

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

Lukmos
—communications—

18 MARCH 2014

TRANSCRIPT DAY 204 PAGES 25005 TO 25169

1 **[PROCEEDINGS ON 18 MARCH 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 is right, Chairperson.

7 **CHAIRPERSON:** Let me just find your
8 heads. There is 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, Chairperson?

13 **CHAIRPERSON:** One of your colleagues.

14 **MS BARNES:** Yes. Yes, we have made
15 copies of that. You will see that we refer to it in our
16 heads. We have also made copies, Chairperson, 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:** Chairperson, 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 am not sure which
25 portions of the heads you are going to be referring to

1 because if you are going to say things that are not in the
2 heads I shall have to write them down. That is –
3 **MS BARNES:** Yes, Chairperson, 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. We make the argument in that section
7 that the Commission ought not to exercise its discretion in
8 favour of granting the SAPD 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 is right, Chairperson, 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 would like to refer the
19 Commission to, it would slot in on page 7, paragraph 19 of
20 our heads. That is where we deal with the principle of
21 statutory interpretation, which we say applies in this
22 case. We point out, Chairperson, that the principle is also
23 sometimes referred to as *generalia specialibus non*
24 *derogant*, in other words *specialibus* –

25 **CHAIRPERSON:** [Microphone off,

1 **inaudible]**.

2 **MS BARNES:** The general does not derogate
3 from the specific. It is the same principle, and of course
4 it applies –

5 **CHAIRPERSON:** [**Microphone off, inaudible]**

6 **MS BARNES:** The case we would 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 29I 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.” Therefore, 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, Chairperson, we endorse the submissions that were made
23 yesterday by Mr Brickhill that the SAPD bears the onus in
24 this application to establish that there is a reasonable
25 possibility of harm occurring to Mr X, and of course that

1 there is a causal connection between the acts of testifying
2 in the open Commission and the possibility of harm. It
3 does not, there is no onus on the opposing parties in that
4 regard. It is not our onus to discharge. It –

5 **CHAIRPERSON:** I doubt whether the SAPD
6 would contend the contrary. I mean they accept, they are
7 asking us to make an order in their favour and they must
8 justify it. I did not detect any suggestion that you must
9 show why I should not make the order. That is right, Mr
10 Semanya, is it not?

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 does not mean you bear an
18 onus, but if in fact you do not dispute it then it could be
19 accepted that you do not quarrel with the contention that
20 there would be some harm, but that is not an onus point,
21 that is something different.

22 **MS BARNES:** Well Chairperson, we have disputed
23 it. Mr Brickhill made that point yesterday as well, so I
24 do not need to repeat that. We have disputed it, but I
25 simply make the point that the onus is on SAPD in this

1 regard.

2 Chairperson, if I might then turn to, well draw

3 specific attention on the question of, this question of the

4 harm to paragraphs 29 to 31 of our heads of argument.

5 Chairperson, we quote in paragraph 29 of our heads – it is on page

6 10 – we quote from the replying affidavit filed by Mr

7 Pretorius on behalf of SAPD, which says the following, “I

8 put it no higher than it is a reasonable apprehension for

9 one such as Mr X, or members of his family, that harm may

10 befall them if the limited protection sought in terms of

11 the application is not granted.” So that is the allegation

12 that is made. We note that the allegation is made for one

13 such as Mr X, not even specifically in relation to Mr X

14 himself.

15 We make the further point in paragraph 30 of our

16 heads that says no direct evidence from Mr X himself as to

17 the fear that he allegedly harbours. There is also no

18 detail provided in the application at all as to the basis

19 of such fear as is allegedly harboured, and without that

20 the causal connection that is required we submit has simply

21 not been established.

22 And then, Chairperson, on the question of harm we

23 submit with respect that in addition to the test which I

24 think was essentially agreed upon yesterday, the test set

25 out in S versus Leepile, there is another important but

1 related, or important and related standard that applies and
2 it is the standard of necessity. It is the principle that in
3 an application such as this relief which infringes upon the
4 publicity of proceedings such as this can only be granted
5 if it is necessary, not merely convenient.

6 **CHAIRPERSON:** That is dealt with in the
7 Australian case, the *BUSB* case to which my attention was
8 drawn. There is some quite interesting dicta by the
9 Australian judges on that point, going back to a judgment
10 of Chief Baron Pollock in the 19th century I think, but one
11 of the problems of course that you would have is the
12 enabling section as far as, or empowering section as far as
13 in-camera aspects of the matter talks about necessary or
14 desirable, so that I am not sure that, certainly as far as
15 the in-camera part is concerned, I understand that you may
16 want to argue the video link is on a different basis, but
17 certainly the in-camera part, there the test in the
18 Commissions Act is simply desirability. I was not saying
19 that by way of endeavouring to end this debate.

20 I mean are there authorities or particular aspects you wish
21 to bring to my attention -

22 **MS BARNES:** Yes -

23 **CHAIRPERSON:** - of relevance with regard
24 to the standard of necessity. I have a bit of conceptual
25 difficulty with that. You know it is like the argument that

1 the person's is only slightly pregnant. I mean, you know,
2 you are pregnant or not pregnant. Now something is
3 necessary or it is not necessary, but the Australians, and I
4 think the English references in the judgment seem to think
5 there are standards of necessity and that may be right, but
6 I have to get my mind around that. Perhaps you can help
7 me.

8 **MS BARNES:** Well, Chairperson, we do refer in
9 our heads on page 9, paragraph 26, to the Scott case and
10 the Scott case deals with this standard of necessity in
11 this context and –

12 **CHAIRPERSON:** That is a case that is often
13 been cited with approval in South Africa.

14 **MS BARNES:** That is correct, Chairperson, and
15 this particular passage, which I shall refer to now, was cited
16 with approval by Ackerman in the S versus Leepile case. I
17 believe that was number 4.

18 **CHAIRPERSON:** He was referred to - I am
19 sure he would have found it himself even if we hadn't
20 referred him to it.

21 **MS BARNES:** Chairperson, the Scott versus Scott
22 reference, page 9, paragraph 26 of our heads is, or if I
23 might start here, "The burden lies on those seeking to
24 displace its application, which is the application of
25 publicity in the particular case to make out that the

1 ordinary rule must of necessity be superseded by this
2 paramount consideration. The question is by no means one
3 which consistently with the spirit of our jurisprudence can
4 be dealt with by judges as resting in his mere discretion
5 as to what is expedient. The latter must treat it as one
6 of principle and as turning not on convenience but on
7 necessity." As we have said, Chairperson, that is been quoted
8 with approval in our courts.

9 We also refer, Chairperson, to the international law,
10 and I shall come to that -

11 **CHAIRPERSON:** I am sorry to interrupt you.

12 Just before you move on, were you given a copy of the
13 judgment in the BUSB case to which Ms Pillay referred?

14 Well, on -

15 **MS BARNES:** We were not, Chairperson.

16 **CHAIRPERSON:** Well then in order to
17 enable you to help me I would better lend you my copy, but what
18 she gave me was a bundle with a number of Australian cases
19 from the High Court, which are referred to in the BUSB case
20 and at the end of the bundle is a judgment of the Court of
21 Criminal Appeal in the New South Wales, BUSB versus The
22 Queen and at page 10 of the - it is a report downloaded from
23 the internet, page 10 of 19 there is a section on the
24 implied power, the concept of necessity, and so forth, and
25 there is a reference to a dictum of Chief Baron Pollock in

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 have 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 will find BUSB in the top left-hand
7 corner, indicating what you are looking for, and at page 10
8 of 19. Now you will 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 is the
21 Australian way of putting it, the dictum by Pollock CB is
22 then given in paragraph 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 is a passage from which I think you may derive some

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 is the passage, which I think, is
5 relevant for you to deal with. I know it is a bit unfair
6 because you have 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, Chairperson. 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 SAPD 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

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 are 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 is the point Ms Pillay
9 made and I doubt very much if the SAPD will contend to the
10 contrary. So you are 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, Chairperson. 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 is difficult to interpret
20 a statute by effectively deleting two words, which is what
21 you are arguing for. The more sophisticated argument, and
22 I am not being unkind when I put it to you, but it is really
23 that I have not 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

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 is really what you are saying, is it not?

4 **MS BARNES:** Indeed, that is precisely our
5 submission, Chairperson.

6 **CHAIRPERSON:** Because I mean I cannot
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, Chairperson -

10 **CHAIRPERSON:** - the kind of argument that
11 might have commended itself to Lewis Carroll, but it
12 does not commend itself to -

13 **MS BARNES:** Chairperson, I was not 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 Chairperson, 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 SAPD when
23 they reply.

24 **MS BARNES:** So Chairperson, we would submit
25 that insofar as the SAPD deal in their application with

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 –

5 **CHAIRPERSON:** [*Microphone off, inaudible*]

6 **MS BARNES:** And accordingly, Chairperson, 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 SAPD have failed
11 to make out a case on two scores in terms of both the
12 standards that they are 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, which is 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, Chairperson, move to deal with section
19 D of our heads of argument, and here, Chairperson, 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, Chairperson, 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

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, Chairperson, 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 Chairperson 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 is 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

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 is 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 –
10 ***CHAIRPERSON: [Microphone off, inaudible]***
11 I am not sure that that is 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 do not know whether the proceedings will be
15 televised. They used to be on YouTube but presumably it
16 was thought that it was not necessary anymore, there were
17 better things to exhibit on YouTube so we are 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 is going on, people go in
24 as accused and come out as convicted people, which will be
25 different. I do not know that this factor, with respect,

1 carries much weight [**cellphone disturbance**].

2 Now I am going to give the person concerned five
3 seconds to turn that thing off, otherwise I am going to ask
4 him to leave. Alright, let us carry on. Let us hope it is
5 been turned off so I do not have to do what I was
6 threatening to do.

7 **MS BARNES:** Yes, Chairperson, we merely submit
8 that that is a general factor, a factor in general terms in
9 favour of publicity, but not that there would be – we do not
10 suggest that there would be a particular risk in that
11 regard in this case –

12 **CHAIRPERSON:** I am 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. 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

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.

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,
14 except by the direct and personal putting of questions and
15 obtaining of immediate answers."

16 **CHAIRPERSON:** But would that not 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 does not 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 is not intended by the police
25 to ask us to abandon that particular safeguard. That must

1 be so surely?

2 **MS BARNES:** Well, Chairperson, 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.

7 The other point, Chairperson, 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 –

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, cannot you see the person's demeanour on Skype?

15 **MS BARNES:** It is 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 –

18 **CHAIRPERSON:** Well, I do not think it is

19 suggested that this is going to be a Skype connection we are

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 am not

25 sure that is one of your better points, Ms Barnes, if I may

1 say.

2 **MS BARNES:** Well Chairperson, 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 is all that one has to deal
9 with. So I am not sure what –

10 **CHAIRPERSON:** Are we going to have a
11 small photo image in this case, Mr Semenya?

12 **MR SEMENYA SC:** Crystal clear, I am told,
13 Chairperson.

14 **CHAIRPERSON:** Fairly big? Larger than
15 life-size?

16 **MR SEMENYA SC:** Larger than life-size,
17 Chairperson. It will be on the screen.

18 **CHAIRPERSON:** Well, if that does not
19 happen you can – if I grant the order, and I still have not
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. Anyway, if of course you succeed
24 in your contention that the order should not be granted then
25 that point will not arise.

1 **MS BARNES:** Yes. Yes, thank you, Chairperson.

2 So it is a practical concern that we raise and so there is a

3 principled concern in relation to the cross-examination

4 being indirect by virtue of the medium, but there is also a

5 practical consideration that we raise in relation to video

6 links. Perhaps as the Chairperson has indicated, SAPD 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.

10 Chairperson, 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 is 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 –

21 **CHAIRPERSON:** The families for whom you

22 appear might be in a slightly weaker position as far as

23 that is concerned because the allegations are not against

24 them personally but against their deceased breadwinner.

25 But clearly, I can understand why from a human emotional

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, Chairperson, 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 am 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 Chairperson. Chairperson, then in paragraph 42 of our heads we make
21 the point that – and I do not think it is a controversial
22 point –

23 **CHAIRPERSON:** I am sorry, I said you were
24 appearing for the families. You are sort of appearing on
25 behalf of the families amongst others at the moment, but

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 is quite correct,

6 Chairperson. So in paragraph 42 of our heads, Chairperson, we make the
7 point that it has been recognised in our law – and I do not
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. Chairperson, 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.

1 It does not 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 have got South African authority applying the
6 open court publicity principle to commissions. All I am
7 saying to you is, it seems the European Convention does not
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 Chairperson, 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. Chairperson, 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 shall just write Kostovski paragraph – have you

1 given copies of these judgments to your learned friends for

2 SAPD?

3 **MS BARNES:** I believe we have, yes.

4 **CHAIRPERSON:** I see, alright. So they will

5 be able to answer on these points if they have answers they

6 wish to give us.

7 **MS BARNES:** Chairperson, then in the next

8 paragraph, that is 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 is not referred to –

14 **CHAIRPERSON:** How do you spell Doorson?

15 **MS BARNES:** It is D-O-O-R-S-O-N.

16 **CHAIRPERSON:** Doorson, what is 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

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 is
4 instructive to have regard to them in the circumstances.
5 So Chairperson, we would submit that the considerations
6 militating against the grant of the relief sought by SAPD
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, Chairperson.

15 **CHAIRPERSON:** Thank you, Ms Barnes.

16 **MR MPOFU:** Chairperson, I do not 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 Chairperson, 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

1 we are saying, even though I do not directly act for them.

2 Thanks, Chairperson.

3 **CHAIRPERSON:** Thank you. Yes, you have

4 anticipated a question I am going to ask the representatives

5 for SAPD when they reply. Does anyone else want to have –

6 you have got your microphone on, Ms Barnes.

7 **MS BARNES:** Chairperson, I apologise, there is

8 an important fact that I omitted. It is 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 am not sure if she is here today. She is

13 the wife of Julius Langa who lost his life on Monday, the

14 13th of August 2012.

15 **[09:52]** She is not represented by any attorney.

16 **CHAIRPERSON:** As far as I understand

17 she is never put herself on record but nevertheless she

18 obviously have 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 is not represented. I do not know whether you have had an

1 opportunity to interview her at any stage.

2 **MR BUDLENDER SC:** No, Chairperson, 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 are prepared to interview her and insofar as there is any

9 point she wishes to have conveyed, you are prepared to

10 convey it on her behalf?

11 **MR BUDLENDER SC:** We shall certainly do so,

12 Chairperson.

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 shall understand each other. Okay, okay. I will try it in

20 my broken Zulu, yes.

21 **CHAIRPERSON:** You might explain to her it

22 will not impose any obligations on her.

23 **MR MPOFU:** Okay, she says thank you. I

24 think we shall explain it through the other representatives as

25 well.

1 **CHAIRPERSON:** Thank you.

2 **MR MPOFU:** Thank you, Chairperson.

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 am

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 is 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, which is an important point. I had not 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 SAPD, Ms Baloyi or Mr Semenya?

22 **MR SEMENYA SC:** I will, Chairperson. Chairperson,

23 before I do though –

24 **CHAIRPERSON:** Shall we take a comfort

25 break now? I am in your hands.

1 **MR SEMENYA SC:** Yes.

2 **CHAIRPERSON:** It is not necessary, I would

3 take it a bit later but if you do not want an interruption

4 in the course of your address it might be sensible to take

5 the comfort break now but you must tell me.

6 **MR SEMENYA SC:** May I take that offer,

7 Chairperson, immediately after making this announcement?

8 **CHAIRPERSON:** Yes.

9 **MR SEMENYA SC:** There is a confirmatory

10 affidavit of Brigadier Van Zyl together with one by Darren

11 Rangasamy, dealing with the costs associated with giving

12 the protection to Mr X if he were to testify in open

13 hearing. I am told these were given to parties this

14 morning. It may be that they are in an unsigned form as we

15 speak –

16 **CHAIRPERSON:** Well, they are also, apart

17 from the unsigned form of the affidavit, Mr Gotz and Ms

18 Barnes and I do not know about the other – and Mr Mpofu and

19 Mr Brickhill are all shaking their heads. So from their

20 body language it would appear that they do not have those

21 affidavits. So perhaps let us take the adjournment now.

22 You can make sure they've got the affidavits and then we

23 can proceed, that piece of housekeeping having been

24 attended to. And we also have not got copies so we are all

25 equally disadvantaged, the opposing parties and the

1 Commission. We shall take the comfort break, I think we shall
2 take it for 15 minutes so that this matter can be – perhaps
3 yes, let us take it for 15 minutes now to give ample time for
4 this point to be dealt with.

5 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

6 **[10:33] CHAIRPERSON:** The Commission resumes. We
7 were waiting before coming back, to receive copies of the
8 affidavits to which we were referred by Mr Semenya. We have
9 now just a few moments, a few minutes ago received a copy
10 of the affidavit from Brigadier Van Zyl, the provincial
11 head of the detective services in the North-West Province,
12 a confirmatory affidavit of Mr X and an explanatory
13 affidavit by Colonel Rangasamy. I take it that exhibits
14 must now be handed in as exhibits. They would not really be
15 part of the Mr Mdze series. I should imagine we should
16 call them NNN1, 2, 3. Is that – and I suppose we should
17 actually also, while we are about it, give exhibit numbers
18 to the other affidavits that we have not done yet. So what
19 we shall do is we will make the Notice of Motion NNN1, the
20 Notice of Motion of the application NNN1. NNN2 will be the
21 opposing affidavit, NNN3 –

22 **MS PILLAY:** With annexures, Chairperson, the
23 opposing affidavit with annexures.

24 **CHAIRPERSON:** Yes, with annexures, that is
25 correct, with annexures. NNN3 will be the replying

1 affidavit and then shall we make these NNN4.1, 2, 3.

2 NNN4.1 is the affidavit of Brigadier – no, that is really I

3 suppose Brigadier Van Zyl's is the first one. NNN4.1 is

4 the affidavit of Brigadier Van Zyl. NNN4.2 is the

5 affidavit of Colonel Rangasamy and NNN4.3 is the affidavit

6 of Mr X. Do any of the parties wish to say anything with

7 regard to the affidavits that have been handed in?

8 **MR MPOFU:** Yes, Chairperson. Thank you,

9 Chairperson. Chairperson, we are, to say the least,

10 disturbed by this development. These affidavits

11 effectively purport to be supplementary affidavits which

12 are being advanced without even the pretence of an

13 explanation as to why they are only being advanced at this

14 stage. They raise material issues, which we would like to

15 deal with but more than that, Chairperson, they raise

16 matters which we, in respect of which we asked for

17 explanations in our answering affidavits, which

18 explanations were not forthcoming in the replying

19 affidavit. And so one cannot now, when the pleadings have

20 closed, seek to deal with matters that were raised in the

21 answering affidavit. Not only after the pleadings have

22 closed but after argument by our side, as it were, which

23 makes it even worse. It might have been understandable if

24 we were given these late, for practical purposes, but

25 allowed to have incorporated them into our argument or to

1 have filed an answering affidavit, even if it was a
2 supplementary affidavit. We might not have quibbled with
3 it as long as we would have had a chance to deal with the
4 material because these proceedings are not, you know we
5 do not, are not run on a technical basis as such but it is
6 not a technical matter, it is a matter of substance that we
7 have to deal with this material.

8 Secondly, Chairperson, even a cursory browsing of
9 these documents would suggest that some of the material
10 here we have to counteract by making our own
11 investigations. I shall just make a simple example,
12 Chairperson.

13 **CHAIRPERSON:** Mr Mpofo –

14 **MR MPOFU:** Yes, Chairperson?

15 **CHAIRPERSON:** You can carry on.

16 **MR MPOFU:** Yes, I shall –

17 **CHAIRPERSON:** I want to say this to you –

18 **MR MPOFU:** - two other points, Chairperson.

19 **CHAIRPERSON:** It seems to be undesirable

20 – Well, you make your two points first before I tell you

21 what it is –

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

23 The second point, Chairperson, is that as I say, even a

24 quick look on this suggests that there will be unhelpful at

25 best, or if not irrelevant completely to the inquiry that

1 needs to be made and I shall make a very simple example.

2 **CHAIRPERSON:** If they are irrelevant then

3 of course you do not have to worry about them but it is 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 are 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 am saying is that even that point we might raise *in*

21 *limine* in an answering affidavit but the point I am making

22 is that –

23 **CHAIRPERSON:** I do not think that this

24 forum is one where we either allow witnesses to be battered

25 or *in limine* points to be taken.

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 do not 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 am sure.

16 **MR MPOFU:** Yes. Thank you, Chairperson,
17 we shall raise these in writing in good time. The third one
18 is the fact that somehow in the –

19 **CHAIRPERSON:** You do not have to raise it
20 in writing, you have raised it, it'll be transcribed, Mr
21 Semenya has heard it, if he thinks there is anything in it
22 he will supplement.

23 **MR MPOFU:** Okay.

24 **CHAIRPERSON:** If he thinks there isn't
25 anything in it he will tell us later.

1 **MR MPOFU:** Well, I would like an – well,
2 what I am trying to say, Chairperson, whether it is in
3 writing or verbally does not matter, we would like a proper
4 opportunity to – so what I am saying here now is what I am
5 saying after having looked at these things for 10 minutes,
6 so I do not 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, have 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, yes. No, no –

21 **CHAIRPERSON:** That is a better way of
22 putting it.

23 **MR MPOFU:** The longer it is, the better
24 for the weight of what I am about to say, Chairperson. The
25 point really is that this is something that we have raised

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 do not know
4 why it was withheld. It is just sneaked in as part of a
5 costing exercise and it is 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 is even a better
11 point, it was apparently typed in February.

12 **MR MPOFU:** Chairperson? Oh well, that is
13 another – yes, it is typed in February and which –

14 **CHAIRPERSON:** Mr Mpofo, I do not 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 is another matter.

23 **MR MPOFU:** Sure.

24 **CHAIRPERSON:** That Mr X could be killed
25 if he –

1 **MR MPOFU:** By the widows.

2 **CHAIRPERSON:** - if he comes and gives

3 evidence and the application is not granted. So therefore

4 it is 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 is no

7 affidavit from Mr X and because his affidavit is out of

8 time and, you know, the sort of affidavit one does not

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 would have

13 the whole exercise all over again. So let us concentrate on

14 the matter.

15 **MR MPOFU:** No, Chairperson –

16 **CHAIRPERSON:** What I am 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

1 then you come with affidavits and so on. So the only
2 question – I see you are 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 do not know
8 whether you work on a public holiday but that gives you two
9 days because we are not sitting tomorrow because these
10 chambers are not available and we decided not to sit
11 Thursday because Friday is a public holiday, we would 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 is 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 are taking
22 instructions or going to tell me what the instructions are,
23 Adv. Hemraj points out that there is a point that could also
24 have been taken that you did not take, presumably you waived
25 it but nevertheless it may be a point that requires

1 consideration and that is the annexures to Colonel
2 Rangasamy's affidavit are not 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 is 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 are not really interested in those technical issues. The
10 point we are 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, yes. That is all really.

19 **CHAIRPERSON:** Anyway, but this is put up
20 to us as a matter of literally life and death, we have to
21 take it very seriously.

22 **MR MPOFU:** Yes.

23 **CHAIRPERSON:** And we have to, as I say,
24 if the papers are not in order they will just come back again
25 so there is no point –

1 **MR MPOFU:** No, Chairperson.

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 SAPD 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 are saying.

19 **MR MPOFU:** Yes.

20 **CHAIRPERSON:** Let us hear what Mr Semenya

21 says about this.

22 **MR SEMENYA SC:** Chairperson –

23 **CHAIRPERSON:** Of course, it is 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

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:** Chairperson, 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, Chairperson. The second issue, which Mr Mpofu 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 Mpofu I understand that. I said that it might 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:** Chairperson, I am sorry, Chairperson.

1 I need another consent. Chairperson, yes, we are happy with
2 Wednesday. The proposal is therefore that we would file an
3 answer on Monday, if any, and the SAPD 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 do not have to
7 make an order to that effect.

8 **MR MPOFU:** On that, yes –

9 **CHAIRPERSON:** The proposal, Mr Semenya,
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 is not 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, Chairperson.

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

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 shall get his input. He is 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:** Chairperson, I would not 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 do not know how, where he is, but he is close
19 by – unless he can, well, yes. Let us adjourn, take the tea
20 adjournment now and as soon as the tea adjournment is over
21 we would expect the Major-General to be at the witness table,
22 waiting to be reminded he is under oath. We shall now adjourn
23 for tea.

24 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

25 **[11:18] CHAIRPERSON:** The Commission resumes.

1 Major General, you are still under oath.

2 **GANASEN NAIDOO:** Still under oath, Chairperson.

3 **CHAIRPERSON:** Mr Mpofo, you are cross-
4 examining.

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

6 **CHAIRPERSON:** You have 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 is correct, Chairperson. Good morning, Major General.

12 **GENERAL NAIDOO:** Good morning, Advocate.

13 **MR MPOFU:** Okay, I have two sections
14 that I want to deal with, but if you can allow me before
15 that, I am just going to sweep through a few –

16 **CHAIRPERSON:** May I ask you, obviously
17 do not 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 do not 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:** Yes-no, I do not mind,

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 is to do with – yes, it is to do with –

15 okay, I would 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:** Yes, well as I was busy saying

22 to the witness, Chairperson, Major General, I am just going

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

24 It is just to clean up some of the issues that we have already

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

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:** Chairperson 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. 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, Chairperson.

1 **MR MPOFU:** Yes, and in the course of that
2 I suggested among other things that the body of the
3 deceased police officers had been taken to the hospital, whereas
4 the other bodies were left there lying on the veld.

5 **GENERAL NAIDOO:** Chairperson, 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, which is correct.

9 **MR MPOFU:** Yes, that is 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:** Chairperson, I, what I
13 indicated was I remember that there was one deceased
14 police officer 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 is correct.

23 **MR MPOFU:** Yes, which is the correct
24 version?

25 **GENERAL NAIDOO:** Chairperson, which was the one

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:** Yes, well whichever one, but
5 was the body of a deceased police officer taken to the hospital?

6 **CHAIRPERSON:** No Mr Mpofu, that is not
7 what he says. What he says is there was one police officer
8 killed on the scenes. Another police officer 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 am not
14 sure if it is after or while being transported to the
15 hospital, and it was the body of that policeman, the one
16 who did not 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 police officer were airlifted?

22 **GENERAL NAIDOO:** No, Chairperson. Lieutenant
23 Baloyi was airlifted.

24 **MR MPOFU:** Yes?

25 **GENERAL NAIDOO:** As far as I can

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 is the way I understand it.

5 **MR MPOFU:** By road?

6 **GENERAL NAIDOO:** By road, Chairperson.

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 is 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, Chairperson.

13 **MR MPOFU:** Yes, and you contested that
14 statement, correct?

15 **GENERAL NAIDOO:** Chairperson, 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 Chairperson, that is not
23 correct, because it is 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

1 matter on Friday, I think it was.

2 **MR MPOFU:** Okay sorry, I think we are

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:** Yes, 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 Chairperson, 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

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 is the passage that –

5 **GENERAL NAIDOO:** It is 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 is the point I think
11 that Mr –

12 **MR MPOFU:** Yes.

13 **CHAIRPERSON:** - Mpofu is referring to.

14 **GENERAL NAIDOO:** Okay, Chairperson, yes.

15 **MR MPOFU:** Agreed?

16 **CHAIRPERSON:** And also if one goes to
17 your paragraph 25, now that is 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 have
25 now inserted references to the deceased mineworkers which

1 had not appeared in the earlier statement.

2 **GENERAL NAIDOO:** Of course, Chairperson.

3 **CHAIRPERSON:** Now that is the point he is
4 busy with, and he is correct?

5 **GENERAL NAIDOO:** Yes, Chairperson.

6 **CHAIRPERSON:** Alright. So Mr Mpofu, now
7 that I have 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. Yes, 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 do not 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 police officers were simply inadequate, 10 minutes
20 here –

21 **CHAIRPERSON:** You are referring now to the
22 briefing at 2:30 obviously –

23 **MR MPOFU:** Yes, on the 16th.

24 **CHAIRPERSON:** - on the Thursday
25 afternoon.

1 **MR MPOFU:** That is correct, Chairperson,
2 yes. You know what I am talking about? I am now talking
3 about Colonel, the briefings which were sparked by Colonel
4 Scott and continued onwards.

5 **GENERAL NAIDOO:** Of course, Chairperson.

6 **MR MPOFU:** Yes, so I am 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 am
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 am using the correct
21 term, that is the second set of briefing, and then they
22 would go and brief their people. Let us put it like that.
23 Is that correct?

24 **GENERAL NAIDOO:** Chairperson, I think we dealt
25 with this during the original cross-exam. The briefing

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 are saying, there

12 were effectively two briefings, the Scott briefing of the

13 commanders –

14 **GENERAL NAIDOO:** That is right.

15 **CHAIRPERSON:** - and then the briefing by

16 the commanders of the people who were –

17 **GENERAL NAIDOO:** That is correct.

18 **CHAIRPERSON:** - under their command.

19 **GENERAL NAIDOO:** Yes, Chairperson.

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 cannot 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?

1 **GENERAL NAIDOO:** That is 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 Chairperson, 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 Yes, you were hosting the briefing as it were.

12 **GENERAL NAIDOO:** That is correct, Chairperson.

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 us 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:** Chairperson no, I am not sure
24 which one because the NIU had a couple of advances. Is it
25 after I joined the NIU?

1 **MR MPOFU:** Yes. Or at any time did they
2 make an advance to engage the protesters?

3 **GENERAL NAIDOO:** Chairperson, 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. Yes alright, it is 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 shall start at; let us start at line 8, or 6.
16 You said there were approximately two or three people who
17 fired.

18 **GENERAL NAIDOO:** Okay, Chairperson.

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 cannot 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 hill
25 stopped?" "It stopped immediately, yes Chairperson," you say.

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 Chairperson, 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 Chairperson." Remember
6 that?

7 **GENERAL NAIDOO:** I remember that, Chairperson.

8 **MR MPOFU:** Yes, 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:** Chairperson, 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 is
17 what I am saying. So the tools that they would have used
18 for that "engagement" would have been their R5s?

19 **GENERAL NAIDOO:** That is correct, Chairperson.

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 is all
24 they had, correct?

25 **GENERAL NAIDOO:** Chairperson, engage not

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 us go to the – okay, those are the small issues that I

11 wanted to round up with you.

12 **MR SEMENYA SC:** Chairperson, 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 is the reference to me.

17 **CHAIRPERSON:** Yes, we had noticed that

18 there were errors in the transcription and I am not sure

19 that, I am 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 shall just have

23 to thank Ms Matthews for that correction, yes.

24 **CHAIRPERSON:** That was Mr Semanya perhaps

25 speaking in a falsetto voice.

1 **MR MPOFU:** Thank you. General, yes now

2 I am 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, which 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 Mpošana 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 would 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?

1 **GENERAL NAIDOO:** Chairperson, 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 affect those arrests,
13 were made before any problem had started, correct?

14 **GENERAL NAIDOO:** Chairperson 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:** Chairperson, 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?

1 **GENERAL NAIDOO:** Chairperson, as I testified, I
2 was not aware of the mortuary vans at that stage –

3 **MR MPOFU:** Yes, you –

4 **GENERAL NAIDOO:** And the circumstances
5 around that, so -

6 **MR MPOFU:** Sorry. Yes, I am sorry, when I
7 say “you” I do not mean you personally. SAPD, to the extent
8 that SAPD brought mortuary vans it would be fair to say
9 that they foresaw deaths?

10 **GENERAL NAIDOO:** Chairperson, I am 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 must not say
17 would –

18 **MR MPOFU:** No, fair enough.

19 **CHAIRPERSON:** - anticipated there might
20 be deaths, and of course it is not clear, because I do not
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:** Yes, well I did not say – that is

1 why I said "persons," Chairperson. Police are also
2 persons.

3 **GENERAL NAIDOO:** Thank you.

4 **MR SEMENYA SC:** Chairperson, for the record, I

5 think the Chairperson 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 was not actually sent, it
11 was on standby. Yes, I see. Anyway, four were asked
12 for, one was made available either – and we have heard on
13 standby. That is 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 is relevant.

20 **MR MPOFU:** Yes, and that is why I asked
21 the question in a neutral fashion. So to the extent that
22 somebody from SAPD ordered or asked for mortuary vans those
23 people, or that person foresaw the deaths to people,
24 correct?

25 **GENERAL NAIDOO:** That is possible, yes.

1 **MR MPOFU:** Thanks.

2 **CHAIRPERSON:** Well, either deaths or

3 possible deaths.

4 **GENERAL NAIDOO:** No, it is deaths, Chairperson,

5 not possible. I said that is possible.

6 **CHAIRPERSON:** Yes, I said possible.

7 **MR MPOFU:** Now let us start then, as I was

8 saying then my clients would like to understand the

9 circumstances of their arrests. Let us start firstly with

10 the people, the arrests that you personally effected.

11 **GENERAL NAIDOO:** Yes, Chairperson.

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:** Chairperson, 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 cannot 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

1 how –

2 **GENERAL NAIDOO:** He was – Chairperson, 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 do not 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 is 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 hill?

1 **GENERAL NAIDOO:** We were walking on the
2 southern side of the hill.

3 **CHAIRPERSON:** Oh, still on the southern
4 side?

5 **GENERAL NAIDOO:** That is correct, Chairperson.

6 **CHAIRPERSON:** I see. I see, you had not
7 reached actually the hill yet?

8 **GENERAL NAIDOO:** No, no, we were far away
9 from the hill, 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 is correct, Chairperson.

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 is necessary to inform the person
24 being arrested of the reason for the arrest.

25 **GENERAL NAIDOO:** Yes.

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 you are doing

5 here, put down your arms, and we are going to arrest you,

6 and then we took – he had a knife and a –

7 **CHAIRPERSON:** You are supposed to tell him

8 what you are arresting him for.

9 **GENERAL NAIDOO:** Yes.

10 **CHAIRPERSON:** That is what the section

11 says.

12 **GENERAL NAIDOO:** Yes.

13 **CHAIRPERSON:** It is no good saying “What

14 are you doing?”

15 **GENERAL NAIDOO:** No, of course –

16 **CHAIRPERSON:** You have to tell him why

17 you are arresting him. You must tell him what the charge

18 is -

19 **GENERAL NAIDOO:** Of course.

20 **CHAIRPERSON:** - on which he is being

21 arrested so that he can if necessary do something. Now was

22 that done?

23 **GENERAL NAIDOO:** Chairperson, as I was

24 indicating that Sergeant Brazier was conversing to him. I

25 tried to now recount some of the things that Sergeant

1 Brazier did tell him. I think I am 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 are 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 is so you can either, and that would include the ones
14 that you are talking about. I do understand that you say
15 you cannot recall correctly, but I am now putting to you
16 positively that they were not told.

17 **GENERAL NAIDOO:** Chairperson, I think that
18 would be unlikely; in addition to these three, I am 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 is unlikely -

23 **CHAIRPERSON:** Are not arrested persons
24 supposed to be told at the time of their arrests what the
25 charge is on which they are being arrested?

1 **GENERAL NAIDOO:** Yes, Chairperson.

2 **CHAIRPERSON:** So in the case of the

3 person who was arrested by Sergeant Brazier you cannot

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:** Chairperson, yes it –

7 **CHAIRPERSON:** - that you cannot say

8 positively that he was informed in the course of his arrest

9 then.

10 **GENERAL NAIDOO:** Chairperson, 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 am taking you to the van, I am

17 arresting you for these things. We asked him, "What are

18 you doing with these weapons?" and things like that. So

19 I am trying to summarise what Sergeant Brazier said –

20 **CHAIRPERSON:** No, I understand. But Mr

21 Mpofu 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.

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 cannot
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 us talk about the bulk of
9 people that were hidden behind the rocks, etcetera, who
10 subsequently came out. I also I think, I am 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 –

1 **MR SEMENYA SC:** Chairperson, our reading of
2 section 39(2) is that it is either at the time of arrest or
3 immediately thereafter.

4 **MR MPOFU:** Yes, well let us assume, for the
5 purposes of this questioning now let us assume that when
6 they eventually got to police stations they were told, you
7 would accept that they were – let us 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, Chairperson.

12 **MR MPOFU:** Yes, and then they were
13 gathered in their large number outside the, in that open
14 arresting area, let us call it that.

15 **GENERAL NAIDOO:** Yes, Chairperson.

16 **MR MPOFU:** That is 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:** Yes, and then from there then
21 they were transported to Lonmin holding cells, or I do not
22 know what you call it, to some place at Lonmin, at Number
23 1, Shaft number 1.

24 **CHAIRPERSON:** I am sure senior counsel
25 who is in attendance today from Lonmin will object if you

1 put it that way.

2 **MR MPOFU:** Yes.

3 **CHAIRPERSON:** Because there is 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 were not, they cannot be

8 described as Lonmin holding cells –

9 **MR MPOFU:** Well, they do have holding

10 cells, as it were, Chairperson, but that is what –

11 **CHAIRPERSON:** - after taking to holding

12 cells.

13 **MR MPOFU:** Yes.

14 **CHAIRPERSON:** But anyway, let us get the

15 terminology right –

16 **MR MPOFU:** Yes, at Shaft number 1.

17 **CHAIRPERSON:** - then we will not have

18 objections.

19 **MR MPOFU:** Let us call it Shaft number 1

20 where they were taken, that is step number 4, correct?

21 **GENERAL NAIDOO:** Chairperson, correct.

22 **MR MPOFU:** Correct?

23 **GENERAL NAIDOO:** Correct, Chairperson.

24 **MR MPOFU:** Yes, now on your version then

25 it was only at step number 4 – oh, and then step number 5

1 they were taken to various police stations, correct?

2 **GENERAL NAIDOO:** That is correct, Chairperson.

3 **MR MPOFU:** Yes, 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, Chairperson. 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 is

11 where they were placed in the larger area. I cannot really

12 say what was being said in vernacular, but the police officers

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 is going to be placing him in the police van, etcetera.

20 I did not; I cannot 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

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:** Chairperson, 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:** Chairperson, 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 do not know if
21 the inference from there, as I said, I cannot 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:** Yes. No, General, I am sorry to

1 belabour this. It is 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 is 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:** Chairperson, which is why I am
8 saying, as most of the members that were speaking to them
9 were speaking vernacular, I cannot 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, Chairperson.

15 **MR MPOFU:** Why was he arrested?

16 **GENERAL NAIDOO:** Chairperson, 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

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 cannot have it
10 both ways. So despite the fact that there was this, what
11 you call illegal gathering, which we shall 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 is correct, Chairperson.

15 **MR MPOFU:** Yes, 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 is correct, Chairperson.

20 **MR MPOFU:** Yes. Now, where are the two
21 weapons?

22 **GENERAL NAIDOO:** Chairperson, 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 –

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 have
4 described?

5 **GENERAL NAIDOO:** I am not sure. We can
6 check with Sergeant Brazier if he can remember, yes, Chairperson.

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:** Chairperson, 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:** Chairperson, I am not sure but

1 we can check with the crime scene people how they processed
2 and entered it, yes.

3 **COMMISSIONER HEMRAJ:** Because will not that
4 be an indication of whom they were recovered from? Will not
5 there be the CAS number that relates to that arrest? Will not
6 that give us some indication?

7 **GENERAL NAIDOO:** Chairperson, yes, 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 is 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 have 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:** Chairperson, no, I have
19 commented already. I have indicated that it would be
20 difficult, yes.

21 **CHAIRPERSON:** Yes, you have indicated it
22 would be difficult. The impression I get is, you cannot
23 really deal specifically with these allegations put to you.

24 **GENERAL NAIDOO:** No, Chairperson.

25 **MR MPOFU:** Well, did you or did you not

1 participate in some of the arrests?

2 **GENERAL NAIDOO:** Chairperson, I specifically

3 indicated the one arrest, yes.

4 **MR MPOFU:** Yes, you participated in the

5 arrest, yes. I am asking you in that capacity so –

6 **GENERAL NAIDOO:** That is why, Chairperson, 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 us 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 is correct, Chairperson.

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 police officers 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 is correct, Chairperson.

23 **MR MPOFU:** And then some of them came

24 out.

25 **GENERAL NAIDOO:** That is correct, Chairperson.

1 **MR MPOFU:** With their hands up.

2 **GENERAL NAIDOO:** Yes, Chairperson.

3 **MR MPOFU:** And they were taken to the,
4 what I have described as the arresting area, correct?

5 **GENERAL NAIDOO:** That is correct, Chairperson.

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:** Chairperson, I think that was
11 the process where they were being searched for any weapons
12 on their person, yes.

13 **MR MPOFU:** Yes. 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:** Chairperson, 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

1 that is when they were subsequently taken to the arresting
2 area and arrested, yes.

3 **MR MPOFU:** Yes. Okay, so let us put those
4 ones aside who came out with their weapons and dropped
5 them, let us consider only the ones who came out with their
6 hands up. Why were those people arrested?

7 **GENERAL NAIDOO:** Chairperson, 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 are covering both in
11 terms of this.

12 **MR MPOFU:** Yes, but these people were
13 disarmed.

14 **GENERAL NAIDOO:** Chairperson, 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 do not
21 know when they disarmed, do you? Or you do not 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

1 arrested?

2 **GENERAL NAIDOO:** Chairperson, 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 have just testified.

7 **GENERAL NAIDOO:** Chairperson, 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 hill 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 hill 1, correct?

17 **GENERAL NAIDOO:** That is correct, Chairperson.

18 **MR MPOFU:** And these events we are talking

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

20 **GENERAL NAIDOO:** That is correct, Chairperson.

21 **MR MPOFU:** That means they had dispersed

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

23 **GENERAL NAIDOO:** Chairperson, I would not

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

25 **MR MPOFU:** Come on, General. Did the

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

2 had they dispersed from hill 1 or not?

3 **GENERAL NAIDOO:** Chairperson, they retreated

4 from hill 1 to hill 3.

5 **MR MPOFU:** They dispersed before they

6 retreated?

7 **GENERAL NAIDOO:** Chairperson, 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 Mpofu, I have been

13 asked, it is 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 am in

16 your hands.

17 **MR MPOFU:** Chairperson, no, it would be

18 convenient, Chairperson.

19 **CHAIRPERSON:** Alright, we shall take a

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

21 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

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

23 Major-General, you are still under oath.

24 **GENERAL NAIDOO:** Still under oath, Chairperson.

25 **CHAIRPERSON:** Mr Mpofu?

1 **MR MPOFU:** Thank you, Chairperson.

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

3 I am 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 is 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 do not know what Mr

12 Mpofo's, what Mr Semenya 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 cannot think of a reason

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

2 case.

3 **MR MPOFU:** Thank you –

4 **CHAIRPERSON:** Unless Mr Semenya's has

5 a vigorous objection. Mr Semenya?

6 **MR SEMENYA SC:** No, Chairperson, I have no

7 objection.

8 **CHAIRPERSON:** Mr Semenya 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 has not been marked.

15 **MR MPOFU:** Yes, it has not been marked,

16 Chairperson.

17 **CHAIRPERSON:** Alright, so we are 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 Chairperson.

1 **CHAIRPERSON:** Statement of Shadrack

2 Zandisile Mtshamba, M-T-S-H-A-M-B-A.

3 **MR MPOFU:** Thank you, Chairperson. Thank you
4 very much Chairperson.

5 **CHAIRPERSON:** Have you seen the document?

6 **MR MPOFU:** Yes, yes.

7 **GENERAL NAIDOO:** Still under oath

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, Chairperson.

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 us start from 25 just for – yes. Or actually
15 let us start from 24 just so that we do not revisit that.

16 This is at scene 2.

17 **CHAIRPERSON:** Sorry, Mr Mpofu, 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

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 will not
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, Chairperson.
14 Alright, General, let us move to something else. Can you

15 just tell us what the position is currently in respect of
16 the use of SSG. What is SSG to begin with, is it a form of
17 ammunition? ———communications———

18 **GENERAL NAIDOO:** It is 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:** Chairperson, primarily it is
24 not used for crowd management, there is an instruction to
25 that.

1 **MR MPOFU:** Yes.

2 **GENERAL NAIDOO:** It is primarily used in
3 the SAPD currently for training or other operational
4 requirements.

5 **MR MPOFU:** Okay, so it would be fair to
6 say it is banned in respect of crowd management.

7 **GENERAL NAIDOO:** It is 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:** Chairperson, I think it is an
13 alignment of the policies, the policing policies in terms
14 of the use of force where previously number 5, that is
15 birdshot, and SSG was used. It is 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 am just
19 saying obviously it is banned for a reason because it is
20 inappropriate to be used in crowd management, would that be
21 fair?

22 **GENERAL NAIDOO:** Well, it is lethal force,
23 yes.

24 **MR MPOFU:** Yes. And do you know whether
25 or not SSG was used in the Marikana massacre, tragedy,

1 whatever?

2 **GENERAL NAIDOO:** Chairperson, 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 am talking about the

7 Marikana killings or massacre.

8 **GENERAL NAIDOO:** Chairperson, by whom? Is it

9 by the SAPD –

10 **MR MPOFU:** By the SAPD.

11 **GENERAL NAIDOO:** As far as I know the

12 SAPD 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 SAPD

15 personnel were allowed to use SSG at the hills, correct?

16 **GENERAL NAIDOO:** That is correct, Chairperson.

17 **MR MPOFU:** And were, or rather the ban on

18 the SSG was operational at that time, correct?

19 **GENERAL NAIDOO:** It is many years now,

20 Chairperson, yes.

21 **MR MPOFU:** For many years, yes, including

22 2012?

23 **GENERAL NAIDOO:** That is correct, Chairperson.

24 **MR MPOFU:** Now can we first go to – do

25 you remember the set of photos that you received last week?

1 **GENERAL NAIDOO:** Yes, Chairperson.

2 **MR MPOFU:** Okay, can you go to the first
3 page? Chairperson, you should have a colour photo.

4 **CHAIRPERSON:** We had better mark them.

5 **MR MPOFU:** We have not marked them. We
6 have not marked them, Chairperson.

7 **CHAIRPERSON:** No, I said we would better mark
8 them.

9 **MR MPOFU:** Did we?

10 **CHAIRPERSON:** No, I am suggesting we mark
11 them now. We did not mark them.

12 **MR MPOFU:** Yes, no, we did not. 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 have been handed, I
18 think it is four photographs, IMG0961.JPG –

19 **MR MPOFU:** That is correct.

20 **CHAIRPERSON:** 0962.

21 **MR MPOFU:** Yes.

22 **CHAIRPERSON:** JPG, 3 and

23 **MR MPOFU:** That is correct.

24 **CHAIRPERSON:** - there is 4. So let us mark
25 them all MMM51.

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 will be 51 point –

10 **MR MPOFU:** Point 3.

11 **CHAIRPERSON:** 3, 0963.JPG. Sorry, I
12 thought I had four, I have six.

13 **MR MPOFU:** Yes, it is two pages, three of
14 each.

15 **CHAIRPERSON:** Alright, so we shall 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, Chairperson.

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 have marked them all accordingly,

24 you may now continue.

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

1 I wonder if the operators would, I know that – oh yes, that
2 answers my question.

3 **CHAIRPERSON:** [*Microphone off, inaudible*]

4 we have now got on the screen – the people who read the
5 record will not understand what you have said, just said, but
6 we now have on the screen MMM51.1, which is IMG0961.

7 **MR MPOFU:** That is correct. Thank you.

8 Now General, what kind of cartridges are those or -

9 **GENERAL NAIDOO:** Chairperson, I do not think
10 it is a cartridge.

11 **MR MPOFU:** Yes.

12 **GENERAL NAIDOO:** It appears to be
13 something that emanates from a shotgun, yes.

14 **MR MPOFU:** Yes, it is a casing, I think
15 would be a better description. It is a shotgun shot casing.

16 **GENERAL NAIDOO:** Possible, yes.

17 **MR MPOFU:** Yes. Okay, and if you look at
18 that one and the next one which is MMM51.2 –

19 **CHAIRPERSON:** That is 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?

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 is the

5 photograph IMG963.JPG at the moment.

6 **MR MPOFU:** Yes, point 4 to point 6.

7 **CHAIRPERSON:** We have not got those on the

8 screen at the moment. We have got –

9 **MR MPOFU:** Oh yes, we do not.

10 **CHAIRPERSON:** IMG0962, 63. Now we have

11 0964.

12 **MR MPOFU:** Yes, you see that, what you

13 can see there –

14 **CHAIRPERSON:** Now we are 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 is a

18 round, I do not know if it is, what is 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:** Chairperson, 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,

1 covering the lower part of it – although I say the lower
2 part of it, it is 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 is the
5 lower part. There is 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, Chairperson. I am
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 am 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 is 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?

1 **GENERAL NAIDOO:** Used –

2 **MR MPOFU:** Shot.

3 **GENERAL NAIDOO:** I am 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 is Mohlaki. It is in the Mohlaki

11 series, yes. Well, I cannot remember his rank but – Captain,

12 yes, he is 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 am seeking

22 to draw?

23 **GENERAL NAIDOO:** Sorry, can you repeat

24 the conclusion?

25 **MR MPOFU:** Okay. I was saying if these

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:** Chairperson, 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 cannot indicate specifically when,
10 whether it was during the commotion as indicated.

11 **CHAIRPERSON:** Yes. I take it we also
12 do not know who used it.

13 **GENERAL NAIDOO:** Exactly, Chairperson.

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:** Chairperson, yes.

18 **CHAIRPERSON:** It might have been. How
19 probable that is, is a matter we have to look at.

20 **GENERAL NAIDOO:** There are two other
21 parties that could have possibly used – as well.

22 **MR MPOFU:** Yes. That is 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?

1 **GENERAL NAIDOO:** Chairperson, 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 is correct.

10 **CHAIRPERSON:** Do you know where on hill
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 am not sure if he is 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 is on his sketch plan,
19 is it not, which is an exhibit? It should be.

20 **MR MPOFU:** No, apparently it is not,
21 Chairperson, but I agree with the Chairperson. I think,
22 I am sure Mr Semanya – 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

1 examination of this witness, but we did not have the key, I
2 cannot 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 am 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 do not 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 shall just forward an
12 appropriate request.

13 **COMMISSIONER HEMRAJ:** Is not 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 shall have a look,
18 Commissioner.

19 **COMMISSIONER HEMRAJ:** Thank you.

20 **MR MPOFU:** Thank you very much,
21 Chairperson.

22 **CHAIRPERSON:** You were not aware of this
23 at the time, these photographs, were you?

24 **GENERAL NAIDOO:** No, Chairperson.

25 **CHAIRPERSON:** Presumably Captain Mohlaki

1 was but of course, it raises quite a serious question,

2 does not 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 do not 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, Chairperson.

11 **CHAIRPERSON:** But is this the first

12 you have heard of it?

13 **GENERAL NAIDOO:** It is the first time,

14 yes. I have not been informed about this particular –

15 **CHAIRPERSON:** And you obviously were not

16 at the time either.

17 **GENERAL NAIDOO:** No, Chairperson.

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.

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 is 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, yes,

25 it says 011 where it is supposed to say 01, yes. On the 16th

1 of January 2014, correct?

2 **GENERAL NAIDOO:** That is correct, Chairperson.

3 **MR MPOFU:** And Chairperson, that letter

4 will be found, there is a cluster of documents which I do not

5 intend to use all of them but the last, no, it is not the

6 last.

7 **CHAIRPERSON:** We have a pile of

8 documents –

9 **MR MPOFU:** Yes.

10 **CHAIRPERSON:** - we have been given. I

11 do not think they are exhibits yet.

12 **MR MPOFU:** No, they are not. It is 20

13 December 2011 is the one in front. I am assuming they are in

14 the same sequence as mine, Chairperson. There is the first

15 letter, 20 December, a two-page letter. It is one, two,

16 three –

17 **COMMISSIONER HEMRAJ:** It is page 6 in the

18 bundle, Mr Mpofu, is it?

19 **MR MPOFU:** That is correct, thank you.

20 Page 6 of that little bundle. Yes, and it is on the screen.

21 **CHAIRPERSON:** Let us give the bundle an

22 exhibit number. We shall call it MMM52.

23 **MR MPOFU:** MMM52.

24 **CHAIRPERSON:** And it is, well, I suppose

25 if then –

1 **MR MPOFU:** 41.2.

2 **CHAIRPERSON:** - what we shall have to do is,

3 yes, we shall have to number each one separately. It will be

4 MMM52.1 - etcetera.

5 **MR MPOFU:** Exactly.

6 **CHAIRPERSON:** Now the one you are

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 is a letter that is on

12 the screen right now.

13 **CHAIRPERSON:** It is a letter –

14 **MR MPOFU:** Signed by General Naidoo dated

15 20, rather 16 January 2014. There is just a mistake. If

16 you can go to the bottom where the signature appears.

17 **COMMISSIONER HEMRAJ:** Yes.

18 **CHAIRPERSON:** It is letter, it is 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" yes.

1 **CHAIRPERSON:** You should read your
2 letters before you sign them. "Regarding withdrawal of
3 round," I suppose I have 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 shall have
9 to put this in quotation marks, "16" –

10 **GENERAL NAIDOO:** January.

11 **CHAIRPERSON:** It is dated 20/04/01.

12 **MR MPOFU:** 2014, Chairperson.

13 **CHAIRPERSON:** Sorry, 2014/011, which is
14 what it is.

15 **MR MPOFU:** It is a mistake.

16 **CHAIRPERSON:** 16.

17 **MR MPOFU:** Yes.

18 **CHAIRPERSON:** "Really," I put it as

19 "Really 2014/01/16." So it is 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 shotguns. So that is, you

25 dictated the letter and you did not spot it when it came

1 back typed to you. It was not really you, it was Brigadier

2 Alexander, I take it.

3 **GENERAL NAIDOO:** That is correct, Chairperson.

4 **CHAIRPERSON:** Brigadier Alexander

5 prepared the letter.

6 **GENERAL NAIDOO:** Yes, he is supply chain –

7 **CHAIRPERSON:** And you signed it.

8 **GENERAL NAIDOO:** That is correct.

9 **CHAIRPERSON:** Neither of you spotted that

10 the shotgun had become shotgun, but anyway we will not 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.” Then it was bore, round shotgun 12-

24 bore number 5, round shotgun 12-bore SSG and then round

25 shotgun 12-bore AAA.

1 **GENERAL NAIDOO:** That is correct, Chairperson.

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 is

5 a PAS issue?

6 **GENERAL NAIDOO:** It is a provisioning

7 administration system because, as I indicated in my earlier

8 testimony, that all government assets are, they are listed

9 on a system and have to be accounted for on the system.

10 **CHAIRPERSON:** Thank you. I see it is now

11 1 o'clock, Mr Mpofo. Is this perhaps an appropriate stage

12 for us to take the adjournment?

13 **MR MPOFU:** Yes, Chairperson.

14 **CHAIRPERSON:** Unless there is something, a

15 point you want to slip in first before we take the

16 adjournment. I am in your hands.

17 **MR MPOFU:** Yes, it is 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 is correct, Chairperson.

21 **MR MPOFU:** Yes. Okay, Chairperson, we can

22 break at that point.

23 **CHAIRPERSON:** Alright, we shall now take the

24 lunch adjournment.

25 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

1 **[13:55] CHAIRPERSON:** The Commission resumes.

2 Major-General, you are still under oath.

3 **GENERAL NAIDOO:** Still under oath, Chairperson.

4 **CHAIRPERSON:** Mr Mpofu, I take it the

5 document that you wanted to have put up on the screen,

6 that is 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 have to

10 deal - you are finishing off a point.

11 **MR MPOFU:** Yes, I shall come to it later but

12 it is, it has been arranged.

13 **CHAIRPERSON:** Alright.

14 **MR MPOFU:** It is been arranged.

15 **CHAIRPERSON:** Please proceed with your

16 cross-examination.

17 **GENERAL NAIDOO:** Still under oath

18 **CROSS-EXAMINATION BY MR MPOFU (CONTD.):**

19 Thank you, Chairperson. General, yes, 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?

1 **GENERAL NAIDOO:** That is correct, Chairperson.

2 **MR MPOFU:** Right, now – and then you kind

3 of banned it again, January this year.

4 **GENERAL NAIDOO:** Chairperson, 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:** Chairperson –

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 is not correct

19 Chairperson.

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

1 years, which 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:** Chairperson, 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 is 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:** Chairperson –

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

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 am
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, etcetera.
7 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, Chairperson.

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 is 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 is correct, Chairperson.

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

1 the records, should it not?

2 **GENERAL NAIDOO:** That is correct, Chairperson.

3 **CHAIRPERSON:** The record – now do you

4 know whether anyone has done any – well, you do not because

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

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. Chairperson, 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 am not

14 aware of the outcome of the reconciling, I have 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 is happening.

19 **CHAIRPERSON:** So has that reconciliation

20 been done or is it still being done?

21 **GENERAL NAIDOO:** Chairperson, 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.

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:** Chairperson, yes. I think the

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

8 admitted to that issue and it is 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:** Chairperson, we did not 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

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 was not
11 booked out then there would be a shortfall.

12 **GENERAL NAIDOO:** That is correct, Chairperson.

13 **CHAIRPERSON:** I mean the first thing to
14 do is to check out whether all –

15 **GENERAL NAIDOO:** It is accounted for.

16 **CHAIRPERSON:** - all the ammunition that is
17 been taken out has been recorded or if there is a shortfall.

18 **GENERAL NAIDOO:** That is right.

19 **CHAIRPERSON:** If there is not a shortfall
20 then you investigate who took out what ammunition prior to
21 the 16th of August 2012.

22 **GENERAL NAIDOO:** Chairperson, yes. Chairperson, 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.

1 **MR MPOFU:** Yes. No, no, that we
2 understand, General. I think the point of the questions
3 I am 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:** Chairperson, as I indicated,
9 to our knowledge at that stage no SSG was issued to any
10 member of the SAPD because it was not allowed in crowd
11 management.

12 **MR MPOFU:** Yes, but that is 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:** Chairperson, yes.

18 **MR MPOFU:** Yes.

19 **GENERAL NAIDOO:** There is an
20 investigation.

21 **MR MPOFU:** Yes, 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 do not know if it is necessary for us to have the evidence on

1 it but if we could have the results it would be helpful.

2 Is there a shortfall? If there was not 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, Chairperson.

8 **CHAIRPERSON:** Thank you. And if it isn't

9 available then obviously, as soon as it becomes available

10 you will 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 would

17 indicate whether there is a shortfall and they would have to go

18 back 10 years to see if there is a shortfall, is that not so?

19 They will know how much they had 10 years ago when the

20 prohibition went out. Every item of ammunition that is been

21 taken out since then has been, should have been recorded,

22 so they will see whether there is a shortfall. If there is a

23 shortfall it means that some stuff has been irregularly or

24 illicitly removed from the store. If everything, there is

25 no shortfall, they'll then be able to see, depending how

1 far back they go – the records presumably go back 10 years
2 – They will 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 is 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 have got an
11 undertaking that once that is completed it will be given to
12 us.

13 **MR MPOFU:** It will be done. Thank you,
14 Chairperson.

15 **MR SEMENYA SC:** Chairperson, it is 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 hill 3 are concerned, scene 2, we shall know which provinces
23 they came from. So for our purposes I suppose we would only
24 need the results of the investigations done in the relevant
25 provinces. I do not think there was anyone from the Western

1 Cape there, for example, so we would not 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:** Chairperson, yes, and there is
14 a range of possibilities, as we know that two shotguns were
15 taken from the security guards. I am not sure what
16 ammunition those security guards were carrying as well. We
17 need to cross-check with that. I am 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 am wrong to say I take it because I may be
25 incorrect but am I correct in thinking that the shotguns

1 that were taken from the security guards on the Sunday the
2 12th were not recovered?

3 **GENERAL NAIDOO:** No, Chairperson.

4 **CHAIRPERSON:** So, well, I suppose it is

5 technically possible that someone might have smuggled them

6 off hill 3 without it being detected on the 16th. The

7 probability is that they would not 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 is not very watertight but

10 –

11 **GENERAL NAIDOO:** Chairperson, yes.

12 **CHAIRPERSON:** - it is a factor to be

13 considered.

14 **GENERAL NAIDOO:** Chairperson, yes. I am just

15 including the whole permutation, the possible sources of

16 the shotguns are, which can be traced I am sure if we look

17 at some of the evidence that is recovered.

18 **MR MPOFU:** Yes. 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 hill and 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.

1 **MR MPOFU:** Yes, but that falls under the
2 fanciful possibilities. I am saying that – let us even say
3 we include all fanciful possibilities, the mere fact, even
4 if you do not 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:** Chairperson, 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 do not have to go through all these
13 fanciful possibilities because there it is known 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 is the simplest and oldest way of dealing
24 with that issue, correct?

25 **GENERAL NAIDOO:** Correct.

1 **MR MPOFU:** Yes. 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:** Chairperson, 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 is 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 am
12 just saying in general that is how the police keep track of
13 ammunition.

14 **GENERAL NAIDOO:** Chairperson, but we cannot
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 am 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 is booked
23 out versus what is booked in, with specific report.

24 **MR MPOFU:** Correct.

25 **GENERAL NAIDOO:** Yes.

1 **MR MPOFU:** Yes. 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:** Chairperson, I am not sure
5 when you say broken down, then not working –

6 **MR MPOFU:** As in – yes, breached. In
7 other words if somebody takes 10, a gun with 10 bullets but
8 we do not 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, Chairperson?

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, Chairperson.

21 **MR MPOFU:** Do you know, or rather let me
22 start by doing this. There is 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:** Chairperson –

1 **MR MPOFU:** It is headed, maybe for the
2 operator – Chairperson, it would have come with that bundle
3 but it is a loose page headed “Report by commander.” Got
4 it, thank you.

5 **CHAIRPERSON:** That is not an exhibit?

6 **MR MPOFU:** Let us call it 52, Chairperson?

7 **CHAIRPERSON:** That is not an exhibit –

8 **MR MPOFU:** No, it is not yet.

9 **CHAIRPERSON:** It will be part of the 52
10 series so we shall make it 52.7 and it is “Report by commander”
11 –

12 **MR MPOFU:** Can we make it 53 because –

13 **CHAIRPERSON:** Alright, I shall make it 53.

14 [14:15] **MR MPOFU:** 53, yes. There is some
15 confusion –

16 **CHAIRPERSON:** Maybe after 50 – yes,
17 alright, okay.

18 **MR MPOFU:** Yes.

19 **CHAIRPERSON:** We shall make it 53.

20 **MR MPOFU:** Thank you, Chairperson.

21 **CHAIRPERSON:** “Report by commander” – is
22 this SAPS15 or 16?

23 **GENERAL NAIDOO:** 15.

24 **MR MPOFU:** 1-5.

25 **CHAIRPERSON:** SAP15, what is the date of

1 it?

2 **MR MPOFU:** 16th August 2012, Chairperson,

3 to 17th August 2012.

4 **CHAIRPERSON:** 16/8/2012 to 17/8/2012.

5 This will be MMM53.

6 **MR MPOFU:** Yes, thank you, Chairperson. That

7 document, among others, would show us when somebody checked

8 out, as it were, and that would be the time when the

9 exercise I have just described would be done, correct, in

10 relation to ammunition?

11 **GENERAL NAIDOO:** Chairperson, no. This is not

12 for booking out of ammunition, it is just a register to book

13 on duty, yes. It is not a firearm register as such.

14 **MR MPOFU:** Yes, I accept that. I know

15 it is not a firearm register. I am saying the times at which

16 you assumed possession of certain ammunition and the time

17 at which you surrender it back would coincide with those

18 times, correct?

19 **GENERAL NAIDOO:** Chairperson, no. I will not

20 agree with that because in terms of, now we are talking

21 about myself, I am issued with a personal firearm, which is

22 on my equipment sheet. So I do not book my firearm in and

23 out. I am permanently in possession of my firearm with the

24 allocated number of rounds that are issued to me.

25 **MR MPOFU:** Okay, maybe let me ask it

1 differently. If it so happened that on a particular day
2 you have – that much will be so on these normal days but if
3 it happens on a particular day that you have discharged
4 your firearm, would that be the time at which you collate
5 the ammunition issued?

6 **GENERAL NAIDOO:** Chairperson, no. I think
7 we are talking past each other. When you say collate, I am
8 not sure exactly what is meant.

9 **MR MPOFU:** Okay. I am saying on a normal
10 day it might well be that, your personal firearm does not
11 have to be declared, so let us put that aside and say I
12 accept that.

13 **GENERAL NAIDOO:** Okay.

14 **MR MPOFU:** I am saying now on a day when
15 you have shot at people or whatever it is –

16 **CHAIRPERSON:** Simply say discharged your
17 firearm, I think that would be –

18 **MR MPOFU:** Yes, discharged your firearm
19 in whatever circumstances.

20 **CHAIRPERSON:** I take it he may well fire
21 his, discharge his firearm for practice purposes.

22 **MR MPOFU:** Yes.

23 **CHAIRPERSON:** So I take it whenever you
24 discharge your firearm, at some stage thereafter you have
25 to fill in some form?

1 **GENERAL NAIDOO:** Chairperson –

2 **CHAIRPERSON:** Is that correct?

3 **GENERAL NAIDOO:** As I indicated, there is

4 two things that happen. One is that there is a duty

5 officer that attends to the issue of the shooting. We

6 dealt with that where there was a duty officer from

7 Marikana who attended but he could not give the detail as

8 much as he wanted and the second thing is that you report

9 it to, in this case, the JOC or if you are at a station, to

10 the community service centre, you report it there. So the

11 report of the shooting is normally dealt with by the duty

12 officer.

13 **MR MPOFU:** Okay, yes –

14 **GENERAL NAIDOO:** I am not required, other

15 than my statement, which I have to submit, I am not required

16 to complete any other form, sir.

17 **MR MPOFU:** Even if you have discharged

18 your firearm?

19 **GENERAL NAIDOO:** That is the duty officer

20 who completes it. You do not, the shooters himself does not

21 complete –

22 **CHAIRPERSON:** You presumably then have to

23 provide information –

24 **GENERAL NAIDOO:** To the duty officer.

25 **CHAIRPERSON:** To the duty officer.

1 **GENERAL NAIDOO:** That is correct, Chairperson.

2 **CHAIRPERSON:** To enable him or her –

3 **GENERAL NAIDOO:** That is correct.

4 **CHAIRPERSON:** To fill in the form.

5 **GENERAL NAIDOO:** That is correct, Chairperson.

6 **CHAIRPERSON:** Okay.

7 **MR MPOFU:** Yes. Sorry, Chairperson. And that

8 would be at the time when you knock off duty, correct?

9 **GENERAL NAIDOO:** At the time of the

10 incident, yes.

11 **MR MPOFU:** No, no. The incident could

12 happen in a supermarket. I am saying the time at which you

13 report about the firearms would be when you now report off

14 duty to the duty officer, correct?

15 **GENERAL NAIDOO:** Chairperson, I think we are

16 missing the point. The duty officer goes out to where the

17 discharging of the firearm took place and completes a

18 report on the scene and the duty officer takes the process

19 forward. The shooters do not take the process forward.

20 **MR MPOFU:** General, I think –

21 **CHAIRPERSON:** I think Mr Mpofu is

22 interested to know when the report was made.

23 **GENERAL NAIDOO:** Yes.

24 **CHAIRPERSON:** And the impression I get is

25 that obviously if it was done when you were off duty that is

1 a different question, let us assume we are 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 is correct.

8 **CHAIRPERSON:** You would not 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, Chairperson.

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:** Yes. 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

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 is correct, Chairperson.

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 is correct, Chairperson.

13 **MR MPOFU:** Now, the point I am 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 is correct, Chairperson.

21 **MR MPOFU:** Yes. Now the question is,
22 insofar as there is any relationship between going off duty
23 and anybody having a record of how many shots you have
24 fired and so on, we would not know at what point you knocked
25 off, as it were.

1 **GENERAL NAIDOO:** Chairperson, 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 do not see the relationship
5 between it and the reporting of the shooting incident which
6 I have already testified to.

7 **MR MPOFU:** Yes. Well, General, all I am
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 am saying, I am not
13 saying it is the sole purpose but I am 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:** Chairperson, I am not sure.
21 Maybe it can be explained to me more, in a different
22 fashion and maybe I shall understand it.

23 **MR MPOFU:** Okay. Let me put it this way.
24 If I were to say to you I am disputing the fact that you
25 only fired two shots, you fired 20 shots –

1 **GENERAL NAIDOO:** Yes, Chairperson.

2 **MR MPOFU:** Yes, I am 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 am just saying that that would be

11 available to you but if you have a blank thing like this

12 which means you still have not knocked off since August –

13 **GENERAL NAIDOO:** Chairperson, 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 is all it

19 locates, that is 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

1 number of rounds I shot.

2 **COMMISSIONER HEMRAJ:** Who was the duty

3 that came from Marikana, do you know?

4 **GENERAL NAIDOO:** I can check. I know

5 there was a duty officer's report, we can check it.

6 **COMMISSIONER HEMRAJ:** So somewhere there

7 must be a document that he is completed that indicates how

8 many shots were fired by you?

9 **GENERAL NAIDOO:** That he attended the

10 shooting and – there are specific questions to be asked in

11 terms of that, yes.

12 **COMMISSIONER HEMRAJ:** And that document

13 would indicate how many shots you reported having shot?

14 **GENERAL NAIDOO:** That shows to – yes.

15 **MR MPOFU:** Okay. In any event, okay,

16 we shall leave that for argument but related to that, you – at

17 the very least you have admitted to having shot twice at the

18 strikers, correct?

19 **GENERAL NAIDOO:** I did, Chairperson.

20 **MR MPOFU:** And you have admitted that you

21 may have injured or killed one or two people.

22 **GENERAL NAIDOO:** Chairperson, which is not what I

23 admitted. I said that it is unknown.

24 **MR MPOFU:** Yes, unknown but it is

25 possible, correct?

1 **GENERAL NAIDOO:** Probable, yes.

2 **MR MPOFU:** Yes. Now insofar as it is

3 possible that you may have killed one or two people, in

4 relation to – in fact your evidence was that after you

5 discharged your shots, when you then proceeded to that area

6 there were, to use your words, only two people had been

7 killed, correct?

8 **GENERAL NAIDOO:** No, Chairperson. I do not

9 remember such words. I think what I indicated for two

10 people was that there were two people that were arrested

11 with firearms in that particular vicinity.

12 **MR MPOFU:** Okay, can you go to page

13 22942, I think it is day 189.

14 **CHAIRPERSON:** Well, is it only two? I

15 see in paragraph 26, sorry, paragraph 76 –

16 **MR MPOFU:** 76?

17 **CHAIRPERSON:** 76 of exhibit JJJ108.

18 **MR MPOFU:** JJJ108.

19 **CHAIRPERSON:** I think the thrust of it is

20 – perhaps I can read the paragraph. Well, it is on the

21 screen now. "In our forward movement to the first bodies

22 among the rocks which I observed on my arrival, we

23 discovered that only two of the strikers were shot and

24 killed. Approximately three strikers were lying still

25 among the bodies with pangas and assegais in their hands."

1 So what he was saying was there were a number, as I
2 understand it, there were a number of people lying down but
3 only two of them were dead, the others were still alive. I
4 understand that to be the thrust of what he is saying but he
5 did say only two is correct but that appears to be the
6 context in that paragraph. There may be something more in
7 the passage in the record that you want to quote.

8 **MR MPOFU:** Okay. Well, whatever. The
9 point is that –

10 **CHAIRPERSON:** What was the passage that
11 you, you referred to a passage in the record but does it
12 effectively say the same thing?

13 **MR MPOFU:** Yes, Chairperson, it is on page
14 –

15 **CHAIRPERSON:** Yes, no, we do have it.

16 It is page 22942.

17 **MR MPOFU:** Yes.

18 **CHAIRPERSON:** Which is day 189?

19 **MR MPOFU:** Yes.

20 **CHAIRPERSON:** And it is lines 8 to 11.

21 It is effectively Mr Semenya reading from, the passage from
22 the statement that I think I have read.

23 **MR MPOFU:** Yes.

24 **CHAIRPERSON:** That is where the only two

25 comes from and he agrees and then explains that there were

1 others who were lying between the bodies of the shot

2 strikers seeking refuge, so – as I put it to you.

3 **MR MPOFU:** Yes, okay, whatever the context

4 was, the point is that after you had shot twice, I am just

5 relating it to the fact that I am saying there is a

6 possibility that you killed one or two persons.

7 **GENERAL NAIDOO:** Chairperson, the context of

8 that particular statement was with regard to when I arrived

9 at the NIU line and we went forward to where we thought

10 there were about five people that had been shot and only

11 two of those people had been shot, three of them were

12 uninjured. That is the context in terms of that.

13 **MR MPOFU:** Yes, that is fine, I accept

14 that.

15 **GENERAL NAIDOO:** Yes.

16 **MR MPOFU:** I am saying you, that – I am

17 saying this in relation to the fact that you may have

18 killed one or two persons and I am saying could these two

19 persons who were killed, only two of them in whatever

20 context, have been those people?

21 **GENERAL NAIDOO:** No, Chairperson. Those people

22 were at the shooting that I arrived at. It was not the

23 people that were involved in the incident with myself so –

24 **MR MPOFU:** Okay, so –

25 **GENERAL NAIDOO:** I think we are talking

1 past each other in terms of –

2 **MR MPOFU:** No, we are not. You have

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 are saying?

6 **GENERAL NAIDOO:** Chairperson, I do not 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 have been demoted.

11 **MR MPOFU:** You and – I do not want to walk

12 –

13 **CHAIRPERSON:** You have just demoted him.

14 **MR MPOFU:** Oh yes, I have. General

15 Naidoo, Doctor, I do not want us to cover the ground that

16 we have 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, Chairperson –

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

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 is 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, Chairperson.

11 **MR MPOFU:** Yes. I am 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, Chairperson. 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?

1 **GENERAL NAIDOO:** R5s, Chairperson, 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 do not know whether you can tell us this but I am sure we can

13 find that out if you cannot 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:** Chairperson, offhand I do not

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 am 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, yes, if you are

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

1 Commission is that you, there is 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:** Chairperson, 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 am sure no-one
14 else would be prosecuted except the shooter, or the
15 shooters.

16 **CHAIRPERSON:** A number of people shot and
17 you cannot link any bullets fired by any shooters to any
18 dead body, you will 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 cannot say which bullet went where, they must
25 just go home? I do not think that is how it works. I think

1 those people would be charged with murder.

2 **CHAIRPERSON:** Mr Mpofu, I did not say

3 that. I did not say that at all.

4 **[14:35]** If there is a crowd of a thousand people, two

5 people shoot at them and there are five dead and the

6 circumstances are such that defence of self-defence or

7 private defence isn't available, it may be impossible to

8 link either of the two shooters with any of the five

9 deaths, but both shooters on those facts could be charged

10 with attempted murder and in all probability neither of

11 them would go home. That is the answer to you –

12 **MR MPOFU:** Thank you. Well, that is all

13 I am saying then. Insofar as you were one of the people who

14 shot, and it may be possible, as the Chairperson says, to

15 link the deaths, then we are going to recommend that you

16 should be charged. I am not saying that you should be

17 convicted. It might well be that all these fancy

18 explanations might hold water. I am just saying that –

19 **CHAIRPERSON:** I do not know whether it is

20 fair to describe them as fancy explanations, and –

21 **MR MPOFU:** Okay, or at least possibility.

22 **CHAIRPERSON:** It is never sensible to

23 charge people if they are likely to be acquitted. That can

24 be an abuse of the prosecutorial function as well.

25 **MR MPOFU:** Yes.

1 **CHAIRPERSON:** So but these are matters –

2 **MR MPOFU:** No, I am conceding –

3 **CHAIRPERSON:** - to be debated later.

4 **MR MPOFU:** Thank you, Chairperson. I am

5 conceding the possibility of an acquittal. We are not going

6 to recommend that he must be convicted. We are going to

7 recommend that he must be charged with murder. It will be

8 for the prosecutor to recommend that he must be convicted

9 after the evidence have been heard. Do you understand,

10 General?

11 **GENERAL NAIDOO:** I do understand, Chairperson.

12 **MR MPOFU:** Thank you. And by the way, as

13 it happened your evidence is that one of the reasons, one

14 of the key reasons that what you have described as the

15 drastic escalation of personnel had happened was so that

16 the perpetrators of the murders on the police should be

17 prosecuted, correct?

18 **GENERAL NAIDOO:** Chairperson, no. What I

19 indicated was the investigations into various murders

20 needed to be supported.

21 **MR MPOFU:** Yes, but if I remember well

22 the National Commissioner made it very clear that there

23 must be this escalation because the people who had murdered

24 police officers must be brought to book, or prosecuted, correct?

25 **GENERAL NAIDOO:** Chairperson, my testimony was

1 very clear. There were two legs of the operation that
2 needed to be supported. One was the investigation leg and
3 one was the public order situation and nowhere did I
4 indicate the issues of prosecution. The police's
5 responsibility is to conduct investigations and that is all.

6 **MR MPOFU:** General, are you aware – I am
7 not saying that you have given this evidence yourself, and
8 I cannot locate it now but I am saying are you aware or
9 you are not aware that the National Commissioner in
10 recommending the drastic escalation among other things were
11 desirous of the fact that the people who had killed the
12 police should be brought to book?

13 **GENERAL NAIDOO:** Chairperson, that is why I am
14 saying the National Commissioner agreed to the escalation
15 of resources to support the investigation.

16 **MR MPOFU:** Only, she just stop at,
17 investigation. She did not say those people should be
18 brought to book?

19 **GENERAL NAIDOO:** Chairperson, I am not going to
20 put – I do not have the National Commissioner's exact
21 words –

22 **CHAIRPERSON:** Mr Mpofu, the police do not
23 normally undertake investigations of crimes unless they
24 think that there is a prospect of them finding the persons
25 responsible –

1 **MR MPOFU:** Yes.

2 **CHAIRPERSON:** - and again they do not just

3 do it on the basis that it will stop there. Clearly they

4 do it on the basis that if the persons who are reasonably

5 suspected of committing the crime in respect of which

6 evidence is forthcoming that they did commit the crime,

7 that they will be prosecuted, that the docket will then be

8 sent by the police to the prosecuting authorities and the

9 assumption is that the prosecution authority will do their

10 duty. I mean that must be -

11 **MR MPOFU:** Yes, I would have thought so,

12 Chairperson. I would have thought it as obvious as it is

13 to you and me, but obviously it is not as obvious to the

14 General. Do you agree with the Chairperson, General -

15 **CHAIRPERSON:** I do not know if that is a

16 fair comment, but let us see what he says. You heard what I

17 said to Mr Mpofu.

18 **GENERAL NAIDOO:** Yes, Chairperson.

19 **CHAIRPERSON:** He says it is obvious to him

20 and it is obvious to me, but it is not so obvious to you.

21 What comment do you make in respect of that?

22 **GENERAL NAIDOO:** Chairperson, I think you made

23 a fair comment and I agree with you.

24 **MR MPOFU:** Okay, so you accept that the

25 ultimate aim would be that those people should be

1 prosecuted?

2 **GENERAL NAIDOO:** By the prosecuting

3 authority, yes.

4 **MR MPOFU:** Yes, correct. Now yes, do you

5 accept therefore that similarly the people who murdered the

6 strikers should be prosecuted?

7 **GENERAL NAIDOO:** Chairperson, I think we went

8 through that exercise. We did –

9 **MR MPOFU:** Can we go through it again?

10 **GENERAL NAIDOO:** We have discussed this and

11 we, I have already indicated there is a clear understanding

12 that matters will be investigated and decisions will be

13 taken, and this is how the criminal justice system works

14 and we would have to account in terms of that.

15 **MR MPOFU:** General, just answer the

16 question. Are you equally desirous that the people who

17 murdered the strikers should be investigated and prosecuted

18 eventually?

19 **GENERAL NAIDOO:** Chairperson, as I have indicated

20 there is a process; people are tasked with that

21 investigation and they will let us know. I am one of the

22 people that will probably be investigated.

23 **CHAIRPERSON:** Perhaps we could put the

24 question slightly differently. If you introduced an

25 element of conditionality into it, if some of the strikers

1 were murdered by the police –

2 **GENERAL NAIDOO:** Yes.

3 **CHAIRPERSON:** - and if it can be

4 ascertained with reasonable certainty - certainty required

5 for a criminal prosecution - who was responsible for such

6 murders, would you also be desirous of those persons being

7 charged, just as you would be desirous of strikers who

8 murdered police officers being prosecuted?

9 **GENERAL NAIDOO:** Of course, Chairperson,

10 exactly as we are doing now in Brits, those police officers were

11 charged and process is going, the criminal and the

12 departmental.

13 **MR MPOFU:** Good, and if those

14 prosecutions were to take place they would primarily

15 involve the shooters, the people who would have killed the

16 strikers, correct?

17 **GENERAL NAIDOO:** Depending on the

18 charges, yes.

19 **MR MPOFU:** And you are one of the

20 shooters, correct?

21 **GENERAL NAIDOO:** That is correct, Chairperson.

22 **MR MPOFU:** Thank you. Now I just want to

23 deal with an issue – I am not going to traverse this because

24 Mr Chaskalson dealt with it, but you would accept that from

25 – I am summarising what Mr Chaskalson put to you using many

1 documents, but the sum total of it is that your version of
2 the events where you were shooting people where you might
3 have killed or injured somebody, that version is not
4 captured in exhibit L.

5 **GENERAL NAIDOO:** Chairperson, not specifically.

6 It is broadly yes –

7 **MR MPOFU:** Not? Yes.

8 **GENERAL NAIDOO:** Not specifically

9 indicated General Naidoo shot this, no.

10 **MR MPOFU:** Yes, thank you, and it is your

11 evidence, I think, that what happened at Roots, which was

12 were exhibit L was born, that what happened at Roots was

13 meant to be an account of exactly what happened at the

14 scene, or the scenes, correct?

15 **GENERAL NAIDOO:** Chairperson, as indicated that

16 each grouping, yes, presented what they experienced, yes.

17 **MR MPOFU:** Yes, so from that it would be

18 fair then to say that one of two things, either you did not

19 – The version of that shooting event, which you gave here,

20 it is either you did not give it at Roots, or if you gave

21 it, somehow it was missed out, or it is one of the two,

22 correct?

23 **GENERAL NAIDOO:** Chairperson, I would not say it

24 was missed out. I do not remember seeing specific names of

25 individuals who were the shooters in the various

1 incidents. There are incidents where they refer to the
2 shooting. Maybe they did not describe it as I would have
3 described it, and I already testified to the fact that I
4 saw the presentation as being a broader inclusive one
5 instead of giving the specific details.

6 **MR MPOFU:** Okay, as I say, I do not intend
7 to revisit – all I know that –

8 **CHAIRPERSON:** [Microphone off, inaudible]

9 say to you, Mr Mpofo, that firstly this point was covered
10 very extensively by Mr Chaskalson –

11 **MR MPOFU:** As I have said, Chairperson.

12 **CHAIRPERSON:** And secondly, it is not one
13 of the topics on which I gave you permission to cross-
14 examine. I expect –

15 **MR MPOFU:** No, but Chairperson –

16 **CHAIRPERSON:** Don't say "but no,
17 Chairperson." You are confined to the issues in terms of

18 the practice rules we adopted to cross-examine on the
19 issues in respect of which I gave you, for which you
20 applies and for which I gave you permission.

21 I have allowed you a fair amount of latitude

22 because some of the points you were touching were points
23 that had not been previously cross-examined and I thought

24 they – the subject of cross-examination, and I thought it

25 was only appropriate that I should allow you to ask the

1 questions. Now you are 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.

5 If there is 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.

12 **MR MPOFU:** Thank you, Chairperson. Well,
13 Chairperson, really, I mean when I prefaced this question -
14 I am 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 am not going to cross-examine on it.

18 **CHAIRPERSON:** No, I understand that but
19 I -

20 **MR MPOFU:** Yes.

21 **CHAIRPERSON:** But the point to which
22 you are building up did not; I cannot see how it fits in, in
23 any of the five topics I gave permission on. That is all.

24 **MR MPOFU:** Yes, okay. You cannot see,
25 Chairperson, because as I say it is building up to something

1 that is in the future, that is still coming. Now I am
2 saying, General, and I emphasise again, I do not want to re-
3 traverse what Mr Chaskalson has covered, but you will
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?

8 **GENERAL NAIDOO:** I remember the cross-
9 examination.

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 shall come back to, the others also want to
15 know the circumstances under which they were injured, and
16 I am 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?

21 **GENERAL NAIDOO:** I am aware of that
22 version.

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

1 like that, on the rock, that that may well have been
2 friendly fire?

3 **GENERAL NAIDOO:** Chairperson no, I think we
4 traversed this one as well. I think I specifically
5 indicated the shooters in this case were visible to me.

6 **MR MPOFU:** Okay, and let us 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?

11 **GENERAL NAIDOO:** Chairperson, 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 cannot testify to that.

16 **MR MPOFU:** Oh, I see. So when you shot
17 the shooting had stopped from the other side?

18 **GENERAL NAIDOO:** I said most of the
19 shooting had stopped.

20 **MR MPOFU:** Yes.

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 police officers were now going into the bush. So
25 the bulk of the shooting had already ended.

1 **MR MPOFU:** Alright. Okay, can we now
2 just go back to MMM50, before I get into more trouble.
3 MMM50.
4 **CHAIRPERSON:** Which paragraph of – do you
5 want to take him through the whole of it, or is there –
6 **MR MPOFU:** Yes, Chairperson, yes –
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 –
10 **MR MPOFU:** Yes, yes.
11 **CHAIRPERSON:** - which is page 5.
12 **MR MPOFU:** Yes, Chairperson. Okay,
13 General, I am 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 hill 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

1 that there were both 9mm and R5s being used, correct?

2 **GENERAL NAIDOO:** Correct, Chairperson.

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 us 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 were 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 fell down within my line of

19 sight. Others who surrendered were lucky and they were

20 escorted by armed police officers 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 police officer was

25 raising his arm, apparently sending some signal to his

1 colleagues." Again that paragraph would accord with the

2 calls that you have testified about of cease fire, correct?

3 **GENERAL NAIDOO:** Correct, Chairperson.

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." Then the rest is about police officers 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 two or three issues come

19 from that. Again the issue about laughing, some were

20 laughing loudly, you can accept that there is 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 am not saying you have knowledge

24 of all these things, but at least some of those that I have

25 pointed to you accord with your evidence, correct?

1 **GENERAL NAIDOO:** Correct, Chairperson.

2 **MR MPOFU:** And you have already

3 testified that some of the people who were surrendering

4 were arrested, which I shall 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:** Chairperson, 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 am 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:** Chairperson, I am 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 am not sure if it was Adv. Chaskalson or my learned

25 colleague Mr Ntsebeza, but the point, General, is – I

1 accept that – I am 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 am referring to conversely also describes a policeman's

8 account where he shot two people and it, why I am 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, yes.

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 are saying that it is further corroborated

18 by that person?

19 **CHAIRPERSON:** I am 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 is the point;

25 we are trying to find the exhibit number. I cannot find it

1 in my notes, but – there it is, but –

2 **MR MPOFU:** We shall find it, Chairperson.

3 **CHAIRPERSON:** Alright, well it was handed

4 in. No sorry, what is his name again? Oh, there it is,

5 Molangoanyane.

6 **GENERAL NAIDOO:** Yes, that is the one on

7 the –

8 **CHAIRPERSON:** Yes, I think –

9 **MR MPOFU:** MMM6.

10 **CHAIRPERSON:** I think Ms le Roux handed

11 it in.

12 **MR MPOFU:** I am told it is MMM6,

13 Chairperson.

14 **CHAIRPERSON:** Yes, that is correct. It is

15 MMM6, yes, thank you. Well done, Mr Mpofu, thank you.

16 **MR MPOFU:** Thanks, Chairperson.

17 **CHAIRPERSON:** Oh, it is on the screen.

18 **GENERAL NAIDOO:** Yes.

19 **CHAIRPERSON:** So I was the one who was

20 unobservant. You were more observant than I at any rate –

21 **MR MPOFU:** I am not wearing my glasses,

22 Chairperson.

23 **CHAIRPERSON:** Anyway, let us not waste

24 time on it further. But in relation to the exhibit we are

25 now busy with, which is MMM50, you have been taken through

1 that.

2 **GENERAL NAIDOO:** Chairperson.

3 **CHAIRPERSON:** And you said certain

4 portions would agree with, you were able to agree with

5 certain of the things he said, but I understood you to be

6 still busy with your answer, or did I misunderstand?

7 **GENERAL NAIDOO:** Chairperson no, what I was

8 merely pointing out was that what this witness describes

9 from one side is also described by the police official in

10 the second statement from the police side as well. So it is

11 something that we should look at from both sides.

12 **MR MPOFU:** Yes.

13 **COMMISSIONER HEMRAJ:** Aren't the

14 circumstances of that shooting different from the one that

15 Mr Mpofo is putting to you in the current statement?

16 **GENERAL NAIDOO:** Chairperson, if they are

17 describing the wounds and the shooting in the arm and on

18 the head and etcetera, the Sergeant describes exactly the

19 same type of shooting, and it was more or less in the same

20 area where the bulk of the people were. If we remember, we

21 went through that exercise of trying to see, locate where

22 this Sergeant, he said he entered the bush there and the

23 shooting occurred.

24 **MR MPOFU:** Thank you, General. I must

25 say I appreciate your honesty in pointing out that

1 coincidence. Indeed, in my mind what I had thought we would
2 do is to find let us say one of the wounded people whose
3 wounds coincide with his description, and so on, but what
4 you have suggested is a better shortcut in the sense that if
5 the shooting incident is described by both sides then there
6 is that commonality as well, apart from your own evidence.
7 You understand?

8 **GENERAL NAIDOO:** Chairperson, yes.

9 **MR MPOFU:** Thanks. Alright, in any event
10 the point here is that – let us leave aside now the issue of
11 surrendering people who may have been shot. We can leave
12 it at that. We shall deal with it in argument. Going back to
13 the surrendering people who were arrested, which is what
14 you and I were discussing before lunch, you remember that?

15 **GENERAL NAIDOO:** Yes, Chairperson.

16 **MR MPOFU:** Yes, would you agree that – or
17 firstly let me say you cannot say how many of the people who
18 were arrested had come up with bare hands up and how many
19 were disarmed?

20 **GENERAL NAIDOO:** No, Chairperson, I cannot
21 offhand say, no.

22 **MR MPOFU:** And worst still, because you
23 were seeing the people for the first time, you would not be
24 able to identify who came out without arms in their –
25 sorry, now the word “arms” is – yes, without weapons and

1 with their arms up and who was disarmed by the police?

2 **GENERAL NAIDOO:** No, Chairperson, there was a

3 large number.

4 **MR MPOFU:** In fact that would be an

5 almost impossible exercise, correct?

6 **GENERAL NAIDOO:** Possibly, yes.

7 **MR MPOFU:** Yes, and so of the 259 people

8 that were arrested, any one of them could have fallen into

9 the group that merely came out with their hands and

10 carrying no arms, correct?

11 **GENERAL NAIDOO:** That is possible, Chairperson.

12 **MR MPOFU:** Thank you.

13 **CHAIRPERSON:** Mr Mpofu, I am reminded I

14 must take the tea adjournment soon, but obviously when it is

15 convenient for the purposes of your cross-examination we shall

16 do so. I do not want to interrupt you –

17 **MR MPOFU:** Chairperson, it will make better

18 sense to do it right now, Chairperson, because I am coming

19 towards the end, then I shall have a chance just to look

20 through my notes.

21 **CHAIRPERSON:** Yes, very good. We shall take

22 the tea adjournment at this point, quarter of an hour.

23 **MR MPOFU:** Thank you, Chairperson.

24 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

25 **[15:25] CHAIRPERSON:** The Commission resumes.

1 Major-General, you are still under oath.

2 **GENERAL NAIDOO:** Still under oath, Chairperson.

3 **CHAIRPERSON:** Mr Mpofo?

4 **GENERAL NAIDOO:** Still under oath

5 **CROSS-EXAMINATION BY MR MPOFU (CONTD.):**

6 Thank you, Chairperson. General, I am just going to ask you

7 one or two questions on a very narrow matter, which I have not

8 seen on the record but I can bet that Mr Chaskalson must

9 have dealt with it but I am just going to – I need you to

10 look at L67 and L142. Let us rather, let us start with L67.

11 Yes.

12 **CHAIRPERSON:** You see the – have you

13 found the slide?

14 **GENERAL NAIDOO:** Yes, Chairperson.

15 **CHAIRPERSON:** It is on the screen, of

16 course.

17 **MR MPOFU:** Thank you, yes.

18 **CHAIRPERSON:** It says "Designated command

19 positions" –

20 **MR MPOFU:** Yes.

21 **CHAIRPERSON:** On the JOCCOM, is it not?

22 **MR MPOFU:** Yes. Thank you, Chairperson,

23 and where it is pointing to the last dash from the bottom,

24 second last, sorry yes. "Commander of reserve and support

25 forces, Major-General Naidoo. Role, manage and reserve" –

1 rather – “manage the reserve and support forces kept at
2 FHA, releasing resources as required by the operational
3 commander.” Do you see that?

4 **GENERAL NAIDOO:** I see that, Chairperson.

5 **CHAIRPERSON:** If that is the position on
6 the 14th of August –

7 **MR MPOFU:** Yes.

8 **CHAIRPERSON:** At that stage there was
9 only one forward holding area.

10 **GENERAL NAIDOO:** That is correct.

11 **CHAIRPERSON:** Subsequently forward
12 holding area 2 were added.

13 **GENERAL NAIDOO:** On the 15th.

14 **CHAIRPERSON:** But I take it that it
15 did not alter your responsibilities insofar as they related
16 to the reserve and support forces kept at forward holding
17 area 1.

18 **GENERAL NAIDOO:** That is correct, Chairperson.

19 **MR MPOFU:** Thank you. And then the slide
20 141, as the Chairperson says, pertains to the 16th, hence it now
21 says forward holding area 1.

22 **CHAIRPERSON:** No, 141 relates to
23 immediate reaction area 2.

24 **MR MPOFU:** 142. I am sorry, Chairperson.

25 **CHAIRPERSON:** What you want is 142.

1 **MR MPOFU:** 142, yes, sorry.

2 **CHAIRPERSON:** No, but – yes, 142 is the

3 correct one.

4 **MR MPOFU:** General, the only question

5 really is, from a reading of those two slides it would seem

6 that under normal circumstances you were not allowed to

7 release any of your units unless you were required to do so

8 by the operational commander.

9 **GENERAL NAIDOO:** That is correct, Chairperson.

10 **MR MPOFU:** Yes. And then there is the

11 second question which flows from that, is – and again I shall

12 try and short-circuit it without having to play the video.

13 I hope you have seen the relevant video. If you have not,

14 you either accept my word or we shall have to play them. Some

15 of the evidence that we have seen from the videos shows us

16 the mounted unit, I think that is what it is called –

17 **GENERAL NAIDOO:** Yes, Chairperson.

18 **MR MPOFU:** - around the area of scene 1,

19 assisting in the dispersion, so to speak, chasing people

20 around. Do you remember seeing that on any of the videos?

21 **GENERAL NAIDOO:** Chairperson, I remember seeing

22 the mounted unit. They were doing a sweep from forward

23 holding area 1 towards scene 1, yes.

24 **MR MPOFU:** Yes. Therefore, those people,

25 insofar as they were now far away from forward holding area

1 one, would have been released to – sorry, would have been

2 released by you, correct?

3 **GENERAL NAIDOO:** Chairperson, as I testified

4 during the initial cross-examination, when certain people

5 were placed at immediate response area 1, then the mounted

6 unit was placed at forward holding area 1 in a ready

7 position to sweep towards scene 1 and/or the dispersion

8 area, yes.

9 **MR MPOFU:** Yes. Now what I find

10 remarkable and I am inviting you to comment if you share my

11 surprise, is that one of the units under your command,

12 namely the mounted unit, would have managed to get to scene

13 1 to sweep, as you call it, even before another unit under

14 your command, namely the medical services which I would

15 assume was more urgently needed, had gotten there. Would

16 you comment on that?

17 **GENERAL NAIDOO:** Chairperson, yes. Firstly,

18 what you said was true and secondly, I think we covered

19 that in testimony when we indicated the units, the mounted

20 unit was placed in direct proximity to scene 1 because of

21 the terrain between forward holding area 1 and the, what

22 became scene 1 and whereas the other units were directed to

23 take the route of the immediate response area and we went

24 through the whole exercise indicating what happened there

25 and how eventually we did not arrive at where we intended

1 to arrive.

2 **MR MPOFU:** Thanks. Okay, that is 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:** Chairperson, we have 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 do not want to, since

13 that phrase has been used so much on television, I do not

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 will not 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 have indicated that to you

20 previously.

21 **MR MPOFU:** Yes.

22 **CHAIRPERSON:** And I do not 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.

1 **CHAIRPERSON:** Mr Semenya – Mr Mpofu 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 Chairperson, can I do that next week?

7 **CHAIRPERSON:** I doubt whether you will
8 finish it today. I do not know how long your re-examination
9 will be but it is probably desirable that it should be dealt
10 with all in one and you will presumably be better able to
11 prepare yourself for it next week. I understand you are 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 shall 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, Chairperson.

22 **CHAIRPERSON:** Yes, Mr Budlender?

23 **MR BUDLENDER SC:** Chairperson, I have just
24 discussed this with Adv. Pillay. She thinks that in chief
25 Lieutenant-Colonel Vermaak will not be as much as two days.

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:** Chairperson, 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 do not 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 shall then do,
14 Chairperson, is we will ask for, we shall 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 is all in place by the time the evidence-in-
25 chief begins on Monday. Then we have already agreed that

1 the police will cross-examine last so the position that Mr
2 Mpofo likes to occupy to cross-examine I am afraid he is not
3 going to have this time but there are reasons, which I am
4 sure Mr Mpofo understands.

5 **MR MPOFU:** Chairperson –

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 will not 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 are quite right
17 that I usually like to be the last cross-examiner but my
18 instructions, in fairness to Mr Semanya, will be that the
19 issue of SAPD cross-examining Vermaak who's virtually their
20 own witness in a way, last, is something that we will take
21 instructions on. I am not quite sure that it would be
22 appropriate, seeing that it is 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 do not intend their fire to be friendly.

2 **MR MPOFU:** Well, in that case –

3 **CHAIRPERSON:** On the contrary.

4 **MR MPOFU:** I accept that, Chairperson.

5 **CHAIRPERSON:** That is the reason.

6 **MR MPOFU:** Thank you.

7 **CHAIRPERSON:** But –

8 **MR MPOFU:** We shall 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 shall adjourn

14 now until Monday morning 9 o' clock.

15 **[COMMISSION ADJOURNED]**

