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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 204

18 MARCH 2014

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<p style="text-align: right;">Page 25005</p> <p>1 [PROCEEDINGS ON 18 FEBRUARY 2014] 2 [09:13] CHAIRPERSON: The Commission resumes. Ms 3 Barnes, I understand your learned leader has been called 4 away to higher business and you are going to deputise for 5 him. Is that correct? 6 MS BARNES: Yes, that's right, Chair. 7 CHAIRPERSON: Let me just find your 8 heads. There's a very interesting article which I saw had 9 been referred to with approval in Australia, written by one 10 our – 11 MS BARNES: The article by Gilbert 12 Barcus, Chair? 13 CHAIRPERSON: One of your colleagues. 14 MS BARNES: Yes. Yes, we have made 15 copies of that. You'll see that we refer to it in our 16 heads. We've also made copies, Chair, of the three 17 international cases that we refer to in our heads. Those I 18 believe have been made available to you early this morning. 19 CHAIRPERSON: Good. 20 MS BARNES: Chair, I will be – 21 CHAIRPERSON: Are you arguing from the 22 heads? Are there passages in the heads from which – the 23 international section for example is dealt with on page 14, 24 paragraphs 43 and following, but I'm not sure which 25 portions of the heads you're going to be referring to</p>	<p style="text-align: right;">Page 25007</p> <p>1 inaudible]. 2 MS BARNES: The general does not derogate 3 from the specific. It's the same principle, and of course 4 it applies – 5 CHAIRPERSON: [Microphone off, inaudible] 6 MS BARNES: The case we'd like to refer 7 the Commission to then is Sasol Synthetic Fuels (Pty) 8 Limited & Others versus Lambert & Others, 2002 (2) SA 21 9 (SCA) – 10 CHAIRPERSON: 2002? 11 MS BARNES: 2002 (2) SA 21 (SCA). The 12 relevant paragraph is at 291 to 30C, and the Court says the 13 following, "When the legislature has given attention to a 14 separate subject and made provision for it, the presumption 15 is that a subsequent general enactment is not intended to 16 interfere with the special provision unless it manifests 17 that intention very clearly." So we submit that that is 18 the principle that applies in the matter at hand and it 19 determines that section 4 of the Commissions Act is the 20 applicable provision in this case. 21 If I might turn then to the question of harm, and 22 here, Chair, we endorse the submissions that were made 23 yesterday by Mr Brickhill that the SAPS bears the onus in 24 this application to establish that there's a reasonable 25 possibility of harm occurring to Mr X, and of course that</p>
<p style="text-align: right;">Page 25006</p> <p>1 because if your going to say things that aren't in the 2 heads I'll have to write them down. That's – 3 MS BARNES: Yes, Chair, what I propose to 4 do is deal essentially with section D of our heads of 5 argument, which is the section that has not yet been dealt 6 with. That is the section in which we make the argument 7 that the Commission ought not to exercise its discretion in 8 favour of granting the SAPS application, assuming that the 9 Commission has the powers to do so, which of course we 10 deny. 11 CHAIRPERSON: Yes, page 11 and following. 12 MS BARNES: That's right, Chair, but 13 before I deal with that in some detail, if I might just at 14 the outset just do two things, firstly just refer the 15 Commission to an authority on the powers question and then 16 secondly if I could just make one point in relation to the 17 harm question that has not yet been made by my colleagues. 18 So the authority that I'd like to refer the 19 Commission to, it would slot in on page 7, paragraph 19 of 20 our heads. That's where we deal with the principle of 21 statutory interpretation, which we say applies in this 22 case. We point out, Chair, that the principle is also 23 sometimes referred to as generalia specialibus non 24 derogant, in other words specialibus – 25 CHAIRPERSON: [Microphone off,</p>	<p style="text-align: right;">Page 25008</p> <p>1 there's a causal connection between the act of testifying 2 in the open Commission and the possibility of harm. It 3 does not, there's no onus on the opposing parties in that 4 regard. It is not our onus to discharge. It – 5 CHAIRPERSON: I doubt whether the SAPS 6 would contend the contrary. I mean they accept, they're 7 asking us to make an order in their favour and they must 8 justify it. I didn't detect any suggestion that you must 9 show why I shouldn't make the order. That's right, Mr 10 Semanya, isn't it? 11 MS BARNES: Yes, we simply make the point 12 in relation to the, in response to the evidence leaders' 13 submission that the opposing parties allegedly did not 14 dispute the fact that there was a possibility of harm. 15 So – 16 CHAIRPERSON: Yes, well, that of course 17 is a different proposition. That doesn't mean you bear an 18 onus, but if in fact you don't dispute it then it could be 19 accepted that you don't quarrel with the contention that 20 there would be some harm, but that's not an onus point, 21 that's something different. 22 MS BARNES: Well Chair, we have disputed 23 it. Mr Brickhill made that point yesterday as well, so I 24 don't need to repeat that. We have disputed it, but I 25 simply make the point that the onus is on SAPS in this</p>

<p style="text-align: right;">Page 25009</p> <p>1 regard.</p> <p>2 Chair, if I might then turn to, well draw</p> <p>3 specific attention on the question of, this question of the</p> <p>4 harm to paragraphs 29 to 31 of our heads of argument.</p> <p>5 Chair, we quote in paragraph 29 of our heads – it's on page</p> <p>6 10 – we quote from the replying affidavit filed by Mr</p> <p>7 Pretorius on behalf of SAPS, which says the following, "I</p> <p>8 put it no higher than it is a reasonable apprehension for</p> <p>9 one such as Mr X, or members of his family, that harm may</p> <p>10 befall them if the limited protection sought in terms of</p> <p>11 the application is not granted." So that is the allegation</p> <p>12 that is made. We note that the allegation is made for one</p> <p>13 such as Mr X, not even specifically in relation to Mr X</p> <p>14 himself.</p> <p>15 We make the further point in paragraph 30 of our</p> <p>16 heads that says no direct evidence from Mr X himself as to</p> <p>17 the fear that he allegedly harbours. There's also no</p> <p>18 detail provided in the application at all as to the basis</p> <p>19 of such fear as is allegedly harboured, and without that</p> <p>20 the causal connection that is required we submit has simply</p> <p>21 not been established.</p> <p>22 And then, Chair, on the question of harm we</p> <p>23 submit with respect that in addition to the test which I</p> <p>24 think was essentially agreed upon yesterday, the test set</p> <p>25 out in S versus Leepile, there's another important but</p>	<p style="text-align: right;">Page 25011</p> <p>1 the person's is only slightly pregnant. I mean, you know,</p> <p>2 you're pregnant or not pregnant. Now something is</p> <p>3 necessary or it isn't necessary, but the Australians, and I</p> <p>4 think the English references in the judgment seem to think</p> <p>5 there are standards of necessity and that may be right, but</p> <p>6 I've got to get my mind around that. Perhaps you can help</p> <p>7 me.</p> <p>8 MS BARNES: Well, Chair, we do refer in</p> <p>9 our heads on page 9, paragraph 26, to the Scott case and</p> <p>10 the Scott case deals with this standard of necessity in</p> <p>11 this context and –</p> <p>12 CHAIRPERSON: That's a case that's often</p> <p>13 been cited with approval in South Africa.</p> <p>14 MS BARNES: That's correct, Chair, and</p> <p>15 this particular passage, which I'll refer to now, was cited</p> <p>16 with approval by Ackerman in the S versus Leepile case. I</p> <p>17 believe that was number 4.</p> <p>18 CHAIRPERSON: He was referred to - I'm</p> <p>19 sure he would have found it himself even if we hadn't</p> <p>20 referred him to it.</p> <p>21 MS BARNES: Chair, the Scott versus Scott</p> <p>22 reference, page 9, paragraph 26 of our heads is, or if I</p> <p>23 might start here, "The burden lies on those seeking to</p> <p>24 displace its application, that is the application of</p> <p>25 publicity in the particular case to make out that the</p>
<p style="text-align: right;">Page 25010</p> <p>1 related, or important and related standard that applies and</p> <p>2 it's the standard of necessity. It's the principle that in</p> <p>3 an application such as this relief which infringes upon the</p> <p>4 publicity of proceedings such as this can only be granted</p> <p>5 if it is necessary, not merely convenient.</p> <p>6 CHAIRPERSON: That is dealt with in the</p> <p>7 Australian case, the BUSB case to which my attention was</p> <p>8 drawn. There's some quite interesting dicta by the</p> <p>9 Australian judges on that point, going back to a judgment</p> <p>10 of Chief Baron Pollock in the 19th century I think, but one</p> <p>11 of the problems of course that you would have is the</p> <p>12 enabling section as far as, or empowering section as far as</p> <p>13 in-camera aspects of the matter talks about necessary or</p> <p>14 desirable, so that I'm not sure that, certainly as far as</p> <p>15 the in-camera part is concerned, I understand that you may</p> <p>16 want to argue the video link is on a different basis, but</p> <p>17 certainly the in-camera part, there the test in the</p> <p>18 Commissions Act is simply desirability. I wasn't saying</p> <p>19 that by way of endeavouring to bring this debate to an end.</p> <p>20 I mean are there authorities or particular aspects you wish</p> <p>21 to bring to my attention -</p> <p>22 MS BARNES: Yes –</p> <p>23 CHAIRPERSON: - of relevance with regard</p> <p>24 to the standard of necessity. I have a bit of conceptual</p> <p>25 difficulty with that. You know it's like the argument that</p>	<p style="text-align: right;">Page 25012</p> <p>1 ordinary rule must of necessity be superseded by this</p> <p>2 paramount consideration. The question is by no means one</p> <p>3 which consistently with the spirit of our jurisprudence can</p> <p>4 be dealt with by judges as resting in his mere discretion</p> <p>5 as to what is expedient. The latter must treat it as one</p> <p>6 of principle and as turning not on convenience but on</p> <p>7 necessity." As we have said, Chair, that's been quoted</p> <p>8 with approval in our courts.</p> <p>9 We also refer, Chair, to the international law,</p> <p>10 and I'll come to that -</p> <p>11 CHAIRPERSON: I'm sorry to interrupt you.</p> <p>12 Just before you move on, were you given a copy of the</p> <p>13 judgment in the BUSB case to which Ms Pillay referred?</p> <p>14 Well, on –</p> <p>15 MS BARNES: We were not, Chair.</p> <p>16 CHAIRPERSON: Well then in order to</p> <p>17 enable you to help me I'd better lend you my copy, but what</p> <p>18 she gave me was a bundle with a number of Australian cases</p> <p>19 from the High Court which are referred to in the BUSB case</p> <p>20 and at the end of the bundle is a judgment of the Court of</p> <p>21 Criminal Appeal in the New South Wales, BUSB versus The</p> <p>22 Queen and at page 10 of the – it's a report downloaded from</p> <p>23 the internet, page 10 of 19 there's a section on the</p> <p>24 implied power, the concept of necessity, and so forth, and</p> <p>25 there's a reference to a dictum of Chief Baron Pollock in</p>

<p style="text-align: right;">Page 25013</p> <p>1 the Pelechowski case, which is one of the leading cases in 2 the High Court of Australia, where reference is made to a 3 judgment – oh no, you've got mine – the Attorney-General, I 4 must give you an opportunity to find the page. Mr Gotz 5 will act as your junior for these purposes. At the end is 6 the BUSB case. You'll find BUSB in the top left-hand 7 corner, indicating what you're looking for, and at page 10 8 of 19. Now you'll see on that page there are a number of 9 numbered paragraphs and in part of paragraph 30 is a 10 quotation from the Pelechowski case, "The term necessary in 11 such a setting as this is to be understood in the sense 12 given it by Pollock CB in Attorney-General versus Walker, 13 namely as identifying a power to make orders which are 14 reasonably required or legally ancillary to the 15 accomplishment of the specific remedies for enforcement 16 provided in Division 4 of Part 3 of the District Court Act. 17 In this setting the term 'necessary' does not have the 18 meaning of essential. Rather it is to be subjected to the 19 touchstone of reasonableness." 20 And then the dictum by, I think that's the 21 Australian way of putting it, the dictum by Pollock CB is 22 then given in para 31. "The word 'necessary' does not mean 23 absolutely necessary but reasonably necessary with 24 reference to circumstances of the case," and then in 32 25 there's a passage from which I think you may derive some</p>	<p style="text-align: right;">Page 25015</p> <p>1 section would have been prior to 1996, presumably '94 - as 2 far as I can remember there was an equivalent provision in 3 the interim constitution - one is obliged to interpret it 4 afresh in the light of the Constitution, and you're not 5 interested so much in what was the intention of the 6 legislature in 1947, but interpreting it through, as has 7 been put, through the prism of the Constitution, and I 8 think section 39(2) applies. That's the point Ms Pillay 9 made and I doubt very much if the SAPS will contend to the 10 contrary. So you're obviously on common ground as it were 11 in regard to this submission. So you say the 12 interpretation must be in accordance with our common law 13 and especially, I take it, the Constitution. 14 MS BARNES: Indeed, Chair. Section 34 we 15 would submit demands it, demands that a restrictive 16 interpretation be given to section 4 of the Commissions 17 Act. That would require necessity and not merely 18 desirability. And then – 19 CHAIRPERSON: It's difficult to interpret 20 a statute by effectively deleting two words, which is what 21 you're arguing for. The more sophisticated argument, and 22 I'm not being unkind when I put it to you but is really 23 that I haven't got the power to strike out those words, but 24 another court – a court, not another court, a court might 25 do that if this case were taken further, and it will be</p>
<p style="text-align: right;">Page 25014</p> <p>1 comfort, "However, a test of necessity cannot be stretched 2 to encompass what is merely desirable or useful," and then 3 it goes on. 4 Anyway, that's the passage which I think is 5 relevant for you to deal with. I know it's a bit unfair 6 because you've just seen it the first time now. You were 7 going to deal with the topic, so hopefully you can assist 8 me in this regard. 9 MS BARNES: Yes, thank you, Chair. We 10 would make two submissions. The first is that our law has 11 in Leepile endorsed the necessity requirement as set out in 12 Scott. The second is that given that section 34 of the 13 Constitution is implicated in this matter it clearly 14 applies to Commissions generally. It applies to the 15 Marikana Commission specifically, and given that the relief 16 sought by SAPS infringes on what is guaranteed in terms of 17 that section, the section 4 of the Commissions Act must be 18 restrictively interpreted to, in a manner where the 19 standard is one of necessity and not merely one of 20 desirability. 21 So we would submit that such an interpretation 22 would be in accordance with our common law, and would also 23 give effect to the Bill of Rights in our Constitution. 24 CHAIRPERSON: I thought Ms Pillay made a 25 valid point there, that whatever the interpretation of that</p>	<p style="text-align: right;">Page 25016</p> <p>1 sensible for me to bear that in mind in exercising a 2 discretion I have or deciding whether I should exercise the 3 discretion, and that's really what you're saying, isn't it? 4 MS BARNES: Indeed, that is precisely our 5 submission, Chair. 6 CHAIRPERSON: Because I mean I can't 7 interpret it by saying I interpret it by cutting out the 8 words "or desire," because that with respect is - 9 MS BARNES: No, Chair – 10 CHAIRPERSON: - the kind of argument that 11 might have commended itself to Lewis Carroll, but it 12 doesn't commend itself to – 13 MS BARNES: Chair, I wasn't with respect 14 suggesting that any word be struck out or anything like 15 that. I was simply suggesting that, or submitting that the 16 section should be interpreted in a manner that would accord 17 with section 34 of the Constitution. 18 So Chair, we would submit that – 19 CHAIRPERSON: Sorry, sorry, forgive me 20 for a moment, my attention is being drawn to something. 21 Yes, please proceed. My attention has been drawn to a 22 point that I should put to the representative of SAPS when 23 they reply. 24 MS BARNES: So Chair, we would submit 25 that insofar as the SAPS deal in their application with</p>

<p style="text-align: right;">Page 25017</p> <p>1 questions of the cost and the difficulty of securing Mr X's 2 presence at this venue, and that those are considerations 3 of convenience and not of necessity, and so we would submit 4 that –</p> <p>5 CHAIRPERSON: [Microphone off, inaudible] 6 MS BARNES: And accordingly, Chair, we 7 would submit that those factors are not strictly relevant 8 or germane to the determination that the Commission has to 9 make. 10 [09:32] So we would submit then that the SAPS have failed 11 to make out a case on two scores in terms of both the 12 standards that they're required to meet, the first being 13 that they need to show a reasonable possibility of harm and 14 a causal connection between testifying in this Commission 15 in the ordinary course and that harm, that's the first 16 standard that they failed to meet, and the second standard 17 we submit that they failed to meet is that of necessity. 18 If I might then, Chair, move to deal with section 19 D of our heads of argument, and here, Chair, we submit that 20 on the assumption that the Commission does in fact have the 21 power to grant the relief sought there are a number of 22 separate considerations that militate against the granting 23 of that relief. One of those, Chair, relates of course to 24 section 34 of the Constitution itself and in that regard we 25 endorse fully the submissions that have been made by Mr</p>	<p style="text-align: right;">Page 25019</p> <p>1 that Wigmore gives for requiring publicity, we refer to 2 those in paragraph 22 of our heads, if I might just refer 3 to that. That's page 8. Wigmore gives three further 4 reasons for requiring publicity, first, "All those involved 5 in the administration of justice are moved to a strict 6 conscientiousness in the performance of duty when acting 7 under the public gaze, since in all experience secret 8 tribunals have exhibited abuses which have been wanting in 9 courts whose procedure was public." Secondly –</p> <p>10 CHAIRPERSON: [Microphone off, inaudible] 11 I'm not sure that that's a factor which operates very 12 powerfully here because what is envisaged is the press, who 13 in a sense are the representatives of the public, would be 14 here. I don't know whether the proceedings will be 15 televised. They used to be on YouTube but presumably it 16 was thought that it wasn't necessary anymore, there were 17 better things to exhibit on YouTube so we're not on YouTube 18 anymore, but they may well be televised. But anyway, the 19 press would be here and so any temptation I might have to 20 misbehave is likely to be counteracted by the presence of 21 the police and the practitioners and everybody else, so I 22 understand if this is like the star chamber, a totally 23 closed room and no-one knows what's going on, people go in 24 as accused and come out as convicted people, that will be 25 different. I don't know that this factor, with respect,</p>
<p style="text-align: right;">Page 25018</p> <p>1 Brickhill. 2 We deal in our heads with three remaining sets of 3 considerations, certain common law principles that are 4 applicable, with the rights that both the victims and the 5 community have in relation to the proceedings of this 6 Commission, and then finally we deal with international 7 law. There of course we say, Chair, simply that 8 international law may be used as an interpretive guide by 9 this Commission in exercising its discretion. We say no 10 more than that in relation to the international law. 11 We deal with the common law principles on page 12 12 from paragraph 35 of our heads and really our submission 13 under this heading is that there are a number of extremely 14 important advantages that are recognised to flow from 15 proceedings being held both in public and from witnesses 16 appearing in person. 17 One of those advantages is the truthfulness and 18 completeness of evidence itself, and that is a factor that 19 the Chair referred to yesterday and quoted Wigmore in that 20 regard. We in fact refer to the same quote from Wigmore in 21 our heads. That appears a little bit earlier on in our 22 heads on page 8, paragraph 21, and that's really the point 23 that the publicity of proceedings tends to enhance the 24 quality of the evidence that is given. 25 If we go on to some of the additional reasons</p>	<p style="text-align: right;">Page 25020</p> <p>1 carries much weight [cellphone disturbance]. 2 Now I'm going to give the person concerned five 3 seconds to turn that thing off, otherwise I'm going to ask 4 him to leave. Alright, let's carry on. Let's hope it's 5 been turned off so I don't have to do what I was 6 threatening to do. 7 MS BARNES: Yes, Chair, we merely submit 8 that that's a general factor, a factor in general terms in 9 favour of publicity, but not that there would be – we don't 10 suggest that there would be a particular risk in that 11 regard in this case –</p> <p>12 CHAIRPERSON: I'm sorry to interrupt you. 13 There would be a measure of publicity which would probably 14 be adequate enough to achieve that purpose. I understand 15 the other points you make, which are on a slightly 16 different footing. But anyway, it is a factor, as you say, 17 a general factor which one should bear in mind at all 18 times. 19 MS BARNES: And perhaps the second two 20 factors given by Wigmore over the page at the top of page 9 21 are perhaps more compelling in the circumstances of this 22 case. This is that persons actually, or factor 2 that he 23 gives, "Persons actually or potentially affected by 24 litigation have a right to be present for the purpose of 25 hearing what is going on." And finally, "Public attendance</p>

<p style="text-align: right;">Page 25021</p> <p>1 secures a strong confidence in judicial remedies which 2 could never be inspired by a system of secrecy." So those 3 are the general advantages to publicity which must be taken 4 account of, we submit.</p> <p>5 We also quote Wigmore when we deal with the 6 matter of the witness appearing in person. That we deal 7 with on page 13, paragraph 37 of our heads, and Wigmore 8 describes this in the following terms, he says, "The main 9 and essential purpose of confrontation is to secure for the 10 opponent the opportunity of cross-examination. The 11 opponent demands confrontation not for the idle purpose of 12 gazing upon the witness or of being gazed upon by him, but 13 for the purpose of cross-examination which cannot be had 14 except by the direct and personal putting of questions and 15 obtaining of immediate answers."</p> <p>16 CHAIRPERSON: But wouldn't that happen 17 here? If he was at some other venue but we could see him 18 on the screen and counsel here sees him, asks him a 19 question and gets, asks the question directly and 20 personally, not through an intermediary or anything of that 21 kind, and immediate answers are obtained, the witness 22 doesn't get an opportunity to go away and get coaching from 23 someone on what the answer should be, so surely that 24 purpose will be achieved. It's not intended by the police 25 to ask us to abandon that particular safeguard. That must</p>	<p style="text-align: right;">Page 25023</p> <p>1 say.</p> <p>2 MS BARNES: Well Chair, the reason we 3 raise it, with respect, is that some of us who have been 4 involved in matters in the past that have involved cross- 5 examining via video link have found it to be entirely 6 unsatisfactory. It has been a lot like a bad Skype 7 connection where one has a small image of the witness, 8 which is rather fuzzy, and that's all that one has to deal 9 with. So I'm not sure what –</p> <p>10 CHAIRPERSON: Are we going to have a 11 small photo image in this case, Mr Semenya?</p> <p>12 MR SEMENYA SC: Crystal clear, I'm told, 13 Chair.</p> <p>14 CHAIRPERSON: Fairly big? Larger than 15 life-size?</p> <p>16 MR SEMENYA SC: Larger than life-size, 17 Chair. It will be on the screen.</p> <p>18 CHAIRPERSON: Well, if that doesn't 19 happen you can – if I grant the order, and I still haven't 20 made up my mind, I have to consider everything, but if I do 21 you obviously have the right to come again and complain if 22 the quality of the picture was such that there was a 23 serious disadvantage. But anyway, if of course you succeed 24 in your contention that the order shouldn't be granted then 25 that point won't arise.</p>
<p style="text-align: right;">Page 25022</p> <p>1 be so surely?</p> <p>2 MS BARNES: Well, Chair, I think there 3 are two responses to that. The first is that the exchange 4 is not as direct as it would be in a live adversarial 5 exchange. It is muted to some extent by the fact that one 6 is dealing with a witness through an electronic medium.</p> <p>7 The other point, Chair, relates to the concern we 8 raise about demeanour, and the reason we raise this, we say 9 that using this mechanism will make it very difficult to 10 assess the witness's demeanour –</p> <p>11 CHAIRPERSON: But is that so? If you 12 engage in a Skype conversation with somebody can you not 13 assess the, say a relative overseas who is talking to you 14 on Skype, can't you see the person's demeanour on Skype?</p> <p>15 MS BARNES: It's very difficult, we would 16 submit, to assess demeanour over a bad Skype connection, or 17 even an average Skype connection, we would submit, which –</p> <p>18 CHAIRPERSON: Well, I don't think it's 19 suggested that this is going to be a Skype connection we're 20 going to have. This is going to be a video connection. I 21 mean sometimes you can see the expressions of sportsmen far 22 better on a TV screen than you can from the stands or even 23 the front row at a sports stadium. You know, the camera is 24 quite close sometimes to the person concerned. So I'm not 25 sure that's one of your better points, Ms Barnes, if I may</p>	<p style="text-align: right;">Page 25024</p> <p>1 MS BARNES: Yes. Yes, thank you, Chair. 2 So it's a practical concern that we raise and so there's a 3 principled concern in relation to the cross-examination 4 being indirect by virtue of the medium, but there's also a 5 practical consideration that we raise in relation to video 6 links. Perhaps as the Chair has indicated, SAPS might be 7 able to obviate that, but we do raise it as a serious 8 practical concern that some of us have experienced in the 9 past.</p> <p>10 Chair, that deals then with our submission in 11 relation to the common law. We then deal on page 14 of our 12 heads from paragraph 41 with the question of rights and we 13 make the point that the parties in this Commission have 14 rights, particularly where they have been implicated in the 15 evidence of Mr X it's quite clear that all the parties on 16 whose behalf these heads have been filed, the injured and 17 arrested persons, the families and AMCU are implicated in 18 the evidence of Mr X. We submit that they accordingly are 19 entitled to face him and to challenge those accusations 20 fully and effectively through their lawyers –</p> <p>21 CHAIRPERSON: The families for whom you 22 appear might be in a slightly weaker position as far as 23 that's concerned because the allegations aren't against 24 them personally but against their deceased breadwinner. 25 But clearly I can understand why from a human emotional</p>

<p style="text-align: right;">Page 25025</p> <p>1 point of view they would wish to see the evidence being 2 given, but still their position isn't as strong as some of 3 the injured and arrested persons who might be personally 4 implicated, and as Mr Mathunjwa who apparently is going to 5 be, as far as we see from the latest statement is also 6 going to be directly accused of having been present, having 7 encouraged the strikers on the night before the killings. 8 MS BARNES: Yes, Chair, that is true. 9 There may of course though still be a reputational impact 10 on the family as a whole. 11 CHAIRPERSON: I understand they have an 12 interest. I can understand the reputational aspect of it 13 mustn't be made light of, but all I'm saying to you is the 14 other people are in a stronger position perhaps because 15 they will be directly involved and there will be 16 allegations against them. In the case of Mr Mathunjwa 17 obviously I take it not of criminal conduct, but certainly 18 of questionable behaviour, to put it gently. 19 MS BARNES: Yes, we take that point, 20 Chair. Chair, then in paragraph 42 of our heads we make 21 the point that – and I don't think it's a controversial 22 point – 23 CHAIRPERSON: I'm sorry, I said you were 24 appearing for the families. You're sort of appearing on 25 behalf of the families amongst others at the moment, but</p>	<p style="text-align: right;">Page 25027</p> <p>1 It doesn't deal with commissions as far as I can see. I 2 understand the argument that based on the Du Preez case 3 which I remember well because the judgment I was a party to 4 was overturned in that case, but the – although not on that 5 point, but we've got South African authority applying the 6 open court publicity principle to commissions. All I'm 7 saying to you is it seems the European Convention doesn't 8 go that far and the passage you quote deals with the 9 situation in litigation, civil or criminal. 10 MS BARNES: It does deal with litigation, 11 Chair, but we would submit that regard may still be had to 12 these clauses in these international instruments and the 13 way that they deal with the requirement of publicity. 14 CHAIRPERSON: I see you very kindly 15 provided me with copies of the judgments of the European 16 Court, is it? The Strasbourg Court, I take it. 17 MS BARNES: We do. We have provided 18 copies. Chair, we set out the principles that have emerged 19 through those cases on page 16 of our heads. If I might 20 just provide a reference in paragraph 45.3 of our heads 21 which is missing, the reference there should be to the case 22 of Kostovski at paragraph 42 – 23 CHAIRPERSON: That is a case also cited 24 in footnote 16, but there you refer to paragraph 41, this 25 is now 42. So I'll just write Kostovski para – have you</p>
<p style="text-align: right;">Page 25026</p> <p>1 your client is actually AMCU. 2 MS BARNES: Yes. 3 CHAIRPERSON: So Mr Mathunjwa is directly 4 in your area of concern. 5 MS BARNES: Yes, that's quite correct, 6 Chair. So in paragraph 42 of our heads, Chair, we make the 7 point that it has been recognised in our law – and I don't 8 think this can be controversial – that the whole process of 9 a commission of inquiry is potentially prejudicial to a 10 person's rights and we cite authorities in that regard in 11 footnote 14 of our heads. One of those is the recent 12 judgment in the Magidiwana matter. 13 CHAIRPERSON: [Microphone off, inaudible] 14 a judgment of the Appeal Court which isn't on appeal, which 15 stands as the law of South Africa. 16 MS BARNES: Yes. Chair, then finally we 17 draw attention to some international law in the last 18 section of our heads of argument and we refer there to 19 article 6 of the European Convention on Human Rights. We 20 also make the point that the requirement of publicity and 21 the circumstances in which publicity can be limited 22 provisionally – 23 CHAIRPERSON: [Microphone off, inaudible] 24 interrupt you. Section 6 of the European Convention 25 appears to deal only with litigation, civil or criminal.</p>	<p style="text-align: right;">Page 25028</p> <p>1 given copies of these judgments to your learned friends for 2 SAPS? 3 MS BARNES: I believe we have, yes. 4 CHAIRPERSON: I see, alright. So they'll 5 be able to answer on these points if they have answers they 6 wish to give us. 7 MS BARNES: Chair, then in the next 8 paragraph, that's 45.4, I also need to give you a reference 9 there. There are in fact two references there. The first 10 is to Doorson versus The Netherlands, that is one of the 11 judgments that has been provided – 12 CHAIRPERSON: [Microphone off, inaudible] 13 MS BARNES: It's not referred to – 14 CHAIRPERSON: How do you spell Doorson? 15 MS BARNES: It's D-O-O-R-S-O-N. 16 CHAIRPERSON: Doorson, what's the 17 reference? 18 MS BARNES: The reference is paragraphs 19 70 and 72 and then also the Van Michelin case – 20 CHAIRPERSON: That is – 21 MS BARNES: That is already referred to 22 at paragraphs 52 to 55, and the principles, we simply seek 23 to emphasise two principles that emerge from this case law. 24 The one is a clear reluctance to make orders of anonymity 25 in relation to witnesses. The other is that where</p>

<p style="text-align: right;">Page 25029</p> <p>1 limitations are to be imposed on publicity they must be 2 strictly necessary and we submit that those are the 3 principles that emerge from the case law and that it's 4 instructive to have regard to them in the circumstances. 5 So Chair, we would submit that the considerations 6 militating against the grant of the relief sought by SAPS 7 are the following. Section 34 of the Constitution, the 8 applicable common law principles in relation to publicity 9 and full and effective cross-examination of witnesses, the 10 rights that the parties have in this case, and then finally 11 we would submit that in exercising its discretion the 12 Commission may have regard to the principles that have 13 emerged from international law, which we submit support our 14 position. Those are our submissions, Chair. 15 CHAIRPERSON: Thank you, Ms Barnes. 16 MR MPOFU: Chair, I don't want to add 17 anything, I just want to clarify the point that you covered 18 on how the arguments are structured. The three presenters, 19 Chair, are effectively arguing for all the parties 20 interchangeably. So whatever Ms Barnes says covers the 21 injured, and so on, and so on. So the issue then is for 22 example on, and in respect of my submissions as far as the 23 in-camera, the conflating of the public with the parties is 24 concerned, the rhetorical question that should be asked is 25 what harm the widows will visit upon Mr X as part of what</p>	<p style="text-align: right;">Page 25031</p> <p>1 opportunity to interview her at any stage. 2 MR BUDLENDER SC: No, Chair, we will do, 3 we will do so. 4 CHAIRPERSON: You will. So insofar as 5 the evidence leaders are here to see to it that all 6 material that is relevant and necessary for our decision, 7 and desirable, to use another word, will be put before us. 8 You're prepared to interview her and insofar as there's any 9 point she wishes to have conveyed, you're prepared to 10 convey it on her behalf? 11 MR BUDLENDER SC: We'll certainly do so, 12 Chair. 13 CHAIRPERSON: Mr Mpofu, would you do your 14 best in your Xhosa to interpret that to her? 15 MR MPOFU: Yes. 16 CHAIRPERSON: I take it she is Xhosa 17 speaking? 18 MR MPOFU: She might not be but I think 19 we'll understand each other. Okay, okay. I will try it in 20 my broken Zulu, ja. 21 CHAIRPERSON: You might explain to her it 22 won't impose any obligations on her. 23 MR MPOFU: Okay, she says thank you. I 24 think we'll explain it through the other representatives as 25 well.</p>
<p style="text-align: right;">Page 25030</p> <p>1 we're saying, even though I don't directly act for them. 2 Thanks, Chairperson. 3 CHAIRPERSON: Thank you. Yes, you've 4 anticipated a question I'm going to ask the representatives 5 for SAPS when they reply. Does anyone else want to have – 6 you've got your microphone on, Ms Barnes. 7 MS BARNES: Chair, I apologise, there's 8 an important fact that I omitted. It's in relation to the 9 matter that was raised yesterday about whether there are 10 possibly any unrepresented parties. I just wanted to place 11 on record that there is in fact an unrepresented party 12 here, Mrs Langa. I'm not sure if she is here today. She's 13 the wife of Julius Langa who lost his life on Monday, the 14 13th of August 2012. 15 [09:52] She's not represented by any attorney. 16 CHAIRPERSON: As far as I understand 17 she's never put herself on record but nevertheless she 18 obviously has an interest in the matter. Mrs Langa, I take 19 it you – do you need someone to interpret? Perhaps Mr 20 Tokota can interpret, or Mr Mpofu, although Mr Tokota's 21 Xhosa is higher. Mrs Langa, do you wish to be allowed to 22 participate as a party in these proceedings from now on? 23 MRS LANGA: Yes, Chairperson. 24 CHAIRPERSON: Alright. Mr Budlender, 25 she's not represented. I don't know whether you've had an</p>	<p style="text-align: right;">Page 25032</p> <p>1 CHAIRPERSON: Thank you. 2 MR MPOFU: Thank you, Chair. 3 CHAIRPERSON: Mrs Langa is then given 4 permission to join as a party. The evidence leaders are 5 requested to interviewer and to see in what way they can be 6 of assistance to her. Thank you for interpreting. I'm 7 interested to hear that the Xhosa word for evidence leader 8 is evidence leader but when you interpret it in Zulu you 9 used some other word. 10 MR MPOFU: Yes, in Xhosa it's e-evidence 11 leader. 12 CHAIRPERSON: I see Xhosa is following 13 the example of English in borrowing words from other 14 languages. The Zulus would appear to be more reluctant to 15 do that. Alright, so thank you Ms Barnes for drawing our 16 attention, that's an important point. I hadn't realised 17 she was present and I hadn't realised that it was, until 18 you drew it to my attention, that it was desirable and 19 perhaps even necessary to join her as a party but that 20 problem has now been solved, thank you. Who is going to do 21 the reply for the SAPS, Ms Baloyi or Mr Semenya? 22 MR SEMENYA SC: I will, Chair. Chair, 23 before I do though – 24 CHAIRPERSON: Shall we take a comfort 25 break now? I'm in your hands.</p>

<p style="text-align: right;">Page 25033</p> <p>1 MR SEMENYA SC: Yes.</p> <p>2 CHAIRPERSON: It's not necessary, I would</p> <p>3 take it a bit later but if you don't want an interruption</p> <p>4 in the course of your address it might be sensible to take</p> <p>5 the comfort break now but you must tell me.</p> <p>6 MR SEMENYA SC: May I take that offer,</p> <p>7 Chair, immediately after making this announcement?</p> <p>8 CHAIRPERSON: Yes.</p> <p>9 MR SEMENYA SC: There is a confirmatory</p> <p>10 affidavit of Brigadier Van Zyl together with one by Darren</p> <p>11 Rangasamy, dealing with the costs associated with giving</p> <p>12 the protection to Mr X if he were to testify in open</p> <p>13 hearing. I'm told these were given to parties this</p> <p>14 morning. It may be that they are in an unsigned form as we</p> <p>15 speak –</p> <p>16 CHAIRPERSON: Well, they are also, apart</p> <p>17 from the unsigned form of the affidavit, Mr Gotz and Ms</p> <p>18 Barnes and I don't know about the other – and Mr Mpofo and</p> <p>19 Mr Brickhill are all shaking their heads. So from their</p> <p>20 body language it would appear that they haven't got those</p> <p>21 affidavits. So perhaps let's take the adjournment now.</p> <p>22 You can make sure they've got the affidavits and then we</p> <p>23 can proceed, that piece of housekeeping having been</p> <p>24 attended to. And we also haven't got copies so we're all</p> <p>25 equally disadvantaged, the opposing parties and the</p>	<p style="text-align: right;">Page 25035</p> <p>1 affidavit and then shall we make these NNN4.1, 2, 3.</p> <p>2 NNN4.1 is the affidavit of Brigadier – no, that's really I</p> <p>3 suppose Brigadier Van Zyl's is the first one. NNN4.1 is</p> <p>4 the affidavit of Brigadier Van Zyl. NNN4.2 is the</p> <p>5 affidavit of Colonel Rangasamy and NNN4.3 is the affidavit</p> <p>6 of Mr X. Do any of the parties wish to say anything with</p> <p>7 regard to the affidavits that have been handed in?</p> <p>8 MR MPOFU: Yes, Chair. Thank you,</p> <p>9 Chairperson. Chairperson, we are, to say the least,</p> <p>10 disturbed by this development. These affidavits</p> <p>11 effectively purport to be supplementary affidavits which</p> <p>12 are being advanced without even the pretence of an</p> <p>13 explanation as to why they're only being advanced at this</p> <p>14 stage. They raise material issues which we would like to</p> <p>15 deal with but more than that, Chairperson, they raise</p> <p>16 matters which we, in respect of which we asked for</p> <p>17 explanations in our answering affidavits, which</p> <p>18 explanations were not forthcoming in the replying</p> <p>19 affidavit. And so one cannot now, when the pleadings have</p> <p>20 closed, seek to deal with matters that were raised in the</p> <p>21 answering affidavit. Not only after the pleadings have</p> <p>22 closed but after argument by our side, as it were, which</p> <p>23 makes it even worse. It might have been understandable if</p> <p>24 we were given these late, for practical purposes, but</p> <p>25 allowed to have incorporated them into our argument or to</p>
<p style="text-align: right;">Page 25034</p> <p>1 Commission. We'll take the comfort break, I think we'll</p> <p>2 take it for 15 minutes so that this matter can be – perhaps</p> <p>3 ja, let's take it for 15 minutes now to give ample time for</p> <p>4 this point to be dealt with.</p> <p>5 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>6 [10:33] CHAIRPERSON: The Commission resumes. We</p> <p>7 were waiting before coming back, to receive copies of the</p> <p>8 affidavits to which we were referred by Mr Semenya. We've</p> <p>9 now just a few moments, a few minutes ago received a copy</p> <p>10 of the affidavit from Brigadier Van Zyl, the provincial</p> <p>11 head of the detective services in the North-West Province,</p> <p>12 a confirmatory affidavit of Mr X and an explanatory</p> <p>13 affidavit by Colonel Rangasamy. I take it that exhibits</p> <p>14 must now be handed in as exhibits. They wouldn't really be</p> <p>15 part of the Mr Mdze series. I should imagine we should</p> <p>16 call them NNN1, 2, 3. Is that – and I suppose we should</p> <p>17 actually also, while we're about it, give exhibit numbers</p> <p>18 to the other affidavits that we haven't done yet. So what</p> <p>19 we'll do is we will make the Notice of Motion NNN1, the</p> <p>20 Notice of Motion of the application NNN1. NNN2 will be the</p> <p>21 opposing affidavit, NNN3 –</p> <p>22 MS PILLAY: With annexures, Chair, the</p> <p>23 opposing affidavit with annexures.</p> <p>24 CHAIRPERSON: Yes, with annexures, that's</p> <p>25 correct, with annexures. NNN3 will be the replying</p>	<p style="text-align: right;">Page 25036</p> <p>1 have filed an answering affidavit, even if it was a</p> <p>2 supplementary affidavit. We might not have quibbled with</p> <p>3 it as long as we would have had a chance to deal with the</p> <p>4 material because these proceedings are not, you know we</p> <p>5 don't, are not run on a technical basis as such but it's</p> <p>6 not a technical matter, it's a matter of substance that we</p> <p>7 have to deal with this material.</p> <p>8 Secondly, Chairperson, even a cursory browsing of</p> <p>9 these documents would suggest that some of the material</p> <p>10 here we have to counteract by making our own</p> <p>11 investigations. I'll just make a simple example,</p> <p>12 Chairperson.</p> <p>13 CHAIRPERSON: Mr Mpofo –</p> <p>14 MR MPOFU: Yes, Chairperson?</p> <p>15 CHAIRPERSON: You can carry on.</p> <p>16 MR MPOFU: Yes, I'll –</p> <p>17 CHAIRPERSON: I want to say this to you –</p> <p>18 MR MPOFU: - two other points, Chair.</p> <p>19 CHAIRPERSON: It seems to be undesirable</p> <p>20 – well, you make your two points first before I tell you</p> <p>21 what it is –</p> <p>22 MR MPOFU: Yes, thank you, Chairperson.</p> <p>23 The second point, Chairperson, is that as I say, even a</p> <p>24 quick look on this suggests that there will be unhelpful at</p> <p>25 best, or if not irrelevant completely to the inquiry that</p>

<p style="text-align: right;">Page 25037</p> <p>1 needs to be made and I'll make a very simple example. 2 CHAIRPERSON: If they're irrelevant then 3 of course you don't have to worry about them but it's only 4 if they may be relevant that you have to deal with them, 5 possibly reply – 6 MR MPOFU: Yes, but the Chairperson was 7 right – sorry. 8 CHAIRPERSON: I understand your argument. 9 Maybe you will contend they're irrelevant but you would 10 obviously wish to cover yourself by saying, as you have 11 done in other parts of the argument, in the event – 12 MR MPOFU: Yes. 13 CHAIRPERSON: - that they are relevant, 14 which we deny – 15 MR MPOFU: Yes. 16 CHAIRPERSON: - we would like to reply. 17 MR MPOFU: Correct. 18 CHAIRPERSON: Yes, I understand. 19 MR MPOFU: No, fair enough, Chairperson. 20 All I'm saying is that even that point we might raise in 21 limine in an answering affidavit but the point I'm making 22 is that – 23 CHAIRPERSON: I don't think that this 24 forum is one where we either allow witnesses to be battered 25 or in limine points to be taken.</p>	<p style="text-align: right;">Page 25039</p> <p>1 MR MPOFU: Well, I would like an – well, 2 what I'm trying to say, Chairperson, whether it's in 3 writing or verbally doesn't matter, we'd like a proper 4 opportunity to – so what I'm saying here now is what I'm 5 saying after having looked at these things for 10 minutes, 6 so I don't want that to be the alpha and omega of our 7 response here. The next point is, somehow in this costing 8 exercise is slipped in the affidavit of Mr X which, quite 9 frankly, has nothing to do with the costing exercise but is 10 something that we have demanded to be done. Ms Barnes this 11 morning went on for a few minutes about the absence of Mr 12 X's own averments. 13 CHAIRPERSON: I think "went on" is an 14 unhappy way of putting it. 15 MR MPOFU: Well – 16 CHAIRPERSON: She argued the matter quite 17 forcefully for some time. 18 MR MPOFU: Yes, she did. 19 CHAIRPERSON: And made the point – 20 MR MPOFU: For a while, ja. No, no – 21 CHAIRPERSON: That's a better way of 22 putting it. 23 MR MPOFU: The longer it is, the better 24 for the weight of what I'm about to say, Chairperson. The 25 point really is that this is something that we have raised</p>
<p style="text-align: right;">Page 25038</p> <p>1 MR MPOFU: Yes, thank you, Chairperson, 2 but if they are relevant then, Chairperson, allow me just 3 to make this example. The purported purpose of these 4 documents is to display to the Commission the cost that 5 might be involved in assisting Mr X and so on but what use 6 is that inquiry if we don't have the cost of, the 7 countermanding cost of the video link because for example 8 if the cost of bringing him here is 200 000 but the cost of 9 the video link is 500 000 then this whole exercise is 10 futile. And so firstly – 11 CHAIRPERSON: Prima facie that sounds 12 like a good point - 13 MR MPOFU: Thank you, thank you. 14 CHAIRPERSON: - which Mr Semenya will be 15 taking aboard, I'm sure. 16 MR MPOFU: Yes. Thank you, Chairperson, 17 we'll raise these in writing in good time. The third one 18 is the fact that somehow in the – 19 CHAIRPERSON: You don't have to raise it 20 in writing, you've raised it, it'll be transcribed, Mr 21 Semenya has heard it, if he thinks there's anything in it 22 he will supplement. 23 MR MPOFU: Okay. 24 CHAIRPERSON: If he thinks there isn't 25 anything in it he'll tell us later.</p>	<p style="text-align: right;">Page 25040</p> <p>1 as a weakness and it turns out, Chairperson, that this 2 affidavit of Mr X was actually commissioned on the 10th of 3 March 2014, some eight days ago. I mean, and we don't know 4 why it was withheld. It's just sneaked in as part of a 5 costing exercise and it's something that is of vital 6 importance. The criticism we had was the fact that Mr 7 Pretorius's affidavit was – or rather it was not Mr X's 8 affidavit or at the very worst that Mr X's confirmatory 9 should have been there. 10 CHAIRPERSON: There's even a better 11 point, it was apparently typed in February. 12 MR MPOFU: Chairperson? Oh well, that is 13 another – ja, it's typed in February and which - 14 CHAIRPERSON: Mr Mpofo, I don't want to 15 be difficult. 16 MR MPOFU: Yes. 17 CHAIRPERSON: You know, this is an 18 application which is literally about life and death. The 19 basis of the application is a fear – 20 MR MPOFU: Yes. 21 CHAIRPERSON: - which you say is not 22 well-founded but that's another matter. 23 MR MPOFU: Sure. 24 CHAIRPERSON: That Mr X could be killed 25 if he –</p>

<p style="text-align: right;">Page 25041</p> <p>1 MR MPOFU: By the widows. 2 CHAIRPERSON: - if he comes and gives 3 evidence and the application isn't granted. So therefore 4 it's not a kind of matter in which, technical points can 5 really be taken. And if, for example, the application 6 were, if the application would fail because there's no 7 affidavit from Mr X and because his affidavit is out of 8 time and, you know, the sort of affidavit one doesn't 9 receive out of time without a proper explanation and so on, 10 then and if that were the reason for the application to 11 fail, then they would come back with another application 12 half an hour later with the application in it, so we'd have 13 the whole exercise all over again. So let's concentrate on 14 the matter. 15 MR MPOFU: No, Chair – 16 CHAIRPERSON: What I'm proposing to do, 17 subject to what you have to say – 18 MR MPOFU: Sure. 19 CHAIRPERSON: - is to stop hearing the 20 application at this stage, to postpone it, to enable your 21 side and perhaps the evidence leaders too if they want to 22 be involved, to file further affidavits if you wish to do 23 so and then obviously give you an opportunity to argue the 24 further points that arise and then and only after that 25 would the police be given an opportunity to reply now and</p>	<p style="text-align: right;">Page 25043</p> <p>1 consideration and that is the annexures to Colonel 2 Rangasamy's affidavit aren't initialled either by the 3 commissioner or the deponent to the affidavit. In the 4 interests of good order that should be sorted out as well. 5 If we postpone the matter till Monday that's something that 6 can also be attended to in the interim. 7 MR MPOFU: Yes. No, Chairperson, as the 8 Chairperson correctly pointed out, let me point out that 9 we're not really interested in those technical issues. The 10 point we're making is that there needs to be an explanation 11 – 12 CHAIRPERSON: I understand that but 13 things should be done properly. 14 MR MPOFU: Yes. 15 CHAIRPERSON: This is an important 16 Commission – 17 MR MPOFU: Alternatively there should be 18 an explanation, ja. That's all really. 19 CHAIRPERSON: Anyway, but this is put up 20 to us as a matter of literally life and death, we've got to 21 take it very seriously. 22 MR MPOFU: Yes. 23 CHAIRPERSON: And we've got to, as I say, 24 if the papers aren't in order they'll just come back again 25 so there's no point –</p>
<p style="text-align: right;">Page 25042</p> <p>1 then you come with affidavits and so on. So the only 2 question – I see you're nodding your head so if that 3 proposal meets, is favourably received, then the only 4 question is until when I should postpone the application. 5 MR MPOFU: Thank you, Chairperson. 6 CHAIRPERSON: I would, my instincts are 7 to make it next Monday. That gives you, I don't know 8 whether you work on a public holiday but that gives you two 9 days because we're not sitting tomorrow because these 10 chambers aren't available and we decided not to sit 11 Thursday because Friday is a public holiday, we'd just have 12 to come back for one day. It gives you two days to prepare 13 such replying affidavits as you consider appropriate, to 14 give them to the police and then we can then proceed with 15 the application on Monday. That's what I would propose. 16 MR MPOFU: Yes. 17 CHAIRPERSON: How do you react to that 18 proposal? 19 MR MPOFU: Chairperson, if I may just 20 consult with my fellow travellers? Chairperson – 21 CHAIRPERSON: Sorry, while you're taking 22 instructions or going to tell me what the instructions are, 23 Adv Hemraj points out that there's a point that could also 24 have been taken that you didn't take, presumably you waived 25 it but nevertheless it may be a point that requires</p>	<p style="text-align: right;">Page 25044</p> <p>1 MR MPOFU: No, Chair. 2 CHAIRPERSON: The only question is, is 3 Monday a good day? 4 MR MPOFU: Chairperson, let me take one 5 step back. What our proposal is, would be that this whole 6 inquiry be treated discreetly, in other words that SAPS can 7 answer, can reply now to what has been argued and whatever 8 our responses will be on this discreet issue which is about 9 costing, because really this is one leg of their case which 10 is quite discreet and severable and it might take a few 11 minutes in that case, or no minutes at all, because we 12 might ask for this and they give it to us and then we 13 simply give you the papers. 14 CHAIRPERSON: On the other hand, you 15 might not. There might be an extensive argument and then 16 they would have to reply again. 17 MR MPOFU: But it is still discreet – 18 CHAIRPERSON: I hear what you're saying. 19 MR MPOFU: Yes. 20 CHAIRPERSON: Let's hear what Mr Semenya 21 says about this. 22 MR SEMENYA SC: Chair – 23 CHAIRPERSON: Of course, it's whether 24 Monday is enough time, is what – but the first question is 25 the idea of a postponement for extra papers to be filed</p>

<p style="text-align: right;">Page 25045</p> <p>1 and, if necessary, extra argument to be received and if 2 that is appropriate, it seems to me prima facie it is, then 3 the question whether postponement till Monday would give 4 enough time to your learned opponents as well as to the 5 police. 6 MR SEMENYA SC: Chair, I will be indebted 7 if we were to look at Wednesday. I have difficulties with 8 Monday and Tuesday coming but the idea of a postponement we 9 support, Chair. The second issue which Mr Mpofo raised is 10 about something being discreet and severable. We would 11 contend differently. We intend to be able to argue in 12 reply, resting all of that reply on the basis of facts that 13 they want to respond to. 14 MR MPOFU: Yes. Well, in that case then, 15 Chairperson, the idea of Wednesday might make sense because 16 we, before any reply is offered we would like to reargue 17 our portion on the basis, for example, that now it is Mr X 18 himself, not Mr Pretorius who is scared of the widows. 19 CHAIRPERSON: No – no, I said – yes, Mr 20 Mpofo I understand that. I said that it may well be that 21 you would wish to argue the matter further in the light of 22 these papers and clearly that opportunity must be afforded 23 you. So if Wednesday is acceptable to all concerned then 24 we will stand this application down and – 25 MR MPOFU: Chair, I'm sorry, Chairperson.</p>	<p style="text-align: right;">Page 25047</p> <p>1 that have been handed in this morning by close of sitting, 2 the session of the Commission on Monday and the police will 3 be given the opportunity to reply thereto, if any 4 affidavits are filed, by the close of the sitting of the 5 Commission on Tuesday. The matter, as I said, will then be 6 argued at 9 o'clock or so soon thereafter as can be on 7 Wednesday. 8 [10:52] MR MPOFU: Thank you, or so soon 9 thereafter. Thank you, Chairperson. Mr Brickhill, just 10 for the sake of completion, will not be here next week but 11 we'll get his input. He's not available next week at all. 12 CHAIRPERSON: Are you content not to be – 13 I understand how these things work but – 14 MR BRICKHILL: Chair, I wouldn't want to 15 further delay the finalisation of the application. 16 CHAIRPERSON: Thank you, thank you. Very 17 well, we will now adjourn for Major-General Naidoo to be 18 contacted. I don't know how, where he is, but he is close 19 by – unless he can, well, yes. Let's adjourn, take the tea 20 adjournment now and as soon as the tea adjournment is over 21 we'd expect the Major-General to be at the witness table, 22 waiting to be reminded he's under oath. We'll now adjourn 23 for tea. 24 [COMMISSION ADJOURNS COMMISSION RESUMES] 25 [11:18] CHAIRPERSON: The Commission resumes.</p>
<p style="text-align: right;">Page 25046</p> <p>1 I need another consent. Chairperson, yes, we're happy with 2 Wednesday. The proposal is therefore that we would file an 3 answer on Monday, if any, and the SAPS might want to reply 4 on, end of business on Tuesday and then hopefully we will 5 be ready. 6 CHAIRPERSON: I take it I don't have to 7 make an order to that effect. 8 MR MPOFU: On that, ja – 9 CHAIRPERSON: The proposal, Mr Semanya, 10 is that they file – when on Monday, lunch time? 11 MR MPOFU: Close of business. 12 CHAIRPERSON: Close of business on Monday 13 – business isn't an appropriate expression to use. 14 MR MPOFU: Okay - 15 CHAIRPERSON: Close of the session on 16 Monday and the police will then have an opportunity to 17 reply in an affidavit or affidavits to be filed by close of 18 sitting on Tuesday and the matter then argued on Wednesday. 19 That seems appropriate. 20 MR SEMENYA SC: Those time frames are 21 accepted, Chair. 22 CHAIRPERSON: So the application will 23 then be postponed until Wednesday of next week and it is 24 recorded that the opposing parties will file such 25 affidavits as they may wish in response to the affidavits</p>	<p style="text-align: right;">Page 25048</p> <p>1 Major General, you're still under oath. 2 GANASEN NAIDOO: Still under oath, Chair. 3 CHAIRPERSON: Mr Mpofo, you are cross- 4 examining. 5 MR MPOFU: Yes, thank you, Chairperson. 6 CHAIRPERSON: You've dealt with most of 7 the topics in respect of which I gave you leave, but there 8 are some points left that you want to raise with the 9 witness, I take it. 10 CROSS-EXAMINATION BY MR MPOFU (CONTD.): 11 That's correct, Chairperson. Good morning, Major General. 12 GENERAL NAIDOO: Good morning, Advocate. 13 MR MPOFU: Okay, I've got two sections 14 that I want to deal with, but if you can allow me before 15 that, I'm just going to sweep through a few – 16 CHAIRPERSON: May I ask you, obviously 17 don't tell me what they are, but can you give me the 18 numbers on the document that you – 19 MR MPOFU: Well, I will, Chairperson, in 20 due course. I don't have the document with me, but they 21 mainly deal with – 22 CHAIRPERSON: I deliberately said the 23 numbers because I take it you mightn't want to disclose at 24 this stage what the topics are. 25 MR MPOFU: Ja-no, I don't mind,</p>

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1 Chairperson.

2 CHAIRPERSON: Alright, well then what are

3 they?

4 MR MPOFU: The one issue is around the

5 arrests that were made, seeing that I act for the injured

6 and arrested –

7 CHAIRPERSON: That is topic 5, yes.

8 MR MPOFU: Yes.

9 CHAIRPERSON: Issues and circumstances

10 connected with arrested protesters specifically and

11 generally only in respect of scene 2 arrests.

12 MR MPOFU: Yes. The other issue really

13 is related to that but it arises from the cross-

14 examination, and that's to do with – yes, it's to do with –

15 okay, I'd rather not disclose that one now, but it flows

16 from –

17 CHAIRPERSON: Well, carry on in the

18 meanwhile with the -

19 MR MPOFU: Thank you.

20 CHAIRPERSON: - with number 5 and then –

21 MR MPOFU: Ja, well as I was busy saying

22 to the witness, Chairperson, Major General, I'm just going

23 to ask you a couple of things which might look unrelated.

24 It's just to clean up some of the issues that we've already

25 covered, so please forgive me, I'll be jumping from one

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1 thing to another for a few minutes.

2 The first one relates to the topic that we

3 concluded last time about the so-called sub-quality

4 intelligence. I just wanted to ask you, is it my correct

5 understanding that at the meeting of the 13th where there

6 was National Commissioner, Brigadier Engelbrecht, and

7 people like that, that there was a complaint or a criticism

8 of the quality of intelligence by some of the senior

9 people?

10 GENERAL NAIDOO: Chair yes, there was a

11 discussion about the lack, or the level of intelligence

12 that was required and was not available.

13 MR MPOFU: Okay –

14 GENERAL NAIDOO: Hence the decision to

15 enhance the capacity that was deployed there, yes.

16 MR MPOFU: Okay, fine. Thank you very

17 much. And then there was an issue that we, you and I were

18 debating on the first day of the cross-examination and I

19 couldn't find the actual reference and that had to do with

20 – you remember the criticism I was meting out to the police

21 to say that they did not treat the strikers in the same way

22 as they treated their own wounded or deceased?

23 GENERAL NAIDOO: I remember.

24 MR MPOFU: You remember that topic, yes.

25 GENERAL NAIDOO: Yes, I remember, Chair.

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1 MR MPOFU: Yes, and in the course of that

2 I suggested among other things that the body of the

3 deceased policemen had been taken to the hospital, whereas

4 the other bodies were left there lying on the veld.

5 GENERAL NAIDOO: Chair, I think what I

6 responded there was that I know that one of the injured

7 policeman who later died was taken to the hospital in a

8 police vehicle, that's correct.

9 MR MPOFU: Yes, that's the point, and you

10 said you knew nothing about the body of the deceased one

11 being taken to the hospital.

12 GENERAL NAIDOO: Chair, I, what I

13 indicated was I remember that there was one deceased

14 policeman on the scene, yes. I did not know about how his

15 body was transported and to where, yes.

16 MR MPOFU: Yes, okay. Well then can you

17 go to paragraph 28 of your statement, JJJ108? You say

18 there, "Two police officers were killed and a third was

19 seriously injured and airlifted to Pretoria. We then

20 visited the mine hospital where we viewed the body of the

21 deceased member who was hacked to death."

22 GENERAL NAIDOO: That's correct.

23 MR MPOFU: Yes, which is the correct

24 version?

25 GENERAL NAIDOO: Chair, that was the one

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1 who was transported to the Andrew Saffy Hospital and he

2 died there. There was still another member that was on the

3 scene.

4 MR MPOFU: Ja, well whichever one, but

5 was the body of a deceased policeman taken to the hospital?

6 CHAIRPERSON: No Mr Mpofo, that's not

7 what he says. What he says is there was one policeman

8 killed on the scenes. There was another policeman who was

9 seriously injured.

10 MR MPOFU: Yes.

11 CHAIRPERSON: There were two who were

12 injured there, but one of them was seriously injured and he

13 was taken to hospital, but he died after being – or I'm not

14 sure if it's after or while being transported to the

15 hospital, and it was the body of that policeman, the one

16 who didn't die on the scene but died after he was taken

17 away from the scene that he is referring to in paragraph

18 28.

19 MR MPOFU: Yes, okay I understand that.

20 So does that mean then that Lieutenant Baloyi and another

21 policeman were airlifted?

22 GENERAL NAIDOO: No, Chair. Lieutenant

23 Baloyi was airlifted.

24 MR MPOFU: Yes?

25 GENERAL NAIDOO: As far as I can

<p style="text-align: right;">Page 25053</p> <p>1 understand that this member that was transferred to, 2 transported to the Andrew Saffy Hospital was transported by 3 his unit commander Colonel Merafe in a police vehicle. 4 That's the way I understand it. 5 MR MPOFU: By road? 6 GENERAL NAIDOO: By road, Chair. 7 MR MPOFU: Okay, alright, understand. 8 Okay, then the next of those quick issues has to do with – 9 yes, I also, I think it's still paragraph 28, I also 10 criticised you of not mentioning the dead miners in one of 11 your statements. You remember that? 12 GENERAL NAIDOO: I do, Chair. 13 MR MPOFU: Ja, and you contested that 14 statement, correct? 15 GENERAL NAIDOO: Chair, what I indicated 16 that I wrote my statement as the information as I became 17 aware of it, I did mention the miners later on in paragraph 18 35, yes. 19 MR MPOFU: Of the subsequent statement. 20 You did not mention them in the original statement of 21 November 2012. 22 GENERAL NAIDOO: No Chair, that's not 23 correct, because it's exactly the same words that I used in 24 my original statement which I had paragraphed in the 25 consolidated statement. I think we did deal with that</p>	<p style="text-align: right;">Page 25055</p> <p>1 killed and a third was seriously injured and airlifted to 2 Pretoria. We then visited the mine hospital where we 3 viewed the body of the deceased member who was hacked to 4 death." That's the passage that – 5 GENERAL NAIDOO: It's 28. 6 CHAIRPERSON: - Mr Mpofu is referring to. 7 Now in your later statement where you amplified some of the 8 things that you had said earlier, which is exhibit JJJ108, 9 one sees that you added at the end of 28 a passage that is 10 not in your earlier statement. That's the point I think 11 that Mr – 12 MR MPOFU: Yes. 13 CHAIRPERSON: - Mpofu is referring to. 14 GENERAL NAIDOO: Okay, Chair, yes. 15 MR MPOFU: Agreed? 16 CHAIRPERSON: And also if one goes to 17 your paragraph 25, now that's the counterpart of the 18 passage that I read from your first statement, the relevant 19 sentence is, ends with the words "and some police personnel 20 had been killed," and then you then added the clause "and 21 there were other unspecified casualties among the 22 protesters as well," in paragraph 25. So what Mr Mpofu is 23 saying to you is that if one compares your paragraph 25 in 24 your new statement and your paragraph 28 one sees you've 25 now inserted references to the deceased mineworkers which</p>
<p style="text-align: right;">Page 25054</p> <p>1 matter on Friday, I think it was. 2 MR MPOFU: Okay sorry, I think we're 3 speaking at cross purposes. Remember the paragraph 28, the 4 one that I just read to you now? 5 GENERAL NAIDOO: Yes. 6 MR MPOFU: Ja, there after talking about 7 the policeman who was hacked to death you say, "We were 8 also informed that there were also about three other 9 individuals who were killed in the encounter and their 10 bodies were still on the scene." That you did not mention 11 in your original statement. 12 GENERAL NAIDOO: Sorry Chair, let me just 13 check. 14 CHAIRPERSON: [Microphone off, inaudible] 15 compare paragraph 25 in your second statement to what you 16 say in page 2 of your first statement, your first statement 17 being exhibit DD, and if you go down, if you go round about 18 line 10, start at line 9, "Just as we were outside 19 Potchefstroom the Provincial Commissioner received a call 20 that the members under the command of Major General Mpembe 21 who were left at Marikana were attacked by the miners and 22 some police personnel had been killed. We immediately 23 turned around and returned to Marikana," and if one goes on 24 in that paragraph, three lines from the end of the 25 paragraph there is a reference to "Two police officers were</p>	<p style="text-align: right;">Page 25056</p> <p>1 had not appeared in the earlier statement. 2 GENERAL NAIDOO: Of course, Chair. 3 CHAIRPERSON: Now that's the point he's 4 busy with, and he is correct? 5 GENERAL NAIDOO: Yes, Chair. 6 CHAIRPERSON: Alright. So Mr Mpofu, now 7 that I've cleared the path through the bush for you, would 8 you like to carry on? 9 MR MPOFU: Thank you, Chairperson. Thank 10 you, General. Ja, then the other quick issue that I want 11 to deal with is just – and I think another witness 12 clarified this, but just for the purposes of rounding off, 13 am I correct in my understanding that the briefings – okay, 14 you don't have to, well, just to give you background; one 15 of the criticisms that we will give, we have indicated we 16 will give at the end of the case is that for the size and 17 importance of an operation such as this one the times that 18 were allowed for the briefings of these hundreds and 19 hundreds of policemen were simply inadequate, 10 minutes 20 here – 21 CHAIRPERSON: You're referring now to the 22 briefing at 2:30 obviously – 23 MR MPOFU: Yes, on the 16th. 24 CHAIRPERSON: - on the Thursday 25 afternoon.</p>

<p style="text-align: right;">Page 25057</p> <p>1 MR MPOFU: That's correct, Chairperson, 2 yes. You know what I'm talking about? I'm now talking 3 about Colonel, the briefings which were sparked by Colonel 4 Scott and continued onwards. 5 GENERAL NAIDOO: Of course, Chair. 6 MR MPOFU: Yes, so I'm asking you this 7 question in that context. The – 8 GENERAL NAIDOO: Sorry, the question? 9 MR MPOFU: Sorry, General? 10 GENERAL NAIDOO: Sorry, no okay, I'm 11 waiting for the question. 12 MR MPOFU: Okay, yes. Now the first 13 thing I want you to clarify for the Commission is that 14 there were effectively three sets of briefings that were 15 expected to occur in that short space of time, and let me 16 just explain what I mean by that. There was the briefing 17 by Scott to people like you, the senior command. 18 GENERAL NAIDOO: Okay. 19 MR MPOFU: And then you would go and 20 brief your section commanders, if I'm using the correct 21 term, that's the second set of briefing, and then they 22 would go and brief their people. Let's put it like that. 23 Is that correct? 24 GENERAL NAIDOO: Chair, I think we dealt 25 with this during the original cross-exam. The briefing</p>	<p style="text-align: right;">Page 25059</p> <p>1 GENERAL NAIDOO: That's correct, the 2 commanders attended the briefing with me so that we cut the 3 communication chain short. 4 MR MPOFU: Yes, and was that also 5 motivated by the fact that there was inadequate time? 6 GENERAL NAIDOO: No Chair, because the 7 briefing was held at forward holding area 1 and all the 8 commanders on, who fell under me were there, so it was just 9 a practical arrangement. 10 MR MPOFU: Okay, no that makes sense. 11 Ja, you were hosting the briefing as it were. 12 GENERAL NAIDOO: That's correct, Chair. 13 MR MPOFU: Thank you. Okay, right. Then 14 were you aware of the barbed wire that was supplied by 15 Lonmin? 16 GENERAL NAIDOO: I became aware of it, 17 yes. 18 MR MPOFU: Yes, okay. Then the next 19 issue is about, round about the, or when you were involved 20 in that shootout - let's call it that – you said that 21 members of the NIU made an advance in order to engage the, 22 I suppose the protesters, correct? 23 GENERAL NAIDOO: Chair no, I'm not sure 24 which one because the NIU had a couple of advances. Is it 25 after I joined the NIU?</p>
<p style="text-align: right;">Page 25058</p> <p>1 took place as follows; yes, Colonel Scott came and briefed 2 the commanders. 3 MR MPOFU: Right. 4 GENERAL NAIDOO: And as far as the 5 commanders that were under my command, they were all part 6 of the briefing. So I did not go and attend that briefing 7 on my own. So Colonel Scott briefed us all. Colonel 8 Gaffley was there, Colonel Modiba was there, K9, everybody, 9 and then they in turn went back and briefed their members. 10 MR MPOFU: Okay – 11 CHAIRPERSON: What you're saying, there 12 were effectively two briefings, the Scott briefing of the 13 commanders – 14 GENERAL NAIDOO: That's right. 15 CHAIRPERSON: - and then the briefing by 16 the commanders of the people who were – 17 GENERAL NAIDOO: That's correct. 18 CHAIRPERSON: - under their command. 19 GENERAL NAIDOO: Yes, Chair. 20 MR MPOFU: Yes, okay, that might pertain 21 to your unit. You may or may not know if in respect of 22 other people there were three briefings because one of the 23 witnesses, I can't remember which one, I think it was 24 Calitz admitted that there were three sets of briefings, 25 but you are saying in your unit there were two?</p>	<p style="text-align: right;">Page 25060</p> <p>1 MR MPOFU: Yes. Or at any time did they 2 make an advance to engage the protesters? 3 GENERAL NAIDOO: Chair, there was 4 statements and evidence was led here where the NIU 5 indicated that they initially advanced and engaged with 6 protesters, yes. 7 MR MPOFU: Let me just get the correct 8 reference. Ja alright, it's page 22940, day 189, 22940 9 going to 41. 10 CHAIRPERSON: Yes, yes, we have 940 on 11 the screen. 12 MR MPOFU: Yes. 13 CHAIRPERSON: Line? 14 MR MPOFU: To give it context, 15 Chairperson, we'll start at, let's start at line 8, or 6. 16 You said there were approximately two or three people who 17 fired. 18 GENERAL NAIDOO: Okay, Chair. 19 MR MPOFU: Then Mr Semenya says, "How 20 much fire do they discharge in that direction, if you can?" 21 "I would say more than five each. I can't remember the 22 exact number because they were using a rifle." Mr Semenya, 23 "Using?" and you say, "They were using an R5 rifle." 24 "Okay, and you say that the firing from inside the koppie 25 stopped?" "It stopped immediately, yes Chair," you say.</p>

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1 The question, "And when the NIU line reached the rocks
2 where shots had emanated from do they not find anybody
3 there?" Then you say, "No Chair, when the firing occurred,
4 as soon as our firing stopped the NIU line moved to engage
5 but there was nobody there to engage, yes Chair." Remember
6 that?

7 GENERAL NAIDOO: I remember that, Chair.
8 MR MPOFU: Ja, now the only question I
9 want to ask there is in using those words you meant that
10 they were moving on to use their R5s obviously?
11 [11:38] GENERAL NAIDOO: Chair, who? The NIU?
12 MR MPOFU: Yes.
13 GENERAL NAIDOO: Well, I think in that
14 evidence I did indicate that there were NIU people that
15 used their R5s, yes.
16 MR MPOFU: With R5s, yes. Yes, that's
17 what I'm saying. So the tools that they would have used
18 for that "engagement" would have been their R5s?
19 GENERAL NAIDOO: That's correct, Chair.
20 MR MPOFU: Thank you. And maybe to round
21 off that point, if somebody were to issue an order to those
22 people with R5s to engage they would be meaning that they
23 must shoot them with live ammunition because that's all
24 they had, correct?
25 GENERAL NAIDOO: Chair, engage not

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1 necessarily means to use their rifles. Engage would
2 probably mean to face and confront, as far as I –
3 MR MPOFU: Yes.
4 GENERAL NAIDOO: A specific order to use
5 the rifles would have been to fire or to shoot, but engage
6 not necessarily means that they should use their rifles.
7 CHAIRPERSON: But could include it?
8 GENERAL NAIDOO: It could, yes.
9 MR MPOFU: Yes. Thank you. Right, now
10 let's go to the – okay, those are the small issues that I
11 wanted to round up with you.
12 MR SEMENYA SC: Chair, in the meantime Ms
13 Matthews does not refer to me.
14 MR MPOFU: Pardon?
15 MR SEMENYA SC: Ms Matthews on line 9,
16 that's the reference to me.
17 CHAIRPERSON: Yes, we had noticed that
18 there were errors in the transcription and I'm not sure
19 that, I'm talking about that one, but we did draw them to
20 the attention of the transcribers. I wonder who Ms
21 Matthews was.
22 MR MPOFU: Well, I think we'll just have
23 to thank Ms Matthews for that correction, yes.
24 CHAIRPERSON: That was Mr Semenya perhaps
25 speaking in a falsetto voice.

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1 MR MPOFU: Thank you. General, yes now
2 I'm going to deal with – you do understand that I represent
3 among others the 259 people who were arrested?
4 GENERAL NAIDOO: Yes, I do.
5 MR MPOFU: And that on top of that I also
6 represent the 13 other people who were not arrested at the
7 scene, who were injured and arrested at various hospitals?
8 GENERAL NAIDOO: I do.
9 MR MPOFU: Yes, which up the total number
10 of people I represented in that category was 272, except
11 two of them are left now, Mr Mpofana and Mr Mabotyana
12 allegedly committed suicide. You are aware of that?
13 GENERAL NAIDOO: I did read about that in
14 the media, yes.
15 MR MPOFU: Yes, and one of the people who
16 committed suicide was one of the six people who have met
17 the Commissioners, who had been subpoenaed by the evidence
18 leaders. Just putting that for the record, Chairperson.
19 Now so in that connection I'd like to understand
20 the circumstances under which my clients were arrested.
21 GENERAL NAIDOO: Okay.
22 MR MPOFU: Would it be fair to say that
23 the police had foreseen, or premeditated the arrests? In
24 other words it was known beforehand that the arrests would
25 be made?

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1 GENERAL NAIDOO: Chair, I think just to
2 explain the police approach, there was in terms of our
3 briefing a gathering of individuals, some of whom had
4 dangerous weapons and they were gathering illegally, and
5 the, what was communicated to us at 2:30 a decision had
6 been taken to disperse the illegal gathering and people
7 that do not disperse and who fail to lay down their arms
8 would be then arrested and prosecuted, so yes, that was the
9 basis in terms of what we conducted our operations.
10 MR MPOFU: Okay, and to support the
11 statement that I make, contingency, or plans were made for
12 what is referred to as Canters to effect those arrests,
13 were made before any problem had started, correct?
14 GENERAL NAIDOO: Chair yes, the
15 contingency plan, logistical arrangements were made for
16 both the recovery of weapons as well as the possible
17 arrests of any suspects.
18 MR MPOFU: And to the extent that you
19 brought emergency medical services one can also say that
20 injuries were foreseen, injuries to people?
21 GENERAL NAIDOO: Chair, we did testify to
22 that effect, yes.
23 MR MPOFU: Yes, okay, and to the extent
24 that mortuary vans were brought you could say that deaths
25 were also foreseen?

<p style="text-align: right;">Page 25065</p> <p>1 GENERAL NAIDOO: Chair, as I testified, I 2 was not aware of the mortuary vans at that stage – 3 MR MPOFU: Ja, you – 4 GENERAL NAIDOO: And the circumstances 5 around that, so - 6 MR MPOFU: Sorry. Ja, I'm sorry, when I 7 say "you" I don't mean you personally. SAPS, to the extent 8 that SAPS brought mortuary vans it would be fair to say 9 that they foresaw deaths? 10 GENERAL NAIDOO: Chair, I'm not sure what 11 the circumstances around the mortuary vans, but yes, 12 mortuary vans are normally utilised for deceased. 13 CHAIRPERSON: As far as I can recall the 14 evidence is four mortuary vans were asked for and one was 15 sent, and clearly the person who asked for the mortuary 16 vans anticipated there would be deaths – I mustn't say 17 would – 18 MR MPOFU: No, fair enough. 19 CHAIRPERSON: - anticipated there might 20 be deaths, and of course it's not clear, because I don't 21 think the person concerned has given evidence, whether it 22 was solely the deaths of miners, the possible deaths of 23 miners that was foreseen, or it was also considered that 24 members of the police might also be killed. 25 MR MPOFU: Ja, well I didn't say – that's</p>	<p style="text-align: right;">Page 25067</p> <p>1 MR MPOFU: Thanks. 2 CHAIRPERSON: Well, either deaths or 3 possible deaths. 4 GENERAL NAIDOO: No, it's deaths, Chair, 5 not possible. I said that is possible. 6 CHAIRPERSON: Yes, I said possible. 7 MR MPOFU: Now let's start then, as I was 8 saying then my clients would like to understand the 9 circumstances of their arrests. Let's start firstly with 10 the people, the arrests that you personally effected. 11 GENERAL NAIDOO: Yes, Chair. 12 MR MPOFU: Do I understand you to be 13 saying that you came across about three strikers hiding in 14 the grass or something like that? 15 GENERAL NAIDOO: Chair, I said that I 16 came across personally one striker together with a member 17 of the K9, and there were other members of the K9 who 18 arrested another two strikers. I can't testify to the 19 exact circumstances of their arrests, but in that sweep 20 three miners were arrested, yes. 21 MR MPOFU: And they were hiding in the 22 grass? 23 GENERAL NAIDOO: The one that we 24 arrested, yes. 25 MR MPOFU: What does that mean? I mean</p>
<p style="text-align: right;">Page 25066</p> <p>1 why I said "persons," Chairperson. Police are also 2 persons. 3 GENERAL NAIDOO: Thank you. 4 MR SEMENYA SC: Chair, for the record, I 5 think the Chair said one was sent. I thought it was on 6 standby. 7 CHAIRPERSON: Sorry? 8 MR SEMENYA SC: It was on standby. The 9 request was to have it on standby. 10 CHAIRPERSON: It wasn't actually sent, it 11 was on standby. Yes, I see. But anyway, four were asked 12 for, one was made available either – and we've heard on 13 standby. That's why I said the person who asked for them 14 obviously thought there might be deaths. 15 MR MPOFU: Yes. 16 CHAIRPERSON: Whether it was solely 17 deaths of miners or also – mineworkers, or also possibly 18 deaths of police members is also a matter that may still 19 have to be investigated insofar as it's relevant. 20 MR MPOFU: Yes, and that's why I asked 21 the question in a neutral fashion. So to the extent that 22 somebody from SAPS ordered or asked for mortuary vans those 23 people, or that person foresaw the deaths to people, 24 correct? 25 GENERAL NAIDOO: That's possible, yes.</p>	<p style="text-align: right;">Page 25068</p> <p>1 how – 2 GENERAL NAIDOO: He was – Chair, he was, 3 as I indicated lying low in the grass and as we approached 4 he woke up. 5 CHAIRPERSON: Did I hear you say "woke 6 up"? 7 GENERAL NAIDOO: Sit up. 8 CHAIRPERSON: Stood up? 9 GENERAL NAIDOO: Yes. 10 CHAIRPERSON: I mean you don't know if he 11 was asleep. 12 GENERAL NAIDOO: No, no, no, not – 13 CHAIRPERSON: Unlikely that he was. 14 GENERAL NAIDOO: No, not likely. 15 CHAIRPERSON: So when you say, it was you 16 and Warrant Officer Harmse, is that right? 17 GENERAL NAIDOO: No, it was Sergeant 18 Brazier. 19 CHAIRPERSON: Sergeant? 20 GENERAL NAIDOO: Brazier. 21 CHAIRPERSON: Sergeant Brazier? 22 GENERAL NAIDOO: That's right. 23 CHAIRPERSON: You and Sergeant Brazier, 24 were you at that stage walking in a northerly direction on 25 the eastern side of the koppie?</p>

<p style="text-align: right;">Page 25069</p> <p>1 GENERAL NAIDOO: We were walking on the 2 southern side of the koppie. 3 CHAIRPERSON: Oh, still on the southern 4 side? 5 GENERAL NAIDOO: That's correct, Chair. 6 CHAIRPERSON: I see. I see, you hadn't 7 reached actually the koppie yet? 8 GENERAL NAIDOO: No, no, we were far away 9 from the koppie, just going in the direction – 10 CHAIRPERSON: And then there was someone, 11 at least someone in the grass and as you approached he 12 stood up? 13 GENERAL NAIDOO: He stood up, yes. 14 CHAIRPERSON: So presumably – yes, I see, 15 and then you arrested him. 16 GENERAL NAIDOO: That's correct, Chair. 17 CHAIRPERSON: Did you arrest him or 18 Sergeant Brazier? 19 GENERAL NAIDOO: Well, we both did. I 20 did assist him in terms of the fact that Sergeant Brazier 21 searched him while I covered him, etcetera. 22 CHAIRPERSON: Now in terms of the 23 Criminal Procedure Act it's necessary to inform the person 24 being arrested of the reason for the arrest. 25 GENERAL NAIDOO: Yes.</p>	<p style="text-align: right;">Page 25071</p> <p>1 Brazier did tell him. I think I'm not being specific or 2 verbatim as to what he said. So he did indicate to him, 3 you know, drop down your weapons, and why have you got the 4 weapons, and come, we're going to arrest you for this 5 thing, etcetera, and then he, Sergeant Brazier loaded him 6 into the police vehicle from there. So I broadly just 7 indicate what I recollect in terms of that arrest, yes. 8 MR MPOFU: Maybe the Chairperson will 9 follow up, but let me just put this to you – 10 GENERAL NAIDOO: Okay. 11 MR MPOFU: - that none of the people I 12 represent were ever told what they were arrested for. 13 That's so you can either, and that would include the ones 14 that you are talking about. I do understand that you say 15 you can't recall correctly, but I'm now putting to you 16 positively that they were not told. 17 GENERAL NAIDOO: Chair, I think that 18 would be unlikely; in addition to these three, I'm talking 19 about the larger number, they were taken to a processing 20 centre. They were taken to a place where they were 21 processed in terms of, you know, informing them of their 22 rights and things like that. So it's unlikely – 23 CHAIRPERSON: Aren't arrested persons 24 supposed to be told at the time of their arrests what the 25 charge is on which they're being arrested?</p>
<p style="text-align: right;">Page 25070</p> <p>1 CHAIRPERSON: So did you comply with that 2 provision in the Criminal Procedure Act? 3 GENERAL NAIDOO: Well, as far as I could 4 remember Sergeant Brazier was asking him what are you doing 5 here, put down your arms, and we're going to arrest you, 6 and then we took – he had a knife and a – 7 CHAIRPERSON: You're supposed to tell him 8 what you're arresting him for. 9 GENERAL NAIDOO: Yes. 10 CHAIRPERSON: That's what the section 11 says. 12 GENERAL NAIDOO: Ja. 13 CHAIRPERSON: It's no good saying "What 14 are you doing?" 15 GENERAL NAIDOO: No, of course – 16 CHAIRPERSON: You've got to tell him why 17 you're arresting him. You must tell him what the charge 18 is - 19 GENERAL NAIDOO: Of course. 20 CHAIRPERSON: - on which he's being 21 arrested so that he can if necessary do something. Now was 22 that done? 23 GENERAL NAIDOO: Chair, as I was 24 indicating that Sergeant Brazier was conversing to him. I 25 tried to now recount some of the things that Sergeant</p>	<p style="text-align: right;">Page 25072</p> <p>1 GENERAL NAIDOO: Yes, Chair. 2 CHAIRPERSON: So in the case of the 3 person who was arrested by Sergeant Brazier you can't 4 positively say that was done. You say he spoke to him, but 5 I understand maybe if you were some distance away – 6 GENERAL NAIDOO: Chair, yes it – 7 CHAIRPERSON: - that you can't say 8 positively that he was informed in the course of his arrest 9 then. 10 GENERAL NAIDOO: Chair, as I – 11 CHAIRPERSON: And – sorry, carry on. 12 GENERAL NAIDOO: So as I indicated that 13 Sergeant Brazier did have a conversation with him whilst, 14 you know, removing his weapons, etcetera, and I tried to 15 get the gist of what the conversation was about and he did 16 indicate now come with me, I'm taking you to the van, I'm 17 arresting you for these things. We asked him, "What are 18 you doing with these weapons?" and things like that. So 19 I'm trying to summarise what Sergeant Brazier said – 20 CHAIRPERSON: No, I understand. But Mr 21 Mpofo goes further; he says in the case of all the people 22 who were arrested there not one of them was told at the 23 time of his arrest what the cause of the arrest was or on 24 what charge he was being arrested. Now the follow-up 25 question, he suggested I might ask a follow-up question.</p>

<p style="text-align: right;">Page 25073</p> <p>1 The follow-up question is are you able from your own 2 knowledge to deal with that allegation, or is that 3 something that you perhaps for understandable reasons can't 4 deal with yourself? 5 GENERAL NAIDOO: Yes, from my 6 observation, as I indicated there was even a subsequent 7 process where they were informed of their constitutional 8 rights, but at the time, let's talk about the bulk of 9 people that were hidden behind the rocks, etcetera, who 10 subsequently came out. I also I think, I'm not sure in my 11 statement I indicated it, the members were shouting to them 12 to drop their weapons and come out without their weapons, 13 we would not harm them. Yes, we would deal with the – so 14 there was continuous communication. The people that were 15 being arrested knew why they were being confronted. They 16 were being told to drop their weapons. There were even few 17 that came out with their weapons still in their hands and 18 they were, you know, the policemen were shouting, "Drop the 19 weapons. Leave it down there," and then move them to a 20 place where they could, so it was quite clear why they were 21 being arrested and it was being communicated. As I said, 22 policemen were not only speaking in English; there were a 23 lot of members speaking in the vernacular as well. So if 24 during that process it was not clear why they were being 25 arrested then –</p>	<p style="text-align: right;">Page 25075</p> <p>1 put it that way. 2 MR MPOFU: Yes. 3 CHAIRPERSON: Because there's no 4 suggestion that Lonmin had holding cells, but Lonmin did 5 make some facilities, accommodation available for the 6 processes, according to the evidence, for the processing of 7 the people arrested. But they weren't, they can't be 8 described as Lonmin holding cells – 9 MR MPOFU: Well, they do have holding 10 cells, as it were, Chairperson, but that's what – 11 CHAIRPERSON: - after taking to holding 12 cells. 13 MR MPOFU: Yes. 14 CHAIRPERSON: But anyway, let's get the 15 terminology right – 16 MR MPOFU: Ja, at Shaft number 1. 17 CHAIRPERSON: - then we won't have 18 objections. 19 MR MPOFU: Let's call it Shaft number 1 20 where they were taken, that's step number 4, correct? 21 GENERAL NAIDOO: Chair, correct. 22 MR MPOFU: Correct? 23 GENERAL NAIDOO: Correct, Chair. 24 MR MPOFU: Ja, now on your version then 25 it was only at step number 4 – oh, and then step number 5</p>
<p style="text-align: right;">Page 25074</p> <p>1 MR SEMENYA SC: Chair, our reading of 2 section 39(2) is that it is either at the time of arrest or 3 immediately thereafter. 4 MR MPOFU: Ja, well let's assume, for the 5 purposes of this questioning now let's assume that when 6 they eventually got to police stations they were told, you 7 would accept that they were – let's just check the issue of 8 immediacy. So there would be the point at which the people 9 were arrested, right? For example those people hiding 10 among the grass. 11 GENERAL NAIDOO: Yes, Chair. 12 MR MPOFU: Ja, and then they were 13 gathered in their large number outside the, in that open 14 arresting area, let's call it that. 15 GENERAL NAIDOO: Yes, Chair. 16 MR MPOFU: That's step 2, and after they 17 were gathered there then they were loaded into the vans, 18 step 3. 19 GENERAL NAIDOO: Yes. 20 MR MPOFU: Ja, and then from there then 21 they were transported to Lonmin holding cells, or I don't 22 know what you call it, to some place at Lonmin, at Number 23 1, Shaft number 1. 24 CHAIRPERSON: I'm sure senior counsel 25 who's in attendance today from Lonmin will object if you</p>	<p style="text-align: right;">Page 25076</p> <p>1 they were taken to various police stations, correct? 2 GENERAL NAIDOO: That's correct, Chair. 3 MR MPOFU: Ja, so it would have been at 4 step number 5 perhaps that they were informed of the reason 5 for their arrest? 6 GENERAL NAIDOO: No, Chair. What I 7 indicated was immediately when they were confronted by the 8 police they were confronted about laying down their weapons 9 and moving to one side and explained to them that they are 10 going to be placed on one side out of the scene. That's 11 where they were placed in the larger area. I can't really 12 say what was being said in vernacular, but the policemen 13 were communicating to them that they must put down their 14 weapons and things like that. I spoke about specifically 15 the arrest where I was present when Sergeant Brazier 16 executed the arrest and he also communicated to the person 17 that he was in possession of weapons, to drop it, why, what 18 was he doing with the weapons, and he indicated to him now 19 he's going to be placing him in the police van, etcetera. 20 I did not, I can't give it to you verbatim what he said. 21 So at that stage the people that were being arrested knew 22 that they were in possession of weapons that they should 23 not be in possession of, and the police were putting them 24 one side, asking them to drop their weapons, etcetera. 25 They were then loaded onto the trucks and taken a short</p>

<p style="text-align: right;">Page 25077</p> <p>1 distance away to the processing centre where they were 2 processed by the detectives. 3 [11:58] And there they were given their constitutional 4 rights and the whole process and from that processing 5 centre then they were detained at the various police 6 stations, I think just to outline the process as given. 7 MR MPOFU: Okay. So you can only be sure 8 that they were told the reason for their arrest at stage 9 number 4, at the Lonmin shaft number 1. 10 GENERAL NAIDOO: Chair, I think that is 11 where the formal process is, where they are given a 12 document of their constitutional rights, yes. 13 MR MPOFU: Yes. And if their evidence is 14 that that happened more than two or three hours after their 15 arrest, you can hardly describe that as immediately after 16 their arrest, correct? 17 GENERAL NAIDOO: Chair, as I indicated, 18 during the process of arrest, it was a large number of 19 people and they were being told about putting down their 20 weapons and they were being arrested. So I don't know if 21 the inference from there, as I said, I can't verbatim 22 indicate what was being said but they were being told to 23 put down their weapons and to move to the side where they 24 were being arrested. 25 MR MPOFU: Ja. No, General, I'm sorry to</p>	<p style="text-align: right;">Page 25079</p> <p>1 he was arrested was because he was in possession of those 2 two weapons? 3 GENERAL NAIDOO: He was, as I indicated 4 before I started giving these answers, there was a 5 gathering of people with dangerous weapons, it was an 6 illegal gathering therefore and the whole intention of the 7 dispersal was to disperse and to disarm and arrest people 8 that failed to disarm or disperse. 9 MR MPOFU: No, General, you can't have it 10 both ways. So despite the fact that there was this, what 11 you call illegal gathering, which we'll leave later for 12 argument, the decision was to let those participants of the 13 illegal gathering go home if they were not armed, correct? 14 GENERAL NAIDOO: That's correct, Chair. 15 MR MPOFU: Ja, so then your answer to my 16 question must be yes, that the reason why this particular 17 gentleman was arrested was because he had those two 18 weapons? 19 GENERAL NAIDOO: That's correct, Chair. 20 MR MPOFU: Yes. Now, where are the two 21 weapons? 22 GENERAL NAIDOO: Chair, I think this was 23 the evidence that was led. The weapons have all been 24 transported to the police station. 25 MR MPOFU: So –</p>
<p style="text-align: right;">Page 25078</p> <p>1 belabour this. It's one thing to say they knew, as you 2 correctly said, they knew as you say, so if I shoot someone 3 and the police come and arrest me I must know that it must 4 have something to do with that but it's a different thing 5 for me to be told, you are now being arrested for shooting 6 of so-and-so. Do you accept the difference? 7 GENERAL NAIDOO: Chair, that is why I'm 8 saying, as most of the members that were speaking to them 9 were speaking vernacular, I can't verbatim say what they 10 were communicating but I understand what the counsel is 11 saying and accept this, yes. 12 MR MPOFU: Yes. And the person, this 13 person, the one in the arrest that you were involved – 14 GENERAL NAIDOO: Yes, Chair. 15 MR MPOFU: Why was he arrested? 16 GENERAL NAIDOO: Chair, as I indicated to 17 you, the instructions in terms of dispersal was that people 18 that dispersed will drop their weapons and disperse, will 19 not be arrested and would not be stopped in any way. 20 People who were still in possession of their weapons and 21 refused to drop those weapons and also those who did not 22 disperse would be arrested and acting in terms of that 23 instruction the one individual was arrested. He was, as I 24 indicated, arrested with two weapons. 25 MR MPOFU: Yes, okay. So the main reason</p>	<p style="text-align: right;">Page 25080</p> <p>1 CHAIRPERSON: Is it possible to identify 2 the weapons to which you are referring which were in the 3 possession of the person who was arrested as you've 4 described? 5 GENERAL NAIDOO: I'm not sure. We can 6 check with Sergeant Brazier if he can remember, yes, Chair. 7 MR MPOFU: Well, to your knowledge as the 8 senior person who was there, is the answer to what the 9 Chairperson is saying in relation to all those people, 10 would it be possible to identify specific weapons in that 11 pile of weapons that was on the site with any individual? 12 GENERAL NAIDOO: Chair, it would be 13 difficult. As I indicated it was a mass arrest. A lot of 14 the people were, as they were coming out, were forced to 15 abandon their weapons, et cetera, so yes, it would be very 16 difficult. 17 MR MPOFU: It would be impossible, would 18 you agree? 19 GENERAL NAIDOO: Not in all cases. In 20 some cases it might be possible. 21 COMMISSIONER HEMRAJ: Can I just 22 understand, how were these exhibits then entered in the 23 SAP13s, as just having been recovered from a mass of people 24 or what was the entry? 25 GENERAL NAIDOO: Chair, I'm not sure but</p>

<p style="text-align: right;">Page 25081</p> <p>1 we can check with the crime scene people how they processed 2 and entered it, yes. 3 COMMISSIONER HEMRAJ: Because won't that 4 be an indication of whom they were recovered from? Won't 5 there be the CAS number that relates to that arrest? Won't 6 that give us some indication? 7 GENERAL NAIDOO: Chair, ja, I suppose it 8 would have been linked to the dockets and their arrest at 9 scene 2, yes. 10 MR MPOFU: Well, I can assist you again. 11 In the documents of the criminal cases there's not a single 12 person who has been linked to a single of those arms. So, 13 and I venture to say to you that is because in the manner 14 in which you've described the arrests having been done, it 15 would have been impossible to do that exercise. 16 CHAIRPERSON: Do you wish to comment on 17 that? 18 GENERAL NAIDOO: Chair, no, I've 19 commented already. I have indicated that it would be 20 difficult, yes. 21 CHAIRPERSON: Yes, you've indicated it 22 would be difficult. The impression I get is, you can't 23 really deal specifically with these allegations put to you. 24 GENERAL NAIDOO: No, Chair. 25 MR MPOFU: Well, did you or did you not</p>	<p style="text-align: right;">Page 25083</p> <p>1 MR MPOFU: With their hands up. 2 GENERAL NAIDOO: Yes, Chair. 3 MR MPOFU: And they were taken to the, 4 what I've described as the arresting area, correct? 5 GENERAL NAIDOO: That's correct, Chair. 6 MR MPOFU: And they were tied down or not 7 tied down, asked to put their hands to their backs and face 8 down for about an hour or so and then later they were put 9 onto the van. 10 GENERAL NAIDOO: Chair, I think that was 11 the process where they were being searched for any weapons 12 on their person, yes. 13 MR MPOFU: Ja. And this is exactly the 14 point, here were people who were told, come out, leave your 15 weapons there and indeed they come up, on your version, 16 with their hands up and yet they were still arrested. Why 17 were those people arrested? 18 GENERAL NAIDOO: Chair, I think I did 19 testify to the fact that not all of them came out without 20 any weapons and not all of them left their weapons at the 21 rocks. 22 MR MPOFU: Sure. 23 GENERAL NAIDOO: Some of them came out 24 with their weapons and they were then confronted to drop 25 their weapons where they were as they were coming out and</p>
<p style="text-align: right;">Page 25082</p> <p>1 participate in some of the arrests? 2 GENERAL NAIDOO: Chair, I specifically 3 indicated the one arrest, yes. 4 MR MPOFU: Ja, you participated in the 5 arrest, ja. I'm asking you in that capacity so – 6 GENERAL NAIDOO: That's why, Chair, I 7 indicated that I know the weapons were taken by Sergeant 8 Brazier and we can establish from him exactly what the 9 trail was. 10 MR MPOFU: Alright, let's approach it 11 from a different angle. You said that at some stage that 12 there were – or firstly, a number of the strikers were 13 hiding among the rocks, correct? 14 GENERAL NAIDOO: That's correct, Chair. 15 MR MPOFU: And several shoutings, for 16 lack of a better word, were made for them to come out, 17 correct? 18 GENERAL NAIDOO: The policemen were 19 calling out to them, yes. 20 MR MPOFU: Yes, and after – I think you 21 said there was some initial reluctance, is that correct? 22 GENERAL NAIDOO: That's correct, Chair. 23 MR MPOFU: And then some of them came 24 out. 25 GENERAL NAIDOO: That's correct, Chair.</p>	<p style="text-align: right;">Page 25084</p> <p>1 that's when they were subsequently taken to the arresting 2 area and arrested, yes. 3 MR MPOFU: Yes. Okay, so let's put those 4 ones aside who came out with their weapons and dropped 5 them, let's consider only the ones who came out with their 6 hands up. Why were those people arrested? 7 GENERAL NAIDOO: Chair, I think I 8 indicated two things, that the instruction was that the 9 people that did not disperse and the people that failed to 10 disarm would be arrested and I think we're covering both in 11 terms of this. 12 MR MPOFU: Ja, but these people were 13 disarmed. 14 GENERAL NAIDOO: Chair, yes. 15 MR MPOFU: Why were they arrested? 16 GENERAL NAIDOO: They disarmed after 17 being confronted, not when the dispersal process took 18 place. 19 MR MPOFU: No, General Naidoo, please. 20 You say the people came out with their hands up. You don't 21 know when they disarmed, do you? Or you don't even know if 22 they ever had arms the whole day. They came up with their 23 hands up, is that correct? 24 GENERAL NAIDOO: Some of them, yes. 25 MR MPOFU: Why were those people</p>

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1 arrested?

2 GENERAL NAIDOO: Chair, because they were

3 part of that illegal gathering.

4 MR MPOFU: But I thought the illegal

5 gathering people were exempted and allowed to go home,

6 you've just testified.

7 GENERAL NAIDOO: Chair, I already

8 indicated to you and I indicated in earlier testimony that

9 the people that were dispersed and that dispersed were

10 allowed to freely disperse. The people that refused to

11 disperse and the people who refused to disarm were the ones

12 that were arrested and the people that were in the grouping

13 at koppie 3 obviously did not disperse as did the other

14 people who were not hindered in dispersal.

15 MR MPOFU: The strikers had gathered at

16 koppie 1, correct?

17 GENERAL NAIDOO: That's correct, Chair.

18 MR MPOFU: And these events we're talking

19 about, they were arrested at koppie 3, correct?

20 GENERAL NAIDOO: That's correct, Chair.

21 MR MPOFU: That means they had dispersed

22 from koppie 1, which is about 300 metres away, correct?

23 GENERAL NAIDOO: Chair, I would not

24 really say they dispersed. I would say they regrouped.

25 MR MPOFU: Come on, General. Did the

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1 people that were arrested with their hands up at koppie 3,

2 had they dispersed from koppie 1 or not?

3 GENERAL NAIDOO: Chair, they retreated

4 from koppie 1 to koppie 3.

5 MR MPOFU: They dispersed before they

6 retreated?

7 GENERAL NAIDOO: Chair, if they dispersed

8 they would not -

9 MR MPOFU: Thank you.

10 GENERAL NAIDOO: They would have followed

11 the line of the other strikers.

12 CHAIRPERSON: Mr Mpofo, I have been

13 asked, it's been drawn to my attention in fact that I

14 should have a comfort break round about now. If you want

15 to round this point off first, please do so, but I'm in

16 your hands.

17 MR MPOFU: Chairperson, no, it would be

18 convenient, Chair.

19 CHAIRPERSON: Alright, we'll take a

20 comfort break now. Let's try to be back within 10 minutes.

21 [COMMISSION ADJOURNS COMMISSION RESUMES]

22 [12:32] CHAIRPERSON: The Commission resumes.

23 Major-General, you're still under oath.

24 GENERAL NAIDOO: Still under oath, Chair.

25 CHAIRPERSON: Mr Mpofo?

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1 MR MPOFU: Thank you, Chairperson.

2 Chairperson, if I may just address the Commission first.

3 I'm now going to use a statement which was distributed to

4 the Commissioners and the witness but what I wanted to say

5 is I had hoped that - the statement is not signed but I had

6 hoped that by now it would have been signed but

7 unfortunately due to the strike, it's been difficult to

8 trace some of our clients. We suspect some of them might

9 have decided to go home but we can give the assurance, we

10 can give the assurance that as soon as -

11 CHAIRPERSON: Well, I don't know what Mr

12 Mpofo's, what Mr Semanya says about it but he, but you

13 remember a statement by Mr X -

14 MR MPOFU: Yes.

15 CHAIRPERSON: - which was not signed and

16 was put in and we allowed cross-examination on it -

17 MR MPOFU: Yes.

18 CHAIRPERSON: - on the basis that the

19 signed one would be forthcoming later. So there is, there

20 has been a relaxation of the usual standards in these

21 matters and so you would rely on that to justify what you

22 want to.

23 MR MPOFU: I intended exactly to do that,

24 Chairperson. Obviously subject to -

25 CHAIRPERSON: I can't think of a reason

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1 why we can distinguish what I allowed then from the present

2 case.

3 MR MPOFU: Thank you -

4 CHAIRPERSON: Unless Mr Semanya's has got

5 a vigorous objection. Mr Semanya?

6 MR SEMENYA SC: No, Chair, I have no

7 objection.

8 CHAIRPERSON: Mr Semanya having got that

9 indulgence himself, can scarcely deprive you of the

10 indulgence.

11 MR MPOFU: Thank you very much,

12 Chairperson.

13 CHAIRPERSON: Alright, do we have to - it

14 hasn't been marked.

15 MR MPOFU: Yes, it hasn't been marked,

16 Chairperson.

17 CHAIRPERSON: Alright, so we're back to

18 the M series.

19 MR MPOFU: MMM.

20 CHAIRPERSON: According to my notes, the

21 last MMM exhibit is 49.

22 MR MPOFU: 49.

23 CHAIRPERSON: So this will be MMM50.

24 MR MPOFU: Five zero, yes, thank you,

25 Chair.

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1 CHAIRPERSON: Statement of Shadrack
 2 Zandisile Mtshamba, M-T-S-H-A-M-B-A.
 3 MR MPOFU: Thank you, Chair. Thank you
 4 very much Chairperson.
 5 CHAIRPERSON: Have you seen the document?
 6 MR MPOFU: Yes, ja.
 7 GENERAL NAIDOO: s.u.o.
 8 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 9 General, you remember the statement which was given to you
 10 last week?
 11 GENERAL NAIDOO: I remember, Chair.
 12 MR MPOFU: Thank you. Now in relation to
 13 what we are dealing with I want to draw your attention to
 14 paragraph, let's start from 25 just for – ja. Or actually
 15 let's start from 24 just so that we don't revisit that.
 16 This is at scene 2.
 17 CHAIRPERSON: Sorry, Mr Mpofo, has the
 18 statement been given to those responsible for operating the
 19 screen? So will it up on the screen?
 20 MR MPOFU: Unfortunately I doubt if my
 21 attorneys did that. No, unfortunately it hasn't,
 22 Chairperson.
 23 CHAIRPERSON: Do you have to cross-
 24 examine on it now? Is there not some other matter you can
 25 deal with in the meanwhile and then during the lunch time

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1 if arrangements can be made.
 2 MR MPOFU: Okay, yes.
 3 CHAIRPERSON: It would make it easier, I
 4 think.
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: If it will prejudice your
 7 cross-examination to wait until after lunch –
 8 MR MPOFU: No.
 9 CHAIRPERSON: Then obviously I won't
 10 insist on it but if we can do it that way I think it would
 11 help.
 12 MR MPOFU: Yes, I can, I can,
 13 Chairperson, yes. Okay, thank you. Thank you, Chair.
 14 Alright, General, let's move to something else. Can you
 15 just tell us what is the position currently in respect of
 16 the use of SSG. What is SSG to begin with, is it a form of
 17 ammunition?
 18 GENERAL NAIDOO: It's a form of
 19 ammunition for shotgun.
 20 MR MPOFU: Yes, okay. And what is the
 21 current position in respect of the use of SSG ammunition or
 22 shotgun?
 23 GENERAL NAIDOO: Chair, primarily it's
 24 not used for crowd management, there's an instruction to
 25 that.

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1 MR MPOFU: Yes.
 2 GENERAL NAIDOO: It's primarily used in
 3 the SAPS currently for training or other operational
 4 requirements.
 5 MR MPOFU: Okay, so it would be fair to
 6 say it's banned in respect of crowd management.
 7 GENERAL NAIDOO: It's banned, yes.
 8 MR MPOFU: Yes, thank you. And okay, you
 9 may not – I suppose you may not be the source of the
 10 original instructions but do you know why SSG is banned in
 11 crowd management?
 12 GENERAL NAIDOO: Chair, I think it's an
 13 alignment of the policies, the policing policies in terms
 14 of the use of force where previously number 5, that's
 15 birdshot, and SSG was used. It's now not allowed. So I
 16 think an alignment of our policies in terms of the new
 17 dispensation.
 18 MR MPOFU: No, fair enough, but I'm just
 19 saying obviously it's banned for a reason because it's
 20 inappropriate to be used in crowd management, would that be
 21 fair?
 22 GENERAL NAIDOO: Well, it's lethal force,
 23 yes.
 24 MR MPOFU: Yes. And do you know whether
 25 or not SSG was used in the Marikana massacre, tragedy,

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1 whatever?
 2 GENERAL NAIDOO: Chair, specifically?
 3 MR MPOFU: Yes, yes, specifically.
 4 GENERAL NAIDOO: Are we talking about a
 5 specific incident or are we talking about generally?
 6 MR MPOFU: No, I'm talking about the
 7 Marikana killings or massacre.
 8 GENERAL NAIDOO: Chair, by whom? Is it
 9 by the SAPS –
 10 MR MPOFU: By the SAPS.
 11 GENERAL NAIDOO: As far as I know the
 12 SAPS was not issued with SSG.
 13 MR MPOFU: Okay, I understand. Can I go
 14 ahead? Yes. Okay, so as far as you are concerned no SAPS
 15 personnel were allowed to use SSG at the koppies, correct?
 16 GENERAL NAIDOO: That's correct, Chair.
 17 MR MPOFU: And were, or rather the ban on
 18 the SSG was operational at that time, correct?
 19 GENERAL NAIDOO: It's many years now,
 20 Chair, yes.
 21 MR MPOFU: For many years, yes, including
 22 2012?
 23 GENERAL NAIDOO: That's correct, Chair.
 24 MR MPOFU: Now can we first go to – do
 25 you remember the set of photos that you received last week?

<p style="text-align: right;">Page 25093</p> <p>1 GENERAL NAIDOO: Yes, Chair. 2 MR MPOFU: Okay, can you go to the first 3 page? Chairperson, you should have a colour photo. 4 CHAIRPERSON: We'd better mark them. 5 MR MPOFU: We haven't marked them. We 6 haven't marked them, Chairperson. 7 CHAIRPERSON: No, I said we'd better mark 8 them. 9 MR MPOFU: Did we? 10 CHAIRPERSON: No, I am suggesting we mark 11 them now. We didn't mark them. 12 MR MPOFU: Yes, no, we didn't. We simply 13 put the handwriting with their originals. 14 CHAIRPERSON: Alright. 15 MR MPOFU: They are from the Mohlaki 16 series, I think. 17 CHAIRPERSON: Now I've been handed, I 18 think it's four photographs, IMG0961.JPG – 19 MR MPOFU: That's correct. 20 CHAIRPERSON: 0962. 21 MR MPOFU: Yes. 22 CHAIRPERSON: JPG, 3 and 23 MR MPOFU: That's correct. 24 CHAIRPERSON: - there's 4. So let's mark 25 them all MMM51.</p>	<p style="text-align: right;">Page 25095</p> <p>1 I wonder if the operators would, I know that – oh yes, that 2 answers my question. 3 CHAIRPERSON: [Microphone off, inaudible] 4 we've now got on the screen – the people who read the 5 record won't understand what you've said, just said, but 6 we've now got on the screen MMM51.1 which is IMG0961. 7 MR MPOFU: That's correct. Thank you. 8 Now General, what kind of cartridges are those or - 9 GENERAL NAIDOO: Chair, I don't think 10 it's a cartridge. 11 MR MPOFU: Ja. 12 GENERAL NAIDOO: It appears to be 13 something that emanates from a shotgun, yes. 14 MR MPOFU: Yes, it's a casing, I think 15 would be a better description. It's a shotgun shot casing. 16 GENERAL NAIDOO: Possible, ja. 17 MR MPOFU: Ja. Okay, and if you look at 18 that one and the next one which is MMM51.2 – 19 CHAIRPERSON: That's exhibit MMM51.2. 20 MR MPOFU: Yes. 21 CHAIRPERSON: Which is the photograph 22 IMG0962.JPG. 23 MR MPOFU: Yes. The tearings that you 24 see there on those casings would indicate that they had 25 been fired, correct?</p>
<p style="text-align: right;">Page 25094</p> <p>1 MR MPOFU: MMM – 2 CHAIRPERSON: 51.1 will be photo 3 IMG0961.JPG and then 51.2 will be the same except it will 4 be 0962. 5 MR MPOFU: Yes. 6 CHAIRPERSON: And – 7 MR MPOFU: The third one – 8 CHAIRPERSON: The third one will be 63, 9 that'll be 51 point – 10 MR MPOFU: Point 3. 11 CHAIRPERSON: 3, 0963.JPG. Sorry, I 12 thought I had four, I've got six. 13 MR MPOFU: Yes, it's two pages, three of 14 each. 15 CHAIRPERSON: Alright, so we'll mark them 16 all as we – 17 MR MPOFU: In that order. 18 CHAIRPERSON: All the way down to 51.6. 19 MR MPOFU: Yes, thank you, Chair. 20 CHAIRPERSON: Let me just make notes of 21 what they all are. So 0963 is 51.3, 0964, 0964 will be 22 51.4, MMM51.4. 0965 will be 51.5 and the last one 0966 23 will be 51.6. Alright, I've marked them all accordingly, 24 you may now continue. 25 MR MPOFU: Yes, thank you, Chairperson.</p>	<p style="text-align: right;">Page 25096</p> <p>1 GENERAL NAIDOO: It would appear so, yes. 2 MR MPOFU: Yes. Now, if you then go to 3 the next page you see that on all those three photos – 4 CHAIRPERSON: This is MMM51.3, that's the 5 photograph IMG963.JPG at the moment. 6 MR MPOFU: Yes, point 4 to point 6. 7 CHAIRPERSON: We haven't got those on the 8 screen at the moment. We've got – 9 MR MPOFU: Oh yes, we don't. 10 CHAIRPERSON: IMG0962, 63. Now we've got 11 0964. 12 MR MPOFU: Yes, you see that, what you 13 can see there – 14 CHAIRPERSON: Now we're seeing 65, 0965. 15 MR MPOFU: And 66. 16 CHAIRPERSON: And 0966. Now what does 17 one see in the middle of the photograph MMM51.6? There's a 18 round, I don't know if it's, what's it made of? A white – 19 MR MPOFU: White circle. 20 CHAIRPERSON: Disk, a white disk with the 21 words "SSG" on it. What exactly is that, Major-General? 22 GENERAL NAIDOO: Chair, it would appear 23 to be the front end of a shotgun cartridge. Normally you 24 have that holding the projectiles in place, sir. 25 CHAIRPERSON: And then on top of it,</p>

<p style="text-align: right;">Page 25097</p> <p>1 covering the lower part of it – although I say the lower 2 part of it, it's actually the top part of it on the 3 photograph but if one assumes that the top part of the disk 4 is the one, the part with SSG written on it then it's the 5 lower part. There's another disk which is sort of a light 6 brown colour, very light brown, what is that? Is that also 7 part of – 8 GENERAL NAIDOO: It could be, Chair. I'm 9 not sure. 10 CHAIRPERSON: You say it could be a disk 11 like that lying on the other side? 12 GENERAL NAIDOO: It could be, yes, part 13 of a similar disk or part of this disk, I'm not sure. 14 CHAIRPERSON: It looks like something to 15 do with the shotgun. 16 GENERAL NAIDOO: It would appear. 17 CHAIRPERSON: And with pellets, is that 18 right? 19 GENERAL NAIDOO: It's normally this part 20 that retains the pellets in a shotgun cartridge. 21 CHAIRPERSON: Yes. 22 MR MPOFU: Right, so would you agree, to 23 put it at its lowest, that from these photographs it would 24 seem that the banned ammunition SSG was used at the scene, 25 correct?</p>	<p style="text-align: right;">Page 25099</p> <p>1 photographs were taken on the 16th at scene 2 after the 2 shootings, it would appear that on that or during the 3 commotion that occurred there, the banned ammunition called 4 SSG was used against the protesters? 5 GENERAL NAIDOO: Chair, I could rather 6 indicate that yes, if these things were found there – 7 MR MPOFU: Yes. 8 GENERAL NAIDOO: - that it was possibly 9 used at some stage but we can't indicate specifically when, 10 whether it was during the commotion as indicated. 11 CHAIRPERSON: Yes. I take it we also 12 don't know who used it. 13 GENERAL NAIDOO: Exactly, Chair. 14 CHAIRPERSON: So it might have been 15 members of the South African Police Service, it might also 16 have been other people who were on the scene. 17 GENERAL NAIDOO: Chair, yes. 18 CHAIRPERSON: It might have been. How 19 probable that is, is a matter we have to look at. 20 GENERAL NAIDOO: There's two other 21 parties that could have possibly used – as well. 22 MR MPOFU: Yes. That's exactly why I 23 framed the question neutrally again. It would appear that 24 the banned ammunition SSG was used on that day, on the 16th 25 during the action that took place there, correct?</p>
<p style="text-align: right;">Page 25098</p> <p>1 GENERAL NAIDOO: Used – 2 MR MPOFU: Shot. 3 GENERAL NAIDOO: I'm not sure where these 4 photographs are taken but it would appear that it is SSG 5 pieces or pieces of SSG cartridge, yes. 6 MR MPOFU: Yes. 7 CHAIRPERSON: Are you able to tell us who 8 took these photographs and where and when? 9 MR MPOFU: Chairperson, I stand 10 corrected, I think it's Mohlaki. It's in the Mohlaki 11 series, ja. Well, I can't remember his rank but – Captain, 12 yes, he's Captain, yes. Captain – 13 CHAIRPERSON: Captain Mohlaki. 14 MR MPOFU: Yes, these were photographs 15 taken by Captain Mohlaki at scene, General. 16 CHAIRPERSON: On the 16th of August? 17 MR MPOFU: On the 16th of August. 18 CHAIRPERSON: After the shootings there. 19 MR MPOFU: Correct, yes. Subsequent to 20 the shooting event. If you can just accept that for now, 21 would you then agree with the conclusion that I'm seeking 22 to draw? 23 GENERAL NAIDOO: Sorry, can you repeat 24 the conclusion? 25 MR MPOFU: Okay. I was saying if these</p>	<p style="text-align: right;">Page 25100</p> <p>1 GENERAL NAIDOO: Chair, if that is what 2 has been found at the scene, as I said, it does not 3 necessarily indicate the day but if it was found on the 4 scene we accept that it was part of the evidence that was 5 recovered on that day, yes. 6 MR MPOFU: And we can also assume that 7 Captain Mohlaki took these photographs exactly to indicate 8 that fact. 9 GENERAL NAIDOO: That's correct. 10 CHAIRPERSON: Do you know where on koppie 11 3 those photographs were taken or is that something we have 12 to ask Captain Mohlaki, either by his coming and giving 13 evidence or by sending him a request, sending the police a 14 request which he can answer. I'm not sure if he's going to 15 come and – 16 MR MPOFU: Yes, Chairperson. I suspect 17 this is the kind of thing that will be dealt with – 18 CHAIRPERSON: It's on his sketch plan, 19 isn't it, which is an exhibit? It should be. 20 MR MPOFU: No, apparently it's not, 21 Chairperson, but I agree with the Chairperson. I think, 22 I'm sure Mr Semenya – this is the kind of thing that a 23 request will cover, an appropriately worded request. 24 [12:52] CHAIRPERSON: If one looks at his sketch 25 plan of which a copy was provided for us in earlier cross-</p>

<p style="text-align: right;">Page 25101</p> <p>1 examination of this witness, but we didn't have the key, I 2 can't remember if the key mentioned these disks but we got 3 it quite a long time ago so my memory may be inaccurate on 4 that but I'm inclined to think we would have focused on it 5 at the time if it had been mentioned - 6 MR MPOFU: - I doubt - 7 CHAIRPERSON: I don't know whether you 8 can help us on that. 9 MR MPOFU: I doubt it myself, 10 Chairperson. Mr Wesley also seems to agree with you and I 11 that those were not on the sketch so we'll just forward an 12 appropriate request. 13 COMMISSIONER HEMRAJ: Isn't there a key 14 to the photographs, though? Does it not perhaps indicate 15 on that key to the photographs where this was taken? Mr 16 Wesley can you help us? 17 MR WESLEY: I'll have a look, 18 Commissioner. 19 COMMISSIONER HEMRAJ: Thank you. 20 MR MPOFU: Thank you very much, 21 Chairperson. 22 CHAIRPERSON: You weren't aware of this 23 at the time, these photographs, were you? 24 GENERAL NAIDOO: No, Chair. 25 CHAIRPERSON: Presumably Captain Mohlaki</p>	<p style="text-align: right;">Page 25103</p> <p>1 MR MPOFU: Okay and you would have been 2 involved in such an investigation. 3 GENERAL NAIDOO: Probably yes, I would 4 have had - 5 MR MPOFU: Or at least been aware of how 6 - 7 GENERAL NAIDOO: I would have been aware 8 and I would have been expected to assist in such an 9 investigation. 10 MR MPOFU: Yes. And in fact in support 11 of that statement you yourself, just to show that these are 12 matters which are your general concern, as it were, you on 13 the - okay, it's difficult to work out the date of this 14 letter but you issued an instruction to do with people 15 having to hand in, among others, SSG, correct? 16 GENERAL NAIDOO: All - 17 MR MPOFU: This year. 18 GENERAL NAIDOO: - shotgun ammunition, 19 yes. 20 MR MPOFU: In January of this year. 21 GENERAL NAIDOO: 16th of January. 22 MR MPOFU: 2014, 16th of January. 23 GENERAL NAIDOO: Yes. 24 MR MPOFU: Okay yes, I can see. Oh ja, 25 it says 011 where it's supposed to say 01, yes. On the 16th</p>
<p style="text-align: right;">Page 25102</p> <p>1 was but of course it raises quite a serious question, 2 doesn't it? 3 GENERAL NAIDOO: Of course. 4 CHAIRPERSON: And if the members, the 5 senior members of the police service had been aware of it 6 at the time - they may have been, I don't know - one would 7 have expected it to have been investigated because if it 8 was members of the police service who used this ammunition 9 it would have been a serious matter. 10 GENERAL NAIDOO: Definitely, Chair. 11 CHAIRPERSON: But is this the first 12 you've heard of it? 13 GENERAL NAIDOO: It's the first time, 14 yes. I have not been informed about this particular - 15 CHAIRPERSON: And you obviously weren't 16 at the time either. 17 GENERAL NAIDOO: No, Chair. 18 CHAIRPERSON: But would you have been 19 involved in, you know, if there had been investigations 20 about this at the time would you have expected to have been 21 told or was it something that would have been outside the 22 matters which you were concerned with? 23 GENERAL NAIDOO: No, definitely such an 24 infringement by a police official would have been 25 investigated and I would have known about it.</p>	<p style="text-align: right;">Page 25104</p> <p>1 of January 2014, correct? 2 GENERAL NAIDOO: That's correct, Chair. 3 MR MPOFU: And Chairperson, that letter 4 will be found, there's a cluster of documents which I don't 5 intend to use all of them but the last, no, it's not the 6 last. 7 CHAIRPERSON: We've got a pile of 8 documents - 9 MR MPOFU: Yes. 10 CHAIRPERSON: - we have been given. I 11 don't think they're exhibits yet. 12 MR MPOFU: No, they're not. It's 20 13 December 2011 is the one in front. I'm assuming they're in 14 the same sequence as mine, Chairperson. There's the first 15 letter, 20 December, a two page letter. It's one, two, 16 three - 17 COMMISSIONER HEMRAJ: It's page 6 in the 18 bundle, Mr Mpofo, is it? 19 MR MPOFU: That's correct, thank you. 20 Page 6 of that little bundle. Yes, and it's on the screen. 21 CHAIRPERSON: Let's give the bundle an 22 exhibit number. We'll call it MMM52. 23 MR MPOFU: MMM52. 24 CHAIRPERSON: And it's, well, I suppose 25 if then -</p>

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1 MR MPOFU: 41.2.
 2 CHAIRPERSON: - what we'll have to do is,
 3 yes, we'll have to number each one separately. It will be
 4 MMM52.1 et cetera.
 5 MR MPOFU: Exactly.
 6 CHAIRPERSON: Now the one you're
 7 referring to is what number in the bundle?
 8 MR MPOFU: It will now be MMM52.6,
 9 Chairperson.
 10 CHAIRPERSON: And what is number 6?
 11 GENERAL NAIDOO: It's a letter that's on
 12 the screen right now.
 13 CHAIRPERSON: It's a letter –
 14 MR MPOFU: Signed by General Naidoo dated
 15 20, rather 16 January 2014. There's just a mistake. If
 16 you can go to the bottom where the signature appears.
 17 COMMISSIONER HEMRAJ: Yes.
 18 CHAIRPERSON: It's letter, it's letter
 19 from Major-General Naidoo.
 20 MR MPOFU: "Regarding withdrawal of –"
 21 CHAIRPERSON: "Regarding withdrawal of
 22 round," it should be shotgun –
 23 MR MPOFU: It is –
 24 CHAIRPERSON: Shotgun, shotgun?
 25 MR MPOFU: Without the "r" ja.

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1 CHAIRPERSON: You should read your
 2 letters before you sign them. "Regarding withdrawal of
 3 round," I suppose I've got to write what is on the letter,
 4 "round shotgun" –
 5 GENERAL NAIDOO: Shotgun.
 6 CHAIRPERSON: "12-bore."
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: Dated, and again I'll have
 9 to put this in quotation marks, "16" –
 10 GENERAL NAIDOO: January.
 11 CHAIRPERSON: It's dated 20/04/01.
 12 MR MPOFU: 2014, Chairperson.
 13 CHAIRPERSON: Sorry, 2014/011, that's
 14 what it is.
 15 MR MPOFU: It's a mistake.
 16 CHAIRPERSON: 16.
 17 MR MPOFU: Yes.
 18 CHAIRPERSON: "Really," I put it as
 19 "Really 2014/01/16." So it's really the 16th of January
 20 2014 but the pen slipped when he was writing the date and
 21 he missed the description of the –
 22 GENERAL NAIDOO: Shotgun.
 23 CHAIRPERSON: In the letter which
 24 referred to shotguns and not shortguns. So that's, you
 25 dictated the letter and you didn't spot it when it came

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1 back typed to you. It wasn't really you, it was Brigadier
 2 Alexander, I take it.
 3 GENERAL NAIDOO: That's correct, Chair.
 4 CHAIRPERSON: Brigadier Alexander
 5 prepared the letter.
 6 GENERAL NAIDOO: Yes, he's supply chain –
 7 CHAIRPERSON: And you signed it.
 8 GENERAL NAIDOO: That's correct.
 9 CHAIRPERSON: Neither of you spotted that
 10 the shotgun had become shortgun, but anyway we won't waste
 11 time on that.
 12 MR MPOFU: And the 011, yes. Okay.
 13 CHAIRPERSON: Alright. And so what
 14 happened was the letter says "As per instruction by the
 15 Provincial Commissioner," so she actually issued the
 16 instruction, you then had to – you and Brigadier Alexander
 17 had to see to it that the instruction went out.
 18 GENERAL NAIDOO: Yes, with Brigadier
 19 Alexander.
 20 CHAIRPERSON: "All POP units in the
 21 North-West Province are instructed, herewith instructed to
 22 hand in the following rounds, shotgun 12-bore by 17 January
 23 2014 at 13H00." And then it was bore, round shotgun 12-
 24 bore number 5, round shotgun 12-bore SSG and then round
 25 shotgun 12-bore AAA.

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1 GENERAL NAIDOO: That's correct, Chair.
 2 CHAIRPERSON: and then the letter
 3 continues, "Ensure proper co-ordination and PAS issues to
 4 Potchefstroom POP of all relevant ammunition." Now what's
 5 a PAS issue?
 6 GENERAL NAIDOO: It's a provisioning
 7 administration system because, as I indicated in my earlier
 8 testimony, that all government assets are, they're listed
 9 on a system and have to be accounted for on the system.
 10 CHAIRPERSON: Thank you. I see it's now
 11 1 o'clock, Mr Mpofu. Is this perhaps an appropriate stage
 12 for us to take the adjournment?
 13 MR MPOFU: Yes, Chairperson.
 14 CHAIRPERSON: Unless there's something, a
 15 point you want to slip in first before we take the
 16 adjournment. I'm in your hands.
 17 MR MPOFU: Yes, it's just a quick one,
 18 Chairperson. The item listed in 1.2 is the same as what we
 19 saw on the pictures, correct?
 20 GENERAL NAIDOO: That's correct, Chair.
 21 MR MPOFU: Ja. Okay, Chairperson, we can
 22 break at that point.
 23 CHAIRPERSON: Alright, we'll now take the
 24 lunch adjournment.
 25 [COMMISSION ADJOURNS COMMISSION RESUMES]

<p style="text-align: right;">Page 25109</p> <p>1 [13:55] CHAIRPERSON: The Commission resumes. 2 Major-General, you're still under oath. 3 GENERAL NAIDOO: Still under oath, Chair. 4 CHAIRPERSON: Mr Mpofo, I take it the 5 document that you wanted to have put up on the screen, 6 that's the statement by Mr Shadrack Zandisile Mtshamba - 7 MR MPOFU: Yes. 8 CHAIRPERSON: Exhibit MMM50, is that now 9 on the screen? Although I know you, I think you've got to 10 deal – you're finishing off a point. 11 MR MPOFU: Yes, I'll come to it later but 12 it is, it has been arranged. 13 CHAIRPERSON: Alright. 14 MR MPOFU: It's been arranged. 15 CHAIRPERSON: Please proceed with your 16 cross-examination. 17 GENERAL NAIDOO: s.u.o. 18 CROSS-EXAMINATION BY MR MPOFU (CONTD.): 19 Thank you, Chairperson. General, ja, we were still dealing 20 with the SSG issue. 21 GENERAL NAIDOO: Correct. 22 MR MPOFU: Now, your evidence earlier was 23 that this SSG, rather by the time the events of the 16th 24 August 2012 occurred, it had already been banned for years, 25 correct?</p>	<p style="text-align: right;">Page 25111</p> <p>1 years, that the stockpile had not depleted sufficiently to 2 be taken out of circulation. 3 MR MPOFU: So in 10 years or so the 4 stock, as it were, was still available to members. 5 GENERAL NAIDOO: Chair, when you say 6 available, it was still in stock at those units where they 7 were placed, yes. 8 COMMISSIONER HEMRAJ: Was access to that 9 ammunition subject to the same rules that, active to other 10 ammunition? 11 GENERAL NAIDOO: Any other ammunition, 12 it's the same process. 13 MR MPOFU: Yes, but the point is, 14 effectively it was accessible to members of POP? 15 GENERAL NAIDOO: For training purposes, 16 yes. 17 MR MPOFU: Yes, but these are 18 nevertheless, I mean whatever purposes, it was available 19 for them. They could use it for training or they could 20 just admire it or whatever. 21 GENERAL NAIDOO: Chair – 22 MR MPOFU: It was available, so – 23 GENERAL NAIDOO: I think when you say 24 available, there are two POP units where the areas, because 25 of the facilities they had, were the main storage areas of</p>
<p style="text-align: right;">Page 25110</p> <p>1 GENERAL NAIDOO: That's correct, Chair. 2 MR MPOFU: Right, now – and then you kind 3 of banned it again, January this year. 4 GENERAL NAIDOO: Chair, not banned it. 5 If I could explain, the arrangement was that the ammunition 6 was placed at certain units and stations and they were no 7 longer going to be on order and they had to be utilised for 8 training purposes, et cetera, until they were depleted and 9 the police were not going to buy any more of this 10 ammunition. 11 MR MPOFU: Yes, but surely if it had been 12 banned for years, it must have been depleted a long time 13 ago. 14 GENERAL NAIDOO: Chair – 15 MR MPOFU: Otherwise if you are doing it 16 again now it means it was supplied during the period of the 17 ban. Am I correct? 18 GENERAL NAIDOO: No, it's not correct 19 Chair. 20 MR MPOFU: Okay. 21 GENERAL NAIDOO: The ammunition that was 22 stockpiled at certain units were drawn from various 23 stations and units and that particular stockpile was 24 intended to be utilised until depletion. What we found in 25 January this year is that although it was more than 10</p>	<p style="text-align: right;">Page 25112</p> <p>1 the ammunition. The booking out of ammunition and issuing 2 of ammunition in POPS is a very specific process. I think 3 we dealt with it earlier in my testimony. So what I'm 4 saying is that there was old stock of ammunition in stock 5 and the idea was that until it was depleted it would be 6 stored there and utilised for training exercises, et 7 cetera. It was withdrawn from use in crowd management 8 duties. 9 CHAIRPERSON: I want to ask you a 10 question about that. 11 GENERAL NAIDOO: Yes, Chair. 12 CHAIRPERSON: I take it when it was 13 taken, taken out of the storeroom or this room, wherever it 14 was stored, store – 15 GENERAL NAIDOO: That's right. 16 CHAIRPERSON: - notes would have been 17 kept and registers would have been filled in. 18 GENERAL NAIDOO: At the relevant store, 19 yes. 20 CHAIRPERSON: Is that right? 21 GENERAL NAIDOO: That's correct, Chair. 22 CHAIRPERSON: Now if some, if these 23 pellets that were used at scene 2 were used by members of 24 the police service and if the pellets that they fired were 25 police stock, then that should be reflected in some way in</p>

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1 the records, should it not?

2 GENERAL NAIDOO: That's correct, Chair.

3 CHAIRPERSON: The record – now do you

4 know whether anyone has done any – well, you don't because

5 you only heard about it here today, I suppose, but you're

6 not aware whether any investigations were done after you

7 signed this letter in January to check whether what now had

8 to be handed in coincided with what was in the records?

9 GENERAL NAIDOO: Yes. Chair, as I

10 testified earlier during the first cross-examination, that

11 there was a particular incident that occurred in Brits

12 which resulted in an investigation and this instruction

13 where the reconciling of all ammunition was done. I'm not

14 aware of the outcome of the reconciling, I've since been

15 here at the Commission but that process, yes, it was

16 undertaken by the supply chain officials to withdraw them

17 from those units, reconcile them against what they say so

18 that we have a picture of what's happening.

19 CHAIRPERSON: So has that reconciliation

20 been done or is it still being done?

21 GENERAL NAIDOO: Chair, it was in process

22 when I came to the Commission so it might be finished, yes.

23 We can establish that.

24 MR MPOFU: So this instruction was

25 prompted, as it were, by the killings in Motleklong.

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1 GENERAL NAIDOO: By the incident in

2 Motleklong, yes.

3 MR MPOFU: Yes, where you had discovered

4 that SSG had been used in the course of those killings,

5 despite the fact that it had been banned for years.

6 GENERAL NAIDOO: Chair, yes. I think the

7 Minister did make a statement on this matter. A member

8 admitted to that issue and it's being dealt with by IPID as

9 well as internally, yes.

10 MR MPOFU: Yes, and you as the police

11 leadership, you were surprised to say the least that SSG

12 had been used by members of the police which, rather

13 despite the fact that it had, it was a banned form of

14 ammunition, correct?

15 GENERAL NAIDOO: It was ammunition that

16 was not allowed in crowd management, yes.

17 MR MPOFU: Yes. Hence, as I say, you

18 effectively had to reissue the banning order of this SSG or

19 re-emphasise it, correct?

20 GENERAL NAIDOO: Chair, we didn't re-

21 emphasise it. We withdrew it all from all the stores.

22 COMMISSIONER HEMRAJ: Can I just clarify

23 something, General?

24 GENERAL NAIDOO: Yes.

25 COMMISSIONER HEMRAJ: If that register is

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1 properly kept then as at the 16th of August, if you work

2 backwards, you should be able to tell us exactly who it was

3 that booked out this particular ammunition.

4 GENERAL NAIDOO: If they booked it out,

5 yes.

6 COMMISSIONER HEMRAJ: If they booked it

7 out and how much is it.

8 GENERAL NAIDOO: The relevant store

9 manager should be able to do that.

10 CHAIRPERSON: But of course if it wasn't

11 booked out then there'd be a shortfall.

12 GENERAL NAIDOO: That's correct, Chair.

13 CHAIRPERSON: I mean the first thing to

14 do is to check out whether all –

15 GENERAL NAIDOO: It's accounted for.

16 CHAIRPERSON: - all the ammunition that's

17 been taken out has been recorded or if there's a shortfall.

18 GENERAL NAIDOO: That's right.

19 CHAIRPERSON: If there isn't a shortfall

20 then you investigate who took out what ammunition prior to

21 the 16th of August 2012.

22 GENERAL NAIDOO: Chair, yes. Chair, in

23 the issue of Motleklong a member has been identified and he

24 has admitted, so there is that investigation which IPID is

25 conducting, so we would determine the source there.

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1 MR MPOFU: Yes. No, no, that we

2 understand, General. I think the point of the questions

3 I'm putting to you is that exactly these issues that are

4 being raised by the Commissioners would have been or should

5 have been the subject of an investigation once it was

6 discovered that SSG had been used on the 16th. Would that

7 be a fair comment?

8 GENERAL NAIDOO: Chair, as I indicated,

9 to our knowledge at that stage no SSG was issued to any

10 member of the SAPS because it was not allowed in crowd

11 management.

12 MR MPOFU: Yes, but that's exactly the

13 same situation that obtained in Motleklong but that did not

14 stop somebody from using it, hence there is an

15 investigation currently underway in respect of that, isn't

16 it?

17 GENERAL NAIDOO: Chair, yes.

18 MR MPOFU: Ja.

19 GENERAL NAIDOO: There is an

20 investigation.

21 MR MPOFU: Ja, alright.

22 CHAIRPERSON: Mr Semenya, you heard what

23 the witness said. I take it that when that exercise is

24 completed the results will be made available to us. I

25 don't know if it's necessary for us to have the evidence on

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1 it but if we could have the results it would be helpful.
 2 Is there a shortfall? If there wasn't a shortfall, what is
 3 revealed in relation to ammunition that was removed from
 4 the store in the period prior to the 16th of August 2012?
 5 MR SEMENYA SC: We will investigate where
 6 the process is and if there is a report it will be
 7 submitted to you, Chair.
 8 CHAIRPERSON: Thank you. And if it isn't
 9 available then obviously as soon as it becomes available
 10 you'll give it to us. Thank you.
 11 MR MPOFU: Chairperson, my understanding
 12 is that there is no such process. My understanding is that
 13 that process was never done because the General only learnt
 14 about this now, in relation to Marikana at least.
 15 CHAIRPERSON: Yes – yes, no, as I say, he
 16 said that, yes but presumably the investigation will
 17 indicate whether there's a shortfall and they'd have to go
 18 back 10 years to see if there's a shortfall, isn't that so?
 19 They will know how much they had 10 years ago when the
 20 prohibition went out. Every item of ammunition that's been
 21 taken out since then has been, should have been recorded,
 22 so they will see whether there's a shortfall. If there's a
 23 shortfall it means that some stuff has been irregularly or
 24 illicitly removed from the store. If everything, there's
 25 no shortfall, they'll then be able to see, depending how

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1 far back they go – the records presumably go back 10 years
 2 – they'll be able to say who took out ammunition in the
 3 period before the 16th of August 2012. It may be difficult,
 4 that may be where the trail would dry out but nevertheless
 5 there's clearly investigation to be done.
 6 MR MPOFU: Yes.
 7 CHAIRPERSON: And which may well produce
 8 results.
 9 MR MPOFU: Thank you.
 10 CHAIRPERSON: And we've got an
 11 undertaking that once that's completed it will be given to
 12 us.
 13 MR MPOFU: It will be done. Thank you,
 14 Chairperson.
 15 MR SEMENYA SC: Chair, it's pointed out
 16 to me that perhaps one of the other complicating factors is
 17 that this exercise may be happening in North-West when we
 18 know on the 16th we had people from other provinces as well.
 19 So that reconciliation may prove to be nationwide.
 20 CHAIRPERSON: Alternatively, it should be
 21 done nationwide but as far as those people involved at
 22 koppie 3 are concerned, scene 2, we'll know which provinces
 23 they came from. So for our purposes I suppose we'd only
 24 need the results of the investigations done in the relevant
 25 provinces. I don't think there was anyone from the Western

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1 Cape there, for example, so we wouldn't need the results of
 2 the investigations in the Western Cape, as an example. And
 3 of course the point also relates, I suppose, to scene 1 as
 4 well because remember there were pellets fired at scene 1
 5 also and again we will know who was there, from which
 6 province. So the same point would apply, would it not?
 7 MR MPOFU: Yes. Thank you, Chairperson.
 8 But of course, General, this exercise, good as it is, would
 9 really assist us in identifying who might have removed the
 10 SSG from the stores and so on but for our purposes what is
 11 important is that somebody used it, correct? Would you
 12 agree with that?
 13 GENERAL NAIDOO: Chair, yes, and there's
 14 a range of possibilities, as we know that two shotguns were
 15 taken from the security guards. I'm not sure what
 16 ammunition those security guards were carrying as well. We
 17 need to cross-check with that. I'm not sure forensically
 18 whether, if you look at that front of the shotgun SSG
 19 cartridge, whether also the manufacturers can be traced so
 20 that we can sort of narrow it down to which type of
 21 ammunition that was used.
 22 MR MPOFU: But yes, okay.
 23 CHAIRPERSON: I take it the shotguns –
 24 perhaps I'm wrong to say I take it because I may be
 25 incorrect but am I correct in thinking that the shotguns

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1 that were taken from the security guards on the Sunday the
 2 12th were not recovered?
 3 GENERAL NAIDOO: No, Chair.
 4 CHAIRPERSON: So, well, I suppose it's
 5 technically possible that someone might have smuggled them
 6 off koppie 3 without it being detected on the 16th. The
 7 probability is that they wouldn't have succeeded in getting
 8 them away so if they had been used they are likely to be
 9 found on the scene. I know that's not very watertight but
 10 –
 11 GENERAL NAIDOO: Chair, yes.
 12 CHAIRPERSON: - it is a factor to be
 13 considered.
 14 GENERAL NAIDOO: Chair, yes. I'm just
 15 including the whole permutation, the possible sources of
 16 the shotguns are, which can be traced I'm sure if we look
 17 at some of the evidence that's recovered.
 18 MR MPOFU: Ja. No, of course, General, I
 19 think one can – I mean here could be a whole host of
 20 fanciful possibilities. Maybe someone was just walking
 21 past the koppie and sommer shot with SSG but I mean the
 22 likelihood, you would agree, is that it was, as in this
 23 case of Motleklong, used by a member of the police.
 24 GENERAL NAIDOO: Or a striker with one of
 25 the stolen shotguns, yes.

<p style="text-align: right;">Page 25121</p> <p>1 MR MPOFU: Yes, but that falls under the 2 fanciful possibilities. I'm saying that – let's even say 3 we include all fanciful possibilities, the mere fact, even 4 if you don't exclude any of the fanciful possibilities, the 5 mere fact that a banned form of ammunition was spotted 6 among, at the scene, should have been sufficient for the 7 police to investigate how that came about, correct? 8 GENERAL NAIDOO: Chair, yes, if that was 9 brought to our attention. As you know, that the 10 investigation on the scene is not being led by the police. 11 MR MPOFU: Yes, and fortunately in the 12 case of Motleklong we don't have to go through all these 13 fanciful possibilities because there it is know that this 14 was fired by the police, correct? 15 GENERAL NAIDOO: It was identified, yes. 16 MR MPOFU: Thank you. Now while we are 17 on the subject of withdrawal from the stores and, you know, 18 methods of tracing ammunition, you would agree that the 19 time tested method of collating ammunition taken by a 20 particular member is the method whereby you book your 21 firearm out, if it has 10 bullets it has 10 bullets and 22 then you book it back, if it has six bullets it means you 23 used four. That's the simplest and oldest way of dealing 24 with that issue, correct? 25 GENERAL NAIDOO: Correct.</p>	<p style="text-align: right;">Page 25123</p> <p>1 MR MPOFU: Ja. If that system is broken 2 down then it would be difficult, if not impossible, to 3 trace who took what and what came back and so on. 4 GENERAL NAIDOO: Chair, I am not sure 5 when you say broken down, then not working – 6 MR MPOFU: As in – ja, breached. In 7 other words if somebody takes 10, a gun with 10 bullets but 8 we don't know whether he came back with it or how many 9 bullets were in it when it came back then the whole system 10 would collapse. 11 GENERAL NAIDOO: Of course, yes. 12 MR MPOFU: Thanks. Now what happened to 13 your gun, the one that you fired twice? 14 GENERAL NAIDOO: What about it, Chair? 15 MR MPOFU: Where is it? 16 GENERAL NAIDOO: I have received it back 17 from IPID. 18 MR MPOFU: Did it go for ballistic 19 testing? 20 GENERAL NAIDOO: Yes, Chair. 21 MR MPOFU: Do you know, or rather let me 22 start by doing this. There's a document which is part of 23 those documents that were sent to you, it comes from the 24 IPID file 4, I think. 25 GENERAL NAIDOO: Chair –</p>
<p style="text-align: right;">Page 25122</p> <p>1 MR MPOFU: Ja. Now, and it would be 2 impossible, if you break that system then it might well be 3 impossible to find out who shot what. It would just be 4 chaos. 5 GENERAL NAIDOO: Chair, no. I think I 6 already testified to the way the public order police, the 7 people who use shotguns in the police, how they book the 8 ammunition out. I have testified and it's not as indicated 9 by the counsel. Their method of issuing ammunition is a 10 little bit different. 11 MR MPOFU: Yes, no, I accept that. I'm 12 just saying in general that is how the police keep track of 13 ammunition. 14 GENERAL NAIDOO: Chair, but we can't 15 generalise when it comes to the public order police because 16 they have, they are currently the users of shotguns – 17 MR MPOFU: I'm not talking about public 18 order police, General, just answer the question. Is that, 19 in general, the time tested method of collating the use of 20 ammunition? 21 GENERAL NAIDOO: Well, the method of 22 collating the use of ammunition is the amount that's booked 23 out versus what's booked in, with specific report. 24 MR MPOFU: Correct. 25 GENERAL NAIDOO: Yes.</p>	<p style="text-align: right;">Page 25124</p> <p>1 MR MPOFU: It's headed, maybe for the 2 operator – Chairperson, it would have come with that bundle 3 but it's a loose page headed "Report by commander." Got 4 it, thank you. 5 CHAIRPERSON: That's not an exhibit? 6 MR MPOFU: Let's call it 52, Chairperson? 7 CHAIRPERSON: That's not an exhibit – 8 MR MPOFU: No, it's not yet. 9 CHAIRPERSON: It'll be part of the 52 10 series so we'll make it 52.7 and it's "Report by commander" 11 – 12 MR MPOFU: Can we make it 53 because – 13 CHAIRPERSON: Alright, I'll make it 53. 14 [14:15] MR MPOFU: 53, ja. There's some 15 confusion – 16 CHAIRPERSON: Maybe after 50 – yes, 17 alright, okay. 18 MR MPOFU: Yes. 19 CHAIRPERSON: We'll make it 53. 20 MR MPOFU: Thank you, Chair. 21 CHAIRPERSON: "Report by commander" – is 22 this SAPS15 or 16? 23 GENERAL NAIDOO: 15. 24 MR MPOFU: 1-5. 25 CHAIRPERSON: SAP15, what's the date of</p>

<p style="text-align: right;">Page 25125</p> <p>1 it?</p> <p>2 MR MPOFU: 16th August 2012, Chairperson,</p> <p>3 to 17th August 2012.</p> <p>4 CHAIRPERSON: 16/8/2012 to 17/8/2012.</p> <p>5 This will be MMM53.</p> <p>6 MR MPOFU: Yes, thank you, Chair. That</p> <p>7 document, among others, would show us when somebody checked</p> <p>8 out, as it were, and that would be the time when the</p> <p>9 exercise I've just described would be done, correct, in</p> <p>10 relation to ammunition?</p> <p>11 GENERAL NAIDOO: Chair, no. This is not</p> <p>12 for booking out of ammunition, it's just a register to book</p> <p>13 on duty, yes. It's not a firearm register as such.</p> <p>14 MR MPOFU: Yes, I accept that. I know</p> <p>15 it's not a firearm register. I'm saying the times at which</p> <p>16 you assumed possession of certain ammunition and the time</p> <p>17 at which you surrender it back would coincide with those</p> <p>18 times, correct?</p> <p>19 GENERAL NAIDOO: Chair, no. I won't</p> <p>20 agree with that because in terms of, now we're talking</p> <p>21 about myself, I'm issued with a personal firearm which is</p> <p>22 on my equipment sheet. So I do not book my firearm in and</p> <p>23 out. I am permanently in possession of my firearm with the</p> <p>24 allocated number of rounds that are issued to me.</p> <p>25 MR MPOFU: Okay, maybe let me ask it</p>	<p style="text-align: right;">Page 25127</p> <p>1 GENERAL NAIDOO: Chair –</p> <p>2 CHAIRPERSON: Is that correct?</p> <p>3 GENERAL NAIDOO: As I indicated, there's</p> <p>4 two things that happen. One is that there is a duty</p> <p>5 officer that attends to the issue of the shooting. We</p> <p>6 dealt with that where there was a duty officer from</p> <p>7 Marikana who attended but he could not give the detail as</p> <p>8 much as he wanted and the second thing is that you report</p> <p>9 it to, in this case, the JOC or if you're at a station, to</p> <p>10 the community service centre, you report it there. So the</p> <p>11 report of the shooting is normally dealt with by the duty</p> <p>12 officer.</p> <p>13 MR MPOFU: Okay, ja –</p> <p>14 GENERAL NAIDOO: I'm not required, other</p> <p>15 than my statement which I have to submit, I'm not required</p> <p>16 to complete any other form, sir.</p> <p>17 MR MPOFU: Even if you have discharged</p> <p>18 your firearm?</p> <p>19 GENERAL NAIDOO: That's the duty officer</p> <p>20 who completes it. You don't, the shottist himself does not</p> <p>21 complete –</p> <p>22 CHAIRPERSON: You presumably then have to</p> <p>23 provide information –</p> <p>24 GENERAL NAIDOO: To the duty officer.</p> <p>25 CHAIRPERSON: To the duty officer.</p>
<p style="text-align: right;">Page 25126</p> <p>1 differently. If it so happened that on a particular day</p> <p>2 you have – that much will be so on these normal days but if</p> <p>3 it happens on a particular day that you have discharged</p> <p>4 your firearm, would that be the time at which you collate</p> <p>5 the ammunition issued?</p> <p>6 GENERAL NAIDOO: Chair, no. I think</p> <p>7 we're talking past each other. When you say collate, I'm</p> <p>8 not sure exactly what is meant.</p> <p>9 MR MPOFU: Okay. I'm saying on a normal</p> <p>10 day it might well be that your personal firearm doesn't</p> <p>11 have to be declared, so let's put that aside and say I</p> <p>12 accept that.</p> <p>13 GENERAL NAIDOO: Okay.</p> <p>14 MR MPOFU: I'm saying now on a day when</p> <p>15 you have shot at people or whatever it is –</p> <p>16 CHAIRPERSON: Simply say discharged your</p> <p>17 firearm, I think that would be –</p> <p>18 MR MPOFU: Yes, discharged your firearm</p> <p>19 in whatever circumstances.</p> <p>20 CHAIRPERSON: I take it he may well fire</p> <p>21 his, discharge his firearm for practice purposes.</p> <p>22 MR MPOFU: Yes.</p> <p>23 CHAIRPERSON: So I take it whenever you</p> <p>24 discharge your firearm, at some stage thereafter you have</p> <p>25 to fill in some form?</p>	<p style="text-align: right;">Page 25128</p> <p>1 GENERAL NAIDOO: That's correct, Chair.</p> <p>2 CHAIRPERSON: To enable him or her –</p> <p>3 GENERAL NAIDOO: That's correct.</p> <p>4 CHAIRPERSON: To fill in the form.</p> <p>5 GENERAL NAIDOO: That's correct, Chair.</p> <p>6 CHAIRPERSON: Okay.</p> <p>7 MR MPOFU: Yes. Sorry, Chair. And that</p> <p>8 would be at the time when you knock off duty, correct?</p> <p>9 GENERAL NAIDOO: At the time of the</p> <p>10 incident, yes.</p> <p>11 MR MPOFU: No, no. The incident could</p> <p>12 happen in a supermarket. I'm saying the time at which you</p> <p>13 report about the firearms would be when you now report off</p> <p>14 duty to the duty officer, correct?</p> <p>15 GENERAL NAIDOO: Chair, I think we're</p> <p>16 missing the point. The duty officer goes out to where the</p> <p>17 discharging of the firearm took place and completes a</p> <p>18 report on the scene and the duty officer takes the process</p> <p>19 forward. The shottist does not take the process forward.</p> <p>20 MR MPOFU: General, I think –</p> <p>21 CHAIRPERSON: I think Mr Mpofo is</p> <p>22 interested to know when the report was made.</p> <p>23 GENERAL NAIDOO: Yes.</p> <p>24 CHAIRPERSON: And the impression I get is</p> <p>25 that obviously if it was done when you were off duty that's</p>

<p style="text-align: right;">Page 25129</p> <p>1 a different question, let's assume we're talking about 2 shots that were fired when you were on duty. I take it the 3 answer is that before going off duty – 4 GENERAL NAIDOO: Yes. 5 CHAIRPERSON: - you would report it to 6 the duty officer. 7 GENERAL NAIDOO: That's correct. 8 CHAIRPERSON: You wouldn't necessarily do 9 it as you go off duty but you would do it before, at some 10 stage before you go off duty. Is that correct? 11 GENERAL NAIDOO: Let me clarify, Chair. 12 You have to report it to the duty officer immediately. The 13 duty officer has to attend it as it happens. 14 MR MPOFU: Okay, almost instantaneously? 15 GENERAL NAIDOO: As soon as possible, 16 yes. 17 MR MPOFU: Ja. So when you discharged 18 your firearm twice did you instantaneously report to the 19 duty officer? 20 GENERAL NAIDOO: I reported to the JOC, 21 yes. 22 MR MPOFU: Is the JOC the same thing as 23 the duty officer? 24 GENERAL NAIDOO: Well, in terms of the 25 operation, yes, that would be the process and the JOC did</p>	<p style="text-align: right;">Page 25131</p> <p>1 GENERAL NAIDOO: Chair, I knocked off 2 almost the next morning, yes. The time when I knocked off 3 the people that were on duty with me had already gone off 4 duty, so the going off duty, I don't see the relationship 5 between it and the reporting of the shooting incident which 6 I've already testified to. 7 MR MPOFU: Ja. Well, General, all I'm 8 saying is that there must be a purpose why the other 9 generals had to indicate with a signature their time of 10 going off duty. 11 GENERAL NAIDOO: Of course. 12 MR MPOFU: Yes and I'm saying, I'm not 13 saying it's the sole purpose but I'm saying one of those 14 purposes is that it would make it possible between point A, 15 which is going on duty, and point B to be able to find out, 16 among other things, what happened to whatever ammunition or 17 firearm they might have been carrying. Would you agree 18 that there is at least that possible relationship between 19 the two things? 20 GENERAL NAIDOO: Chair, I'm not sure. 21 Maybe it can be explained to me more, in a different 22 fashion and maybe I'll understand it. 23 MR MPOFU: Okay. Let me put it this way. 24 If I were to say to you I'm disputing the fact that you 25 only fired two shots, you fired 20 shots –</p>
<p style="text-align: right;">Page 25130</p> <p>1 activate the duty officer from Marikana who did submit a 2 report. 3 MR MPOFU: Yes and that was done – well, 4 okay, let me just cut it short by saying this. If you look 5 at MMM53 you will see that both General Mpembe and I think 6 Annandale signed on duty with a signature and off duty with 7 a time and a signature. 8 GENERAL NAIDOO: That's correct, Chair. 9 MR MPOFU: But in your case we only have 10 your signature on duty and, unlike the other generals, you 11 did not declare when you went off duty. 12 GENERAL NAIDOO: That's correct, Chair. 13 MR MPOFU: Now, the point I'm making is 14 that insofar as there may be any coincidence and it might 15 not be instantaneously at the time of going off duty, that 16 I accept, but insofar as there may be any coincidences 17 going off duty or – firstly, of those three generals there 18 you were the only one who discharged your firearm, to your 19 knowledge, correct? 20 GENERAL NAIDOO: That's correct, Chair. 21 MR MPOFU: Yes. Now the question is, 22 insofar as there's any relationship between going off duty 23 and anybody having a record of how many shots you have 24 fired and so on, we wouldn't know at what point you knocked 25 off, as it were.</p>	<p style="text-align: right;">Page 25132</p> <p>1 GENERAL NAIDOO: Yes, Chair. 2 MR MPOFU: Ja, I'm just making an 3 example. 4 GENERAL NAIDOO: Yes. 5 MR MPOFU: One of the ways in which you 6 could counteract my statement would be to say, how can you 7 say that because I signed on duty at 5 o'clock and I 8 signed, with 10 bullets, and I signed off duty at X time 9 with eight bullets, so clearly during the relevant period I 10 only fired two shots. I'm just saying that that would be 11 available to you but if you have a blank thing like this 12 which means you still haven't knocked off since August – 13 GENERAL NAIDOO: Chair, the person who I 14 reported the matter would be the appropriate person to 15 indicate in terms of this. The fact that I did not sign 16 off the register merely meant that the time when I went off 17 duty that the people that were normally on duty had already 18 gone and I could not locate this sheet. That's all it 19 locates, that's all it indicates. It does in no way have a 20 bearing on the number of shots I fired. As I indicated, 21 the two instances, the JOC commander was made aware of the 22 fact of the shooting, the JOC commander also activated the 23 duty officer who completed the duty officer's report. 24 Those are the things that pertain to the shooting. The 25 time that I went off duty has no bearing in terms of the</p>

<p style="text-align: right;">Page 25133</p> <p>1 number of rounds I shot.</p> <p>2 COMMISSIONER HEMRAJ: Who was the duty</p> <p>3 that came from Marikana, do you know?</p> <p>4 GENERAL NAIDOO: I can check. I know</p> <p>5 there was a duty officer's report, we can check it.</p> <p>6 COMMISSIONER HEMRAJ: So somewhere there</p> <p>7 must be a document that he's completed that indicates how</p> <p>8 many shots were fired by you?</p> <p>9 GENERAL NAIDOO: That he attended the</p> <p>10 shooting and – there are specific questions to be asked in</p> <p>11 terms of that, yes.</p> <p>12 COMMISSIONER HEMRAJ: And that document</p> <p>13 would indicate how many shots you reported having shot?</p> <p>14 GENERAL NAIDOO: That shows to – yes.</p> <p>15 MR MPOFU: Okay. In any event, okay,</p> <p>16 we'll leave that for argument but related to that, you – at</p> <p>17 the very least you've admitted to having shot twice at the</p> <p>18 strikers, correct?</p> <p>19 GENERAL NAIDOO: I did, Chair.</p> <p>20 MR MPOFU: And you've admitted that you</p> <p>21 may have injured or killed one or two people.</p> <p>22 GENERAL NAIDOO: Chair, that's not what I</p> <p>23 admitted. I said that it's unknown.</p> <p>24 MR MPOFU: Yes, unknown but it's</p> <p>25 possible, correct?</p>	<p style="text-align: right;">Page 25135</p> <p>1 So what he was saying was there were a number, as I</p> <p>2 understand it, there were a number of people lying down but</p> <p>3 only two of them were dead, the others were still alive. I</p> <p>4 understand that to be the thrust of what he's saying but he</p> <p>5 did say only two is correct but that appears to be the</p> <p>6 context in that paragraph. There may be something more in</p> <p>7 the passage in the record that you want to quote.</p> <p>8 MR MPOFU: Okay. Well, whatever. The</p> <p>9 point is that –</p> <p>10 CHAIRPERSON: What was the passage that</p> <p>11 you, you referred to a passage in the record but does it</p> <p>12 effectively say the same thing?</p> <p>13 MR MPOFU: Yes, Chairperson, it's on page</p> <p>14 –</p> <p>15 CHAIRPERSON: Yes, no, we've got it.</p> <p>16 It's page 22942.</p> <p>17 MR MPOFU: Yes.</p> <p>18 CHAIRPERSON: Which is day 189.</p> <p>19 MR MPOFU: Ja.</p> <p>20 CHAIRPERSON: And it's lines 8 to 11.</p> <p>21 It's effectively Mr Semenya reading from, the passage from</p> <p>22 the statement that I think I've read.</p> <p>23 MR MPOFU: Ja.</p> <p>24 CHAIRPERSON: That's where the only two</p> <p>25 comes from and he agrees and then explains that there were</p>
<p style="text-align: right;">Page 25134</p> <p>1 GENERAL NAIDOO: Probable, yes.</p> <p>2 MR MPOFU: Ja. Now insofar as it is</p> <p>3 possible that you may have killed one or two people, in</p> <p>4 relation to – in fact your evidence was that after you</p> <p>5 discharged your shots, when you then proceeded to that area</p> <p>6 there were, to use your words, only two people had been</p> <p>7 killed, correct?</p> <p>8 GENERAL NAIDOO: No, Chair. I don't</p> <p>9 remember such words. I think what I indicated for two</p> <p>10 people was that there were two people that were arrested</p> <p>11 with firearms in that particular vicinity.</p> <p>12 MR MPOFU: Okay, can you go to page</p> <p>13 22942, I think it's day 189.</p> <p>14 CHAIRPERSON: Well, is it only two? I</p> <p>15 see in paragraph 26, sorry, paragraph 76 –</p> <p>16 MR MPOFU: 76?</p> <p>17 CHAIRPERSON: 76 of exhibit JJJ108.</p> <p>18 MR MPOFU: JJJ108.</p> <p>19 CHAIRPERSON: I think the thrust of it is</p> <p>20 – perhaps I can read the paragraph. Well, it's on the</p> <p>21 screen now. "In our forward movement to the first bodies</p> <p>22 among the rocks which I observed on my arrival, we</p> <p>23 discovered that only two of the strikers were shot and</p> <p>24 killed. Approximately three strikers were lying still</p> <p>25 among the bodies with pangas and assegais in their hands."</p>	<p style="text-align: right;">Page 25136</p> <p>1 others who were lying between the bodies of the shot</p> <p>2 strikers seeking refuge, so – as I put it to you.</p> <p>3 MR MPOFU: Ja, okay, whatever the context</p> <p>4 was, the point is that after you had shot twice, I'm just</p> <p>5 relating it to the fact that I'm saying there's a</p> <p>6 possibility that you killed one or two persons.</p> <p>7 GENERAL NAIDOO: Chair, the context of</p> <p>8 that particular statement was with regard to when I arrived</p> <p>9 at the NIU line and we went forward to where we thought</p> <p>10 there were about five people that had been shot and only</p> <p>11 two of those people had been shot, three of them were</p> <p>12 uninjured. That is the context in terms of that.</p> <p>13 MR MPOFU: Ja, that's fine, I accept</p> <p>14 that.</p> <p>15 GENERAL NAIDOO: Yes.</p> <p>16 MR MPOFU: I'm saying you, that – I'm</p> <p>17 saying this in relation to the fact that you may have</p> <p>18 killed one or two persons and I'm saying could these two</p> <p>19 persons who were killed, only two of them in whatever</p> <p>20 context, have been those people?</p> <p>21 GENERAL NAIDOO: No, Chair. Those people</p> <p>22 were at the shooting that I arrived at. It was not the</p> <p>23 people that were involved in the incident with myself so –</p> <p>24 MR MPOFU: Okay, so –</p> <p>25 GENERAL NAIDOO: I think we are talking</p>

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1 past each other in terms of –

2 MR MPOFU: No, we're not. You've

3 clarified what I was asking. So the one or two persons

4 that you may have killed would have been at a different

5 location, is that what you're saying?

6 GENERAL NAIDOO: Chair, I don't recall

7 indicating where people I may have killed, I indicated the

8 area where I discharged my firearm.

9 MR MPOFU: Brigadier Naidoo, please.

10 GENERAL NAIDOO: I've been demoted.

11 MR MPOFU: You and – I don't want to walk

12 –

13 CHAIRPERSON: You've just demoted him.

14 MR MPOFU: Oh yes, I have. General

15 Naidoo, Doctor, I don't want us to cover the ground that

16 we've already covered. You and I today and on Friday I

17 think, or whenever the last time was, have agreed that you

18 may have killed one or two people.

19 GENERAL NAIDOO: No, Chair –

20 MR MPOFU: If not – oh, sorry, okay.

21 Just give your explanation?

22 GENERAL NAIDOO: I think we indicated the

23 possibility of somebody being killed or injured. We never

24 indicated numbers, et cetera.

25 MR MPOFU: Yes, okay fine. Okay, so you

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1 only admit that you may have killed or injured one person.

2 GENERAL NAIDOO: No, I think we indicated

3 that as a result of my shooting there may have been a

4 person injured or killed but that has not been proved by

5 other evidence.

6 MR MPOFU: Yes, that's why I used the

7 word "may." If it was proved I would say you killed.

8 GENERAL NAIDOO: Of course.

9 MR MPOFU: Do you understand?

10 GENERAL NAIDOO: I understand, Chair.

11 MR MPOFU: Ja. I'm saying to you, seeing

12 that you shot twice you may have killed one or two people,

13 correct?

14 GENERAL NAIDOO: May have, yes.

15 MR MPOFU: Yes, thank you. Now seeing

16 that you may have killed one or two people, is your

17 evidence that those two people would have been at a

18 different location as against these two that I was

19 referring to you now?

20 GENERAL NAIDOO: Yes, Chair. Those two

21 were among the bodies that we already testified to that

22 were engaged with the shooting with the NIU when I arrived

23 at the NIU. This is completely a different incident.

24 CHAIRPERSON: What firearms were the NIU

25 people using, R5s?

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1 GENERAL NAIDOO: R5s, Chair, and 9

2 millimetres.

3 CHAIRPERSON: And?

4 GENERAL NAIDOO: As well as 9 millimetre.

5 CHAIRPERSON: And 9 millimetre, I see.

6 MR MPOFU: And you – sorry.

7 CHAIRPERSON: And K9, what were they

8 using? The K9 people, what were they using?

9 GENERAL NAIDOO: The same R5s and 9

10 millimetre.

11 CHAIRPERSON: I see. And among the – I

12 don't know whether you can tell us this but I'm sure we can

13 find that out if you can't tell us, the dead bodies that

14 were found at scene 2, do we know how many of them died as

15 a result of R5 fire and how many died as a result of being

16 shot by a pistol?

17 GENERAL NAIDOO: Chair, offhand I don't

18 know but in the previous cross-examination we dealt mostly

19 with high velocity. There were one or two that were lower

20 velocity but the majority were high velocity, yes.

21 MR MPOFU: Yes, General, and I just want

22 to assure you I'm not – whether, who those people that you

23 may have killed and so on would be a subject of a different

24 process, probably in the criminal courts, ja, if you are

25 ever charged but all I need for the purposes of this

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1 Commission is that you, there's a possibility that you may

2 have killed one or two persons or injured them. And maybe

3 while we are there, for the record I must say that because

4 of that we will recommend that you should be charged as

5 accused number 7 in the list of public officials who should

6 be charged with murder. In your case it would be not,

7 well, it would principally be because of those one or two

8 deaths, possible, or any other deaths that Mr Chaskalson

9 and I think Mr Ntsebeza dealt with.

10 MR SEMENYA SC: Chair, do people get

11 prosecuted for possible deaths?

12 MR MPOFU: Well, yes. If a person shoots

13 at a crowd of people and two of them die, I'm sure no-one

14 else would be prosecuted except the shooter, or the

15 shottist.

16 CHAIRPERSON: A number of people shot and

17 you can't link any bullets fired by any shottist to any

18 dead body, you'll then have difficulty, absent some

19 invocation of the doctrine of common purpose, you'll have

20 difficulty charging anybody with murder. The most you

21 could do would be to charge them with attempted murder.

22 MR MPOFU: So Chairperson, if there are

23 two people who shoot at a crowd of 1 000 and five of them

24 die and we can't say which bullet went where, they must

25 just go home? I don't think that's how it works. I think

<p style="text-align: right;">Page 25141</p> <p>1 those people would be charged with murder.</p> <p>2 CHAIRPERSON: Mr Mpofu, I didn't say</p> <p>3 that. I didn't say that at all.</p> <p>4 [14:35] If there's a crowd of a thousand people, two</p> <p>5 people shoot at them and there are five dead and the</p> <p>6 circumstances are such that defence of self-defence or</p> <p>7 private defence isn't available, it may be impossible to</p> <p>8 link either of the two shottists with any of the five</p> <p>9 deaths, but both shottists on those facts could be charged</p> <p>10 with attempted murder and in all probability neither of</p> <p>11 them would go home. That's the answer to you –</p> <p>12 MR MPOFU: Thank you. Well, that's all</p> <p>13 I'm saying then. Insofar as you were one of the people who</p> <p>14 shot, and it may be possible, as the Chairperson says, to</p> <p>15 link the deaths, then we're going to recommend that you</p> <p>16 should be charged. I'm not saying that you should be</p> <p>17 convicted. It might well be that all these fancy</p> <p>18 explanations might hold water. I'm just saying that –</p> <p>19 CHAIRPERSON: I don't know whether it's</p> <p>20 fair to describe them as fancy explanations, and –</p> <p>21 MR MPOFU: Okay, or at least possibility.</p> <p>22 CHAIRPERSON: It's never sensible to</p> <p>23 charge people if they're likely to be acquitted. That can</p> <p>24 be an abuse of the prosecutorial function as well.</p> <p>25 MR MPOFU: Yes.</p>	<p style="text-align: right;">Page 25143</p> <p>1 very clear. There were two legs of the operation that</p> <p>2 needed to be supported. One was the investigation leg and</p> <p>3 one was the public order situation and nowhere did I</p> <p>4 indicate the issues of prosecution. The police's</p> <p>5 responsibility is to conduct investigations and that's all.</p> <p>6 MR MPOFU: General, are you aware – I'm</p> <p>7 not saying that you have given this evidence yourself, and</p> <p>8 I can't locate it now but I'm saying are you aware or</p> <p>9 you're not aware that the National Commissioner in</p> <p>10 recommending the drastic escalation among other things was</p> <p>11 desirous of the fact that the people who had killed the</p> <p>12 police should be brought to book?</p> <p>13 GENERAL NAIDOO: Chair, that's why I'm</p> <p>14 saying the National Commissioner agreed to the escalation</p> <p>15 of resources to support the investigation.</p> <p>16 MR MPOFU: Only she just stop at</p> <p>17 investigation. She didn't say those people should be</p> <p>18 brought to book?</p> <p>19 GENERAL NAIDOO: Chair, I'm not going to</p> <p>20 put – I don't have the National Commissioner's exact</p> <p>21 words –</p> <p>22 CHAIRPERSON: Mr Mpofu, the police don't</p> <p>23 normally undertake investigations of crimes unless they</p> <p>24 think that there's a prospect of them finding the persons</p> <p>25 responsible –</p>
<p style="text-align: right;">Page 25142</p> <p>1 CHAIRPERSON: So but these are matters –</p> <p>2 MR MPOFU: No, I'm conceding –</p> <p>3 CHAIRPERSON: - to be debated later.</p> <p>4 MR MPOFU: Thank you, Chairperson. I'm</p> <p>5 conceding the possibility of an acquittal. We're not going</p> <p>6 to recommend that he must be convicted. We are going to</p> <p>7 recommend that he must be charged with murder. It will be</p> <p>8 for the prosecutor to recommend that he must be convicted</p> <p>9 after the evidence has been heard. Do you understand,</p> <p>10 General?</p> <p>11 GENERAL NAIDOO: I do understand, Chair.</p> <p>12 MR MPOFU: Thank you. And by the way, as</p> <p>13 it happened your evidence is that one of the reasons, one</p> <p>14 of the key reasons that what you've described as the</p> <p>15 drastic escalation of personnel had happened was so that</p> <p>16 the perpetrators of the murders on the police should be</p> <p>17 prosecuted, correct?</p> <p>18 GENERAL NAIDOO: Chair, no. What I</p> <p>19 indicated was the investigations into various murders</p> <p>20 needed to be supported.</p> <p>21 MR MPOFU: Yes, but if I remember well</p> <p>22 the National Commissioner made it very clear that there</p> <p>23 must be this escalation because the people who had murdered</p> <p>24 policemen must be brought to book, or prosecuted, correct?</p> <p>25 GENERAL NAIDOO: Chair, my testimony was</p>	<p style="text-align: right;">Page 25144</p> <p>1 MR MPOFU: Yes.</p> <p>2 CHAIRPERSON: - and again they don't just</p> <p>3 do it on the basis that it will stop there. Clearly they</p> <p>4 do it on the basis that if the persons who are reasonably</p> <p>5 suspected of committing the crime in respect of which</p> <p>6 evidence is forthcoming that they did commit the crime,</p> <p>7 that they will be prosecuted, that the docket will then be</p> <p>8 sent by the police to the prosecuting authorities and the</p> <p>9 assumption is that the prosecution authority will do their</p> <p>10 duty. I mean that must be –</p> <p>11 MR MPOFU: Yes, I would have thought so,</p> <p>12 Chairperson. I would have thought it as obvious as it is</p> <p>13 to you and me, but obviously it's not as obvious to the</p> <p>14 General. Do you agree with the Chairperson, General –</p> <p>15 CHAIRPERSON: I don't know if that's a</p> <p>16 fair comment, but let's see what he says. You heard what I</p> <p>17 said to Mr Mpofu.</p> <p>18 GENERAL NAIDOO: Yes, Chair.</p> <p>19 CHAIRPERSON: He says it's obvious to him</p> <p>20 and it's obvious to me, but it's not so obvious to you.</p> <p>21 What comment do you make in respect of that?</p> <p>22 GENERAL NAIDOO: Chair, I think you made</p> <p>23 a fair comment and I agree with you.</p> <p>24 MR MPOFU: Okay, so you accept that the</p> <p>25 ultimate aim would be that those people should be</p>

<p style="text-align: right;">Page 25145</p> <p>1 prosecuted?</p> <p>2 GENERAL NAIDOO: By the prosecuting</p> <p>3 authority, yes.</p> <p>4 MR MPOFU: Yes, correct. Now ja, do you</p> <p>5 accept therefore that similarly the people who murdered the</p> <p>6 strikers should be prosecuted?</p> <p>7 GENERAL NAIDOO: Chair, I think we went</p> <p>8 through that exercise. We did –</p> <p>9 MR MPOFU: Can we go through it again?</p> <p>10 GENERAL NAIDOO: We've discussed this and</p> <p>11 we, I've already indicated there's a clear understanding</p> <p>12 that matters will be investigated and decisions will be</p> <p>13 taken, and this is how the criminal justice system works</p> <p>14 and we would have to account in terms of that.</p> <p>15 MR MPOFU: General, just answer the</p> <p>16 question. Are you equally desirous that the people who</p> <p>17 murdered the strikers should be investigated and prosecuted</p> <p>18 eventually?</p> <p>19 GENERAL NAIDOO: Chair, as I've indicated</p> <p>20 there is a process; people are tasked with that</p> <p>21 investigation and they will let us know. I'm one of the</p> <p>22 people that will probably be investigated.</p> <p>23 CHAIRPERSON: Perhaps we could put the</p> <p>24 question slightly differently. If you introduced an</p> <p>25 element of conditionality into it, if some of the strikers</p>	<p style="text-align: right;">Page 25147</p> <p>1 documents, but the sum total of it is that your version of</p> <p>2 the events where you were shooting people where you might</p> <p>3 have killed or injured somebody, that version is not</p> <p>4 captured in exhibit L.</p> <p>5 GENERAL NAIDOO: Chair, not specifically.</p> <p>6 It's broadly yes –</p> <p>7 MR MPOFU: Not? Yes.</p> <p>8 GENERAL NAIDOO: Not specifically</p> <p>9 indicated General Naidoo shot this, no.</p> <p>10 MR MPOFU: Yes, thank you, and it is your</p> <p>11 evidence, I think, that what happened at Roots, which was</p> <p>12 were exhibit L was born, that what happened at Roots was</p> <p>13 meant to be an account of exactly what happened at the</p> <p>14 scene, or the scenes, correct?</p> <p>15 GENERAL NAIDOO: Chair, as indicated that</p> <p>16 each grouping, yes, presented what they experienced, yes.</p> <p>17 MR MPOFU: Ja, so from that it would be</p> <p>18 fair then to say that one of two things, either you did not</p> <p>19 – the version of that shooting event which you gave here,</p> <p>20 it is either you did not give it at Roots, or if you gave</p> <p>21 it, somehow it was missed out, or it's one of the two,</p> <p>22 correct?</p> <p>23 GENERAL NAIDOO: Chair, I wouldn't say it</p> <p>24 was missed out. I don't remember seeing specific names of</p> <p>25 individuals who were the shottists in the various</p>
<p style="text-align: right;">Page 25146</p> <p>1 were murdered by the police –</p> <p>2 GENERAL NAIDOO: Yes.</p> <p>3 CHAIRPERSON: - and if it can be</p> <p>4 ascertained with reasonable certainty - certainty required</p> <p>5 for a criminal prosecution - who was responsible for such</p> <p>6 murders, would you also be desirous of those persons being</p> <p>7 charged, just as you would be desirous of strikers who</p> <p>8 murdered policemen being prosecuted?</p> <p>9 GENERAL NAIDOO: Of course, Chair,</p> <p>10 exactly as we are doing now in Brits, those policemen were</p> <p>11 charged and process is going, the criminal and the</p> <p>12 departmental.</p> <p>13 MR MPOFU: Good, and if those</p> <p>14 prosecutions were to take place they would primarily</p> <p>15 involve the shooters, the people who would have killed the</p> <p>16 strikers, correct?</p> <p>17 GENERAL NAIDOO: Depending on the</p> <p>18 charges, yes.</p> <p>19 MR MPOFU: And you are one of the</p> <p>20 shooters, correct?</p> <p>21 GENERAL NAIDOO: That is correct, Chair.</p> <p>22 MR MPOFU: Thank you. Now I just want to</p> <p>23 deal with an issue – I'm not going to traverse this because</p> <p>24 Mr Chaskalson dealt with it, but you would accept that from</p> <p>25 – I'm summarising what Mr Chaskalson put to you using many</p>	<p style="text-align: right;">Page 25148</p> <p>1 incidents. There are incidents where they refer to the</p> <p>2 shooting. Maybe they didn't describe it as I would have</p> <p>3 described it, and I already testified to the fact that I</p> <p>4 saw the presentation as being more broader inclusive one</p> <p>5 instead of giving the specific details.</p> <p>6 MR MPOFU: Okay, as I say, I don't intend</p> <p>7 to revisit – all I know that –</p> <p>8 CHAIRPERSON: [Microphone off, inaudible]</p> <p>9 say to you, Mr Mpofo, that firstly this point was covered</p> <p>10 very extensively by Mr Chaskalson –</p> <p>11 MR MPOFU: As I've said, Chairperson.</p> <p>12 CHAIRPERSON: And secondly, it's not one</p> <p>13 of the topics on which I gave you permission to cross-</p> <p>14 examine. I expect –</p> <p>15 MR MPOFU: No, but Chairperson –</p> <p>16 CHAIRPERSON: Don't say "but no,</p> <p>17 Chairperson." You are confined to the issues in terms of</p> <p>18 the practice rules we adopted to cross-examine on the</p> <p>19 issues in respect of which I gave you, for which you</p> <p>20 applies and for which I gave you permission.</p> <p>21 I've allowed you a fair amount of latitude</p> <p>22 because some of the points you were touching were points</p> <p>23 that hadn't been previously cross-examined and I thought</p> <p>24 they – the subject of cross-examination, and I thought it</p> <p>25 was only appropriate that I should allow you to ask the</p>

<p style="text-align: right;">Page 25149</p> <p>1 questions. But now you're busy repeating something Mr 2 Chaskalson asked, so I must remind you, I gave you 3 permission on five topics and I expect you to adhere to 4 those five topics.</p> <p>5 If there's an extra point you want to raise that 6 isn't covered by that, that has become apparent to you 7 since that application was made, which you consider it 8 appropriate you should cross-examine on, I will obviously 9 consider it and I will be flexible if I consider that you 10 are contributing to the process. But please, insofar as 11 you can, stick to the five topics.</p> <p>12 MR MPOFU: Thank you, Chairperson. Well, 13 Chairperson, really, I mean when I prefaced this question - 14 I'm obviously building to something. When I prefaced this 15 question by acknowledging that Mr Chaskalson has covered 16 this, it was really for your benefit so that you understand 17 that I'm not going to cross-examine on it.</p> <p>18 CHAIRPERSON: No, I understand that but 19 I -</p> <p>20 MR MPOFU: Ja.</p> <p>21 CHAIRPERSON: But the point to which 22 you're building up didn't, I can't see how it fits in, in 23 any of the five topics I gave permission on. That's all.</p> <p>24 MR MPOFU: Ja, okay. You can't see, 25 Chairperson, because as I say it's building up to something</p>	<p style="text-align: right;">Page 25151</p> <p>1 like that, on the rock, that that may well have been 2 friendly fire?</p> <p>3 GENERAL NAIDOO: Chair no, I think we 4 traversed this one as well. I think I specifically 5 indicated the shottist in this case was visible to me.</p> <p>6 MR MPOFU: Okay, and let's now look at it 7 from the other side of the coin. If when you were shooting 8 at whoever, if one of your shots had missed somebody else 9 might have mistaken your shot for hostile fire when it was 10 actually friendly fire, correct?</p> <p>11 GENERAL NAIDOO: Chair, two things; in 12 terms of the angle shooting, as I indicated, was downwards 13 directly and secondly, at that stage most of the other 14 shooting had stopped. So in terms of how it was perceived 15 by other people, I can't testify to that.</p> <p>16 MR MPOFU: Oh, I see. So when you shot 17 the shooting had stopped from the other side?</p> <p>18 GENERAL NAIDOO: I said most of the 19 shooting had stopped.</p> <p>20 MR MPOFU: Yes.</p> <p>21 GENERAL NAIDOO: There was already a call 22 by the Special Task Force commander, we find out now, for 23 cease fire and the helicopter had already indicated to 24 people that the policemen were now going into the bush. So 25 the bulk of the shooting had already ended.</p>
<p style="text-align: right;">Page 25150</p> <p>1 that is in the future, that is still coming. Now I'm 2 saying, General, and I emphasise again, I don't want to re- 3 traverse what Mr Chaskalson has covered, but you'll 4 remember that he went through with you 11 incidents, I 5 think, to demonstrate the fact that none of those accorded 6 with what you had told the Commission. You remember that 7 cross-examination?</p> <p>8 GENERAL NAIDOO: I remember the cross- 9 examination.</p> <p>10 MR MPOFU: Yes, okay. Now the point that 11 I really want to go to is this; in relation to the - and 12 you must understand again the people I represent, as I 13 said, just as much as they want to know how they were 14 arrested, which we'll come back to, the others also want to 15 know the circumstances under which they were injured, and 16 I'm only going to ask you this issue. Are you aware that 17 in relation to scene 2 the version of the police is that 18 the people who were shooting there, the policemen who were 19 shooting there may have mistakenly been responding to 20 friendly fire, something to that effect?</p> <p>21 GENERAL NAIDOO: I'm aware of that 22 version.</p> <p>23 MR MPOFU: Yes, so in that context would 24 you accept that when you were shooting after you saw that 25 bullet bouncing on the stone in front of you or something</p>	<p style="text-align: right;">Page 25152</p> <p>1 MR MPOFU: Alright. Okay, can we now 2 just go back to MMM50, before I get into more trouble. 3 MMM50.</p> <p>4 CHAIRPERSON: Which paragraph of - do you 5 want to take him through the whole of it, or is there -</p> <p>6 MR MPOFU: Yes, Chairperson, yes -</p> <p>7 CHAIRPERSON: I take it, I thought when I 8 read it that you were probably going to deal with 9 paragraphs 23 and following -</p> <p>10 MR MPOFU: Yes, yes.</p> <p>11 CHAIRPERSON: - which is page 5.</p> <p>12 MR MPOFU: Yes, Chairperson. Okay, 13 General, I'm just going to read it out. This is a 14 statement of Mr Mtjamba, who was one of the people arrested 15 at scene 2. You understand? He says at paragraph 23, "At 16 koppie 3, scene 2, I joined other fellow protesters and we 17 hid ourselves behind big rocks. I could observe more or 18 less 50 in number in my immediate vicinity. I later 19 realised that there were a few hundred of us." 24, "As I 20 was hiding myself I heard shots," rather "lots of gunshots 21 coming from different directions. I was scared for my life 22 and I covered my face with my hands for some time, 23 expecting to be shot at any time. Some of the shots were 24 single shots and others were short bursts of fire." Just 25 to pause there, that would seem to accord with your account</p>

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1 that there were both 9mm and R5s being used, correct?
 2 GENERAL NAIDOO: Correct, Chair.
 3 MR MPOFU: Yes, and then number 25 he
 4 says, "As protesters were running around for cover one came
 5 and joined us. He was wounded on his arm and I assisted
 6 him by wrapping the wound with a jacket. The wound
 7 appeared to be a gunshot wound."
 8 26, "One protester suggested that we should come
 9 out of the hiding place with our hands up. He said, 'Guys,
 10 let's surrender.' He then went out of the group with his
 11 hands raised up."
 12 27, "He was shot on his hands or arms. He
 13 kneeled down and as he tried to stand up still with his
 14 hands up, he was shot in the stomach and he fell down. He
 15 then tried to stand up, but was shot again and he fell
 16 down. He tried to crawl, but could not do so."
 17 Number 28, "Another surrendering protester was
 18 shot in his head and also fell down within my line of
 19 sight. Others who surrendered were lucky and they were
 20 escorted by armed policemen without being shot at point
 21 blank."
 22 29, "Then three policemen came out from the front
 23 facing towards our direction. I then heard the voice
 24 shouting, 'Cease fire, cease fire.' One policeman was
 25 raising his arm, apparently sending some signal to his

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1 colleagues." Again that paragraph would accord with the
 2 calls that you have testified about of cease fire, correct?
 3 GENERAL NAIDOO: Correct, Chair.
 4 MR MPOFU: Okay, then he says, "We were
 5 ordered to lie down on our stomachs and crawl to an open
 6 space, and as we crawled about two to three people remained
 7 where they were. They could not crawl. They appeared to
 8 have sustained gunshot wounds. I still think they may have
 9 been dead." And then the rest is about policemen who were
 10 kicking them – or well, I must as well read that part.
 11 31, "A lot of policemen came there and they were
 12 searching us. They were kicking us whilst we were lying on
 13 the ground and they were bragging amongst themselves about
 14 the manner in which they had taken people down. Some were
 15 laughing loudly. Some even said that if it were in
 16 Zimbabwe they would burn us alive with petrol. They
 17 referred to us as useless and as cop killers," and so on.
 18 So now there are two or three issues that come
 19 from that. Again the issue about laughing, some were
 20 laughing loudly, you can accept that there's been objective
 21 evidence and it has been admitted by, I think Captain
 22 Mohlaki or some other witness. So you would agree that
 23 some of these accounts, I'm not saying you have knowledge
 24 of all these things, but at least some of those that I've
 25 pointed to you accord with your evidence, correct?

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1 GENERAL NAIDOO: Correct, Chair.
 2 MR MPOFU: And also you have already
 3 testified that some of the people who were surrendering
 4 were arrested, which I'll come to now, but now I want to
 5 ask you specifically if you have any knowledge about some
 6 of those people who were in the process of surrendering
 7 being shot at.
 8 GENERAL NAIDOO: Chair, not to my
 9 knowledge. As I indicated that people were arrested, but
 10 if you look at the description of some of this, and it was
 11 also led in other cross-examination where a statement was
 12 introduced of one Sergeant Molangoanyane who on the other
 13 side describes something very similar –
 14 CHAIRPERSON: I'm sorry to interrupt you,
 15 Major General, could you give us the exhibit number,
 16 please, so when we read the record we can follow it up?
 17 MR MPOFU: Yes.
 18 [14:55] GENERAL NAIDOO: Chair, I'm going to have
 19 a problem with that. It was one of the statements that Mr
 20 Chaskalson introduced during his cross-examination.
 21 MR MPOFU: Yes, Chairperson, maybe we
 22 could short-circuit this by me accepting that there was
 23 reference to this issue of people who were surrendering.
 24 I'm not sure if it was Adv Chaskalson or my learned
 25 colleague Mr Ntsebeza, but the point, General, is – I

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1 accept that – I'm saying you do understand that Mr Mtjamba
 2 is a witness who I intend to call and who is one of the
 3 people that I act for?
 4 GENERAL NAIDOO: Yes, and the –
 5 MR MPOFU: Because he was arrested.
 6 GENERAL NAIDOO: And the statement that
 7 I'm referring to conversely also describes a policeman's
 8 account where he shot two people and it, why I'm raising
 9 the particular thing is because he refers to where he shot
 10 a person in the hand and in the arm and etcetera, and even
 11 indicates he shot him in the head –
 12 MR MPOFU: Thank you, ja.
 13 GENERAL NAIDOO: So it corroborates what
 14 your witness says.
 15 MR MPOFU: Okay, yes. Thank you. So
 16 apart from the other corroborations that I pointed out from
 17 your evidence, you're saying that it's further corroborated
 18 by that person?
 19 CHAIRPERSON: I'm sorry, what was the
 20 name of the constable whose statement you referred to?
 21 GENERAL NAIDOO: Sergeant Molangoanyane.
 22 Molangoanyane.
 23 MR MPOFU: And the exhibit number?
 24 CHAIRPERSON: Well, that's the point;
 25 we're trying to find the exhibit number. I can't find it

<p style="text-align: right;">Page 25157</p> <p>1 in my notes, but – there it is, but –</p> <p>2 MR MPOFU: We'll find it, Chairperson.</p> <p>3 CHAIRPERSON: Alright, well it was handed</p> <p>4 in. No sorry, what's his name again? Oh, there it is,</p> <p>5 Molangoanyane.</p> <p>6 GENERAL NAIDOO: Yes, that's the one on</p> <p>7 the –</p> <p>8 CHAIRPERSON: Yes, I think –</p> <p>9 MR MPOFU: MMM6.</p> <p>10 CHAIRPERSON: I think Ms le Roux handed</p> <p>11 it in.</p> <p>12 MR MPOFU: I'm told it's MMM6,</p> <p>13 Chairperson.</p> <p>14 CHAIRPERSON: Yes, that's correct. It is</p> <p>15 MMM6, yes, thank you. Well done, Mr Mpofu, thank you.</p> <p>16 MR MPOFU: Thanks, Chairperson.</p> <p>17 CHAIRPERSON: Oh, it's on the screen.</p> <p>18 GENERAL NAIDOO: Yes.</p> <p>19 CHAIRPERSON: So I was the one who was</p> <p>20 unobservant. You were more observant than I at any rate –</p> <p>21 MR MPOFU: I'm not wearing my glasses,</p> <p>22 Chairperson.</p> <p>23 CHAIRPERSON: Anyway, let's not waste</p> <p>24 time on it further. But in relation to the exhibit we're</p> <p>25 now busy with, which is MMM50, you've been taken through</p>	<p style="text-align: right;">Page 25159</p> <p>1 coincidence. Indeed in my mind what I had thought we would</p> <p>2 do is to find let's say one of the wounded people whose</p> <p>3 wounds coincide with his description, and so on, but what</p> <p>4 you've suggested is a better shortcut in the sense that if</p> <p>5 the shooting incident is described by both sides then there</p> <p>6 is that commonality as well, apart from your own evidence.</p> <p>7 You understand?</p> <p>8 GENERAL NAIDOO: Chair, yes.</p> <p>9 MR MPOFU: Thanks. Alright, in any event</p> <p>10 the point here is that – let's leave aside now the issue of</p> <p>11 surrendering people who may have been shot. We can leave</p> <p>12 it at that. We'll deal with it in argument. Going back to</p> <p>13 the surrendering people who were arrested, which is what</p> <p>14 you and I were discussing before lunch, you remember that?</p> <p>15 GENERAL NAIDOO: Yes, Chair.</p> <p>16 MR MPOFU: Yes, would you agree that – or</p> <p>17 firstly let me say you can't say how many of the people who</p> <p>18 were arrested had come up with bare hands up and how many</p> <p>19 were disarmed?</p> <p>20 GENERAL NAIDOO: No, Chair, I can't</p> <p>21 offhand say, no.</p> <p>22 MR MPOFU: And worst still, because you</p> <p>23 were seeing the people for the first time, you wouldn't be</p> <p>24 able to identify who came out without arms in their –</p> <p>25 sorry, now the word "arms" is – ja, without weapons and</p>
<p style="text-align: right;">Page 25158</p> <p>1 that.</p> <p>2 GENERAL NAIDOO: Chair.</p> <p>3 CHAIRPERSON: And you said certain</p> <p>4 portions would agree with, you were able to agree with</p> <p>5 certain of the things he said, but I understood you to be</p> <p>6 still busy with your answer, or did I misunderstand?</p> <p>7 GENERAL NAIDOO: Chair no, what I was</p> <p>8 merely pointing out was that what this witness describes</p> <p>9 from one side is also described by the police official in</p> <p>10 the second statement from the police side as well. So it's</p> <p>11 something that we should look at from both sides.</p> <p>12 MR MPOFU: Yes.</p> <p>13 COMMISSIONER HEMRAJ: Aren't the</p> <p>14 circumstances of that shooting different from the one that</p> <p>15 Mr Mpofu is putting to you in the current statement?</p> <p>16 GENERAL NAIDOO: Chair, if they're</p> <p>17 describing the wounds and the shooting in the arm and on</p> <p>18 the head and etcetera, the Sergeant describes exactly the</p> <p>19 same type of shooting, and it was more or less in the same</p> <p>20 area where the bulk of the people were. If we remember, we</p> <p>21 went through that exercise of trying to see, locate where</p> <p>22 this Sergeant, he said he entered the bush there and the</p> <p>23 shooting occurred.</p> <p>24 MR MPOFU: Thank you, General. I must</p> <p>25 say I appreciate your honesty in pointing out that</p>	<p style="text-align: right;">Page 25160</p> <p>1 with their arms up and who was disarmed by the police?</p> <p>2 GENERAL NAIDOO: No, Chair, there was a</p> <p>3 large number.</p> <p>4 MR MPOFU: In fact that would be an</p> <p>5 almost impossible exercise, correct?</p> <p>6 GENERAL NAIDOO: Possibly, yes.</p> <p>7 MR MPOFU: Yes, and so of the 259 people</p> <p>8 that were arrested, any one of them could have fallen into</p> <p>9 the group that merely came out with their hands and</p> <p>10 carrying no arms, correct?</p> <p>11 GENERAL NAIDOO: That's possible, Chair.</p> <p>12 MR MPOFU: Thank you.</p> <p>13 CHAIRPERSON: Mr Mpofu, I'm reminded I</p> <p>14 must take the tea adjournment soon, but obviously when it's</p> <p>15 convenient for the purposes of your cross-examination we'll</p> <p>16 do so. I don't want to interrupt you –</p> <p>17 MR MPOFU: Chair, it will make better</p> <p>18 sense to do it right now, Chairperson, because I'm coming</p> <p>19 towards the end, then I'll have a chance just to look</p> <p>20 through my notes.</p> <p>21 CHAIRPERSON: Yes, very good. We'll take</p> <p>22 the tea adjournment at this point, quarter of an hour.</p> <p>23 MR MPOFU: Thank you, Chairperson.</p> <p>24 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>25 [15:25] CHAIRPERSON: The Commission resumes.</p>

<p style="text-align: right;">Page 25161</p> <p>1 Major-General, you're still under oath.</p> <p>2 GENERAL NAIDOO: Still under oath, Chair.</p> <p>3 CHAIRPERSON: Mr Mpofo?</p> <p>4 GENERAL NAIDOO: s.u.o.</p> <p>5 CROSS-EXAMINATION BY MR MPOFU (CONTD.):</p> <p>6 Thank you, Chairperson. General, I'm just going to ask you</p> <p>7 one or two questions on a very narrow matter which I've not</p> <p>8 seen on the record but I can bet that Mr Chaskalson must</p> <p>9 have dealt with it but I'm just going to – I need you to</p> <p>10 look at L67 and L142. Let's rather, let's start with L67.</p> <p>11 Yes.</p> <p>12 CHAIRPERSON: You see the – have you</p> <p>13 found the slide?</p> <p>14 GENERAL NAIDOO: Yes, Chair.</p> <p>15 CHAIRPERSON: It's on the screen, of</p> <p>16 course.</p> <p>17 MR MPOFU: Thank you, yes.</p> <p>18 CHAIRPERSON: It says "Designated command</p> <p>19 positions" –</p> <p>20 MR MPOFU: Yes.</p> <p>21 CHAIRPERSON: On the JOCCOM, isn't it?</p> <p>22 MR MPOFU: Yes. Thank you, Chairperson,</p> <p>23 and where it's pointing to the last dash from the bottom,</p> <p>24 second last, sorry yes. "Commander of reserve and support</p> <p>25 forces, Major-General Naidoo. Role, manage and reserve" –</p>	<p style="text-align: right;">Page 25163</p> <p>1 MR MPOFU: 142, yes, sorry.</p> <p>2 CHAIRPERSON: No, but – yes, 142 is the</p> <p>3 correct one.</p> <p>4 MR MPOFU: General, the only question</p> <p>5 really is, from a reading of those two slides it would seem</p> <p>6 that under normal circumstances you were not allowed to</p> <p>7 release any of your units unless you were required to do so</p> <p>8 by the operational commander.</p> <p>9 GENERAL NAIDOO: That's correct, Chair.</p> <p>10 MR MPOFU: Yes. And then there's the</p> <p>11 second question which flows from that, is – and again I'll</p> <p>12 try and short-circuit it without having to play the video.</p> <p>13 I hope you have seen the relevant video. If you haven't,</p> <p>14 you either accept my word or we'll have to play them. Some</p> <p>15 of the evidence that we have seen from the videos shows us</p> <p>16 the mounted unit, I think that's what it's called –</p> <p>17 GENERAL NAIDOO: Yes, Chair.</p> <p>18 MR MPOFU: - around the area of scene 1,</p> <p>19 assisting in the dispersion, so to speak, chasing people</p> <p>20 around. Do you remember seeing that on any of the videos?</p> <p>21 GENERAL NAIDOO: Chair, I remember seeing</p> <p>22 the mounted unit. They were doing a sweep from forward</p> <p>23 holding area 1 towards scene 1, yes.</p> <p>24 MR MPOFU: Yes. And so those people,</p> <p>25 insofar as they were now far away from forward holding area</p>
<p style="text-align: right;">Page 25162</p> <p>1 rather – "manage the reserve and support forces kept at</p> <p>2 FHA, releasing resources as required by the operational</p> <p>3 commander." Do you see that?</p> <p>4 GENERAL NAIDOO: I see that, Chair.</p> <p>5 CHAIRPERSON: If that's the position on</p> <p>6 the 14th of August –</p> <p>7 MR MPOFU: Yes.</p> <p>8 CHAIRPERSON: At that stage there was</p> <p>9 only one forward holding area.</p> <p>10 GENERAL NAIDOO: That's correct.</p> <p>11 CHAIRPERSON: Subsequently forward</p> <p>12 holding area 2 was added.</p> <p>13 GENERAL NAIDOO: On the 15th.</p> <p>14 CHAIRPERSON: But I take it that it</p> <p>15 didn't alter your responsibilities insofar as they related</p> <p>16 to the reserve and support forces kept at forward holding</p> <p>17 area 1.</p> <p>18 GENERAL NAIDOO: That's correct, Chair.</p> <p>19 MR MPOFU: Thank you. And then the slide</p> <p>20 141, as the Chair says, pertains to the 16th, hence it now</p> <p>21 says forward holding area 1.</p> <p>22 CHAIRPERSON: No, 141 relates to</p> <p>23 immediate reaction area 2.</p> <p>24 MR MPOFU: 142. I'm sorry, Chair.</p> <p>25 CHAIRPERSON: What you want is 142.</p>	<p style="text-align: right;">Page 25164</p> <p>1 1, would have been released to – sorry, would have been</p> <p>2 released by you, correct?</p> <p>3 GENERAL NAIDOO: Chair, as I testified</p> <p>4 during the initial cross-examination, when certain people</p> <p>5 were placed at immediate response area 1, then the mounted</p> <p>6 unit was placed at forward holding area 1 in a ready</p> <p>7 position to sweep towards scene 1 and/or the dispersion</p> <p>8 area, yes.</p> <p>9 MR MPOFU: Yes. Now what I find</p> <p>10 remarkable and I'm inviting you to comment if you share my</p> <p>11 surprise, is that one of the units under your command,</p> <p>12 namely the mounted unit, would have managed to get to scene</p> <p>13 1 to sweep, as you call it, even before another unit under</p> <p>14 your command, namely the medical services which I would</p> <p>15 assume was more urgently needed, had gotten there. Would</p> <p>16 you comment on that?</p> <p>17 GENERAL NAIDOO: Chair, yes. Firstly,</p> <p>18 what you said was true and secondly, I think we covered</p> <p>19 that in testimony when we indicated the units, the mounted</p> <p>20 unit was placed in direct proximity to scene 1 because of</p> <p>21 the terrain between forward holding area 1 and the, what</p> <p>22 became scene 1 and whereas the other units were directed to</p> <p>23 take the route of the immediate response area and we went</p> <p>24 through the whole exercise indicating what happened there</p> <p>25 and how eventually we did not arrive at where we intended</p>

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1 to arrive.

2 MR MPOFU: Thanks. Okay, that's fine. I

3 remember that explanation but you would agree that at face

4 value one would've expected of your units, the one that

5 should have gotten around scene 1 before anybody else,

6 given the tragedy that had just occurred, should have been

7 the medical services.

8 GENERAL NAIDOO: Chair, we've already

9 acceded to that.

10 MR MPOFU: Yes, thank you. Alright.

11 Well, Chairperson, I have several matters that I would have

12 wanted to put to the General but I don't want to, since

13 that phrase has been used so much on television, I don't

14 want to put to him unnecessary things that have already

15 been covered in the testimony, as long as the usual

16 arrangement holds, Chairperson, that you won't hold it

17 against me if I have not put a specific version to him.

18 Most of it has been put in the course of the questioning.

19 CHAIRPERSON: I've indicated that to you

20 previously.

21 MR MPOFU: Yes.

22 CHAIRPERSON: And I don't propose

23 deviating or departing now from what I said earlier.

24 MR MPOFU: Yes. Thank you, Chairperson.

25 In that case I have nothing further. Thank you, General.

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1 CHAIRPERSON: Mr Semenya – Mr Mpofo was

2 the last cross-examiner, that was the way it was intended

3 to be. Mr Semenya, are you ready to do the re-examination

4 now or do you wish to do that next week?

5 MR SEMENYA SC: With your permission,

6 Chair, can I do that next week?

7 CHAIRPERSON: I doubt whether you'll

8 finish it today. I don't know how long your re-examination

9 will be but it's probably desirable that it should be dealt

10 with all in one and you'll presumably be better able to

11 prepare yourself for it next week. I understand you're not

12 available on Monday and Tuesday. I also understand that

13 the next witness, Colonel Vermaak, who is going to be led

14 by Adv Pillay, is likely to be about two days. So that

15 seems to fit in quite neatly with our schedule if he gives

16 evidence-in-chief Monday and Tuesday, then on Wednesday

17 morning we have the – I take it that it will only be

18 Wednesday morning, although one never knows in this

19 Commission, we'll then deal with the resumption of the

20 application for an in camera hearing. Is that so?

21 MR SEMENYA SC: That is indeed so, Chair.

22 CHAIRPERSON: Yes, Mr Budlender?

23 MR BUDLENDER SC: Chair, I've just

24 discussed this with Adv Pillay. She thinks that in chief

25 Lieutenant-Colonel Vermaak will not be as much as two days.

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1 She seems very confident about it, so we may have a dead

2 period on Tuesday sometime unless somebody else cross-

3 examines first.

4 MR SEMENYA SC: Chair, you would recall

5 we were going to be cross-examining but we were going to do

6 that last, so there would be a whole number of other

7 parties who may –

8 CHAIRPERSON: Yes, the arrangement was

9 that, for reasons that I don't have to elaborate on, it was

10 likely that you would wish to cross-examine Colonel Vermaak

11 after other counsel have cross-examined. Alright, well,

12 that being –

13 MR BUDLENDER SC: What we'll then do,

14 Chair, is we will ask for, we'll send out a note today to

15 everyone reminding them if they want to cross-examine

16 Lieutenant-Colonel Vermaak they must get in applications

17 now.

18 CHAIRPERSON: Yes.

19 MR BUDLENDER SC: So that you can decide

20 which will be permitted.

21 CHAIRPERSON: Yes. I think they should

22 get in the applications by the end of tomorrow and so I can

23 consider the applications on Thursday and then give my

24 rulings so that's all in place by the time the evidence-in-

25 chief begins on Monday. And then we've already agreed that

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1 the police will cross-examine last so the position that Mr

2 Mpofo likes to occupy to cross-examine I'm afraid he's not

3 going to have this time but there are reasons which I'm

4 sure Mr Mpofo understands.

5 MR MPOFU: Chair –

6 CHAIRPERSON: The parties can agree among

7 themselves as to order of cross-examination.

8 MR MPOFU: Chairperson, yes –

9 CHAIRPERSON: And the evidence leaders of

10 course won't cross-examine on this occasion.

11 MR MPOFU: Yes.

12 CHAIRPERSON: At least I take it not,

13 because one of the evidence leaders will be leading the

14 evidence.

15 MR MPOFU: Will be leading, correct.

16 Yes, Chairperson, on a serious note, you're quite right

17 that I usually like to be the last cross-examiner but my

18 instructions, in fairness to Mr Semenya, will be that the

19 issue of SAPS cross-examining Vermaak who's virtually their

20 own witness in a way, last, is something that we will take

21 instructions on. I'm not quite sure that it would be

22 appropriate, seeing that it's likely to be friendly fire,

23 as it were. I think it would be better for us –

24 CHAIRPERSON: No – no, I understand that

25 the reasons for the request that they cross-examine last is

1 they don't intend their fire to be friendly.
2 MR MPOFU: Well, in that case –
3 CHAIRPERSON: On the contrary.
4 MR MPOFU: I accept that, Chair.
5 CHAIRPERSON: That's the reason.
6 MR MPOFU: Thank you.
7 CHAIRPERSON: But –
8 MR MPOFU: We'll discuss it with Mr
9 Semenya.
10 CHAIRPERSON: You can discuss it with Mr
11 Semenya outside the chamber.
12 MR MPOFU: Thank you, Chairperson.
13 CHAIRPERSON: Alright, so we'll adjourn
14 now until Monday morning 9 o'clock.
15 [COMMISSION ADJOURNED]
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