

22 **BRIGADIER CALITZ:** I think if we

23 can go to that photo, and then I can show the Chairperson

24 where my Nyala is on that photo. So it

25 will be an indication.

1 **MR CHASKALSON SC:** That is JJJ178 GW.

2 **BRIGADIER CALITZ:** It is just, if it

3 is of importance, then we can -

4 **CHAIRPERSON:** We saw that photograph

5 yesterday and if it is important -

6 **BRIGADIER CALITZ:** Oh, no, no, I just want to

7 show you.

8 **CHAIRPERSON:** If you particularly want it

9 obviously I will not stop you. However, I do not think it is

10 necessary, because I am just trying to understand how it

11 fit together.

12 **BRIGADIER CALITZ:** Then I am satisfied, Mr

13 Chairperson.

14 **CHAIRPERSON:** Because you did say in your

15 statement that you positioned your Nyala, this is paragraph

16 129, when you got to hill 3 in front on the northern side

17 that is why I wanted to know where the northern side was.

18 But now I understand that and I understand where more or

19 less where body C was.

20 **BRIGADIER CALITZ:** It is correct.

21 **CHAIRPERSON:** Yes, I think I can follow

22 and if I cannot follow it I will let you know.

23 **BRIGADIER CALITZ:** Thank you, Mr

24 Chairperson.

25 **MR CHASKALSON SC:** And, Brigadier, you

1 mentioned before the photo came up that there was, I think
2 you said a passage or an opening or a clearing into the
3 hill, can you just mark that so that the Commissioners
4 can see what you are referring to.

5 **BRIGADIER CALITZ:** I said my vehicle
6 stopped in front of the rocks, and I said there were
7 a gap between the rocks. So you can see, just left or
8 right in front of my vehicle, there is two vehicles which we
9 refer to as Cantors, that is the gap and if you move
10 forward with my Nyala, you will drive into that gap,
11 that is the gap I am referring to.

12 **MR CHASKALSON SC:** And if you were to
13 drive straight through that opening you would have reached
14 the place which doubled as an arrest collection point and a
15 field hospital?

16 **BRIGADIER CALITZ:** I can say after the second group
17 of vehicles standing there you will see there is a group
18 of people, maybe if we zoom in you will see it is that the
19 arrests then behind the vehicle, when you go nearer
20 you can see them where they-

21 **CHAIRPERSON:** Are there also bodies
22 there?

23 **BRIGADIER CALITZ:** Mr Chairperson,
24 the bodies that was between the rocks, it is more towards
25 the south, if we look at the picture up and

1 right, which is where I saw the bodies, between there
2 and then I was not aware of anybody, because it is
3 the centre spot where the people was arrested. I
4 know, I am unaware of one of them perhaps maybe they have gone
5 while they were busy with the medical
6 staff.

7 **CHAIRPERSON:** So the position is then
8 those bodies if one can call them that which are close to
9 the Cantors, there is two Cantors parallel with each other
10 and immediately above them on the photograph the whole
11 group of, what looks like bodies, those are the arrested
12 people are they?

13 **BRIGADIER CALITZ:** It is the people on the ground
14 that is the same position as the previous six we -

15 **CHAIRPERSON:** And then if one goes up,
16 slightly to the right there is a group of other people lying
17 on the ground to the right. Are those the dead bodies?

18 **MR CHASKALSON SC:** Chairperson, if I can
19 help you there are no dead bodies at this scene at all.

20 **BRIGADIER CALITZ:** I think, yes I did-

21 **CHAIRPERSON:** Oh, I see. Alright so -

22 **BRIGADIER CALITZ:** not on this photo,
23 Mr Chairperson.

24 **CHAIRPERSON:** Not on this, okay.

25 **BRIGADIER CALITZ:** Go upwards.

1 **MR CHASKALSON SC:** When I say at the
2 scene I mean this photograph, at what is photographed here.

3 **BRIGADIER CALITZ:** Yes.

4 **MR CHASKALSON SC:** Now, Brigadier,
5 yesterday at the end of the day when you were clarifying
6 that time when you moved off after Lieutenant Colonel
7 Macintosh you said in answer to the Chairperson that the
8 photographing of the arrested persons, your radio exchange
9 with Lieutenant Colonel Vermaak about engaging inside the
10 hill and Lieutenant Colonel Macintosh's flight to the
11 scene of victim C happened more or less at the same time,
12 maybe not exactly at the same time, do you recall that?

13 **BRIGADIER CALITZ:** Yes, I referred to the
14 transcript, and I said if we are going to look at the,
15 where we were, I referred to as L25, we referred to
16 a time in the conversation and that is where
17 Colonel Vermaak indicated that the people are encircled.
18 so it is, between where we were in 1125 in the conversation after
19 about 13:28, so if I look at the recording two or three
20 minutes. Approximately-

21 **MR CHASKALSON SC:** Sorry, I am not, I am
22 not following. You're saying it is approximately two or
23 three minutes -

24 **BRIGADIER CALITZ:** I said as I looked at the
25 transcript before me. I did not check the

1 time, I mean I was not at that point of time

2 held. I am saying it can easily be worked out according to the

3 transcript before us.

4 **MR CHASKALSON SC:** You see if we go back

5 to your statement and can we call up the statement,

6 paragraph 124 and 5. Your statement suggests that you had

7 literally just got off the radio when you or you had just

8 been community with Lieutenant Colonel Vermaak when at that

9 moment, I shouted at Warrant Officer Nong to quickly come to

10 the Nyala. So your statement conveys is that immediately

11 after you had issued your instruction to the POPS members

12 to engage at the hill on the radio you called Warrant

13 Officer Nong to come back to the Nyalas so that he could

14 drive you to Lieutenant Colonel Macintosh. Is that how you

15 remembered it?

16 **BRIGADIER CALITZ:** Mr Chairperson,

17 no I did testify to you yesterday that the statement is not

18 written in sequins as you always asked me

19 to. I did say and I thought, Mr Chairperson, said

20 there were two or three incidents, occurring more or less the same

21 time. So I asked you at a stage that you have the

22 time lines, I do not have the time lines before

23 me. It is easy, according to which one we can see

24 have to take place. I have witnessed that it is more

25 or less –

1 **CHAIRPERSON:** But, Brigadier, but it does
2 look, if you look at paragraph 124 and 125 together that
3 when you made your statement the way you remembered it was
4 that you shouted to Nong, Warrant Officer Nong to come to
5 the Nyala so that, and then you went off in the direction
6 of Lieutenant Colonel Macintosh. That expression at that
7 moment clearly it refers back to what you say in 124 and
8 124 deals with the report you heard over the radio from
9 Lieutenant Colonel Vermaak that the armed strikers were
10 encircled which is on the hill and you then gave
11 instruction to all the POP members in the Nyalas to get out
12 of their vehicles and do various things, to disperse the
13 group into smaller pockets, encircle them, disarm them and
14 arrest them. But the use of the expression at that moment,
15 creates the clear impression that as you
16 remembered it then when you made the statement, you thought
17 that those two things had happened more or less
18 simultaneously. That does seem correct, does not it?

19 **BRIGADIER CALITZ:** I think we can link 125
20 to 123, commissioner, where Macintosh and I jumped
21 out and ran, I remembered I shouted I said we have to
22 wait for him, and he said no and kept on running because
23 he was under attack. I was
24 at that stage where, I yelled at
25 Nong. I think the radio conversation occurred at the

1 same time, I cannot remember if we were on our way
2 driving or when we were still static when I said
3 it. But it is as I remembered it, it happened about
4 the same time. I say that we can see in the transcripts,
5 at 13 minutes 28 seconds, in the
6 transcript, Colonel Vermaak gave me that
7 order. So I did ask if a guy can look, I think the
8 shooting was around 16:20 as I established on the
9 timeline. Therefore, I do not know if the times do match.

10 **CHAIRPERSON:** It looks then as if
11 paragraph 124 is in the wrong position in your statement.

12 **BRIGADIER CALITZ:** It can maybe be just
13 exchanged with 125, that is why I said, Mr Chairperson,
14 it is not in sequence.

15 **CHAIRPERSON:** Yes, I am just trying to
16 ascertain what the position is. It looks from what you now
17 tell us that 124 is wrongly placed in the statement, you
18 say it should actually come after 125, is that right, in
19 other words 125 should be 124 and 124 be 125, would that be
20 more accurate?

21 **BRIGADIER CALITZ:** Mr Chairperson, yes
22 I can agree with you, I say as I remember at that
23 time, this is how I remember the events and that is
24 how I wrote the statement.

25 **CHAIRPERSON:** That is why I asked you when

1 you made your statement is that how you remembered it.

2 **BRIGADIER CALITZ:** It is correct, Mr

3 Chairperson.

4 **MR CHASKALSON SC:** You see, Brigadier,

5 the statement is very misleading in that respect because

6 these two events did not happen even remotely close to one

7 another in the broader scheme of the operation. They

8 happened a long time apart from one another. Your

9 communication with Lieutenant Colonel Vermaak was as you

10 mentioned at 13:48 on the transcript of the Protea Coin

11 chopper that was at ETV time 16:11:18. The episode with

12 Lieutenant Colonel Macintosh running out of the Nyala

13 happened more than eight and a half minutes later because

14 Mr Mpumza was only killed at 16:19:47 and that is a time

15 that we take from Captain Ryland's video, if I can give you

16 the reference to Captain Ryland's video. It is Captain

17 Ryland's video 26, which is exhibit I2 one minute into that

18 video, you hear the shoots that killed victim C, Mr Mpumza.

19 So you are talking about incidents that were eight minutes,

20 eight and a half minutes apart at least because until,

21 Lieutenant Colonel Macintosh could only have run out after

22 victim C had been killed, but that is not the only misleading

23 aspect about your evidence in relation to the incident with

24 Lieutenant Colonel Macintosh. In fact there is much more

25 misleading aspects and most of the version that you are

1 putting forward in this commission today can be shown to be
2 incorrect with reference to the video footage. I am going
3 to say out all of the inaccuracies so you can consider them
4 all before I ask you to respond to each one.

5 **CHAIRPERSON:** Before you do that, can I
6 ask you a question, Mr Chaskalson. I asked the Brigadier
7 whether 124 and 125 were in the wrong order and I
8 understood him to say that 125 in 124 and 124 should be
9 125, if that is correct that means that the Vermaak
10 incident, report by Vermaak and the instruction to the POP
11 members in the Nyalas to get out of their vehicles on
12 hill 3 took place after the events described in paragraph
13 125. Now you say, I understand you to say that is not
14 correct but in fact the, those incidents took place
15 something like ten minutes before.

16 **MR CHASKALSON SC:** Eight and a half
17 minutes before.

18 **CHAIRPERSON:** Eight and a half. May I
19 ask you this, now if that is correct, obviously we do not
20 know if that is so. Do you, are you able to tell us from
21 your timeline and the examination of the videos and so on
22 at what time the events in the second sentence of
23 paragraph, the event in the second sentence of 122
24 occurred, that is Warrant Officer Nong getting out of the
25 Nyala at the place that the arrests took place to take

1 photographs of the arrested strikers. In other words did
2 those, that incident that is dealt with effectively in
3 paragraph 122, the arrest of some of the strikers, making
4 them lie down, they them being photographed by Warrant
5 Officer Nong, do we know at what time that happened? Are
6 you –

7 **MR CHASKALSON SC:** Yes, we can give you
8 the time of the very first photograph that Warrant Officer
9 Nong took.

10 **CHAIRPERSON:** Yes, what is that?

11 **MR CHASKALSON SC:** Well I will have to look
12 for it.

13 **CHAIRPERSON:** I just want to understand
14 what you are putting and the way I propose doing it is to
15 annotate my copy of the witness's statement with the
16 relevant times against some of the key paragraphs. So what
17 I am looking for at the moment is to write a time, an ETV
18 time I take it against the second sentence of paragraph
19 122.

20 **MR CHASKALSON SC:** The first photograph
21 taken by Warrant Officer Nong is JJJ, not the first
22 photograph taken by him but the first photograph taken by
23 him at the scene to the north west of the hill where the
24 strikers are being arrested.

25 **CHAIRPERSON:** Yes.

1 **MR CHASKALSON SC:** It is JJJ63674,

2 JJJ63674.

3 **CHAIRPERSON:** And what time is that?

4 **MR CHASKALSON SC:** That is at ETV time

5 16:12:20.

6 **CHAIRPERSON:** 16:12 -

7 **MR CHASKALSON SC:** 20.

8 **CHAIRPERSON:** 20.

9 **MR CHASKALSON SC:** So that is roughly a

10 minute after the exchange between Lieutenant Colonel

11 Vermaak and Brigadier Calitz.

12 **CHAIRPERSON:** Now we come to the next

13 point. The next point is the report from Lieutenant

14 Colonel Vermaak followed by the instruction given by the

15 witness which is the first two sentences, in fact it is the

16 two sentences of paragraph 124 what is ETV time of that?

17 **MR CHASKALSON SC:** Lieutenant Colonel

18 Vermaak is 16:13:21.

19 **CHAIRPERSON:** 16:13:21, in other words a

20 minute after the first photograph.

21 **MR CHASKALSON SC:** And the witness's

22 replied it is 16:13:31, so it is 16:13:21 to 16:13:31.

23 **CHAIRPERSON:** Yes, I understand, and

24 then the last one I want is the -

25 **MR CHASKALSON SC:** Sorry, Chairperson,

1 while I am doing this just in case any of the parties want

2 to check this, can I give the references to the video.

3 **CHAIRPERSON:** Of course.

4 **MR CHASKALSON SC:** That is at 13:57 is

5 the, is the communication from Lieutenant Colonel Vermaak

6 on the Protea Coin video, 14:09 from, is the answer from

7 Brigadier Calitz.

8 **CHAIRPERSON:** Yes, and what is the

9 exhibit order? Well it does not matter.

10 **MR CHASKALSON SC:** It is the Protea Coin

11 video.

12 **CHAIRPERSON:** If they want it, they will

13 ask you for it and then 125, is shouting, he shouts to

14 Warrant Officer Nong to quickly come to the Nyala so they

15 could go off to, they could drive off to where Lieutenant

16 Colonel Macintosh was attending to the striker, this is

17 victim body C, what do we know when that was?

18 **MR CHASKALSON SC:** We do not know when the

19 instruction came –

20 **CHAIRPERSON:** Do we know –

21 **MR CHASKALSON SC:** We know when Mr Mpumza

22 were killed.

23 **CHAIRPERSON:** That was?

24 **MR CHASKALSON SC:** And that was at ETV

25 time 16:19:47.

1 **CHAIRPERSON:** 16:19:47.

2 **MR CHASKALSON SC:** And that –

3 **CHAIRPERSON:** I understand. So when, so

4 the statement in 125 on his arrival, that is Nong's arrival

5 back at the Nyala we drove to where Macintosh attending to

6 the striker he's lying on the ground, Macintosh informed me

7 he died. So that information was given by Colonel

8 Macintosh after Mpumza, Mr Mpumza died. So obviously given

9 after 16:19:47?

10 **MR CHASKALSON SC:** It is more than that,

11 Chairperson, because the incident involving the death of

12 victim C was almost instantaneous in the attack as it is

13 described by the –

14 **CHAIRPERSON:** Yes, yes I understand

15 that. But what we are concerned with is, what Lieutenant

16 Macintosh is informing the witness that the person had

17 died, he could not have informed him if he died before he

18 died.

19 **MR CHASKALSON SC:** Yes, but –

20 **CHAIRPERSON:** Some time after 16:19,

21 there may have been instantaneously after, it may have been

22 a minute later but it was –

23 **MR CHASKALSON SC:** No, I am making a

24 different point, Chairperson, that if Lieutenant Colonel

25 Macintosh saw the attack, which is what triggered his

1 decision to get out of the Nyala that would have happened
2 almost simultaneously with the death of victim C because
3 victim C was shot immediately he jumped up and tried to
4 attack Constable Sebatchane.

5 **CHAIRPERSON:** Well after that of
6 Lieutenant Colonel Macintosh arriving there the, Nong
7 coming back to the Nyala, driving the Nyala as described in
8 the statement. Anyway, thank you, you've given me the
9 relevant times that I want to enable me I hope to follow
10 the evidence.

11 **MR CHASKALSON SC:** Brigadier, I said I
12 was going to set out all of the inaccuracies so that you
13 could hear what my concerns were before I asked you to
14 respond to any one of them. So here they are. The first
15 inaccuracy is that your team did not respond immediately to
16 the death, to the departure of Lieutenant Colonel
17 Macintosh. After the death of Mr Mpumza Warrant Officer
18 Nong continued to photograph suspects and in fact took
19 another seven mug shots. Your vehicle was in fact the last
20 of the armoured vehicles to leave the scene of the arrests
21 to the North West. It only started moving from its
22 position at 16:22:52 ETV time where we see it on the Protea
23 Coin video at 25:22. Therefore, this was more than three minutes
24 after the death of Mr Mpumza.

25 **[09:45]** The two other armoured vehicles that were at the

1 scene of the arrests to the Northwest. The Casspir and
2 Pappa5 responded to the shooting of Mr Mpumza much quicker
3 than your vehicle. The Casspir is not visible on the
4 Protea Coin video at the time of the shooting of Mr Mpumza
5 which is 22:17 on the Protea Coin video. It seems to have
6 been moving off from the scene when the shooting took
7 place, but it then changed direction and drove in the
8 direction of Mr Mpumza's body, which we see from 22:27 to
9 24:07 on the Protea Coin video. And in fact at 22:01 on
10 the Protea Coin video, which is ETV 16:20:31, 16:20:31, it
11 stopped near Victim C where it stayed for 35 seconds. It
12 starts moving off again at ETV time 16:21:06. We also see
13 it driving slowly behind the body in the direction towards
14 the body on Captain Ryland's video at 26 - that is exhibit
15 I2 - at 1:38 into the video, which is ETV 16:20:25. And we
16 see it apparently stationary behind Colonel Macintosh,
17 who is already at the body, 37 seconds later, on the same
18 video, Captain Ryland's video, 26 I2 exhibit, at two
19 minutes, 15 seconds. That is ETV 16:21:02, before it pulls
20 off slowly from the scene at 2:19 into the video, which is
21 ETV time 16:21:06. So the Casspir was the first vehicle to
22 respond. It stopped. It was stationery while Colonel
23 Macintosh was already there and presumably was satisfied
24 that there was no problem and moved off.
25 The second vehicle to respond was Pappa5. It

1 moved off the scene to the Northwest at Lonmin chopper,
2 24:19, which is ETV 16:21:49 and more than a minute before
3 your Nyala moved off. It headed straight to the body of
4 victim C, where it stopped around Lonmin chopper, 25:18,
5 which was ETV, 16:22:48, and it stayed at the body of
6 victim C for a lengthy period.

7 Your vehicle, as I have already indicated, started
8 moving only at 16:22:52, which is Protea Coin video, 25:22.
9 Now, not only was your vehicle the last to leave, but it
10 did not even head in the direction of the body of Mr Mpumza.
11 It did not drive to Mr Mpumza at all. It drove straight to
12 hill 3 in its final position to the Northwest of the
13 hill, which it reached at Protea Coin video at 26:10, ETV
14 26:23:40. It seems that if you did in fact go to the scene
15 of victim C's body at all it was not in the immediate
16 aftermath of the shooting, but it was much, much later. It
17 also seems that at least someone inside your vehicle knew
18 that hill 3 was a massive crime scene that needed to be
19 attended, because Warrant Officer Nong was out of the
20 vehicle taking photographs of suspects less than two
21 minutes after the vehicle arrived at scene 2 at ETV time,
22 16:25:22, where we see this first photograph, which is
23 JJJ83, 36966. And he was photographing dead bodies by ETV
24 time, 16:37:50. That is 10 minutes before your call to
25 Major-General Annandale, JJJ8, 3729.

1 So those are the inaccuracies. I have a range
2 of concerns about the inaccuracies, which I want to put to
3 you. I am happy to put them to you now, so you know where
4 I am going, or if you want to respond to the inaccuracies
5 first you can do that, it is your choice. Do you want to
6 hear my concerns?

7 **BRIGADIER CALITZ:** You can continue, Mr
8 Chairperson.

9 **MR CHASKALSON SC:** You see my concern
10 about these misleading statements and inaccuracies is I am
11 worried that they may have been deliberate. First, if we
12 read your statement, your affidavit, there is a clear
13 suggestion that the exchange with Lieutenant-Colonel
14 Vermaak and the incident with Lieutenant-Colonel Macintosh
15 happened at the same time. That is one understands if one
16 read the affidavit. In truth, as we know, they did not
17 happen in anything like the same time, they happened 8 and
18 a half minutes apart. And at the time of your exchange
19 with Lieutenant-Colonel Vermaak, which was 8 and a half
20 minutes earlier, it seems to us that only one person had
21 been killed at scene 2. That is victim N. So he was the
22 first victim killed at scene 2, and who is body was reported
23 by Lieutenant-Colonel Vermaak Protea Coin chopper 12:02.
24 which is ETV time, 16:09:32. 1.46 seconds before your
25 exchange with Lieutenant-Colonel Vermaak. That is when

1 Lieutenant-Colonel Vermaak reported to the JOC that there
2 were two bodies at the small hill. One of those two
3 bodies that appears at that time was victim N, the other
4 body was a body of a man who was still alive and survived.
5 Now that was what the situation was when you had your
6 exchange with Lieutenant-Colonel Vermaak, only one person
7 had been killed.

8 By the time of the incident with Lieutenant-
9 Colonel Macintosh, all 14 victims at scene 2 had been
10 killed and another three had been fatally wounded. And
11 your version is that all of this happened without your
12 knowledge in an operation that you were supposed to be
13 commanding. What is clear is that it happened without any
14 apparent attempt on your part to control the processes that
15 actually led to the deaths of the victims. And it also
16 happened, after you had ordered your men to engage the
17 strikers in the hill and you had then not taken any steps
18 to control what happened in that engagement.

19 Now, if your radio exchange with Lieutenant-
20 Colonel Vermaak and the incident with Lieutenant Colonel
21 Macintosh happened more or less simultaneously, I could
22 understand why you did not take a more active response, as
23 operational commander, to the report from Lieutenant-
24 Colonel Vermaak and to your duty as operational commander
25 to control the engagement that was about to take place in

1 the hill, because if it happened simultaneously you were
2 facing an immediate crisis about the safety of Lieutenant-
3 Colonel Macintosh, and you had to respond to that, you
4 could not do anything else, but if incidents happened 8 and
5 a half minutes apart, we have to ask the question, should
6 you have taken a more active response and attempted to
7 command and control the operation that was about to unfold
8 at the hill.

9 You just ordered your POPS members to get out of
10 their Nyalas under protection and to engage the strikers
11 who had regrouped at the hill that was now surrounded.
12 You understood that the militant group had reformed in the
13 line behind hill 2, before they were dispersed by the
14 water cannons and had now regrouped inside the hill. So
15 you knew that inside the hill was the militant group, or
16 at any rate large numbers of the militant group. So you
17 knew that the strikers who your POPS members were going to
18 engage would include many members of the militant group and
19 you had been informed that these members were armed. Some of
20 them with firearms, others with traditional weapons. You
21 knew that the terrain at the hill was difficult terrain
22 and that there had be lots of places militant strikers to
23 conceal themselves. In particular, you must have known
24 that the terrain at the hill was much more complicated
25 than the open area where you had arrested people to the

1 Northwest and where you were still positioned. And from
2 what you had witnessed at scene 1, you must have realised
3 that it was going to be a highly risky operation for the
4 POPS members.

5 You also knew that some of the members needed to
6 be controlled on the use of force, because after the
7 dispersion of the line behind hill 2, they had been
8 shooting rubber bullets at strikers from inside the Nyalas
9 in circumstances where this was not justified. That was
10 your testimony on day 154, at page 17345. And from your
11 position to the north or the northwest, you had have no way
12 of seeing what happened when your members got out of the
13 armoured vehicles to engage the strikers on the hill and
14 no way of controlling what happened there. And before you
15 respond, I want to refer to an answer you gave to me in
16 cross-examination on day 158, 29 November, when you were
17 explaining why you moved from your position at scene 1 in
18 response to incident 2. The reference is 18026, line 23.

19 I asked you, "Can you remember why you did that?" That was
20 moving away from your starting position, and you said, "Mr
21 Chairperson, I order my Public Order Policing,
22 the Pappa Nyalas, to disperse. I saw
23 that the people on the
24 hill moved out and formed in a group, that
25 were on their way to me at the small kraal. I then gave the

1 order for the dispersion action and then
2 moved closer to see what was happening
3 at the scene.”
4 So as an operational commander, on your own
5 terms, I would have expected you, before ordering people to
6 engage the militant group in the most difficult terrain of
7 the operation to move to a position where you would be able
8 to see what is going on and to exercise
9 some control over what happened. So those are my concerns.

10 **MR SEMENYA SC:** Mr Chairperson, even
11 before Mr Semenya, can we just get that reference of the
12 last transcript page, please.

13 **MR CHASKALSON SC:** It is 18027, lines 4 to
14 12.

15 **CHAIRPERSON:** Is there anywhere that what
16 you said has been translated - the Afrikaans section you
17 read has been translated. Can you perhaps give us a
18 translation, or if necessary give me the page and I will -

19 **MR CHASKALSON SC:** Mr Chairperson, I gave
20 the order for my public order, the Pappa Nyalas to go and
21 disperse. I observed - I watched - I observed at
22 that stadium or I kept -

23 **CHAIRPERSON:** Stage, I observed that
24 stage -

25 **MR CHASKALSON SC:** Until I saw that the

1 people on the hill had moved out and I saw that there was
2 a point that formed towards me.

3 **CHAIRPERSON:** Towards me, I would think.

4 **MR CHASKALSON SC:** Towards me in the
5 direction of the small kraal.

6 **CHAIRPERSON:** Yes. Then I gave
7 instruction for the dispersion action and thereafter, as
8 any commander must do, I then moved closer to go and see
9 and to inform myself what was on the go there.

10 **MR SEMENYA SC:** Chairperson, I was going to
11 raise the concern that Mr Chaskalson has clearly made
12 assertions that may be or may not be correct, which are a
13 long narrative. I think he has referred us to elements of
14 the statement, which he contends, are misleading. Others to
15 which he says are inaccuracies and others are concerns,
16 just so that I am not befuddled by this, can I invite him to
17 break each inaccuracy, so that we have a response?

18 **CHAIRPERSON:** I understood him – the way
19 it works was he said he was going to explain to the witness
20 what, what they were based on, to enable the witness to
21 answer, and he then said to the witness, do you want me to
22 break it up or do you want me to give it all now, and the
23 witness said, go ahead. However, it may well be that
24 when he re-traverses the ground, he must do it section by
25 section, but I thought, to be fair, I wondered whether I

1 should allow this narrative, but I thought in fairness to
2 the witness, to give him a chance to understand the thrust
3 of the criticism to take it all in one, and then obviously
4 we will proceed to deal with it piece by piece. So the point
5 you are raise is correct, but in fairness to Mr Chaskalson,
6 he did what he did at the request of the witness. And I
7 can understand why the witness would like to get the whole
8 picture before he answers, but Mr Chaskalson, you've heard
9 the exchange between Mr Semanya and myself, is there any
10 more narrative you want to give or if the time now comes to
11 take the pieces one by one; give the witness a chance to
12 deal with it, unless the witness himself chooses to give a
13 general reply first before dealing with the details. It is
14 his evidence after all.

15 **MR CHASKALSON SC:** In fairness to the
16 witness, there is one other concern that I will be, would be
17 questioning him on.

18 **CHAIRPERSON:** Sorry, Mr Chaskalson.

19 Brigadier, would you like to hear Mr Chaskalson's other
20 concern, in other words, to get the whole picture of his
21 concerns before we get into the details, one by one.

22 **BRIGADIER CALITZ:** If it is a short
23 concern. The last one, I thought maybe there I just
24 something. I myself got mixed up with the times and stuff as I
25 try to keep up and write. Therefore, I think we may

1 hear it, and then maybe go back and then I can point

2 by point-

3 **CHAIRPERSON:** Is it a short concern, Mr

4 Chaskalson?

5 **MR CHASKALSON SC:** Yes, it is a short

6 concern and it colours where this questioning goes in a

7 separate direction. The concern is that if one reads the

8 statement, the episode in relation to Colonel Macintosh and

9 victim C looms large, but if one looks at the video, it

10 seems not to have bothered you too much at the time. You

11 claim that your Nyala drove straight after Lieutenant-

12 Colonel Macintosh, but it did not, it drove straight to the

13 hill in scene 2 and it reached scene 2 at approximately

14 23 minutes before your call to Major-General Annandale.

15 You knew that the death of suspect in an operation was

16 something that had to be reported to the JOC, and you are

17 asking this Commission to accept your statement that

18 despite the fact that your Nyala was at scene 2 by

19 16:23:40, that is 23 minutes before your call to Major-

20 General Annandale, where there was a massive crime scene in

21 front of you and if you had asked anyone there, you would

22 have found out that many people had been killed in that

23 hill. It took you another 23 minutes before you first

24 found out that anyone other than victim C, have been killed.

25 So those are the concerns.

1 **CHAIRPERSON:** The witness has said and I
2 can quite understand what he said, but his difficulty in
3 getting it all down, and he says he got a bit confused.
4 Now, you seem to me to be reading from notes.

5 **MR CHASKALSON SC:** I am. What I propose
6 to is put each paragraph –

7 **CHAIRPERSON:** What I was wondering
8 whether it wouldn't be fairer to the witness if we adjourn
9 – I am in Mr Semanya's hands, it is his witness, whether we
10 should not adjourn now. Whether the notes that you were
11 reading from, should not be photo copied quickly and given to
12 the witness. Then I think he will be better able to
13 deal with the points that you are making. It is very
14 important allegations you are making, very important point
15 in the case, as I understand it, and we have to be fair to
16 all concerned and that seems to me to be a fair way. Well,
17 let us see what he says. Would you prefer us to do that,
18 Brigadier?

19 **BRIGADIER CALITZ:** Mr Chairperson,
20 it will definitely help if I can see the times, so that I
21 can compare it with the transcript in front of me and the
22 evidence.

23 **CHAIRPERSON:** He was talking quite fast
24 and you were making notes, but you say you understandably
25 were not able to keep up.

1 **BRIGADIER CALITZ:** It is correct.

2 **CHAIRPERSON:** Are you happy with that

3 suggestion of mine, Mr Semenya?

4 **MR SEMENYA SC:** I am indeed, Chairperson.

5 **CHAIRPERSON:** Then we will take a short –

6 **MR CHASKALSON SC:** Chairperson, may it be

7 a bit longer than a short adjournment, because I have

8 handwritten annotations on follow-up questions, so what

9 I will have to do is to essentially reproduce what I have

10 read to the Brigadier, which may take a while.

11 **CHAIRPERSON:** Alright, I understand your

12 point. You do not want him to see your follow-up questions.

13 So we will take an adjournment now. We will take an early tea

14 adjournments I think, and when you are ready, you will let us

15 know. We will now take the premature tea adjournment.

16 **[COMMISSION ADJOURNS/ COMMISSION RESUMES]**

17 **[10:42] CHAIRPERSON:** The Commission resumes, we

18 had some discussions in Chambers with the representatives

19 and the evidence leaders and the SAPS and I understand that

20 an agreement has been reached concerning the future

21 handling of the aspect of cross-examination we are now busy

22 with. Mr Semenya, do you wish to speak to us on the

23 matter?

24 **MR SEMENYA SC:** Thank you, Chairperson. Chairperson

25 and the Commissioners, we submit that in fairness to the

1 witness Mr Chaskalson has dealt with various references and
2 minutia of a whole host of issues that he has identified to
3 constitute, inconsistencies which he says they point to
4 areas of concern about the conduct of the witness and the
5 witness has not had an opportunity to look at the
6 background documents that inform the challenge which Mr
7 Chaskalson is making.

8 **CHAIRPERSON:** And the video as well.

9 **MR SEMENYA SC:** And the videos as well,

10 and we submit that a witness of the brigadier's stature
11 surely requires to give informed and advised answers in
12 relation to that material. Our estimate is that he will
13 require a whole good number of hours to do so. It is not
14 possible for him to do it whilst they we standing down
15 today. Happily we are not sitting tomorrow because of the
16 commitments of this facility we have with the municipality
17 and we were proposing to use tomorrow, together with our
18 own expert in examining this technical material that
19 informs the cross-examination and which in turn will inform
20 and enable the witness to be able to speak accurately on
21 the issues that are raised with him.
22 There was a suggestion that we could interpose
23 somebody else in further cross-examination for the day and
24 that too raises the same concerns we have about whether or
25 not it would be fair to the witness to handle them today.

1 We would then be asking for a stand down of this hearing to
2 Thursday, one, to enable us to look at this material and to
3 familiarise the witness with that material and for him to
4 be able to speak and give considered answers to it. We
5 would also, if the Chairperson and Commissioners, you were minded to
6 grant us the indulgence, invite the legal team because, the
7 legal teams, because Mr Chaskalson has offered to use the
8 time for today in illustrating to, at least the SAPS' legal
9 team as well as those that may want to stay behind, how he
10 comes to the conclusions that he has, so that we can also
11 follow the cross-examination, where it is going.
12 If Chairperson and Commissioners, you are so minded, we
13 would ask the matter to stand down until Thursday. We will
14 use the rest of today with our experts looking at the
15 material, the video material that Mr Chaskalson intends to
16 use.

17 **CHAIRPERSON:** Thank you, Mr Semanya.

18 **MR BIZOS SC:** Mr Chairman?

19 **CHAIRPERSON:** Yes, Mr Bizos?

20 **MR BIZOS SC:** I am sorry to interrupt, I

21 am concerned by the content of this application. The
22 witness is under cross-examination. My learned friend
23 claims the right to consult with him and advise him as to
24 what answers to give. It is not permissible.

25 **CHAIRPERSON:** Mr Bizos, Mr Bizos, I am

1 sorry.

2 **MR BIZOS SC:** What does he mean when he

3 says that he wants to advise him, Mr Chairman?

4 **CHAIRPERSON:** This matter was

5 discussed in chambers, perhaps Mr Semenya can answer

6 himself. My understanding is that it is felt that the

7 witness will not have the technical expertise to summon up

8 the videos in question and zoom in on the particular

9 portions that are going to be relied on by Mr Chaskalson,

10 so it is only fair that he should be shown those videos,

11 someone must show it to him. The matter was discussed in

12 chambers, there is no question of him being told what

13 answers to give. Mr Chaskalson was quite happy to accept

14 that the person who would be present while this would

15 happen will be Mr Semenya, who as you know is an advocate

16 with the highest integrity, in whom we have full confidence

17 and there is no question at all that Mr Semenya would do

18 anything improper. He himself was originally concerned

19 that he could not speak to the witness because he was under

20 cross-examination and it seems to us that that problem was

21 removed on the basis, which I have explained to you, but what

22 – let him explain further, but I think I have captured some

23 of it anyway. Mr Semenya, would you like to deal with it?

24 **MR SEMENYA SC:** Chairperson, I can –

25 **CHAIRPERSON:** Would you like to satisfy,

1 - Mr Bizos I understand your concern.

2 **MR SEMENYA SC:** I can satisfy Mr Bizos

3 that I intend to do nothing unethical of the kind he is

4 suggesting. I am not going to be advising the witness on

5 anything and if I have articulated myself that way it was

6 completely not what I intend to convey. What I intended to

7 convey is that there would be an expert who will manipulate

8 the material for the benefit of the witness, not for us or

9 the witness to be given answers by anybody. I can assure

10 you, Mr Bizos, I have absolutely no intention to do

11 anything unethical. I have not done it in the past.

12 **CHAIRPERSON:** I understand you are going

13 to be present.

14 **MR BIZOS SC:** Mr Chairman, with respect,

15 to use the word "advise", I have known Mr Semanya for a

16 long time and I have no personal quarrel and I accept his

17 integrity, but to say that for the witness to consult with

18 an expert, what is the expert going to advise him on? He

19 is under cross-examination, Mr Chairman, he is under cross-

20 examination. The cross-examination relates to facts that

21 were in his statement, why does he need a consultation with

22 an expert as to what answers to give?

23 **CHAIRPERSON:** I do not –

24 **MR BIZOS SC:** I am ready, Mr Chairman, to

25 cross-examine the witness; we have been waiting for a long

1 time. I oppose the application for a stand down, the
2 witness should not be assisted either by an expert or by
3 counsel, it is contrary to the long standing rules that if
4 you are under cross-examination and more particularly in
5 relation to what you have said in your statement, it is not
6 a matter for consultation or advice, Mr Chairman. It is
7 completely irregular in my submission and I oppose the
8 application and I appeal for the witness not to have to
9 answer, if he has got to go and look at the documents, they
10 have been identified by my learned friend, he is the
11 Brigadier and he can look after himself. We cannot have,
12 we cannot have in perpetuity people being assisted in what
13 evidence they have to give, particularly as has happened
14 here this morning. They have been exposed to
15 contradictions between their evidence and what the evidence
16 shows and what they have said in their statements. It is
17 completely irregular and we strongly object to the
18 application for the stand down of further cross-
19 examination, Mr Chairman.

20 **CHAIRPERSON:** Mr Semenya? I must confess

21 I did not quite understand –

22 **MR SEMENYA SC:** Chairperson –

23 **CHAIRPERSON:** - the expert's role to be

24 as Mr Bizos has explained it, but perhaps you could explain

25 it fully for the benefit of everybody so that there can be

1 no suspicion even of any improprieties. I personally am

2 satisfied there will not be, but it is very important –

3 **MR SEMENYA SC:** If –

4 **CHAIRPERSON:** It is very important for a

5 commission of this kind, which the Commission should retain

6 its credibility throughout and obviously nothing would

7 happen which creates even a suspicion. We must be like

8 Caesar's wife, but perhaps you can explain more fully, Mr

9 Semenya.

10 **MR SEMENYA SC:** Chairperson, the –

11 **CHAIRPERSON:** One thing I should make, a

12 point I should make clear before you answer, Mr Semenya,

13 and that is that the idea for proceeding this way came from

14 us. It is not an application you were bringing actually, I

15 think you may have put it that way but it is not actually,

16 you submitted it should happen, it is not really an

17 application brought by the police, as I understand it and I

18 think that is the important point to make but I think, - but

19 that is not the concern really of Mr Bizos. Mr Bizos is

20 concerned and I can imagine it is a concern, it might well

21 be shared by other people outside, looking at the

22 activities of this Commission, but somehow things are being

23 done which are inappropriate and would undermine some of

24 the credibility of the Commission, so perhaps you can relay

25 those concerns.

1 **MR SEMENYA SC:** Chairperson, the expert we
2 intend to call is certainly not one who is going to tell
3 the witness what answers to give to which questions. What
4 we intend to have him look at is, for instance the evidence
5 leaders would say, we can tell that Pappa1 moved from this
6 point to this point and we come to that conclusion based on
7 looking at this video material, that video material, that
8 photograph, that, whatever instrument they use to come to
9 that conclusion. The expert is helping us also understand
10 the correctness of the inferences which the evidence
11 leaders are doing. It is nothing to do with what answers
12 must be given.

13 **CHAIRPERSON:** I suppose my understanding
14 was, as it was explained to us by Mr Chaskalson, is that it
15 is not enough just to look at a particular video clip which
16 Mr Chaskalson has given a reference, it is necessary to
17 zoom in on particular portions of a particular clip and
18 magnify it to the greatest possible extent. So what looks
19 like an ant, as it was put to me on the main video, then
20 becomes, if this is so, becomes clearly this witness's
21 Nyala, so that is the kind of thing that is required. So it
22 is not enough to say, here is a list of videos, go into a
23 room and look at them. That will not help the witness because
24 he will require assistance of the kind I have mentioned.
25 That is my understanding, I take it that is yours as well.

1 **MR SEMENYA SC:** And Chairperson, Mr
2 Chaskalson can do it in an open auditorium, it will take
3 him, as he says, another additional day or two just to
4 illustrate those six minutes in substance. We think it is
5 better it is done and we are inviting Mr Bizos as well to be
6 present to see that this has nothing to do with informing
7 the witness or advising him about the possible questions
8 that would arise.

9 **CHAIRPERSON:** Yes, I did not understand
10 that the witness would be present this afternoon if it was
11 done here in Chamber, am I right?

12 **MR SEMENYA SC:** No, Chairperson.

13 **CHAIRPERSON:** He would be excused, in
14 fact only parties would remain, counsel would remain, the
15 parties, legal representatives would remain.

16 **MR SEMENYA SC:** Indeed, Chairperson.

17 **CHAIRPERSON:** The witness will go
18 privately with you and your experts and be simply shown the
19 relevant video clips with the necessary zooming in that is
20 to be done, is that also correct?

21 **MR SEMENYA SC:** It can also be done
22 without the legal team, just the expert in illustrating the
23 conclusions, which the evidence leaders have done.

24 **CHAIRPERSON:** Mr Semenya, is there
25 anything you want to add further before I call on Mr

1 Chaskalson?

2 **MR SEMENYA SC:** No, Chairperson.

3 **CHAIRPERSON:** Mr Chaskalson, - sorry, I

4 see Ms Lewis wants to say something. Do you want to say

5 something before Mr Chaskalson has given further

6 explanation?

7 **MS LEWIS:** I think so, yes.

8 **CHAIRPERSON:** Alright.

9 **MS LEWIS:** Mr Chairperson, on behalf of the

10 families we would support certainly in principle the

11 objection by Mr Bizos and the suggestion would be for the

12 process to be done in public. If Mr Chaskalson is going to

13 take the parties through the relevant videos and explain

14 how he draws the particular conclusions, could that not be

15 done in the presence of the witness and then that would

16 enable him to also or to have the explanation that he seeks

17 -

18 **CHAIRPERSON:** So what you are saying -

19 **MS LEWIS:** - be given to him.

20 **CHAIRPERSON:** I am sorry to interrupt you,

21 what you are saying in effect is that when, this invitation

22 has been extended to the parties to be present once we

23 adjourn; it is not desirable that we should stay because

24 what is put up, may well be rebutted. It is probably best

25 that we not be present while this happens, - we, the

1 commissioners be present, but your suggestion is that the
2 witness should stay and all the parties' representatives
3 would be present and they would be able to satisfy their
4 clients that everything be done correctly, that is your
5 case? Alright, that is the suggestion that Advocate Hemraj
6 has always been making to me. Mr Chaskalson, how do you
7 react to that?

8 **MR CHASKALSON SC:** Mr Chairperson, I
9 would be quite happy with that suggestion, I have got no
10 difficulty. I think in fairness to the brigadier he needs
11 as much time, he is entitled to as much time as he needs to
12 understand the basis of my concerns and I have got no
13 difficulties with him being present when we take the legal
14 representatives through the underlying reasoning. It seems
15 a sensible compromise to deal with the difficult situation.

16 **CHAIRPERSON:** Mr Semenya, are you happy
17 with that?

18 **MR SEMENYA SC:** I am, Chairperson.

19 **CHAIRPERSON:** Mr Bizos, are you now
20 satisfied?

21 **MR BIZOS SC:** Mr Chairman, I have an
22 alternative solution, which is in accordance with the rules
23 of our profession. I understand Mr Semenya's difficulties,
24 our rules make it easy for him. He can say that I want to
25 see the videos in order to re-examine the witness in case

1 Mr Chaskalson misunderstood it, put it correctly, and let
2 the witness answer. This is how the business of courts and
3 commissions are done, not by having private arrangements.
4 **CHAIRPERSON:** What's proposed, sorry Mr
5 Bizos, what is proposed now by Mr Lewis, which is accepted
6 by Mr Chaskalson and Mr Semenya is, there will not be a
7 private arrangement, we will have it in public. You will
8 be here, the representatives of all the other parties will
9 be here, if you choose to stay, you will be satisfied that
10 everything is done. The problem with the suggestion you
11 make is this, but if the witness is not present while this
12 happens and the witness is simply given a list of videos to
13 go and look at without being told what to zoom in and
14 where, he may well be giving answers in cross-examination
15 and agreeing to things on an uninformed basis and he may be
16 making answers. Now it may well be that humpty dumpty can
17 be put together again when Mr Semenya re-examines, but
18 damage may well have been done in cross-examination which
19 the king's men weren't able to put right in the story that
20 I referred you to.
21 So I would thought, think myself that Ms Lewis'
22 suggestion is the best one to adopt and I cannot see any
23 prejudice to anybody. Remember we are concerned about
24 prejudice in three ways. One is the credibility of the
25 Commission and its ultimate findings. One is the

1 perception outside the public, they must be satisfied that
2 fair play has been observed, but there is also fair play to
3 the witness, so all those factors have to be borne in mind,
4 so it seems to me that your intervention in fact led to Ms
5 Lewis' proposal which, I think has found general favour and
6 I think that is the way we should proceed.

7 **MR BIZOS SC:** Well, Mr Chairman, the
8 final concern that I have, has not been dealt with but time
9 is of the essence and if we offer to cross-examine the
10 witness but not on any of the subjects that were dealt
11 with, we can make very useful time of the time available,
12 three quarters of a day having regard to the limitations
13 that we have had and the limitations of that should not be
14 squandered, Mr Chairman.

15 **CHAIRPERSON:** I am very conscious to that
16 point but there are two factors that we have to borne in
17 mind there. Firstly, yes, the time that is being spoken
18 about would be time that will be spent today, which would
19 obviously not have to be used in the Commission later
20 because we wouldn't have to have all the videos shown in
21 detail in the Commission. Secondly, tomorrow we are not
22 sitting as Mr Semenya points out because this chamber is
23 not available. Therefore, we would only be losing the three
24 quarters of a day, losing in one sense but in fact saving
25 on it in another because we wouldn't then have to cover

1 that ground again later on, on Thursday.

2 **[11:02]** That is the first point, but the second point is,

3 I understand from Mr Semanya and Mr Pretorius that the

4 witness has not had the opportunity to go through the

5 bundle of documents to which you referred which you are

6 going to rely in cross-examination and I was told that on

7 that basis they would not agree to the suggestion I made,

8 based upon what you told me during the adjournment, that we

9 interpose your cross-examination at this stage. That is

10 the response I got, which is – and I have seen the bundle of

11 documents that you are going to rely on and the witness can

12 in fact spend tomorrow reading your documents in

13 preparation for your cross-examination on the non-sitting

14 day and he can be present this afternoon, the rest of the

15 morning as well, while the videos are gone through, so that

16 we do not have to spend time in Commission looking at all

17 those videos in detail. That needs to be the way

18 forward.

19 **MR BIZOS SC:** Mr Chairman, with respect,

20 we will accept any ruling that the Commission may make, but

21 I want to associate myself with the remark made that we

22 do not want any private discussions. I do not want to be

23 present at anything that Mr Semanya does. I trust him to

24 make, or his attorney to make available the information and

25 let the witness, who is under oath, work out for himself

1 what his answers are going to be and that he will answer
2 the questions without any discussion with any legal
3 representative.

4 **CHAIRPERSON:** The way I propose dealing
5 with the matter will address that concern. We accept Ms
6 Lewis's proposal that the witness be present when Mr
7 Chaskalson takes the police representatives and the
8 parties' representatives through the relevant videos.
9 Nothing will be told to the witness as to what he has to say.
10 No advice will be given to him. He will merely understand,
11 as everyone else will understand, what the thrust is of the
12 criticism, what he has to deal with by way of the video and
13 other material, which is available. There's also audio
14 material apparently which is going to be referred to. So
15 I am pleased that you raised your objection because I think
16 it helps us to clarify the way forward in a way which I
17 believe will not undermine the credibility of the
18 Commission, satisfy all reasonable people that fairness is
19 being observed to all concerned. So that is what will
20 happen and at this point therefore, we will adjourn until
21 Thursday – oh, sorry, I beg your pardon, Mr Chaskalson,
22 you have another point.

23 **MR CHASKALSON SC:** I do. Well, I do not
24 want to have to run through the same process on my next
25 topic of cross-examination, but it may be that is something

1 that I can address by just giving a list of references,
2 detailed references to Mr Semenya who can allow, or give
3 that list to the Brigadier and the Brigadier can just
4 listen to the videos with reference to that list of
5 references. That is not something that needs to be
6 manipulated. It is an issue of listening to a poor quality
7 audio on a video –

8 **CHAIRPERSON:** What you are stating
9 therefore is that the exercise that is now going to be
10 performed in our absence, the absence of the Commissioners,
11 but in the presence of the representatives of the parties
12 and the witness will be confined to the video material.
13 You have certain audio material you are going to refer to
14 in cross-examination. The witness will merely be given a
15 list of the material, audio material you are going to refer
16 to. I do not know if he's got a recording of them, but
17 presumably, if he has not, that can be arranged. That is what
18 you are proposing?

19 **MR CHASKALSON SC:** Yes, Chairperson, he
20 does have the recording. It is the Protea Coin video.

21 **CHAIRPERSON:** Yes, alright. Well, on that
22 basis then we will adjourn until Thursday morning at 9
23 o' clock.

24 **[COMMISSION ADJOURNED]**