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TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 210

1 APRIL 2014

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<p style="text-align: right;">Page 25864</p> <p>1 [PROCEEDINGS ON 1 APRIL 2014] 2 [09:15] CHAIRPERSON: The Commission resumes. 3 Before we came into the chamber this morning we had two 4 applications which we had to consider in chambers, one from 5 the Human Rights Commission to amend their previous 6 application to cross-examine Lieutenant-Colonel Vermaak, 7 which was granted in part, and an application which was 8 belatedly brought before us, which was supposed to have 9 been brought before us on Friday, by the SAPS for leave to 10 cross-examine Lieutenant-Colonel Vermaak. I've granted the 11 application, but I made it clear to the attorney for the 12 police who came to see us that in future applications for 13 leave to cross-examine must be made timeously and there's 14 no excuse for not having complied with the time limits that 15 we laid down, which were actually agreed to in any event by 16 the police, and in future if applications are made out of 17 time for leave to cross-examine there will have to be 18 compelling reasons to justify condonation of the late 19 application. 20 That having been said, we are this morning 21 proceeding with the application to receive the evidence of 22 Mr X in camera, with certain other relief. Supplementary 23 affidavits have been filed by some of the opposing parties 24 and a further replying affidavit has been filed by the 25 police. I understand that counsel for the opposing parties</p>	<p style="text-align: right;">Page 25866</p> <p>1 CHAIRPERSON: We haven't had an 2 opportunity to finalise our considerations – 3 MR MPOFU: Thank you, Chairperson. 4 CHAIRPERSON: - our thoughts in that 5 regards, and I'll discuss it obviously with my colleagues 6 as well. But it's a point that is well made. Ms Barnes. 7 MS BARNES: Yes, thank you, Chair. So 8 Chair, as Mr Mpofo indicated, I'll be making these 9 submissions which relate to the additional affidavits filed 10 belatedly by SAPS. The submissions are made on behalf of 11 four parties that appear before the Commission, the injured 12 and arrested persons, AMCU, the families of the three 13 persons killed on the 13th of August 2012, and of the 34 14 families killed on the 16th of August 2012 – 15 CHAIRPERSON: The three civilians killed 16 on the 13th. There were five people killed on the 13th. 17 MS BARNES: Yes, that's correct, Chair. 18 Thank you. And then also the family of Mr Ledingoane, 19 who's represented by the Legal Resources Centre. 20 Now Chair, we filed an affidavit in which we 21 dealt with the additional affidavits filed by the police. 22 We filed that affidavit last week, I believe it was filed 23 on Tuesday morning last week. Chair, before I make the 24 arguments that arise out of that affidavit I'd just like to 25 provide a synopsis of the parties' oppositions to the SAPS</p>
<p style="text-align: right;">Page 25865</p> <p>1 wish to supplement their argument. Is that correct? Who's 2 going to address me on behalf of the opposing parties? 3 MR MPOFU: Chairperson, the main address 4 is going to be done by Ms Barnes. I will add to it a 5 little bit at the end, just a broad submission, but before 6 she does so, if I may just comment on your earlier remark 7 about the cross-examination applications, just something to 8 consider. I think one of – I don't know if it's other 9 people's experience, but my experience has been that one of 10 the reasons for the delays in submitting those applications 11 is the fact that sometimes the due date is set even before 12 the witness has finished evidence-in-chief. So I think as 13 a compromise, I accept that once a date is set it must be 14 set, but maybe something that the Commission might consider 15 is to set those dates not far, or rather definitely not 16 before the evidence-in-chief is finished, but maybe a day 17 or so after that. 18 CHAIRPERSON: Yes, in all cases the 19 witness's evidence-in-chief should be covered, or it isn't 20 always, but should be covered by the statement filed, but I 21 have already discussed the matter with Mr Budlender and he 22 and I have not yet, and we agreed that we would endeavour 23 to determine a date which has regard to the kind of factors 24 that you've mentioned. 25 MR MPOFU: Thank you very much.</p>	<p style="text-align: right;">Page 25867</p> <p>1 application, which will set the scene for the submissions 2 that I'm going to make. 3 So what we have here, Chair, is an application by 4 SAPS which will to a greater or lesser extent infringe a 5 whole string of rights, rights and principles. These are 6 the principle of open justice, the right of access to 7 courts, which is guaranteed in section 34 of the 8 Constitution, the common law right to fair procedure and to 9 be able to test evidence through full and effective cross- 10 examination – 11 CHAIRPERSON: [Microphone off, inaudible] 12 the wording of the third one. I didn't get it down. 13 MS BARNES: The rights that exist at 14 common law to public trials, to fair procedure and to test 15 the evidence of witnesses through full and effective cross- 16 examination. 17 CHAIRPERSON: Yes, of course those are 18 probably just an elaboration on the first point, namely the 19 right to open justice, because the open justice brings 20 those things with it, but it's probably sensible to set 21 them out separately so that one doesn't overlook any one of 22 them. 23 MS BARNES: There is indeed some overlap 24 there, Chair. That is correct. 25 CHAIRPERSON: Okay, any other –</p>

<p style="text-align: right;">Page 25868</p> <p>1 MS BARNES: Yes, the final set of rights 2 we point to are the rights of the victim parties and the 3 public to participate in the proceedings of the Commission. 4 CHAIRPERSON: Well, how do the public 5 participate? I can understand the parties, but public 6 don't normally participate. Sometimes they observe and 7 it's been said that sometimes their presence encourages 8 everyone concerned to behave properly and have regard to 9 what goes on, what is going on and so you don't get the 10 abuse of the secret trials and secret hearings and so on, 11 but I'm not sure the public participate. But anyway, 12 that's the way you put it; the right of victim parties and 13 public to participate. 14 MS BARNES: Chair, we say this simply 15 because of the nature of the allegations made by Mr X and 16 the large number of people that they potentially implicate. 17 There may be people that do not form part of one of the 18 parties that may be affected by his evidence and may have 19 something to say in that regard. We simply make the 20 submission to that extent. 21 CHAIRPERSON: It's not really the public, 22 it's other persons potentially affected really. 23 MS BARNES: That's correct, Chair. That 24 would perhaps be a more accurate way of putting it. So we 25 say, Chair, that clearly this application brought by the</p>	<p style="text-align: right;">Page 25870</p> <p>1 be undermined and it will be possible for him to – to put 2 it bluntly – be assassinated. That's their case as I 3 understand it. If I'm wrong I will be corrected. 4 So their case isn't that it's not enough to have 5 a ring of steel around here. Their case is substantially 6 more than that is required. So I don't think, with 7 respect, unless I've misunderstood something, that I'm 8 understanding you correctly. 9 MS BARNES: Chair, they simply, or they 10 don't explain in their affidavit why the provision of 11 additional security for Mr X both at the Commission and in 12 the course of transporting him to and from the Commission 13 would not be effective. There is nowhere in the papers 14 that averments are made to explain why that would not be 15 effective, and the SAPS case is in fact stated, and the 16 only place it is really stated is in paragraph 9 of their 17 founding affidavit and there they simply say, "The 18 logistical requirements to secure Mr X's presence in the 19 Commission will be enormous," and that is their case. They 20 don't say prohibitive at any stage, even in reply. They 21 simply say that the logistical requirements will be 22 enormous, and if one goes through the papers that is simply 23 all one finds. 24 Now I will address the question of the costs and 25 I will submit, Chair, that SAPS has not even shown that the</p>
<p style="text-align: right;">Page 25869</p> <p>1 SAPS is going to a greater or lesser extent infringe the 2 rights and principles that I've just enumerated. 3 Then we ask, Chair, on what basis does the SAPS 4 seek to justify this infringement. What is the SAPS case 5 really? And perhaps, Chair, we should ask by asking what 6 the SAPS case is not, and what it is not is a case that the 7 provision of additional security for Mr X at the Commission 8 would not be effective. So in other words the SAPS does 9 not say anywhere that providing additional security at the 10 Commission for Mr X would not be an effective means of 11 protecting him. 12 CHAIRPERSON: [Microphone off, inaudible] 13 they say that. I understood the argument to go further 14 than that. They say it's not enough to have a ring of 15 steel around this chamber or this building. There's a 16 further danger, they say, and whether it's a good point is 17 another matter. I mean we're trying to ascertain what 18 their case is. They say there's a danger that if there are 19 people who are minded to assassinate him because of the 20 evidence that he is going to give, or it is thought that he 21 will give, it would be possible for them to observe him 22 when he arrives, follow him when he leaves, in that way 23 ascertain where he is being kept under the witness 24 protection programme, and once his whereabouts are known 25 the whole purpose of the witness protection programme will</p>	<p style="text-align: right;">Page 25871</p> <p>1 costs will be enormous relative to the provision of a video 2 link or relative to anything at all, and there must of 3 course be enormous relative to something. But certainly 4 they don't make out a case that they're prohibitive. In 5 fact they don't even allege that the costs are prohibitive. 6 But even if they had been able to show, Chair, 7 that these costs were enormous relative perhaps to the 8 video link, then we submit, Chair, that that simply cannot 9 be a justifiable basis for infringing the rights that are 10 at stake here, for infringing any of the rights that are at 11 stake here, let alone a constitutional right. 12 So if I can deal then, Chair, with our 13 submissions in response to the additional affidavits filed 14 by SAPS, we make essentially four submissions in response 15 to them. The first submission that we make is simply that 16 the contents of the additional late affidavits are 17 irrelevant and we say this because they deal with matters 18 of convenience and cost. They do not deal with the 19 necessity of the rights and the principles of open justice 20 being limited. 21 As we've submitted previously, if section 4 of 22 the Commissions Act is to be interpreted consistently with 23 the Constitution, as of course it must, then the Commission 24 should have the power to limit the principle of open 25 justice only when it is necessary to do so. The facts set</p>

<p style="text-align: right;">Page 25872</p> <p>1 out in the additional affidavits have no bearing on the 2 necessity inquiry. They speak only to matters of 3 convenience and cost and therefore we submit that their 4 contents are irrelevant and should simply be disregarded by 5 the Commission. 6 Then, Chair, the second submission we make, we 7 say even if the contents of these additional affidavits are 8 relevant in some way, we say that they in fact, their 9 contents in fact confirm the position taken by the parties 10 that I represent today, and this is simply because, it's 11 because of what they don't say and because of what they do 12 say. They don't say that it would be impossible or 13 ineffective to use additional security to protect Mr X. 14 They don't say that the cost of that would be prohibitive. 15 They say that there is, and then what they do say is that 16 there is some cost involved. His protection would require 17 a plan and they set out what that plan would entail. 18 Therefore if one has regard to the allegations on the 19 papers we submit that it's clear that security can be 20 provided and should be provided. 21 On page 7 of our affidavit in paragraph 20 we 22 refer there to the pleadings, and I draw the Commission's 23 attention particularly to the submission we make in 24 paragraph 20. There we point out that the SAPS have failed 25 to deny, or to deal with in any way in reply with what we</p>	<p style="text-align: right;">Page 25874</p> <p>1 to complain about. 2 But our complaint really is that we need 3 information about how much the video link would cost 4 because obviously that cost would need to be set off 5 against the cost of providing additional security for Mr X 6 if he is to testify here in this Commission, and SAPS 7 simply does not give us this information. 8 We go into some detail in our opposing affidavit, 9 Chair, about what would be required here. There would be a 10 series of cameras and screens would be required. Not only 11 would there need to be a clear and consistent link between 12 an evidence leaders or a cross-examiner and the witness, 13 but video material would need to be shown to the witness 14 for example, or transcript references would need to be 15 shown to the witness and he would need to, and that would 16 also need to be done seamlessly. 17 We make the point on page 8, paragraph 24 of our 18 opposing affidavit that the two venues would have to be 19 linked either via high-speed fibre optic cable or microwave 20 connection, if technically possible, so that the crystal- 21 clear video images and audio that the applicant has 22 promised can be transmitted between them. 23 Now we have, despite having set this out, in the 24 latest replying affidavit we get virtually no information 25 in this regard. We're simply told that SAPS does have some</p>
<p style="text-align: right;">Page 25873</p> <p>1 say in paragraph 42 of our opposing affidavit. If one 2 takes that failure to deny that allegation, together with 3 the new facts we have in the additional affidavits 4 regarding the plan that can be made and the costs that 5 would be involved, then we submit that in fact we're all ad 6 idem that there are less restrictive means to ensure the 7 protection of Mr X which do not infringe on the principle 8 of open justice, the right to a public hearing, and the 9 rights of the accused, the victims, and the public more 10 broadly. 11 Then Chair, the last two submissions we make deal 12 with some of the detail of the facts provided by SAPS in 13 these additional affidavits. The first is the failure 14 really on SAPS' part to provide any evidence of what the 15 costs would be of setting up a video link, and it appears – 16 CHAIRPERSON: [Microphone off, inaudible] 17 MS BARNES: Yes, Chair. The third point 18 that we'd like to make is we'd like to draw attention to 19 the fact that the SAPS provide no evidence of what it would 20 cost in order to set up the video link that they seek, and 21 it appears here from their latest replying affidavit that 22 they've misunderstood our complaint in this regard. They 23 say in their replying affidavit that we, as in the parties 24 that I represent today, will not have to foot the bill for 25 the video link, so therefore we really don't have anything</p>	<p style="text-align: right;">Page 25875</p> <p>1 sort of video link in place currently, but there's 2 absolutely no detail as to what that entails, and 3 importantly SAPS does concede in its latest replying 4 affidavit that additional cameras and screens would still 5 be required for this video link that is sought. So clearly 6 more needs to be done. They don't tell us though what 7 exactly that is, let alone what it would cost, and so it's 8 impossible in the circumstances, with respect, to assess 9 SAPS' claim that the cost of this would be enormous without 10 having that critical piece of information about how much 11 the video link would cost, not only to set up but to 12 operate on a continuous basis. 13 And then the fourth point that we make, Chair, is 14 we deal with some of the figures that are set out in the 15 affidavit of Mr Rungusamy. We really make two points here. 16 First we say what Mr Rungusamy does is he sets out the cost 17 of, the salary cost essentially of eight warrant-officers 18 and eight sergeants which are on a daily basis, which is 19 what the SAPS have said would be required to protect Mr X. 20 We point out that that's not an additional cost; those are 21 persons employed by SAPS who would be deployed, would 22 simply be deployed to protect Mr X, as opposed to somebody 23 else. 24 CHAIRPERSON: They won't have to employ 25 extra warrant-officers and sergeants from somewhere else to</p>

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1 fill the gap caused by the fact that they're deployed here.
 2 Is that right?
 3 MS BARNES: Indeed. Indeed, Chair, and
 4 they don't make that allegation. They do say in reply that
 5 normally the witness protection programme protects Mr X and
 6 now since he would be their witness they would have to take
 7 over his protection, but they don't say that they'd have to
 8 hire additional people to do that.
 9 [09:35] CHAIRPERSON: On that basis it's just
 10 essentially a bookkeeping entry as far as the police
 11 service are concerned, the fact that they have got to make
 12 these bookkeeping entries and debit one division and credit
 13 another, doesn't mean there overall extra cost to the SAPS.
 14 Is that essentially the point you're making?
 15 MS BARNES: Yes, indeed. Absolutely,
 16 Chair, and then the other point we make, Chair, is we take
 17 some issue with the travel costs that they set out which
 18 is, comes to an astronomical total of R243 000 a month is
 19 what they say is the travel cost they say they would have
 20 to incur. We've taken issue with it in our reply. They
 21 haven't really explained it in – at least in our answer
 22 we've taken issue with it. They haven't even explained it
 23 in reply. They've said we don't know, they said they don't
 24 know where we get the figure of R243 000 from. Well,
 25 that's the total travel expenses they assert they'll have

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1 to incur. So mean we simply get it from Mr Rangasamy's
 2 affidavit but it's not explain, Chair, but it seems at best
 3 then, assuming that that travel expense is correct and
 4 justified, that that would be the only additional cost and
 5 that would then have to be set off against the cost of the
 6 video link and it may well be that the cost of the video
 7 link comes to far more than the travel cost.
 8 So in the circumstances we submit that the SAPS
 9 have not established that the cost will be enormous
 10 relative to the video link, relative to anything. They
 11 certainly haven't established that it will be prohibitive
 12 and even if they had –
 13 CHAIRPERSON: So is your submission that
 14 in the absence of comparative figures indicating that it
 15 would be more expensive to do the one rather than the
 16 other, the cost factor should be excluded from
 17 consideration?
 18 MS BARNES: Yes.
 19 CHAIRPERSON: They say we will have these
 20 tremendous expenses for travelling and so on but they don't
 21 say what the expenses would be with the video link and
 22 unless you know that the travelling costs and those extra
 23 book entries with warrant officers being transferred from
 24 one division to another and so on, lest we know those costs
 25 we can't say that the cost factor is a relevant one. Is

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1 that your submission?
 2 MS BARNES: Indeed.
 3 CHAIRPERSON: So the cost point should be
 4 excluded from consideration, is that your argument?
 5 MS BARNES: Indeed. Indeed, Chair, they
 6 haven't –
 7 CHAIRPERSON: I understand.
 8 MS BARNES: SO finally then, Chair, we
 9 would submit that it hasn't been shown that – I use the
 10 word "enormous" simply because that's the word that SAPS
 11 uses, that is how they have set out their case in paragraph
 12 9 of their founding affidavit - they haven't demonstrated
 13 that and even if they had, though, that is not a basis in
 14 order to grant them the relief they seek which would
 15 infringe a whole gamut of rights including a constitutional
 16 right. So they haven't proved their assertions from facts
 17 but even if they had, we say it wouldn't assist them on the
 18 law. Thank you, Chair.
 19 CHAIRPERSON: Thank you, Ms Barnes. Mr
 20 Mpofo, you said you wanted to –
 21 MR MPOFU: Yes.
 22 CHAIRPERSON: - make broad submissions, I
 23 think is the way you –
 24 MR MPOFU: Yes, thank you, Chair. Chair,
 25 if I may, just a housekeeping issue before I start, because

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1 of this issue of Mr X there's obviously extra interest from
 2 the people that we represent and there's now a lot more
 3 people apparently than the devices. If I may just address
 4 them, Chair, and find out if those who don't have the
 5 devices can live with no interpretation and then maybe we
 6 can provide a summary for them at the end or rather at the
 7 break, during the break. Or Mr Mahlangu could come here
 8 but then that will take more time. Let me just find out
 9 how many people are affected.
 10 CHAIRPERSON: It depends on how long
 11 you're going to be.
 12 MR MPOFU: Yes.
 13 CHAIRPERSON: If you're not going to be
 14 very long then it won't take much extra time if we have
 15 consecutive translation.
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: But if you're going to
 18 regale us with an argument that will take the rest of the
 19 day, then it might be an idea to do something about
 20 simultaneous translation.
 21 MR MPOFU: No, it will take slightly less
 22 –
 23 CHAIRPERSON: It's in your hands. Tell
 24 me what you propose to do.
 25 MR MPOFU: Slightly less than the day,

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1 Chairperson. No, I'm joking Chair, it's just a few
2 submissions.

3 CHAIRPERSON: If it's going to be a few
4 submissions, I'd suggest we ask Mr Mahlangu to come and
5 let's do it consecutively because as you say, this is an
6 important matter –

7 MR MPOFU: Yes.

8 CHAIRPERSON: - and people have come here
9 out of interest to know what's going on and it's only right
10 that they should understand.

11 MR MPOFU: Thank you, Chairperson.

12 CHAIRPERSON: [Microphone off, inaudible]
13 - puts you under an obligation to be brief and to the
14 point.

15 MR MPOFU: As usual, Chairperson.

16 CHAIRPERSON: Which I'm sure you're
17 capable of being. I won't respond to that particular bait.
18 While we're waiting for the interpreter to come, Ms Pillay,
19 do you propose addressing any additional submissions to us
20 on this issue?

21 MS PILLAY: Chair, we do not intend
22 making additional submissions, just to add, Chair, that the
23 two sets of further affidavits need to be marked as
24 exhibits because we've marked the previous affidavits as
25 the NNN series of exhibits.

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1 CHAIRPERSON: I was informed that a set
2 of the complete papers were going to be made for us, which
3 hasn't happened yet, so we will mark them in due course
4 following on the series of numbers we had before. We'll
5 wait for the complete structure to be made available. In
6 other words, before I give the ruling we'll have all the
7 housekeeping in order. Mr Mahlangu, what has happened is,
8 we are informed that there's a problem, that we've run out
9 of headsets because the demand has exceeded the supply and
10 so what was suggested, that Mr Mpofo assures us that he'll
11 be brief and to the point in his argument in reply and I'm
12 sure Mr Semenya will also, so the suggestion was we ask you
13 to come and help us and we return to the mode of
14 consecutive translation for the benefit of the extra people
15 who are here today, who have come specially to hear the
16 argument.

17 MR MPOFU: Okay. Thank you very much.
18 Chairperson, I just wanted to, really what I'm going to say
19 is that everything I'm going to say turns on one question
20 which I'm going to submit is probably the deciding issue in
21 this matter and that's the matter of causality which we
22 address. I'm not going to go back to – we addressed it and
23 cited the authorities and so on in relation thereto. And
24 again so that I don't regurgitate our argument of last week
25 I will confine that aspect to this particular point of

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1 costs, the cost benefit analysis, as I will call it here.

2 And as Ms Barnes correctly pointed out, what has
3 happened now is that Mr Pretorius or let me just say SAPS
4 seemed, well, they've said in so many words they do not
5 understand the point that we are making regarding the
6 question of costs. Actually in 5.1 of the further replying
7 affidavit of Mr Pretorius he says, "I am therefore unable
8 to understand the basis and object of the opposition on the
9 grounds of unquantified and speculative additional costs."
10 So obviously if he can't understand it then he can't answer
11 it. And our submission, Chairperson, is that there is no
12 reason or reasonable ground for SAPS not to understand the
13 point we are making because, firstly, we made it here in
14 open Commission in the course of asking for the
15 postponement and the Chairperson went further to say, well,
16 on that ground, if that is what is missing then I will
17 grant the postponement and explained the connection between
18 the issue of costs and so on. So we fail to understand why
19 they fail to understand. And the point there is simple and
20 I'll relate it once again to the issue of causality. What
21 they are saying, as Ms Barnes has correctly – let's assume
22 they are saying that the extra costs of bringing Mr X here
23 is R1 000. If the extra costs of linking him in the way
24 they suggest is R2 000 or is more than R1 000, then that,
25 as the Chairperson has correctly pointed out, it becomes

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1 neutralised. It cannot be causally connected to the relief
2 that they are seeking, that's all.

3 CHAIRPERSON: Even if it costs R1 000, on
4 your example.

5 MR MPOFU: Yes, exactly. Even if it's
6 exactly R1 000.

7 CHAIRPERSON: It costs the same to have
8 the TV link –

9 MR MPOFU: Ja.

10 CHAIRPERSON: - and all these other book
11 entries about warrant officers being transferred from one
12 position to another, if those all amount to 1 000 and the
13 TV link costs you 1 000 then the cost advantage disappears.

14 MR MPOFU: Absolutely, that's right.

15 CHAIRPERSON: Unless we know the numbers
16 we're unable to assess the cost advantage, if there is one.

17 MR MPOFU: Absolutely. Thank you, Chair.
18 Chair, in the absence of those numbers it can never be
19 argued that the question of costs is causally connected to
20 the relief that they seek.

21 The second point, Chairperson, is a much more
22 important point and that is a cost benefit analysis of a
23 broader type. In other words, let's look at the cost
24 benefit in terms of the principles that are applicable to
25 an application of this kind. And to simplify it,

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1 Chairperson, let me put it like this. There are let's say
 2 five groupings of people who would ordinarily be inside
 3 this room when a witness gives evidence. Firstly, it's the
 4 commissioners and they don't seek to exclude the
 5 commissioners, fortunately. Secondly, it's the lawyers,
 6 let's say all of us on either side of the spectrum.
 7 Then thirdly it's the parties or, as the
 8 Chairperson said, the people who are directly affected.
 9 Fourthly, it's the public and fifthly it's the media.
 10 Those are the people who are in this room right now as we
 11 speak. Now, what SAPS is doing, wants to do is to excluded
 12 or rather to retain here only group number 1, number 2 and
 13 number 5, the commissioners, the lawyers and the media and
 14 they seek to exclude the parties or the people who are
 15 directly affected and the public.
 16 Firstly, they seek to do this by the linguistic
 17 facility of lumping, as we said last week, lumping the two
 18 groups as if they are one, the parties and the public,
 19 which is wrong. And the cases explain the difference
 20 between those two parties – the public is here for a
 21 different purpose, as we debated last week, so that if
 22 somebody sees that this person is not telling the truth and
 23 so on and the general interest of the public, then they can
 24 be of assistance.
 25 The parties are here for a completely different

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1 purpose, which is their own direct participation and their
 2 general interest in what is stated there behind you,
 3 Chairperson, truth, restoration and justice. And that is
 4 why, for example, and I think this example was also made
 5 either by Mr Ntsebeza or myself last week, that is why even
 6 in a normal criminal case you would have, in a normal in
 7 camera application as it were, you would have – I've never
 8 heard of an in camera application where you exclude the
 9 accused, for example, because the accused is there for a
 10 different purpose than the public. That is because the
 11 accused is not there as a member of the public, he is there
 12 or she is there as a party.
 13 Now this then poses again the questions of
 14 causality. For SAPS to succeed in relation to excluding
 15 the parties, that is the people who are directly affected,
 16 they would have to show and the onus is on them on this
 17 because once again the cases are very clear as to what the
 18 general rule is and the fact that it should only be
 19 departed from in exceptional circumstances. What they
 20 would have to show, Chairperson, in discharging that onus
 21 is that the parties are going to endanger or rather the
 22 presence of the parties is going to endanger the safety,
 23 security or life of Mr X and it is our submission that they
 24 are unable to show anything of that sort. And without much
 25 elaboration let's look at the people that they want to

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1 exclude.
 2 Using the principle that a chain is as strong as
 3 its weakest link, I will start with the group, one of the
 4 groups that they want to exclude is the widows of the slain
 5 miners. Now, the rhetorical question becomes obviously,
 6 what possible threat to Mr X's safety can those widows
 7 pose? What are they going to do to him? What are they
 8 going to do to him to such an extent that this Commission
 9 must deviate from the well-grounded principles that the
 10 parties must be present at all times, what has happened?
 11 Then the next group, Chairperson, is the injured
 12 and arrested, or the survivors, as we call them and I will
 13 use just for convenience, the representatives of those
 14 people, the people that we know who have testified here –
 15 Mr Magidiwana, Mr Phatsha who is here and those types of
 16 people. What are they going to do to Mr X? Nothing. They
 17 themselves have put their version, most of which has been
 18 scathingly opposed to what Mr X says.
 19 [09:55] And unless, then SAPS would then prove, or rather
 20 – yes, discharge the onus to show that those people in that
 21 class of parties pose a threat to Mr X such that once again
 22 the Commission must deviate from the principle which has
 23 been followed since the 1st of October 2012, that those
 24 people have been present here, and which is as I say the
 25 broad cost, the cost to society that were not now the

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1 financial cost, because if we say we are going to bend the
 2 rules we are basically creating a particular cost. We are
 3 saying we know that normally we should allow everyone to be
 4 here, but we won't do that in this case because of this and
 5 that and that harm. So if there's no connection between
 6 the two then there's no reason for us to incur that social
 7 cost, as it were.
 8 But finally, Chairperson, to make it, the
 9 absurdity of this application is made clear by the fact
 10 that let's just assume for argument sake that some among
 11 the survivors might harbour some ill feeling towards Mr X,
 12 then SAPS has a duty to convince you that the presence of
 13 even those people who might, the presence here in the
 14 chamber of those people who might harbour those ill
 15 feelings is directly connected to their application to have
 16 Mr X testifying in the absence of those people, as it were,
 17 and by that I simply mean the following; that we know - and
 18 this is a matter we touched on again the last time – one
 19 would have to, either have to ensure that these people by
 20 their absence here will be prevented from knowing the
 21 identity of Mr X. Again it's very clear that that standard
 22 can never be met because, as I explained last week and as
 23 conceded by SAPS themselves, as soon as I get the identity
 24 and possibly photograph or whatever of Mr X I will, and I
 25 actually have a duty to inform them of the identity of Mr

<p style="text-align: right;">Page 25888</p> <p>1 X. I have to tell them his name. I have to show them what 2 he looks like and I must tell them where, you know, where, 3 which shaft he works in and all those kinds of things, what 4 he was wearing on the day, and every time he says anything 5 here I'm going to tell them. 6 So the identity point can never be causally 7 connected to the application that is being sought here, so 8 that if anyone was harbouring any ill feelings towards him 9 they will have the exact same ill feelings towards him and 10 he will face the exact same risk that he would have faced 11 from them, whether they are next-door or inside this room. 12 So the crucial point here, Chairperson, is I'm 13 doing this almost on the basis of conceding some type of 14 danger, but what I'm saying is that that danger will not be 15 alleviated by the relief that is sought, and I'm just doing 16 that to press the point. Remember our position is that 17 there is no danger at all in the first place which has been 18 demonstrated. 19 So once the – well, the other issue is this, 20 Chairperson, and this is a point that I've been 21 specifically instructed to raise, and I won't belabour it 22 because I did raise it last time but I'm now raising it in 23 the context of what I call the social cost benefit. And 24 even that, as the Commission knows from the record, that 25 the witnesses from the survivors, and even including those</p>	<p style="text-align: right;">Page 25890</p> <p>1 followed by someone from this chamber could simply be 2 alleviated by the fact – we know that there are police 3 premises just across the road; when he comes out of here he 4 could be taken to that place or a police station or 5 whatever and until such time that the danger of anyone 6 following him, or taken in a vehicle, unmarked vehicle. 7 There are all sorts of measures. I don't have to – I'm 8 just making examples off the top of my head. The real 9 point is that those costs, he doesn't have to be taken from 10 wherever he might be - which could be anywhere quite 11 frankly, it could be in another province or whatever – 12 every day to come here for the few weeks or whatever period 13 that he's testifying, surely there must be a duty upon SAPS 14 to mitigate, and the Chairperson correctly pointed out that 15 their case is not so much the ring of steel. Let's assume 16 then that the ring of steel around here can be easily 17 effected, then the only issue is this alleged danger of hot 18 pursuit. That surely can be mitigated very easily, and if 19 it can then we don't all have to suffer, including the 20 parties, and change the rules for something that can be 21 cured in a different way. 22 So all in all, Chairperson, what I'm saying is 23 that there is, nothing has been put before you on the 24 papers that even approximates the discharging of the burden 25 that SAPS has for the Commission to deviate and to</p>
<p style="text-align: right;">Page 25889</p> <p>1 people who were subpoenaed, Chairperson, you'll remember 2 that I opposed the application by Mr Madlanga to subpoena 3 some people on the basis that among other things it might 4 endanger their safety and so on, to the extent that the 5 Commission when we were still in Rustenburg agreed with my 6 subsequent request that even those postponements of the 7 subpoena appearances should be done in chambers with the 8 Commissioners rather than in the open chamber because there 9 were those concerns, and indeed one of those people 10 allegedly committed suicide. We don't know whether it was 11 connected or not. 12 But the point I'm making, I mean even a witness 13 like Colonel Vermaak is saying things about people and I'm 14 sure he's worried about his safety. The point I'm making 15 here, Chairperson, is that other witnesses have shown 16 reticence and reluctance but in the interest of the broader 17 performance of the public duty that the Commission is asked 18 to do those people have had basically to take their chances 19 and take whatever level of risk was associated, or was 20 perceived to be associated with their giving their 21 testimony. 22 Final point is that the SAPS has not discharged 23 their onus to show that such costs, broadly and narrowly 24 speaking, as may be incurred cannot be properly mitigated. 25 For example the question about Mr X being tailed, or</p>	<p style="text-align: right;">Page 25891</p> <p>1 effectively truncate people's rights, which have been 2 articulated in the course of this application. So whether 3 one looks at it from the technical basis of the cost 4 benefit analysis regarding the actual money issues that 5 SAPS have raised, or the broad cost benefit analysis of the 6 infringement of the rights of the parties, the application 7 ought to fail, Chairperson. Thank you very much. 8 CHAIRPERSON: Thank you, Mr Mpfu. Mr 9 Semenya. 10 MR SEMENYA SC: Chair, we have prepared 11 some written reply. 12 CHAIRPERSON: And copies for your learned 13 friends? 14 MR SEMENYA SC: I have. I have, Chair, 15 and I have circulated those. In reply, Chair, we make the 16 obvious submission that the Commission has heard legal 17 argument, and quite an extensive one, on the principles of 18 open justice, that is a way in accordance with which 19 matters before courts and commissions are required to be 20 conducted in an open and a democratic society. 21 Chair, we make the submission that the debate is 22 unnecessary. The conduct of this Commission has been and 23 will continue to be transparent and open, with witnesses 24 giving their evidence in the open and also cross-examined 25 in the open. Section 4 of the Commissions Act dictates</p>

<p style="text-align: right;">Page 25892</p> <p>1 that to be the case and in its opening it says all the 2 evidence and addresses heard by a commission shall be heard 3 in public. 4 The proper debate, Chair, is rather different 5 one, and that is whether SAPS have established the 6 requirements for the treatment of the evidence of Mr X to 7 be handled differently. Thus the inquiry in these 8 proceedings; has SAPS made out a case for the handling of 9 the evidence of Mr X in camera. If the answer to that 10 question is a yes then we've discharged our obligations in 11 relation to this application. 12 CHAIRPERSON: It's not as simple as that 13 because there's still the point relating to the difference 14 between the public and the parties. Normally when an 15 application is granted for a court or commission to sit in 16 camera, certainly as far as the courts are concerned – the 17 Commissions Act may be different, but certainly where an 18 application is granted for a court to sit in camera the 19 public are excluded, but not the parties. So that's a 20 further point. I don't know if you're going to deal with 21 that in your [inaudible]. You are asking not just that we 22 sit in camera, which normally means exclude the public, 23 which is what section 4 talks about, although it talks 24 about classes of persons and so on. You're asking for 25 certain other relief as well, which you may or may not be</p>	<p style="text-align: right;">Page 25894</p> <p>1 And so the Commissions Act then continues to tell 2 us that any person whose presence at the hearing of such 3 evidence or address is in your opinion, Chairperson, not 4 necessary or desirable. That's what the law is. So the 5 submission is that the inquiry therefore is whether the 6 Chairperson has the discretion to exclude a class of 7 persons at any place where the hearing of such evidence is 8 tendered, whether you, Chairperson, you are of the opinion 9 that such a class of person is to be excluded at the 10 hearing of such evidence, and whether the exclusion in your 11 opinion is necessary or desirable. 12 CHAIRPERSON: I've glanced through your 13 heads briefly and I may have missed something, but one of 14 the points that was dealt with in argument by your learned 15 friends was the question, which of course I am not 16 competent to decide, and that is whether section 4 of the 17 Commissions Act, which is a pre-Constitution act, is not 18 overbroad and whether it's not to some extent 19 unconstitutional insofar as it poses a test of desirability 20 as opposed to necessity. Now you may say to me well 21 that's, I mustn't concern myself with that because I 22 haven't got the power to declare it unconstitutional. Of 23 course what I do have is the power and indeed the duty to 24 interpret it in the light of the Constitution. 25 [10:14] Through the prism, as it's been put, of the</p>
<p style="text-align: right;">Page 25893</p> <p>1 entitled to but it's not as simple as you're putting it in 2 this paragraph of your heads. That's all I'm putting to 3 you. 4 MR SEMENYA SC: Chair, the hurdle I have 5 to survive is whether or not I can make a case out for the 6 evidence of Mr X to be heard in camera. We will then later 7 deal with what that camera entails, because if I can't go 8 past base 1 – 9 CHAIRPERSON: No, I understand if you 10 don't – 11 MR SEMENYA SC: - I'm not going to base 12 2. 13 CHAIRPERSON: If you don't get the in- 14 camera ruling at all then the rest of the debate falls 15 away. I understand that. 16 MR SEMENYA SC: And in our attempts to 17 jump the first hurdle we say as we read section 4 of the 18 Commissions Act it empowers you, Chair, to exclude from the 19 place where such evidence is to be heard or such address to 20 be delivered any class of persons, and it says that; any 21 class of persons. It does not qualify what class that is, 22 and I'm going to make submissions later why it should in 23 these circumstances include the parties, which Mr Mpofu 24 says there are parties before this Commission, we'll 25 contend there are no parties before you.</p>	<p style="text-align: right;">Page 25895</p> <p>1 Constitution. Now it's been argued and I'm not sure that 2 the argument can stand up but it has been argued that, 3 using the prism of the Constitution, I can effectively 4 exclude the word "desirable" and simply rely on necessity 5 and say desirable means necessary. Well, I'm not sure that 6 that argument is right but of course you do realise that if 7 I were to found the decision in your favour, if I were to 8 give one, solely on the basis of desirability, you might 9 encounter problems in another court – in a court, not 10 another court – in a court in which it would be held that 11 the court has the power to deal with the section more 12 robustly than I can and you might find that any victory you 13 gain here might prove to be illusory op die ou einde. 14 So I just put that, you don't appear to deal with 15 it in your heads but it's something which I would be 16 grateful to have assistance on because I take it your 17 opponents might argue, somewhat boldly as they sometimes 18 do, that it's not even desirable that this should happen 19 but they found their argument on the basis of necessity and 20 they found it upon section 34 of the Constitution, the 21 cases which have held that that section applies to bodies 22 of this kind. So those points are not points that can be 23 just swept off the table and ignored in the hope that if I 24 make an order in your favour, somehow the next court, the 25 next matter that deals with – the court that deals with the</p>

<p style="text-align: right;">Page 25896</p> <p>1 matter will somehow be able to overcome them, even though I 2 haven't applied my mind to them. So obviously this is, to 3 some extent, a tentative provisional comment because we 4 don't know whether I'm going to find for you anyway on the 5 merits, but it's something obviously that we have to 6 grapple with because it would be sensible, I imagine, to do 7 so. Anyway, I hope I haven't taken you out of the line but 8 you don't appear to deal with those points in your written 9 heads. They may require further submissions, if you wish 10 to make points to me in that regard.</p> <p>11 MR MPOFU: Chairperson, I also don't want 12 to interrupt Mr Semanya, I promise it's the last time I say 13 anything but I think in fairness to him so that he can deal 14 with our actual submission, it is important to emphasise 15 what I said last week which is that we, our contention – 16 and he can read that together with what I said this morning 17 – is that the absence of the parties is neither necessary 18 nor desirable, but we also say what the Chairperson is 19 saying, that even if the Chairperson found that he couldn't 20 go as far as to exclude the word "desirable," we say even 21 on a desirability test, yes.</p> <p>22 CHAIRPERSON: I understand that. I 23 understand that but what I was really saying was that I can 24 see that if, we don't know what's going to happen, if I 25 were to say I can't say it's necessary but I do say it's</p>	<p style="text-align: right;">Page 25898</p> <p>1 anyway. I understand that. I haven't – I won't misdirect 2 myself as far as that's concerned, whichever way I go.</p> <p>3 MR SEMENYA SC: Well, Chair, in response 4 there are the following factors I can place before your 5 lordship, before the Chair. The first, as you correctly 6 say, Chair, you don't have the power sitting as you do to 7 determine the constitutionality or otherwise of any law.</p> <p>8 CHAIRPERSON: I do have the power, I take 9 it, to interpret this within, using the Constitution as an 10 interpretive prism, a prism.</p> <p>11 MR SEMENYA SC: And whatever interpretive 12 tool you may use will never give you the power to excise 13 words from a statute. The third reason, Chair, is that if 14 the constitutionality or otherwise of section 4 was a 15 matter that should restrain the powers of this Commission, 16 the proper remedy is for the respondents to go to a court 17 which has competent jurisdiction and to obtain an order 18 there and we come and have this debate. That hasn't 19 happened.</p> <p>20 CHAIRPERSON: Wouldn't that be 21 (indistinct) because the argument would be, I imagine, 22 limited to the word "desirable," they would not contend 23 that the section as a whole is unconstitutional. The most 24 they would contend for is the test of desirability is no 25 longer a constitutional one and the court before which they</p>
<p style="text-align: right;">Page 25897</p> <p>1 desirable and that's all I have to look at because that's 2 all section 4 of the Commissions Act says, that might be an 3 imprudent course to adopt, regard being had to other 4 arguments that have been advanced in relation to the fact 5 that this is a 1947 statute to be read, I think it's in 6 terms of section 39 of the Constitution, through the prism 7 of the Constitution. And it may be, of course, that a 8 court would hold that commissions are different and either 9 that those that contend, those that said section 34 applies 10 to commissions are wrong or it may be that there's some 11 other basis for saying that commissions are different, 12 desirability is all that's necessary, but if I were to 13 found the judgment on that then it would open up a whole – 14 not judgment, I beg your pardon – the ruling on that, it 15 would open up a whole vista of new points which I think I 16 should consider now before making up my mind finally on 17 what I should do. That's the point really, isn't it? 18 (Indistinct) of the arguments for the opponents of the 19 application has been founded substantially on the question 20 of necessity, I do understand you to be saying and for the 21 various reasons you and Ms Barnes and Mr Ntsebeza I think 22 before you have contended – no, Mr Ntsebeza came but he 23 didn't speak, he left it to Ms Barnes – Mr Brickhill, Mr 24 Brickhill, for the reasons expressed and the values 25 referred to, you would contend it wouldn't be desirable</p>	<p style="text-align: right;">Page 25899</p> <p>1 came, would say well, isn't this premature? How do we know 2 what the Commission is going to do? The Commission may 3 find it necessary in any event, in which case the point 4 would fall away and courts, as I understand it, don't 5 decide constitutional issues unless they have to and if a 6 point arises in a case which may never be decisive, the 7 court very often says, well, we won't reach the 8 constitutionality thereof, we won't reach the 9 constitutionality point unless we have to. So I think that 10 may be the answer to the point you've just put.</p> <p>11 Mr Semanya, it's been pointed out to me that it's 12 nearly time from a comfort break and, as you can hear from 13 my voice, I'm in need of some medication. It may help you 14 if we take the comfort break now and possibly (indistinct) 15 assisting you in the matter. We'll take the comfort break 16 now.</p> <p>17 MR SEMENYA SC: We may, Chair.</p> <p>18 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>19 [10:54] CHAIRPERSON: - question just before we 20 took the comfort break, which you might have appreciated 21 the opportunity to consult with some of your colleagues who 22 seemed to be wanting to consult with you. Are you ready, 23 are you in a position now to proceed with your argument?</p> <p>24 MR SEMENYA SC: I am, Chair, thank you. 25 Chair, the last point on the questions I was seeking to</p>

<p style="text-align: right;">Page 25900</p> <p>1 answer is the Constitution itself. You have schedule 6 of 2 the Constitution which deals with transitional 3 arrangements. Item 2 in schedule 6 of the Constitution 4 deals with the continuation of existing law and there it 5 says, "All law that was in force when the Constitution took 6 effect continues in force subject to, (a), any amendment or 7 repeal; and (b), consistency with the Constitution," and 8 the submission we're making is that consistency with the 9 Constitution is a power that resides with courts in the 10 determination of that element of the Constitution. So for 11 the purposes of the determination of this application, 12 Chair, you have to accept that the law is what it is.</p> <p>13 CHAIRPERSON: I accept that, but I also 14 though have to interpret the law - even though I'm a mere 15 commissioner, you know, I have to interpret the law, I 16 gather, through the prism of the Constitution in terms of, 17 I think it's section 39(2) of the Constitution. That's 18 correct, isn't it? I haven't got the power to strike down, 19 but I have got a power and a duty to interpret and post 20 '94, in this case '96, I have to interpret an old law 21 through the prism of the Constitution. That's correct –</p> <p>22 MR SEMENYA SC: There's no doubt that –</p> <p>23 CHAIRPERSON: That's correct, is it not?</p> <p>24 MR SEMENYA SC: There's no doubt that we 25 have a supreme law. It is binding on all organs of State.</p>	<p style="text-align: right;">Page 25902</p> <p>1 that you are also bound by the provision of regulation 11 2 which says what ever it is that we do here must not 3 adversely affect pending proceedings in other courts, and 4 our submission is Mr X is that type of a witness who is 5 critical to the prosecutions of events that arise out of 6 Marikana, and the submission we make in that regard is that 7 were the safety of Mr X to be undermined or any member of 8 his family be put at risk, there is no doubt that that will 9 affect adversely the conduct of future hearings.</p> <p>10 Now in answering the question whether it is 11 necessary or desirable to have this evidence in camera and 12 through the video link we deal with a whole number of 13 issues, but it is important to see the circumference around 14 which the camera evidence of Mr X is to be received and we 15 say that, Chair, that Mr X will be giving his evidence viva 16 voce, which evidence will be transmitted in real-time to 17 persons who are interested to follow the evidence. So the 18 persons who Mr Mpofo calls interested people, or who he 19 otherwise calls parties, will be able to hear the evidence 20 of Mr X viva voce and in real-time, and when Mr X 21 testifies, as we make the submission, the legal 22 representatives permitted to examine him or cross-examine 23 him will do that also in real-time.</p> <p>24 Members of the media will also be able to 25 transmit the evidence of Mr X real-time, as it's always</p>
<p style="text-align: right;">Page 25901</p> <p>1 You're a creature of statute. You are an exercise of 2 executive power under the Constitution, and you have to 3 exercise those powers consistent with the dictates of the 4 Constitution. There is no debate about that part.</p> <p>5 What I think the respondents are inviting you to 6 do is to excise provisions in the statute, or language in a 7 statute or concept in a statute or words in a statute. 8 That can't be interpretation.</p> <p>9 So in paragraph 4 of our written reply, Chair, we 10 say we need to demonstrate to you, Chair, that you have the 11 power to direct the evidence of Mr X to be in camera, and 12 we have to demonstrate that it is desirable or necessary 13 that his evidence, that is now Mr X, be given in camera, 14 and then to implore you, Chair, that you exercise that 15 discretion you have in granting the application. We know 16 that to be correct because you're empowered, Chair, to 17 determine, or the Commission rather is empowered in terms 18 of regulation 19 to determine its own procedure, and in our 19 submission the question how the evidence of Mr X is to be 20 tendered and the medium through which it is to be tendered 21 are matters of procedure, and which regulation says the 22 Commission has the power to determine, and to which we'll 23 be inviting the Commission that his evidence be received 24 not only in camera, but through a video link.</p> <p>25 In paragraph 6, Chair, we make the submission</p>	<p style="text-align: right;">Page 25903</p> <p>1 been the case. The Commission and lawyers who will be 2 listening to the evidence of Mr X will be able to observe 3 his demeanour and the media will be able to report that 4 evidence without any censorship, save for the requirement 5 that must conceal his identity.</p> <p>6 But most importantly, as we will submit later, 7 the underlying premise for all of this application is that 8 you, Chair, and the Commission must ensure that justice 9 happens, and as we make the submission it is going to be 10 critically important that the evidence of Mr X helps the 11 Commission establish the truth and the justice that must 12 ensue out of these processes.</p> <p>13 So more significant, Chair, we're making the 14 submission under paragraph 8 that it is only the identity 15 of Mr X that we seek to protect, and more importantly all 16 those people who are related to him, and to help establish 17 whether or not it is necessary or desirable that this 18 evidence be tendered in the manner we request, we point to 19 a whole number of factors, Chair, under paragraph 9.</p> <p>20 In paragraph 9.1 we submit that it is of vital 21 importance to recognise one telling distinction in the 22 consideration of how the evidence of Mr X is to be received 23 in contrast to most of the cases to which the Commission 24 has been referred. Even the Leepile judgments are in our 25 respectful submission to be distinguished principally by</p>

<p style="text-align: right;">Page 25904</p> <p>1 one distinct fact we mention about Mr X. 2 Chair, we make the submission that Mr X is a 3 protected person within the meaning of the Witness 4 Protection Act. The director of the Witness Protection has 5 made a decision to place Mr X under witness protection, and 6 that decision was made having considered the nature and 7 extent of the risk to the safety of the witness or the 8 nature and the extent of the risk to a related person to 9 that witness. 10 He or she, the director that is, considered any 11 danger that the interests of the community might be 12 affected if Mr X or anyone related to him is not placed 13 under protection. 14 He or she also had to look into the nature of the 15 proceedings in which Mr X will be required to give 16 evidence, the importance, relevance, and nature of evidence 17 that Mr X will be giving in those proceedings, the 18 probability that the witness, that is Mr X or anyone 19 related to him will be able to adjust to the protection, 20 having regard to the personal characteristics – and we 21 emphasise that – circumstances and family or other 22 relationships of Mr X or persons related to him. 23 He or she, that is the Director of Witness 24 Protection, had to look at the cost likely to be involved 25 in the protection of that witness or anyone related to that</p>	<p style="text-align: right;">Page 25906</p> <p>1 the safety of those people related to him. So Brigadier 2 van Zyl says to you, Chair, that he holds the opinion that 3 Mr X to testify in an open forum will endanger his life and 4 that of his family. 5 Now to help persuade you, Chair, why it is 6 desirable and why it is that it is necessary that you 7 exercise the discretion in the manner the application 8 requests, we want to point now to the nature of the 9 evidence and the importance and relevance of the evidence 10 of Mr X, which are matters that according to the terms of 11 reference the Commission has been enjoined to investigate. 12 MR MPOFU: Chairperson, I'm really sorry 13 to do this. This tendency of SAPS to want to 14 sensationalise this application, we have said many times 15 that the question of relevance of Mr X's evidence is not 16 something we contest. So to regurgitate his lies in public 17 all the time is really something that we think is just 18 abuse of this forum because last time it happened and now 19 it's being done again. It doesn't matter what Mr X says. 20 We have conceded that his evidence is relevant. So you 21 know, if once again the people who represent are going to 22 be slandered through, you know, something that's not 23 necessary for the purposes of this application, as happened 24 last week, then we'd object to that. 25 [11:14] CHAIRPERSON: Mr Semenya, what do you say</p>
<p style="text-align: right;">Page 25905</p> <p>1 witness, had to look at the availability of any other means 2 of protecting the witness or one related to him, and other 3 relevant factors. 4 That having happened, Chair, we make the 5 submission under paragraph 9.2 that the decision of the 6 director to place Mr X under witness protection has not and 7 could not be challenged in this forum and for that reason 8 the submission is that the hearing of the evidence of Mr X 9 cannot be received in a manner that undermines the objects 10 of the Witness Protection Act. 11 That's the first aspect we wish to advance in 12 relation to whether or not in the exercise of your 13 discretion, Chair, you would find it desirable or necessary 14 that his evidence be received in the manner the application 15 requests. 16 There is a second reason. We have Brigadier van 17 Zyl who tells us that he's the coordinator of the task team 18 appointed to investigate cases relating to the events in 19 Marikana. He tells us that he knows the contents of the 20 dockets and based on the violence, says Brigadier van Zyl, 21 the killings, the intimidation of witnesses or people who 22 could have given valuable information, it is his belief, 23 that is the brigadier, that Mr X should not testify in an 24 open forum. He says that shouldn't happen for his own 25 safety and the submission we make is that it is also for</p>	<p style="text-align: right;">Page 25907</p> <p>1 in reply – 2 MR SEMENYA SC: Chair, really it's the 3 first time I hear relevant evidence constituting slander. 4 The two can't fit together. I have to persuade you, Chair, 5 in terms of the legislation that we have referred to, that 6 the evidence of Mr X is necessary or desirable as a basis 7 for which you would be exercising your discretion. We have 8 no interest in sensation 9 CHAIRPERSON: Say – 10 MR SEMENYA SC: – causing sensation in 11 relation to the evidence and we seek to cause no distress 12 and these are the arguments that we intend ultimately to 13 make. 14 CHAIRPERSON: Mr Mpofo, what do you say 15 in reply to that? 16 MR MPOFU: Well, first, Chairperson – 17 firstly I'm sure it's not the first time that Mr Semenya 18 hears that relevant evidence can be slander. In a 19 defamation case the words that are slanderous are the 20 relevant words, so they have to be repeated. The fact that 21 they are slanderous, it doesn't make them less slanderous 22 just because they are relevant. 23 Secondly, Chairperson, all I'm saying is that 24 let's – we are saying that Mr X's evidence would be 25 relevant to the Commission but what we are saying is</p>

<p style="text-align: right;">Page 25908</p> <p>1 irrelevant to this application, is the repetition of Mr X's 2 allegations against the people because we have read the 3 evidence of Mr X and we have conceded that his evidence is 4 relevant. We are not opposing this application on the 5 basis – if Mr Semenya was saying he grabbed someone from 6 the taxi rank and said I want to have an in camera 7 application for that person, then we would be saying 8 firstly this person's evidence is irrelevant and also, and 9 so on, but here we are not saying that. We have conceded 10 that the evidence itself, the content of the evidence is 11 relevant.</p> <p>12 CHAIRPERSON: Relevant for what, Mr 13 Mpofu?</p> <p>14 MR MPOFU: For the Commission. So what 15 we are saying, it's irrelevant for this thing to be 16 repeated again because once again it means regurgitation of 17 allegations which we have already said are slanderous and 18 are a pack of lies from an unreliable murderer.</p> <p>19 CHAIRPERSON: Mr Mpofu has objected to 20 the repetition by Mr Semenya of certain aspects of the 21 evidence that it is understood that Mr X may give in due 22 course and he does so on the basis, he says that he and 23 those who are associated with him in opposing this 24 application have conceded that this evidence, if true – 25 something which they deny – will be relevant for the</p>	<p style="text-align: right;">Page 25910</p> <p>1 CHAIRPERSON: Mr Semenya, it sounds to me 2 as if you're delivering a concurring judgment – 3 MR SEMENYA SC: No – 4 CHAIRPERSON: - in respect of the ruling 5 I've just given. 6 MR SEMENYA SC: No, Chair. With respect, 7 I would submit that the burden we carry is, as they say, 8 Commission hearings must be in public. That's the general 9 rule, so there must be compelling reasons why, if you were 10 to succeed, that the society that is listening to these 11 proceedings must understand what may have been the reasons 12 that bring you to the conclusion that you do, if we were to 13 be successful. and we say, Chair, and we open the 14 paragraphs we deal with on the basis that if Mr X is to be 15 believed – I'm not raising it higher than that – 16 CHAIRPERSON: Might I interrupt you at 17 this point? This flows to some extent from a point that Mr 18 Mpofu made. Obviously the evidence, if it's given by Mr X, 19 will be very damaging to Mr Mpofu's clients and a number of 20 others. It will be evidence which will seriously affect 21 them from a reputational point of view apart from any 22 other, and a number of other points of view. So it's 23 important to stress that the evidence – you are arguing the 24 matter on the basis that if it is true and this Commission 25 must be aware of the fact, as I am, that this evidence may</p>
<p style="text-align: right;">Page 25909</p> <p>1 Commission.</p> <p>2 In my view there is no basis for refusing Mr 3 Semenya the right to refer to some of the evidence that Mr 4 X, he has understood Mr X will be giving, provided that 5 evidence is relevant to the question as to whether this 6 Commission should sit in camera. The relevancy of his 7 evidence for the work of the Commission is one thing, it's 8 relevance for the purposes of this application may well be 9 another. If the evidence is of such a nature as to 10 strengthen the case of the SAPS for a hearing in camera, 11 then in my opinion there's no reason why Mr Semenya 12 shouldn't be allowed to repeat it to (indistinct). I don't 13 think it appropriate that he should simply refer to 14 everything which he understands Mr X will give but I will 15 allow him to refer to those aspects of the evidence which 16 it is thought Mr X will give which is relevant to his 17 contention that on this part of the matter the Commission 18 should sit in camera. So I overrule the objection.</p> <p>19 MR SEMENYA SC: Chair, but also it is one 20 thing that the respondents are conceding the relevance of 21 the evidence but what I think the world would want to know, 22 if you were to find for us, they would want to know why you 23 came to that conclusion as a Commission. It will not be 24 only to say to the rest of the country or the world that 25 you emphasise –</p>	<p style="text-align: right;">Page 25911</p> <p>1 not be true. It may, as is suggested by Mr Mpofu, be, to 2 use his words, a pack of lies but we're considering, the 3 application being considered at this stage on the basis of 4 the assumption, which may turn out to be unwarranted at the 5 end, that the evidence is true. Certainly Mr X is going to 6 make very, very serious allegations about a number of 7 people including – and also about himself, of course – and 8 it may well be a matter of importance to assess how serious 9 these allegations are, both from the point of view of how 10 likely it is that that may provoke some kind of adverse 11 response from the people potentially affected but also from 12 the other point, the more important the evidence, the more 13 compelling the reason to allow it, provided the other facts 14 that are necessary to be established have been established. 15 I mean if he is simply going to give evidence that four 16 hearses were requested on the morning of the 16th, that 17 would be a different matter.</p> <p>18 MR SEMENYA SC: Mr X, if we take what he 19 will tell us, it would inter alia be that he, together with 20 the late Mr Noki and 3 to 400 persons were acting in 21 concert, making it understandable that the police's attempt 22 to disperse them was thwarted by the mere say-so of Mr Noki 23 saying "We have done nothing wrong." And there are 3 to 24 400 people who knowingly are having dangerous weapons, the 25 guns and the pangas, the spears, the assegais, some of</p>

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1 those in full view of the police and in clear contravention
 2 of the law and while there is an active attempt by a law
 3 enforcement agency in the country to disarm them. He will
 4 tell us that the group went and undergone muti rituals with
 5 the promise that that muti would make them invincible. And
 6 our submission, Chair, is that that may help us understand
 7 or give explanations for something that is otherwise
 8 inexplicable, why an armed group of people would approach a
 9 police line, almost oblivious to the fact that their
 10 movement could reasonably be interpreted as a threat or an
 11 attack, given the antecedent incidents including fatalities
 12 of members of the police. Mr X is believed would help us
 13 understand why an unfurling of barbed wire or the discharge
 14 of teargas would precipitate an attack on the police.
 15 Chair, the Commission has heard evidence of
 16 police witnesses who say this is inconsistent with police
 17 doctrine. It doesn't happen in past experiences that
 18 people respond in the manner that happened on the 16th, but
 19 Mr X will tell us that the instruction of the inyanga was
 20 that they must await the first act to be - of the police
 21 and then the attack would bring no consequence to them, and
 22 because Mr X would have told them those who perish before
 23 you did so by reason of the fact that they did not follow
 24 one or other of the instructions given to them.
 25 It is not self-evident when you look at the video

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1 material why it is that people don't have their palms open
 2 even when giving directions. Mr X is going to explain that
 3 to us and he will tell the Commission that if you take
 4 koppie 3 and why it is that immediately after scene 1 a
 5 whole number of people went to koppie 3, because it's
 6 inexplicable, why choose that koppie? Mr X will tell us
 7 that it was chosen as a strategic location for various
 8 reasons. They knew the koppie would be secluded and
 9 located way from the public for the performance of rituals.
 10 He will tell us the trees and the boulders gave privacy and
 11 that strangers would be seen approaching from far away
 12 because of the vantage position and the lighting, it would
 13 be difficult for a stranger to specifically pinpoint the
 14 precise location of where the group camped.
 15 And now we can understand even somebody who is
 16 injured with an amputated toe does not run to any place
 17 other than koppie 3. There was an appreciation that access
 18 to the koppie using a motor vehicle was not easy because of
 19 the rugged terrain and that they knew that it would be easy
 20 to escape from koppie 3 if need be.
 21 In 10.7, Chair, we make at least what we're
 22 saying is the fulcrum to the weight of this application.
 23 Mr X points fingers and he accuses some of the persons even
 24 in this auditorium of serious crimes in Marikana and that
 25 must point to the likely harm that he stands to suffer if

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1 they listen and hear and see what it is that he says about
 2 them. And we submit in paragraph 11, "If the image of Mr X
 3 were to be widely publicised, his family members and
 4 persons related to him would be exposed to clear harm if
 5 the death of so many others has resulted from their pure
 6 association with the events in Marikana." It is no answer,
 7 we submit Chair, as some parties would want to contend,
 8 that the identity of Mr X is known already. He would be,
 9 on his own version, an accomplice.
 10 The purpose of the application, we make the
 11 submission, Chair, is not only to protect Mr X but it is
 12 also to protect those related to him and the submission is
 13 that if his image was to be known, if he's from the Eastern
 14 Cape then everybody in the Eastern Cape will know him but
 15 they will also know who are the relatives and that exposure
 16 to risk is, in our submission, not necessary or desirable.
 17 And around Mr X there is an additional factor we
 18 wish to point to, Chair. This is a witness who must be
 19 capable of reintegration if his evidence is believed and he
 20 gets the 204 indemnity for his complicity in the events
 21 about which he testifies and implicates others. We should
 22 not make it difficult for that reintegration to happen,
 23 justice does not require it.
 24 [11:33] In paragraph 12, Chair, we make the submission
 25 that we have a Colonel Rungusamy who is telling us that he

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1 is in the ORS Finance Department and in that capacity says
 2 that the cost SAPS would incur to post members at the
 3 Commission amount to those figures that are in the
 4 affidavit.
 5 CHAIRPERSON: That's per month?
 6 MR SEMENYA SC: Per month, Chair. The
 7 respondents offer the opinion of Ms Keetse, and we say with
 8 respect she cannot even claim to have personal knowledge of
 9 facts that are competent and capable of refuting what
 10 Colonel Rungusamy tells us.
 11 CHAIRPERSON: Mr Semenya, the point made
 12 by Ms Barnes was that in the absence of evidence as to what
 13 the video link would cost there's no comparison. You can't
 14 say we've got all these expenses incurred because we will
 15 have to post members at the Commission to protect Mr X, but
 16 we don't know on the other side what the costs of not
 17 posting those members, but allowing him to testify from a
 18 remote venue by video link would cost. So unless one can
 19 say that the cost of having him testify here with all these
 20 warrant-officers or sergeants in attendance substantially
 21 exceeds the cost of the video link, then this cost factor
 22 is irrelevant. That's the contention she put up. What's
 23 your answer to that?
 24 MR SEMENYA SC: Well Chair, that is
 25 correct. The affidavits don't make that point except to

<p style="text-align: right;">Page 25916</p> <p>1 say if we draw inspiration from how the provisions of 2 section 158(2) of the Criminal Procedure Act deals with 3 this aspect, cost is only one of the elements.</p> <p>4 CHAIRPERSON: Yes, I understand that. I 5 could understand that you argue that apart from the cost 6 implications you say you've made out a good case. Whether 7 that's so or not I'll have to consider, but the point that 8 Ms Barnes made was in assessing the cogency of the case you 9 make out I shouldn't pay attention to the cost factor for 10 the reasons she gave and it does sound from what you're 11 saying to me in response is you don't quarrel with Ms 12 Barnes on that.</p> <p>13 MR SEMENYA SC: And in the reply, Chair, 14 we just now want to deal with the tenure of the objection 15 to the application that has been raised by the various 16 parties. On behalf of the injured and arrested persons, 17 families of the deceased, and AMCU, they broadly offer 18 threefold bases, or grounds of objection or opposition.</p> <p>19 Firstly as we make observation, whilst conceding 20 that the Commission can order the evidence of Mr X to be 21 heard in camera and to prohibit the disclosure of his 22 identity, the argument is that you do not have the power at 23 least to direct the manner in which that evidence would be 24 given, i.e. through the video link. Well, we've already 25 addressed this contention in our written submissions and we</p>	<p style="text-align: right;">Page 25918</p> <p>1 have looked at the dockets and I'm satisfied that if Mr X 2 were to give evidence in an open forum he will be exposed 3 and that of his relatives to harm. That evidence is not 4 countered. It is not challenged at least by anybody who 5 could profess to have an appreciation of matters of risk 6 and safety and matters of criminal investigation.</p> <p>7 CHAIRPERSON: Is there a legal basis upon 8 which I can not exactly delegate the decision, but 9 substantially defer to someone who gives me his opinion 10 almost on an ipse dixit basis? What value can I attach to 11 that?</p> <p>12 MR SEMENYA SC: Perhaps not much weight 13 if it is counterbalanced by some other more compelling 14 evidence, but absent any countervailing evidence to that, 15 Chair, and no basis to reject his ipse dixit, ipse dixit 16 though given by somebody who tells a chair that I'm the 17 brigadier in the police service, I'm investigating criminal 18 matters in relation to these matters, I have looked at the 19 contents of the docket and I hold the view the safety of 20 this individual stands to be in peril in relation to him 21 giving evidence, if it were manifestly unsound or 22 manifestly implausible then you would have the power, 23 Chair, to reject it.</p> <p>24 Now the third argument which has been offered 25 quite extensively as well is that, Chair, don't use the</p>
<p style="text-align: right;">Page 25917</p> <p>1 say it is directly answered by the provisions of regulation 2 19 which gives you the power to determine the how.</p> <p>3 The second ground is that we failed to make out a 4 case, and I think it was even argued today that we just 5 simply failed to make out that case.</p> <p>6 CHAIRPERSON: In particular the point 7 made was that there's a lack of a causal link between the 8 giving of evidence by Mr X, or the non-giving of evidence 9 by him because the order you seek was not made. The lack 10 of a causal link was stressed very strongly by Mr Mpofo.</p> <p>11 MR SEMENYA SC: Chair, that argument is 12 met by at least two distinct factors. As we make the 13 submission Mr X is already a protected witness under the 14 statute. So the debate whether or not giving evidence and 15 his safety are causally related has been established at 16 least under the statute and the decision stands. If we are 17 talking about an unprotected witness we would be having a 18 different debate. We would have had to convince you that 19 that relationship exists, but the statute which is 20 principally intended to protect people from harm by very 21 reason of them giving evidence in other proceedings is the 22 basis of that statute.</p> <p>23 But we give a second reason and we say we have a 24 brigadier who says he's coordinating a task team which is 25 investigating the complaints around Marikana and he says I</p>	<p style="text-align: right;">Page 25919</p> <p>1 discretion which you have under the law because using that 2 discretion would be inconsistent with the common law. The 3 submission we make is that that can't be correct. The 4 common law recognises the giving of evidence in camera and 5 so does international law.</p> <p>6 The other argument which has been made why, 7 Chair, you should exercise your discretion against the 8 granting of the application is that the ruling would 9 infringe the rights of victims of Marikana. To that the 10 submission we make is that the force of the application is 11 to protect perhaps one of the most sacrosanct rights in the 12 Bills of Rights, which is the right to life of Mr X and 13 those who are related to him. In balancing the two 14 competing rights we would submit that the balance must tilt 15 in favour of protecting the right to life.</p> <p>16 The Legal Resources Centre on behalf of the 17 Ledingoane family tell us, Chair, that they recognise that 18 the Commission has the power to exclude other persons from 19 the hearing or limit disclosure of information that may 20 identify the witness. They say that that is only legally 21 competent if a proper case for that relief is made out, and 22 the opposition is that this is the type of ruling that is 23 inconsistent with open justice.</p> <p>24 Now again as we make the submission it's 25 conflating two sides of the coin and the requirements of</p>

<p style="text-align: right;">Page 25920</p> <p>1 open justice are not up for debate at least in this 2 application. It is the reserve of that coin which is 3 whether or not an in-camera hearing, or the requirement for 4 it has been made out in this application and we make the 5 submission that in-camera hearings are founded squarely in 6 our domestic law, as well as in international law. 7 The LRC on the other hand also concedes that the 8 right to life, dignity and security of a person are 9 constitutionally protected rights, but then question as 10 they say it in quotes, we say there, "The likeliness of 11 harm to Mr X or his family has not been demonstrated," and 12 we meet that with the submissions we have made in relation 13 to that point made by Mr Mpofo about causality. 14 But in paragraph 19 we say, Chair, most tellingly 15 the LRC makes the concession that "We accept that there is 16 a reasonable possibility that Mr X might be harmed as a 17 result of his testimony." And this we submit it's a 18 correctly made concession by a human rights conscious legal 19 team that answers to the causality that Mr Mpofo was 20 wanting to see. 21 And on the question of the identity of Mr X, says 22 the LRC, that in any event he's an accomplice, his identity 23 is already known, and as Mr Mpofo amplifies, he's going to 24 be telling his clients, as he must, and the identity of Mr 25 X therefore will find that type of exposure. But our</p>	<p style="text-align: right;">Page 25922</p> <p>1 [11:53] But ultimately the question is what is in the 2 interests of justice, we submit, and in our submission it 3 is in the interests of justice that Mr X give his evidence 4 in camera and per video link without exposing him to likely 5 harm in his duty to give evidence, but this is the greater 6 danger, Chair, which we postulate, if Mr X refuses to 7 testify in an open forum the consequence to him is no 8 higher than just to be held in contempt, he's imprisoned 9 for it given - but that outcome, in our respectful 10 submission, would undermine the very interests of justice 11 this Commission has been established to discover. We pitch 12 it a little higher and say it may even derail the 13 Commission in coming to the truth behind the tragedy that 14 happened in Marikana. No less it will adversely affect 15 pending criminal prosecutions inconsistent with the 16 regulation 11 we referred to earlier. 17 Finally, on behalf of the SAPS we say we have 18 made out a proper case for the Chair to exercise a 19 discretion to grant the application, having come to the 20 opinion that it was necessary and desirable that his 21 evidence be given in the manner contemplated in the draft 22 relief and the Commission, sitting as three commissioners 23 exercising the powers in regulation 19, may direct that 24 that evidence be received by way of a video link. 25 CHAIRPERSON: Mr Semenya, what do you say</p>
<p style="text-align: right;">Page 25921</p> <p>1 submission is that that argument misses the point, Chair, 2 with respect. The relationship of Mr X and his family is a 3 matter which is not of wide public knowledge, neither is – 4 CHAIRPERSON: Sorry, I think you mean 5 identity – 6 MR SEMENYA SC: Identity, yes Chair. 7 CHAIRPERSON: Yes. 8 MR SEMENYA SC: The people in the village 9 where he lives and those who may be exposed to possible 10 harm to his members and family will not know Mr X and his 11 identity if it is protected, and by extension the safety of 12 those related to him, and as we reiterate the point that 13 his reintegration must be made possible as opposed to 14 difficult. 15 In paragraph 21 we dealt with the question of 16 costs and I've made the concession I have made in that 17 regard, Chair, and by way of conclusion we say that the 18 evidence leaders in principle at least support the 19 application, meaning that they are satisfied that the 20 requirements for in-camera hearing have been met. They 21 share the view with us that the evidence of Mr X is 22 critical in answering some of the questions raised in the 23 terms of reference, so that, Chair, the ultimate submission 24 we make by way of conclusion is to say that that case seems 25 to be borne out in the papers.</p>	<p style="text-align: right;">Page 25923</p> <p>1 to the suggestions that Ms Pillay made in her argument that 2 the relief you seek should be qualified or supplemented in 3 certain respects which she sets out in her heads? Do you 4 concede that the suggestions she makes are of a nature that 5 could be incorporated in the order that I make in the event 6 of my deciding to make an order in your favour? 7 MR SEMENYA SC: We align ourselves with 8 the draft relief order, Chair. 9 CHAIRPERSON: Very important arguments 10 have been put before me with regard to this application. 11 Weighty considerations have to be [indistinct] and weighed 12 up and I'm not in a position to make my ruling now. I 13 would like to give my ruling as soon as I can. There's a 14 lot of material that I have to work through and points that 15 I have to weight up and all I can say is that I will give 16 the ruling on the application as soon as I'm able to do so. 17 We will now take the tea adjournment after which we will 18 continue with the evidence of Lieutenant-Colonel Vermaak. 19 Counsel is going to be cross-examining him after the 20 adjournment because we have representatives now of AMCU, 21 the families, injured and arrested persons, the Human 22 Rights Commission. 23 MS LE ROUX: Chair, I believe the Human 24 Rights Commission will commence. 25 CHAIRPERSON: May I enquire, have the</p>

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1 parties are going to cross-examine agreed among themselves
 2 as to the order which they would prefer? So you're first,
 3 Ms Le Roux, who is going to be next?
 4 MS LEWIS: Chair, the families will
 5 cross-examine next.
 6 CHAIRPERSON: Ms Lewis, will you be
 7 cross-examining next?
 8 MS LEWIS: No, Chair, Mr Ntsebeza will.
 9 CHAIRPERSON: That's if he is here.
 10 MS LEWIS: He will be here, Chair.
 11 CHAIRPERSON: After counsel for the
 12 families?
 13 MR GOTZ: Chair, I'll be cross-examining
 14 Lieutenant-Colonel Vermaak on behalf of AMCU and then
 15 finally –
 16 MR MPOFU: Then it's between SAPS and –
 17 MR GOTZ: - Mr Mpofo.
 18 MR MPOFU: I know.
 19 CHAIRPERSON: Sorry, I thought I'd
 20 indicated I should allow the SAPS to cross-examine him last
 21 –
 22 MR MPOFU: Yes.
 23 CHAIRPERSON: - because there may well be
 24 material arising from the cross-examination of the parties
 25 who indicated already they will cross-examine as well as Mr

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1 Mpofo on behalf of the injured and arrested persons, which
 2 the South African Police Service might wish to interrogate.
 3 So you, Mr Mpofo, will be next after Mr Gotz.
 4 MR MPOFU: Yes, Chairperson, subject –
 5 well, yes, we accept that, Chair, your ruling Chairperson,
 6 simply to place on record that we will reserve our right,
 7 depending on the SAPS cross-examination, to reapply should
 8 the need arise.
 9 CHAIRPERSON: Well, you have that right
 10 to reapply, you don't have to reserve the right. Obviously
 11 if something arises from the cross-examination it would
 12 only be appropriate for me to allow some of the other
 13 parties who have already cross-examined to cross-examine
 14 further. I would obviously consider such application. The
 15 right exists, it doesn't have to be reserved. We will now
 16 take the tea adjournment.
 17 MR MPOFU: Thank you, Chairperson.
 18 [COMMISSION ADJOURNS COMMISSION RESUMES]
 19 [12:20] CHAIRPERSON: The Commission resumes.
 20 Luitenant-kolonel, ek moet u nog daaraan herinner dat u
 21 gebonde is deur die plegtige bevestiging.
 22 KOLONEL VERMAAK: Dis korrek, Voorsitter.
 23 CHAIRPERSON: Ms Le Roux?
 24 MR MPOFU: Chairperson, just a quick one.
 25 I was asked to just make a request that when the ruling is

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1 going to be done we are just given forward warning, a
 2 couple of days.
 3 CHAIRPERSON: No, of course.
 4 MR MPOFU: Because of the interests -
 5 CHAIRPERSON: Of course. When I'm in a
 6 position to give the ruling I will indicate at least a day
 7 beforehand when I will give it.
 8 MR MPOFU: Thanks, Chairperson.
 9 SALMON JOHANNES VERMAAK: (bevestig
 10 verder)
 11 CHAIRPERSON: Now, Ms Le Roux, you gave
 12 us some exhibits or some future exhibits, I think one can
 13 call them, in chambers. Do you want to do the housekeeping
 14 now or shall we wait for Ms Pillay to come and help us with
 15 the relevant indications? Are you going to start with
 16 these exhibits immediately?
 17 MS LE ROUX: No, Chair, I'm not but there
 18 are only two of them so I'm in your hands as to whether
 19 you'd like to mark them now or when we get to them in the
 20 course of the cross-examination.
 21 CHAIRPERSON: Let's mark them now so we
 22 don't interrupt the flow of your cross-examination. Let's
 23 have a look and see where we were. The last exhibit
 24 appeared to be OOO19, so shall we make yours – which one do
 25 you want first?

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1 MS LE ROUX: Chair, if we could mark the
 2 CALS analysis document as –
 3 CHAIRPERSON: OOO20?
 4 MS LE ROUX: OOO20.
 5 CHAIRPERSON: Let me get that down in my
 6 book. Exhibit, it's an analysis of exhibit Z2 and Z3. And
 7 then we've got another one that you gave us, OOO –
 8 MS LE ROUX: Yes, Chairperson, and then –
 9 CHAIRPERSON: - 21, that'll be. What's
 10 that?
 11 MS LE ROUX: It's a presentation obtained
 12 from the SAPS hard drive, I propose we can entitle it the
 13 Brügge and Thomas presentation. I'm not sure on
 14 pronunciation.
 15 CHAIRPERSON: So what do I call this
 16 exhibit?
 17 MS LE ROUX: Chair, we could call it the
 18 May 2011 Brügge and Thomas presentation.
 19 CHAIRPERSON: May 2011. Is that how you
 20 pronounce Brügge? I see it's got an umlaut on the "u" I
 21 don't know what that –
 22 MS LE ROUX: Chair, any assistance you
 23 can provide, I'll accept. I don't know. Chair, the
 24 printout you have has today's date because that's how the
 25 PowerPoint prints but on the SAPS hard drive we can

<p style="text-align: right;">Page 25928</p> <p>1 identify that it was made in May 2011.</p> <p>2 CHAIRPERSON: Alright.</p> <p>3 MS LE ROUX: That's the beginning date –</p> <p>4 CHAIRPERSON: I just want to mark it May</p> <p>5 2011 because do we – I don't think we have a German speaker</p> <p>6 in the house. Brüggé and Thomas presentation, May 2011,</p> <p>7 that's OOO21. Very well, please proceed with your cross-</p> <p>8 examination.</p> <p>9 CROSS-EXAMINATION BY MS LE ROUX: Thank</p> <p>10 you, Chair. Lieutenant-Colonel Vermaak, good afternoon.</p> <p>11 COLONEL VERMAAK: Good afternoon, Ma'am.</p> <p>12 MS LE ROUX: Lieutenant-Colonel, the</p> <p>13 South African Human Rights Commission has been granted</p> <p>14 leave to cross-examine you on five topics. I'd like to</p> <p>15 start with the first of those which relates to the</p> <p>16 circumstances in which you are appearing before us at the</p> <p>17 Commission, unrepresented by the SAPS legal team.</p> <p>18 CHAIRPERSON: No, no –</p> <p>19 MS LE ROUX: I'd like to ask – no, I'm</p> <p>20 not asking, Chair, I'm observing the ruling, I'm just</p> <p>21 orientating in my application what I'm dealing with.</p> <p>22 CHAIRPERSON: I thought I refused the</p> <p>23 first one.</p> <p>24 MS LE ROUX: Yes, but that's not the</p> <p>25 question I'm about to ask.</p>	<p style="text-align: right;">Page 25930</p> <p>1 the Commission a falsehood? So the first I asked you was</p> <p>2 whether you'd been asked to omit any information you have,</p> <p>3 now I'm asking you whether you've been ask to lie to the</p> <p>4 Commission in any –</p> <p>5 COLONEL VERMAAK: Nee, geen stadium was</p> <p>6 ek aangesê om voor die Kommissie te jok nie.</p> <p>7 MS LE ROUX: Thank you, Lieutenant-</p> <p>8 Colonel. Moving on to the next topic of my cross-</p> <p>9 examination which relates to radio communication in</p> <p>10 particular. As the Human Rights Commission understands the</p> <p>11 SAPS case before this Commission and your role and</p> <p>12 responsibility in that, it appears to us that SAPS are</p> <p>13 submitting that scene 2 only took place because the overall</p> <p>14 commander, the operational commander and the JOC were</p> <p>15 unaware of scene 2 – sorry, scene 1 – and on that account</p> <p>16 these commanders were unaware of scene 1 because you failed</p> <p>17 to inform them of what had happened there. And then of</p> <p>18 course if that is correct, you would bear overwhelming</p> <p>19 responsibility for what took place at scene 2 and as I</p> <p>20 understand your evidence you've accepted that it as part of</p> <p>21 the plan as briefed to you, that your role would be to</p> <p>22 inform the JOC and the operational commander of what was</p> <p>23 happening on the ground.</p> <p>24 COLONEL VERMAAK: Dis korrek.</p> <p>25 MS LE ROUX: So to orientate you in what</p>
<p style="text-align: right;">Page 25929</p> <p>1 CHAIRPERSON: Alright, go on, okay.</p> <p>2 MS LE ROUX: Lieutenant-Colonel, on day</p> <p>3 206 of the Commission's proceedings you described a phone</p> <p>4 call that you received from Brigadier Calitz during his</p> <p>5 cross-examination on the 9th of January. We don't need to</p> <p>6 go there but for the record, it appears at page 25447 of</p> <p>7 the transcript and during your evidence on that phone call</p> <p>8 it appeared to us that you suggested that you were placed</p> <p>9 under some pressure to mislead the Commission. I'd just</p> <p>10 like to clarify that evidence because I'm not sure if we</p> <p>11 understood that correctly. So let me ask you plainly, have</p> <p>12 you been put under any pressure at any stage not to tell</p> <p>13 the Commission the truth by omitting information from your</p> <p>14 statements or evidence before this Commission?</p> <p>15 COLONEL VERMAAK: Voorsitter, nee, ek</p> <p>16 dink dit was, daardie stelling was verkeerd gewees. Dit</p> <p>17 het maar net daarop gegaan dat brigadier Calitz vir my gesê</p> <p>18 het dat indien ek dalk mediaberigte of iets lees waarin my</p> <p>19 naam uitkom en wat dit sou lyk dat asof hy die skuld en</p> <p>20 verantwoordelikheid van koppie 3 na my toe sal afskuif, dit</p> <p>21 nie sy bedoeling was nie en dan die opmerking gemaak wat ek</p> <p>22 en hy van die begin af gesê het, is dat ek en hy net by die</p> <p>23 waarheid sal bly en niks anders as by die waarheid nie.</p> <p>24 MS LE ROUX: And just to close the loop,</p> <p>25 have you at any stage been put under any pressure to tell</p>	<p style="text-align: right;">Page 25931</p> <p>1 I'm dealing with, you're comfortable with that?</p> <p>2 COLONEL VERMAAK: Dis korrek.</p> <p>3 MS LE ROUX: Could I then ask you to turn</p> <p>4 to exhibit JJJ178, which is the statement of Gary White,</p> <p>5 the Human Rights Commission's expert, and specifically to</p> <p>6 page 108 of that statement? Page 108.</p> <p>7 COLONEL VERMAAK: Ek het hom, dankie.</p> <p>8 MS LE ROUX: Lieutenant-Colonel, you've</p> <p>9 had the opportunity to review the entire statement of Mr</p> <p>10 White as well as all of its annexures, correct?</p> <p>11 COLONEL VERMAAK: Ek het hom deurgegaan,</p> <p>12 dis korrek.</p> <p>13 MS LE ROUX: Could I ask you to</p> <p>14 concentrate on paragraph 7.4.5 which appears on page 108?</p> <p>15 Here Mr White notes that "There were problems communicating</p> <p>16 on a single channel, which does not excuse a failure to</p> <p>17 report on progress of the operation to the JOC. Paragraph</p> <p>18 5.2.9 of the POP policy document on crime management states</p> <p>19 in terms, 'feedback concerning the operation must be</p> <p>20 continually conveyed to the operational centre.' On that</p> <p>21 basis, there is no reason why those in the JOC should not</p> <p>22 be fully informed of what is happening on the ground.</p> <p>23 Lieutenant-Colonel Vermaak reported by radio the presence</p> <p>24 of two bodies at the back of the second koppie, apparently</p> <p>25 as soon as he saw them. Immediately after scene 1 he</p>

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1 photographed the approximately 20 bodies lying by the
 2 kraal. It is inconceivable that he did not report by radio
 3 the fact that a number of people had been shot, their
 4 bodies were down and medical assistance was required. If
 5 he did not, that failure is grossly negligent, given that
 6 he was the eyes of the operation from the air and he was
 7 one of the few people with ongoing access to the radio."
 8 There is a footnote which I'll deal with next in due
 9 course, but paragraph 7.4.5 sets out Mr White's criticism
 10 of you that if you did not convey the seriousness of the
 11 situation to the JOC shortly after the shooting at scene 1,
 12 then that would have been grossly negligent on your part.
 13 Of course Mr White in the footnote then refers us back to
 14 page 99 of his statement, if I could ask you to go there
 15 and to paragraph 7.3.6 in particular because here Mr White
 16 sets out the following. He states, "I'm not in a position
 17 to challenge Major-General Mpembe's evidence but it is
 18 deeply concerning that as overall commander he was unaware
 19 of the shooting at scene 1, given that there appears to
 20 have been significant radio traffic about the shooting."
 21 He then lists five examples of that radio traffic.
 22 "Captain Loest gave a reporting of shootings to the JOC and
 23 called for medical assistance at scene 1 immediately
 24 thereafter. Major-General Naidoo heard a report of
 25 shootings and a call for medical assistance and that is

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1 what prompted the movement of vehicles from forward holding
 2 area 1 around 3 [indistinct]. After the shootings
 3 Brigadier Fritz heard over the radio that people were shot,
 4 first aid personnel were requested to attend to the injured
 5 people and the police were trying to determine how many
 6 were shot." Then over the page, "Lieutenant Tsiloane gave
 7 a report on the number of fatally wounded and dead to
 8 Brigadier Fritz in chopper 2." And then "Warrant Officer
 9 Masinya heard the shooting incident through the radio in
 10 the JOC." So it appears that a number of members in their
 11 various statements suggest that you had been reasonably
 12 clear about the seriousness of the situation because they'd
 13 heard radio communication to that effect. Now, of course
 14 the difficulty is that we don't have a recording of the
 15 audio in the eight minutes and 30 seconds from the time of
 16 the shooting until the Protea Coin helicopter starts
 17 recording and that, for the record, is at 4:40 on the
 18 Protea Coin chopper recording which correlates to 16:02:20
 19 eTV time. So am I correct that you don't know of any other
 20 objective evidence that records radio communication in that
 21 eight and a half minutes? We simply don't have that before
 22 the Commission.
 23 KOLONEL VERMAAK: Dit is korrek,
 24 Voorsitter.
 25 MS LE ROUX: And the radio communication

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1 that we have recorded after that, so on the Protea Coin
 2 chopper and the Captain Ryland videos, it comes and goes.
 3 So we can hear that radios are being used but we can't hear
 4 what's being said on the radio, you accept that?
 5 KOLONEL VERMAAK: Dis korrek. Wat ek wel
 6 opgemerk het, op stadiums as u baie noukeurig na die video-
 7 opname kyk sou u gesien het dat die hand, op 'n stadium as
 8 iemand praat, nader gebring word aan die mikrofoon van die
 9 videokamera, dan word hy weer weggeneem, dan hoor jy
 10 gesprek in die agtergrond en dan sal jy die radio weer sien
 11 wat weer vorentoe kom, wat spesifieke persone se gesprekke
 12 opneem, Voorsitter.
 13 CHAIRPERSON: While we're talking about
 14 noise in the background, I hear in the background singing
 15 by some of the people who were here earlier and I'm
 16 informed they want to present a document to me. So I'm
 17 going to take the adjournment at this stage. I'd be
 18 grateful if Mr Mpofu would accompany me outside to receive
 19 the document, whatever it is that I'm going to be given.
 20 We'll now adjourn for a few minutes.
 21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 [12:50] COLONEL VERMAAK: Mr Chair.
 23 CHAIRPERSON: Ms Le Roux?
 24 MS LE ROUX: Thank you, Chair.
 25 SALMON JOHANNES VERMAAK: (bevestig

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1 verder)
 2 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 3 Lieutenant-Colonel, where we finished off before the
 4 adjournment was your agreement that obviously the recording
 5 of radio communication that is before this Commission is
 6 incomplete in that it doesn't have the eight and a half
 7 minutes from the time of the shooting until the Protea Coin
 8 chopper video starts but what I'd like to understand is
 9 your radio communication in that period of time, so it's
 10 from 15:53:50 which is the start of the shooting at scene 1
 11 and 16:02:20 which is when the Protea Coin chopper starts.
 12 So could I ask you to turn to exhibit FFF25 which is the
 13 occurrence book and if we could go to page 25 of that, to
 14 entry 1018. Chair, I'm just going to pause until everyone
 15 has managed to resume their seats. Chair, are we going to
 16 do simultaneous translation in the room? Are we okay?
 17 CHAIRPERSON: You know, it undermines the
 18 whole principle of simultaneous translation to speed things
 19 up but look, we've got 10 minutes before lunch time. I
 20 think let's have simultaneous trans – let's have
 21 consecutive translation until 1 o'clock and after that I'm
 22 afraid if there isn't enough, if there aren't enough
 23 headphones and there's not enough room in the room, people
 24 will have to accept that but let's for the next 10 minutes
 25 anyway before lunch proceed on a consecutive translation

<p style="text-align: right;">Page 25936</p> <p>1 basis. Where's Mr Mahlangu? Is he here?</p> <p>2 MR MPOFU: He is outside. Chairperson,</p> <p>3 yes, after lunch we will make arrangements that if there</p> <p>4 are extra people they can go to the overflow room.</p> <p>5 CHAIRPERSON: Thank you, Mr Mpofo. I</p> <p>6 don't know whether everyone will necessarily stay here this</p> <p>7 afternoon. I think they've come for something else but</p> <p>8 while they're here they'd obviously like to hear things up</p> <p>9 until the lunch adjournment and they have the right to do</p> <p>10 so. Has someone gone to fetch Mr Mahlangu?</p> <p>11 MR MPOFU: Chairperson, maybe I should</p> <p>12 just steal a minute to say that while I was outside I</p> <p>13 addressed the people and maybe it's my duty to convey their</p> <p>14 appreciation of the manner in which the Chairperson and the</p> <p>15 Commission handled their grievances. Thank you.</p> <p>16 CHAIRPERSON: Perhaps we should just put</p> <p>17 on record that after we adjourned we went outside</p> <p>18 accompanied by Mr Mpofo and Mr Mahlangu and the other</p> <p>19 commissioners and various other people and counsel, and the</p> <p>20 people present, Mr Magidiwana actually handed me a</p> <p>21 memorandum which had been prepared, which I read out and</p> <p>22 had translated to them so that everybody would know what</p> <p>23 the memorandum contained. Before that they sang songs and</p> <p>24 – but when they'd finished singing, Mr Magidiwana made a</p> <p>25 short speech and handed me the memorandum and I undertook,</p>	<p style="text-align: right;">Page 25938</p> <p>1 that two separate reports or it's one report on the radio</p> <p>2 that would have been communicated in that way to both</p> <p>3 Brigadier Calitz and the JOC?</p> <p>4 COLONEL VERMAAK: No, that will be one</p> <p>5 report made.</p> <p>6 MS LE ROUX: Major-General, I don't want</p> <p>7 to go to the exhibit unless I need to but in Major-General</p> <p>8 Naidoo's statement which, for the record, is exhibit JJJ108</p> <p>9 at paragraph 60 of that he records a request for medical</p> <p>10 assistance, that medical assistance was required. He heard</p> <p>11 that over the radio. Did you make that report that medical</p> <p>12 assistance was required?</p> <p>13 COLONEL VERMAAK: No, I heard over the</p> <p>14 radio that somebody, I couldn't say exactly who it was, was</p> <p>15 asking for medical support. Then I repeat it again and</p> <p>16 asked for the people on the ground need medical support.</p> <p>17 MS LE ROUX: And then, Lieutenant-</p> <p>18 Colonel, Brigadier Fritz in his statement which is JJJ72</p> <p>19 paragraph 6.2, again we don't need to go there, he reports</p> <p>20 hearing on the radio that people had been shot. Did you</p> <p>21 make a report that people had been shot or did he hear that</p> <p>22 from somebody else?</p> <p>23 COLONEL VERMAAK: No, my report was that</p> <p>24 there were bodies down. At that stage they didn't know</p> <p>25 what the reason was for the down on the ground.</p>
<p style="text-align: right;">Page 25937</p> <p>1 I received the memorandum and I undertook to consider it</p> <p>2 when I weigh up the evidence, the arguments that have been</p> <p>3 put before me in this in camera application and to give it</p> <p>4 due consideration before coming to whatever conclusion I</p> <p>5 come to.</p> <p>6 The memorandum I think we'll hand in as an</p> <p>7 exhibit. We'll call it PPP and I've described it as</p> <p>8 "Memorandum handed to Chairman on 1/4/2014." And those, if</p> <p>9 there's anyone here who wants a copy of the memorandum, I'm</p> <p>10 sure copies can be made. It's presently in the custody of</p> <p>11 the chief evidence leader Mr Budlender and he'll please</p> <p>12 mark it PPP so we'll know what it is. I fear you've only</p> <p>13 got five minutes left, Ms Le Roux, but use them as</p> <p>14 profitably as you can.</p> <p>15 MS LE ROUX: Thank you, Chair.</p> <p>16 Lieutenant-Colonel, in entry 1018, that is the occurrence</p> <p>17 book entry that correlates to the time period where we</p> <p>18 don't have radio communication recorded but what I'd like</p> <p>19 to understand is, was it your radio communication? Did you</p> <p>20 convey that there were 18 bodies down as it's recorded in</p> <p>21 entry 1018 in the occurrence book? Did you make that</p> <p>22 report?</p> <p>23 COLONEL VERMAAK: Yes, Chairperson, I</p> <p>24 made that report to the JOC and also to Brigadier Calitz.</p> <p>25 MS LE ROUX: And Lieutenant-Colonel, is</p>	<p style="text-align: right;">Page 25939</p> <p>1 MS LE ROUX: But did you hear a report on</p> <p>2 the radio that people had been shot –</p> <p>3 COLONEL VERMAAK: No.</p> <p>4 MS LE ROUX: I understand you didn't make</p> <p>5 it, did you hear it?</p> <p>6 COLONEL VERMAAK: No, I didn't hear it.</p> <p>7 MS LE ROUX: But from your perspective in</p> <p>8 this eight minutes and 30 seconds that we don't have</p> <p>9 recorded, did you convey to the JOC, to the operational</p> <p>10 commander and to the overall commander that people might be</p> <p>11 dead or seriously injured?</p> <p>12 COLONEL VERMAAK: I couldn't see from the</p> <p>13 air what exactly was the reason that they are lying down</p> <p>14 because I think the way that their bodies was lying, I</p> <p>15 assumed that some of the people might be injured seriously</p> <p>16 but I couldn't see it if they were shot because why, you</p> <p>17 can't hear it in the helicopter. I can just mention when,</p> <p>18 after I'd take photos with the Blackberry I used a Pentax</p> <p>19 also to take photos and then when I zoomed into the scene I</p> <p>20 could see there was some blood on the ground.</p> <p>21 MS LE ROUX: Other than being able to</p> <p>22 observe the blood on the ground, what was it about the way</p> <p>23 the bodies were lying that made you think people were</p> <p>24 injured or possibly dead?</p> <p>25 COLONEL VERMAAK: Some of them were lying</p>

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1 on top of each other and other people were lying away from
 2 the main group and in an unnatural position. Normally,
 3 Chair, normally when you arrest someone on the ground he
 4 will put his hands on the back of his head and straighten
 5 his legs to the back, so the way that they were lying is
 6 not the same.

7 MS LE ROUX: Lieutenant-Colonel Vermaak,
 8 last question before we break for the lunch adjournment,
 9 you're clear that you conveyed on the radio to the JOC and
 10 the commanders the seriousness of what you saw at scene 1,
 11 that 18 bodies were down, people were injured seriously?

12 COLONEL VERMAAK: The first time I
 13 reported to the JOC 18 bodies down, then we go through with
 14 a circle and then I started counting again and, if I
 15 remember, the last figure that I gave through to them was
 16 25 bodies down.

17 CHAIRPERSON: Alright, at this point
 18 we'll take the lunch adjournment. We will resume at about
 19 quarter to two.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]

21 [14:05] CHAIRPERSON: The Commission resumes.
 22 I'm afraid we had some more housekeeping to attend to in
 23 chambers during the lunch hour, so we didn't come back at
 24 the time we said we would. Luitenant-kolonel, ek moet u
 25 nog daaraan herinner dat u nog steeds gebonde is deur die

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1 plegtige bevestiging wat u gemaak het.

2 KOLONEL VERMAAK: Dis korrek, Voorsitter.

3 CHAIRPERSON: Ms Le Roux?

4 SALMON JOHANNES VERMAAK: (bevestig
 5 verder)

6 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 7 Thank you, Chair. Lieutenant-Colonel, let me just take a
 8 step back because we've had a number of interruptions to
 9 the progress of the cross-examination. So I'm correct, am
 10 I not, that we do not have an audio recording for the eight
 11 and a half minutes from the time of the shooting until
 12 16:02:20 when Protea Coin starts, is that correct?

13 COLONEL VERMAAK: That's correct.

14 MS LE ROUX: But then even after 16:02:20
 15 we don't have a full record of communication because of the
 16 difficulties you've identified where the radio comes close
 17 to the microphone and leaves, so the Commission does not
 18 have a complete record, correct?

19 COLONEL VERMAAK: I agree.

20 MS LE ROUX: What I'd like us to
 21 concentrate on, we were looking in the occurrence book at
 22 entry 1018 and I would just like to make sure, because this
 23 does fall within the period where we don't have recorded, a
 24 complete recording, and so your recollection will be of
 25 much assistance to the Commission. Can you confirm for me

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1 from your recollection, because as we've managed to piece
 2 things together the order goes as follows. So we start
 3 with entry 1017 where Brigadier Calitz reports the attack
 4 on, an attack on TRT members. As we understand it, you
 5 then report the people are moving around and some are down.
 6 Calitz then, and this isn't recorded here, he then makes
 7 his radio enquiry about where the TRT are. You respond
 8 with your report of 18 bodies down and then somebody, after
 9 18 bodies down, it's reported somebody – we're not sure who
 10 – requests medical assistance and you relay that
 11 communication. Is that the order as you recall it?

12 KOLONEL VERMAAK: Dis korrek.

13 MS LE ROUX: And the medical request that
 14 you relayed, do you know who that came from?

15 COLONEL VERMAAK: No, I'm not sure who
 16 was asking for it on the ground but after I have relayed
 17 that request somebody on the radio said the medics don't
 18 want to come in if it is not secure. Then I said to them
 19 there are enough policemen on the ground to give enough
 20 coverage for them where they are needed.

21 MS LE ROUX: Okay. Was your impression
 22 though that the person on the radio who requested medical
 23 assistance first and then you relayed that request –

24 COMMISSIONER HEMRAJ: Sorry, can you just
 25 clarify for us please, Colonel, the request that came for

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1 medical assistance, you said that was someone from the
 2 ground or did I mishear that?

3 COLONEL VERMAAK: That's correct, that
 4 was from the ground and then I relayed the message to the
 5 JOC.

6 MS LE ROUX: And Lieutenant-Colonel, a
 7 follow-up to that, when you say on the ground do you mean
 8 at scene 1?

9 COLONEL VERMAAK: That's correct,
 10 Chairperson.

11 MS LE ROUX: Then Lieutenant-Colonel,
 12 before the lunch adjournment we were dealing with the
 13 following. So you communicated 18 bodies down –

14 COLONEL VERMAAK: That's correct.

15 MS LE ROUX: And obviously we must
 16 understand that evidence in light of your prior testimony
 17 that when you mean bodies, you mean bodies as opposed to
 18 suspects. So you mean people who are injured, possibly
 19 fatally, correct?

20 COLONEL VERMAAK: I couldn't say how
 21 fatal but yes, for sure it seems to me that they might be
 22 injured seriously.

23 MS LE ROUX: So when you use the word
 24 "bodies" that's what you mean to communicate?

25 COLONEL VERMAAK: That's correct, Chair.

<p style="text-align: right;">Page 25944</p> <p>1 MS LE ROUX: And then you revised your 18 2 to 25 bodies, is that your next radio communication that 3 you make? 4 COLONEL VERMAAK: That's correct. 5 MS LE ROUX: And you relay the need for 6 medical assistance. 7 COLONEL VERMAAK: That is correct. 8 MS LE ROUX: Now arguably that 9 combination where you report 18 bodies, revise it upwards 10 to 25 and relay the medical assistance request, coupled 11 with the other communications I've already taken you to 12 where people hear a report of people being shot on the 13 radio, that may well convey the seriousness of what 14 happened at scene 1 but did you ever communicate on the 15 radio about the other observations you made? So you 16 identified that you observed blood on the ground, the 17 bodies lying on top of each other and otherwise in 18 unnatural positions not consistent with the position you'd 19 assume during arrest, did you convey any of those other 20 observations to indicate how serious the events at scene 1 21 were? 22 COLONEL VERMAAK: At scene 1 I couldn't 23 express my view more than I have done it. Then I just 24 report to the JOC of the people who was running away from 25 the scene in different directions and afterwards where they</p>	<p style="text-align: right;">Page 25946</p> <p>1 that he used any time his radio but you must remember, as I 2 explained to the Commission, we do have the police radio in 3 the helicopter as well as the aviation radio. So there 4 might be some circumstances that you can miss one of the 5 calls. 6 MS LE ROUX: And then lastly you would 7 have seen what's been marked as exhibit KKK43, which is a 8 collection of images of SAPS members using or appearing to 9 use the radio at scene 1. Do you recall any other reports 10 on the radio from members at scene 1 other than those we've 11 already discussed, in this eight and a half minute period? 12 COLONEL VERMAAK: I didn't hear anybody 13 on the ground speak, most of the time it was me giving 14 feedback to the JOC and also to Brigadier Calitz but there 15 were some times when it was quiet on the radio, that nobody 16 was talking on it. 17 MS LE ROUX: So Lieutenant-Colonel, other 18 than the one report requesting medical attention that you 19 said was a member at the scene, you don't recall anyone 20 else on the radio who was at scene 1? 21 COLONEL VERMAAK: That is correct. 22 MS LE ROUX: I'd now like to turn to how 23 you used your Blackberry to take photographs during the 24 course of the day on the 16th and obviously we've been 25 provided with those. For the record, they're the JJJ11</p>
<p style="text-align: right;">Page 25945</p> <p>1 gathered again at koppie 2. 2 MS LE ROUX: Did you receive any response 3 back to you from the JOC or any of the particular 4 commanders in response to those communications? 5 COLONEL VERMAAK: No, I did not receive 6 any feedback. 7 MS LE ROUX: And in that eight and a half 8 minutes that we don't have recorded we, from the statement 9 of Lieutenant Tsiloane – we don't need to go there, it's 10 exhibit HHH45 paragraph 8 for the record – he reports that 11 he counted up the number of people who were dead and 12 reported that statistic, he says to chopper 2. Did you 13 hear that report? 14 COLONEL VERMAAK: No, that's negative. 15 MS LE ROUX: And then the statement of 16 Captain Loest which is exhibit HHH 44 paragraph 8, for the 17 record, he similarly reported radio, hearing radio 18 communication about – apologies. So from Captain Loest's 19 statement we see that he informed the JOC of the event and 20 we know from exhibit KKK4 he makes a phone call to 21 Brigadier Pretorius. Did you hear him make any radio 22 transmission in that eight and a half minute period? We 23 know that he phoned Brigadier Pretorius, did you hear him 24 use his radio at all to report to the JOC? 25 COLONEL VERMAAK: No, I can't remember</p>	<p style="text-align: right;">Page 25947</p> <p>1 series and if we – what we've been able to do is correlate 2 these to various entries in the occurrence book during the 3 course of the 16th of August and it appears as if you would 4 send a cellular picture that you took on your Blackberry in 5 support or sort of at the same time as you would make a 6 communication over the radio which was recorded. Is that – 7 COLONEL VERMAAK: That is correct. 8 MS LE ROUX: - what you were doing. So 9 as we, just to take a few examples of that, if I could ask 10 you to turn in the occurrence book to page 22, if we start 11 at entry 974. Entry 974, the first thing I'd like clarity 12 on is, you were chopper 1 but in the occurrence book 13 sometimes your communications are recorded as chopper 2. 14 Do you have any idea why that – 15 COLONEL VERMAAK: No, I think it was a 16 mistake from the people who was working in the JOC because 17 why, it was Pappa1, Pappa2, chopper 1, chopper 2, but most 18 of the time it was only chopper 1 that was giving feedback. 19 We were all the time in the air and as I explained, we did 20 not utilise the Squirrel for all the time due to the fact 21 that he has limited hours on that stage. 22 MS LE ROUX: Right. So if we start in 23 the occurrence book, entry 974, that's recorded at 9:15 in 24 the morning of the 16th. It sets out a situation report and 25 says "Chopper 2" - but that should obviously be chopper 1 -</p>

<p style="text-align: right;">Page 25948</p> <p>1 "reported that people moving towards the koppie, most are 2 not carrying their weapons." And then if we could switch 3 to your Blackberry photograph which is marked JJJ11 and 4 then the particular photograph, if we could go there, is 5 number 01488. 01488, yes. Now I should just note for the 6 record, this records that it's created at 9:14AM. Using 7 the evidence leaders' conversion table we know that that's 8 about three and a half minutes fast so it's more likely to 9 have been taken at around 9:10 that morning and this shows 10 people arriving at the koppie and if we go to the next two 11 photographs, 1489 and 1490, those show the same thing. And 12 those, 1490, the last of those is taken at 9:18 eTV time. 13 So the photo you send seems to correlate with the situation 14 report recorded in the occurrence book, correct? 15 COLONEL VERMAAK: That is correct, Chair. 16 MS LE ROUX: Right. And then if we look 17 at – we can do three entries in the occurrence book 18 together, so entry 979 is at 9:52AM. The sitrep there is 19 "Chopper 2 reported women gathered with placards from the 20 eastern side. About 20 women marching." Entry 981 is 21 10:03 where the sitrep is, "Chopper 2 reporting that the 22 group of women goes house to house at the eastern village 23 near the koppies." And then entry 984, 10:15 "Chopper 2 24 reports women are moving house to house and 60 in number 25 and group of males plus-minus 50 met at the northern side</p>	<p style="text-align: right;">Page 25950</p> <p>1 situation report is, "C2 reported NIU, task team and TRT 2 are at their post, orderly. Chopper 2 report to the group 3 in front of the koppie, they in possession of their 4 traditional weapons." And if we then look in your JJJ 5 series 11, 1501, you seem to have been able to zoom in as 6 much as you could on your Blackberry to that group that we 7 see, so that's the small group that you were referring to 8 in your radio communication, is that correct? 9 COLONEL VERMAAK: That is correct. 10 MS LE ROUX: Right, and then if we just 11 do a last one, entry 994 in the occurrence book at 10:57 we 12 get a sitrep, "Chopper 2 reported plus-minus 80 people 13 moving from the village towards the entrance of the hostel 14 as group of women gathered again now are almost 100 of 15 them." If we go to your JJJ11 series, 1502 and 1503, these 16 are both time-stamped 11:01, we see the women gathering and 17 moving from the village. 18 COLONEL VERMAAK: That is correct. 19 MS LE ROUX: Right. So obviously we 20 can't link every Blackberry image that you sent through to 21 Brigadier Pretorius to an occurrence book entry but in 22 general, that's what you were trying to do. You would 23 send Blackberry imagery that supported your radio 24 communication, is that – 25 COLONEL VERMAAK: That is correct.</p>
<p style="text-align: right;">Page 25949</p> <p>1 of the koppie." If we then go to your photograph series 2 JJJ11 from 01492, 01492 and if we go through those until 3 01496, if we could just display those in sequence, 1492 to 4 1496, these are taken over the period of time 9:56 to 5 10:09AM and they appear to show the group of women that you 6 are describing in your situation report. Is that correct? 7 COLONEL VERMAAK: That is correct, Chair. 8 MS LE ROUX: Right, so your communicating 9 orally to the JOC about the women that you're observing and 10 you're sending the photographic evidence of that. 11 COLONEL VERMAAK: That's correct. 12 MS LE ROUX: Right. Then if we look at – 13 we've gone through those – if we then look at occurrence 14 book entry 990, there you return in your flight to 15 observing the koppie and you report, "Still people coming 16 from the eastern side in huge numbers towards the koppie." 17 COLONEL VERMAAK: That is correct. 18 MS LE ROUX: And if we then go back to 19 your photographs JJJ11, 01498 and 99, those are both taken 20 around 10:43. If we go to JJJ11 1498 and 1499 and then – 21 so we see the movement of people congregating to the koppie 22 and 1499 depicts the same scene. 23 COLONEL VERMAAK: That is correct. 24 MS LE ROUX: Right and if I just do two 25 more, if we look at entry 991 in the occurrence book, the</p>	<p style="text-align: right;">Page 25951</p> <p>1 MS LE ROUX: Right. And you only sent 2 the photographs to Brigadier Pretorius, correct, you didn't 3 distribute them beyond her? You only sent it to her? 4 COLONEL VERMAAK: That is correct. 5 MS LE ROUX: Right. And do you know 6 during the course of that day, did you know whether she was 7 showing them to anybody in the JOC? 8 COLONEL VERMAAK: No, I'm not aware of 9 it. 10 MS LE ROUX: Okay. If we then look at 11 your photograph JJJ11.1518, 1518, this is taken at 12 15:56:29. Did you send that image in support of your 13 radio communication about 18 bodies down? 14 COLONEL VERMAAK: That is positive, 15 Chairperson. 16 MS LE ROUX: Now, General Annandale 17 testified that Brigadier Pretorius may have received it but 18 didn't bring it to his attention. Does that surprise you? 19 COLONEL VERMAAK: Well, I cannot comment 20 on what happened in the JOC. As far as my responsibility 21 or the initiatives that I take, was to take photos, send it 22 through with a sitrep. 23 MS LE ROUX: Right. And have you ever 24 discussed with Brigadier Pretorius to this day whether she 25 showed anyone in the JOC the photographs?</p>

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1 COLONEL VERMAAK: No, I haven't discussed
 2 it with her.
 3 MS LE ROUX: Has anyone who was present
 4 in the JOC mentioned to you that they saw your photographs
 5 during the course of the day?
 6 COLONEL VERMAAK: No, nobody.
 7 MS LE ROUX: From your experience of that
 8 day, do you believe that no-one but Brigadier Pretorius saw
 9 your photographs?
 10 CHAIRPERSON: Is that an appropriate
 11 question to ask the witness? It's for us to believe what
 12 evidence on – surely. I can understand if he's in a
 13 particular position to express an opinion which we aren't
 14 in a position to do, the question is in order but you can't
 15 ask one witness do you believe another one. Maybe one can
 16 approach the matter slightly differently. What was the
 17 purpose of your sending these photographs to the JOC, just
 18 to be seen by Brigadier Pretorius?
 19 COLONEL VERMAAK: Chairperson, no. The
 20 whole idea was that they in the JOC have that footage
 21 immediately available and if need, to make decisions they
 22 can have the photos and on the photos what they saw in
 23 front of them, they can make decisions on that.
 24 [14:25] CHAIRPERSON: I take it from the very
 25 fact that the people in the JOC are some distance – I think

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1 we were told it's about two kilometres away from the scene
 2 of action, it was very important that they should receive
 3 up to the minute information about what was going on so
 4 they could give the necessary instructions –
 5 COLONEL VERMAAK: That is –
 6 CHAIRPERSON: - based upon their
 7 understanding of what was happening is that right?
 8 COLONEL VERMAAK: That is correct, Chair.
 9 CHAIRPERSON: So you didn't send
 10 photographs then to be seen only by one person, is that
 11 correct??
 12 COLONEL VERMAAK: No, the photos that I
 13 sent there was, everybody was on the scene that's seeing
 14 the same images.
 15 CHAIRPERSON: Ja. They weren't for the
 16 private information of Brigadier Pretorius, but for the
 17 general information of the people in the JOC so that they
 18 could react to them appropriately, is that correct?
 19 COLONEL VERMAAK: That's correct.
 20 MS LE ROUX: And Lieutenant-Colonel,
 21 other than the photographs that you sent through in real-
 22 time, do you know if the JOC had any other visual aids?
 23 COLONEL VERMAAK: I know about the CCTV
 24 cameras of the mine but I also know that they are quite a
 25 distance from the scene where it happened.

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1 CHAIRPERSON: Is it correct to say, you
 2 were – they used the phrase eye in the sky, you were the
 3 eye in the sky not just for the operational commander,
 4 Brigadier Calitz, but also particularly I would imagine for
 5 the people in the JOC, is that correct?
 6 COLONEL VERMAAK: That's correct, Chair,
 7 and also for everybody who is participating in the
 8 operation. If they feel they have a need to send the
 9 chopper somewhere, they can discuss or convey that message
 10 to us but through the JOC.
 11 COMMISSIONER HEMRAJ: Colonel, in the
 12 light of your previous evidence that the sending of the
 13 photographs was your initiative, had you, prior to going up
 14 into the air before the incident, told Brigadier Pretorius
 15 that you would be sending these photographs to her on the
 16 message system?
 17 COLONEL VERMAAK: Chair, on the previous
 18 day I already started sending pictures to her Blackberry,
 19 due that we realised that that ability is not there of lack
 20 of cameras, the FLIR systems on the helicopters. So I
 21 decided to make use of the Blackberry to send that photos
 22 to her in the JOC.
 23 COMMISSIONER HEMRAJ: And was there any
 24 indication from Brigadier Pretorius the previous day that
 25 she had received these photographs that you'd sent?

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1 COLONEL VERMAAK: That's correct, ma'am.
 2 COMMISSIONER HEMRAJ: When were you told
 3 that?
 4 COLONEL VERMAAK: During the day when I
 5 send a BBM photo to her I will usually ask if they received
 6 the photo and then they confirm yes, they've got the photo.
 7 COMMISSIONER HEMRAJ: That's on the 15th?
 8 COLONEL VERMAAK: On the 15th and, so far
 9 possible, on the 16th as well.
 10 COMMISSIONER HEMRAJ: And the
 11 confirmation of receipt, how would you have received that
 12 from Brigadier Pretorius?
 13 COLONEL VERMAAK: No, the people in the
 14 JOC who are operating the radio, they then confirm. I'm
 15 speaking to them and I ask them they must confirm with
 16 Brigadier Pretorius if she did receive the photo and then
 17 they came back to me and said Brigadier Pretorius
 18 confirmed.
 19 COMMISSIONER HEMRAJ: Thank you.
 20 MS LE ROUX: Lieutenant-Colonel, there
 21 are two other radio transmissions that made explicit
 22 reference to bodies or deaths at scene 1. The first is at
 23 16:09:30 eTV time, you report to the JOC the two bodies at
 24 the back of the second koppie, you recall that
 25 communication?

<p style="text-align: right;">Page 25956</p> <p>1 COLONEL VERMAAK: That's correct.</p> <p>2 MS LE ROUX: And that communication we</p> <p>3 can hear clearly. Did you get any enquiry back from</p> <p>4 anybody as to what you meant by two bodies? Did anyone</p> <p>5 follow up with you about what you'd reported?</p> <p>6 COLONEL VERMAAK: No, nobody followed it</p> <p>7 up. There were policemen close to it so I did not further</p> <p>8 talk on the radio at that stage.</p> <p>9 MS LE ROUX: Then Lieutenant-Colonel,</p> <p>10 there's a second transmission I'd like to spend some time</p> <p>11 exploring with you and that is the one recorded in Captain</p> <p>12 Van Heerden's note and she records that at some point</p> <p>13 between 16:11:18 and 16:14:09 the transmission recorded 30</p> <p>14 people lying down, some dead, some injured. If we could</p> <p>15 display that, it's KKK42, the annotated Van Heerden notes</p> <p>16 where the Human Rights Commission has attempted to put time</p> <p>17 stamps to the entries made by Captain Van Heerden and if we</p> <p>18 could just go down a little bit because the entries that</p> <p>19 start 16:11:18 and run to 16:14:09, the third of those says</p> <p>20 "30 people lying down, some dead, some injured." If I can</p> <p>21 just note for the record that of course we lose the radio</p> <p>22 on the Protea Coin chopper transcript at 16:12:25 and then</p> <p>23 we can pick it up again on Ryland at 16:13:42. So we know</p> <p>24 that the 30 people lying down, some dead, some injured</p> <p>25 radio communication is between those two times so we've</p>	<p style="text-align: right;">Page 25958</p> <p>1 occurrence book, Van Heerden records that as six arrests</p> <p>2 are made. Same content, slightly different wording and</p> <p>3 then when Van Heerden records "30 people lying down, some</p> <p>4 dead, some injured," the occurrence book says "30</p> <p>5 people/bodies lying down." Do you agree with our</p> <p>6 interpretation that when the occurrence book notes "bodies"</p> <p>7 as opposed to people, it means to indicate injury or</p> <p>8 possibly death?</p> <p>9 COLONEL VERMAAK: Yes, it might be.</p> <p>10 MS LE ROUX: Now, when Brigadier Calitz</p> <p>11 came to testify he testified that he was unaware of any</p> <p>12 deaths at scene 1 or scene 2 until he came to body C, which</p> <p>13 was at approximately 16:24 and he says that it was only</p> <p>14 when he spoke to the JOC by telephone at 16:47 that he was</p> <p>15 made aware of the other 31 confirmed deaths at scene 1 or</p> <p>16 scene 2. So he says he was only aware of body C until</p> <p>17 16:47 when we phoned the JOC. Now from your recollection</p> <p>18 of the radio communication in that 54 minute period from</p> <p>19 15:53 when scene 1 happens until 16:47 when he speaks to</p> <p>20 the JOC, do you consider it possible that an operational</p> <p>21 commander would have been unaware of scene 1, scene 2 and</p> <p>22 the fact that we had seriously injured and possibly dead</p> <p>23 strikers?</p> <p>24 COLONEL VERMAAK: Chairperson, according</p> <p>25 to me I gave that information through to the JOC and I also</p>
<p style="text-align: right;">Page 25957</p> <p>1 narrowed it a little bit further than what we have on</p> <p>2 Captain Van Heerden's notes. Do you recall hearing that</p> <p>3 radio transmission, "30 people lying down, some dead, some</p> <p>4 injured?"</p> <p>5 COLONEL VERMAAK: Chairperson, no, I did</p> <p>6 not recall.</p> <p>7 MS LE ROUX: Is it possible that that</p> <p>8 would have been made by telephone to the JOC rather than on</p> <p>9 the radio?</p> <p>10 COLONEL VERMAAK: I cannot comment on</p> <p>11 that.</p> <p>12 MS LE ROUX: Did you hear anybody else on</p> <p>13 the radio making any sort of enquiry or expressing surprise</p> <p>14 or mentioning the 30 bodies, 30 people lying down, some</p> <p>15 dead, some injured, do you remember the 30 people being</p> <p>16 discussed or on the radio.</p> <p>17 COLONEL VERMAAK: The only conversation</p> <p>18 regarding the people lying on the ground was my own where</p> <p>19 I, at two stages, report to the JOC and to Brigadier Calitz</p> <p>20 about it.</p> <p>21 MS LE ROUX: Right, and then of course</p> <p>22 what's interesting is if we look at how that was recorded</p> <p>23 in the occurrence book, this is in entry 1018 if we can go</p> <p>24 back to the occurrence book, here we – in entry 1018, so if</p> <p>25 we start where we have six people arrested recorded in the</p>	<p style="text-align: right;">Page 25959</p> <p>1 called Pappa1 when I called the JOC to convey the message</p> <p>2 through after bodies that was lying down. From my reports</p> <p>3 I believe he could say that he was not aware of any persons</p> <p>4 dead but I don't know if the operation or the section</p> <p>5 commanders on the ground maybe could have contacted him on</p> <p>6 cell phone to report the situation and what is going on, on</p> <p>7 the specific scenes.</p> <p>8 MS LE ROUX: But Lieutenant-Colonel</p> <p>9 Vermaak, from what you remember of the radio communication</p> <p>10 on that day and what we know from the statements of other</p> <p>11 members that I'm taking you to where they hear people</p> <p>12 being, you know, the reports of a shooting, need for</p> <p>13 medical assistance and then the various accounts that refer</p> <p>14 to bodies, do you accept, do you think it's possible that</p> <p>15 an operational commander could have been unaware if he had</p> <p>16 been in the proximity of a radio in that 54 minute period?</p> <p>17 COLONEL VERMAAK: If he was close to the</p> <p>18 radio I believe he should have heard it, especially when we</p> <p>19 – there was asked for medical assistance, then you can</p> <p>20 think for yourself something had happened there and if the</p> <p>21 police ask for medical assistance, we didn't say – we only</p> <p>22 say bodies down, so it means it could be policemen, it</p> <p>23 could be protesters, it could be anybody. So if he was</p> <p>24 close to the radio I believe that he could have heard it.</p> <p>25 MS LE ROUX: And Lieutenant-Colonel</p>

<p style="text-align: right;">Page 25960</p> <p>1 Vermaak, it's Brigadier Calitz who reports an attack on the 2 TRT, so would you accept that that, coupled with the 3 medical assistance request, would make an operational 4 commander question what had happened and think that 5 something serious had happened? 6 COLONEL VERMAAK: Ja, I agree with you. 7 MS LE ROUX: Okay. Could I ask you then 8 to turn up what's been marked exhibit KKK41? This is a 9 chronology that the Human Rights Commission presented to 10 Brigadier Calitz which lists the points at which Brigadier 11 Calitz may have been able to gain knowledge of the deaths 12 and it goes through the radio communications. There are 13 just certain entries of these, on this chronology that I'd 14 like your assistance to clarify further for the Commission. 15 The first of those is if we look at the entry 16:04:40 on 16 the second page. No, there we go, 16:04:40. We had noted 17 it as, "Brigadier Calitz says over the radio, 'no need for 18 firearms now unless, unless the targets engage you,'" and 19 your evidence was, am I correct, that Brigadier Calitz 20 didn't say "no need for firearms," that you heard him say 21 "no lethal firearms." 22 COLONEL VERMAAK: That is correct. 23 MS LE ROUX: That's your recollection. 24 COLONEL VERMAAK: That's correct. 25 MS LE ROUX: And we've listened to it</p>	<p style="text-align: right;">Page 25962</p> <p>1 he was talking about rubber would have to be false. So if 2 we can go to 7:10 – 3 CHAIRPERSON: I'm sorry, I don't – let's 4 listen. I'm not sure I understand that last point you made 5 but let's listen first and then we can debate it. 6 [VIDEO IS SHOWN] 7 MS LE ROUX: - the video. Chair, I'm not 8 sure if you'd like to hear it again. 9 CHAIRPERSON: Can we play it again, 10 please? 11 [VIDEO IS SHOWN] 12 MS LE ROUX: If we can pause it. So 13 again, Chair – 14 CHAIRPERSON: I'm sorry, I know I'm being 15 singularly obtuse and I apologise to all concerned. Can we 16 listen to it again? What I thought I heard was "lethal" 17 the first time and "need for" the second. I thought he 18 said "no lethal firearms" and then he said "no need to 19 shoot unless," et cetera. So I think that's what it is but 20 can we listen to it again just to make absolutely sure 21 that's right. 22 [VIDEO IS SHOWN] 23 MS LE ROUX: Chair, so the submission – 24 CHAIRPERSON: - the first one is "no 25 lethal" and then "no need to shoot." So need for and need</p>
<p style="text-align: right;">Page 25961</p> <p>1 again and, Chair, I'm in your hands if you would like to 2 hear the recording again. We have played it several – 3 CHAIRPERSON: I would actually because 4 I'm not quite sure what a non-lethal firearm is, so the 5 firearm I would imagine would be lethal but Mr Chaskalson 6 is going to correct me – 7 MR CHASKALSON SC: No, no, Chairperson, 8 in the context of Brigadier Calitz's evidence he 9 specifically said that he was speaking about rubber bullets 10 in relation to this particular communication so that would 11 be a non-lethal – 12 CHAIRPERSON: You would fire rubber 13 bullets from a firearm. 14 MR CHASKALSON SC: Indeed, Chairperson. 15 CHAIRPERSON: Anyway let's listen to it 16 though, just to satisfy ourselves. 17 MS LE ROUX: So if we call up the Protea 18 Coin chopper video CC22 at 7:10, in that recording. And 19 Chair, Mr Chaskalson has made precisely the point, so 20 Brigadier Calitz said he was talking about rubber bullets 21 and therefore he meant no need for firearms now and he 22 meant no need for rubber, but in light of Lieutenant- 23 Colonel Vermaak's testimony that it's actually no lethal 24 firearms now, which does seem to accord with how we hear 25 the transcript, the recording now, then the evidence that</p>	<p style="text-align: right;">Page 25963</p> <p>1 to comes into it, but that's the second part. The first 2 part is "no lethal" I think – 3 MS LE ROUX: Yes, Chair, and it's that 4 first part where Brigadier Calitz said he was speaking only 5 about rubber but of course if he's saying "no lethal," then 6 that evidence doesn't make a lot of sense. It seems s if 7 he was talking about sharp pointed ammunition, live 8 firearms but this is a matter for argument – 9 CHAIRPERSON: I don't understand that. 10 If you've got a firearm and you're using it to shoot 11 rubber, that then is not a lethal firearm, whereas if 12 you've also got your pistol at your side and you've got a 13 choice between using your shotgun to fire rubber or your 14 pistol to fire live ammunition, then it would make perfect 15 sense. So when he says "no lethal firearms" doesn't he 16 mean no firearms with live ammunition but it could include 17 that you can use firearms with rubber bullets? So I don't 18 see the, sorry, I don't see the problem. And then he goes 19 on to say, "No need to shoot," et cetera unless the targets 20 engage you. 21 MS LE ROUX: Chair, the – 22 CHAIRPERSON: Sorry, Ms Le Roux, before 23 you carry on, Mr Semenya, Adv Hemraj reminds me that at one 24 stage you gave an undertaking to try to get some people 25 with special equipment to clear up some of these points</p>

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1 where the audio soundtrack of the videos is not clear. Can
2 you report any progress on that now?
3 MR SEMENYA SC: I'll follow up that,
4 Chair, with the JOC.
5 MS LE ROUX: Chair, of course it's a
6 matter for submissions in due course but Brigadier Calitz
7 was testifying that he had no idea that lethal firearms,
8 lethal ammunition had been used and therefore he was
9 talking only about don't use rubber. Clearly if he's
10 saying no need for lethal firearms now unless engaged, that
11 would discredit, in our view, that submission but it is for
12 argument –
13 CHAIRPERSON: That's a matter for
14 argument. I have indicated to you that I have some sales
15 resistance to that argument but I may be wrong and you may
16 be able to persuade me later.
17 MS LE ROUX: Right, but Lieutenant-
18 Colonel Vermaak, in light of the radio communication that
19 you had heard up to that point, did you have the impression
20 that live ammunition had been used at scene 1?
21 COLONEL VERMAAK: Chairperson, no, I
22 didn't thought of live ammunition. Still in my mind was
23 the dispersion actions as the planning was in the morning
24 and we only concentrated on the people moving on the
25 ground, reported to the operational commander and to the

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1 JOC, so I didn't even think about the possibility of live
2 ammunition.
3 CHAIRPERSON: I must say I 14:25/19-
4 11(indistinct) that answer. Perhaps I should put it to you
5 now while it's clear in my mind. I've got two problems.
6 The first is if the strikers were moving to attack the TRT,
7 we debated that last week the TRT people didn't have rubber
8 bullets. If you attack a TRT man he can only defend
9 himself with live ammunition, isn't that so? Only with an
10 R5 actually.
11 COLONEL VERMAAK: That's correct.
12 CHAIRPERSON: And if he defends himself
13 with an R5 there's a fair probability that there'll be a
14 dead body or a seriously injured body on the ground after
15 that, isn't that so?
16 COLONEL VERMAAK: That's correct.
17 CHAIRPERSON: And you did hear them say –
18 you in fact said, sorry, you heard, you didn't say it, you
19 heard the statement that they're attacking the TRT, did you
20 not? Did you hear that?
21 COLONEL VERMAAK: That is correct.
22 [14:45] CHAIRPERSON: Alright. That was the
23 first problem that I had. The second one was, you said you
24 thought that – because you hadn't received the update, you
25 hadn't been invited to the JOCCOM meeting at 1:30 nor were

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1 you invited to the debriefing, the briefing at 2:30.
2 COLONEL VERMAAK: That's correct.
3 CHAIRPERSON: So you still thought that
4 the plan from the early morning –
5 COLONEL VERMAAK: That is correct.
6 CHAIRPERSON: But, and you thought it was
7 a dispersal but surely if there was, if they were already
8 busy with the dispersal wouldn't you have expected there to
9 have been a warning beforehand? You see the evidence is
10 that – I know this relates to the 1:30 meeting but I would
11 suspect it's a matter of police routine in this kind of
12 operation – the evidence was, what was supposed to happen,
13 what Brigadier Calitz was going to do apparently was he was
14 going to, at the appropriate time, give the strikers a
15 warning, look, we want you to disperse and it was going to
16 be done in the vernacular and then a few minutes later he
17 was going to repeat it and only after that were they going
18 to proceed with the dispersal operation. Is that –
19 COLONEL VERMAAK: That's an ideal
20 situation, Chair.
21 CHAIRPERSON: Sorry, that's a?
22 COLONEL VERMAAK: Ideal situation.
23 CHAIRPERSON: Ideal situation, yes. Now
24 you weren't aware, as I understand you, of any warning
25 being given to these people beforehand. I know you were,

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1 to some extent, at a disadvantage because they hadn't taken
2 the trouble to tell you what the plan was but there wasn't
3 any suggestion surely that they'd already reached the stage
4 of dispersion without any warning – in fact there should
5 have been two warnings – isn't that what you expected would
6 have happened, two warnings, an interval between the two
7 and so on?
8 COLONEL VERMAAK: In normal situations,
9 Chair, there would have been warnings but after that we
10 saw, if I can call the clash on the first scene, and the
11 line-up of the Nyalas and the follow-up of the other people
12 on the ground, according to me they were, it was an ongoing
13 operation now with the dispersion. That is why I said I
14 didn't predict that at the third koppie that they were
15 using live ammunition. For me it was a dispersion action,
16 dispersion action normally is with the POP members with the
17 necessary teargas and pyrotechnical equipment.
18 MS LE ROUX: Lieutenant-Colonel Vermaak,
19 if I could just follow up on the Chair's response to that
20 where you didn't think it was live ammunition but I'm not
21 sure how to square that with your earlier evidence that you
22 saw blood on the ground, people lying on top of each other
23 and otherwise in unnatural positions where they appeared
24 injured rather than awaiting arrest. Did that not make you
25 think that live ammunition had been used?

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1 COLONEL VERMAAK: No. I explained there
 2 was actually two scenes, the one where we saw that that
 3 happened there and then the follow-up with the Nyalas who
 4 was in line like a dispersion action and we also see people
 5 coming from the barbed wire side on the ground. That made
 6 me believe that there's a continuing of a dispersion action
 7 and we saw the people running away, we give feedback to the
 8 JOC and to Brigadier Calitz, so it didn't cross my mind
 9 that there would have been live ammunition being used when
 10 there's already been members put on ground. According to
 11 the original plan those members should have swept koppie 1
 12 and 2 after dispersion action.

13 MS LE ROUX: Lieutenant-Colonel, I just
 14 want to make sure we're not missing each other in my
 15 question. I understand you're speaking about different
 16 stages in the operation but at the very beginning, the
 17 scene 1 shooting that you observed the aftermath, did you
 18 think that scene that you observed there was the result of
 19 live ammunition or could be produced by rubber?

20 COLONEL VERMAAK: After I saw the bodies
 21 lying on the ground I realised it was not only teargas and
 22 stun grenades being used, for the way the bodies was lying
 23 on the ground. So that was a different situation from the
 24 second one where the people were running into the veld.
 25 They're not at that stage on the one side a group anymore,

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1 although at the back of koppie 2 there were a few hundred
 2 that was gathering there again and we gave that sitrep to
 3 Brigadier Calitz and the JOC and we saw the Nyalas is lined
 4 up so it is clear to me that a follow-up operation is
 5 continuing of the dispersion and encirclement.

6 MS LE ROUX: Right, but keeping you
 7 focused on the bodies that you saw at the kraal, at scene
 8 1, did you think that live ammunition must have been used
 9 to produce what you observed just at that part of the
 10 operation?

11 COLONEL VERMAAK: I believe and I
 12 considered the fact when you saw the blood there, lying
 13 there, that live ammunition must have been used.

14 MS LE ROUX: Lieutenant-Colonel, if we
 15 then move on in the Brigadier Calitz chronology to the
 16 entry at 16:12:12 where we note there, "SAPS member says
 17 over the radio, 'okay live fire, live.'" Yes, Chair, this
 18 obviously – sorry, this was the subject of revision, you
 19 will recall. It seems that our colleague in the corner
 20 doesn't have the up-to-date version because the entry then
 21 added, remember, was that, "SAPS member says over the
 22 radio, 'okay live fire, live.'" The Human Rights
 23 Commission says this is the voice of Brigadier Calitz,
 24 Brigadier Calitz does not recall saying those words and
 25 cannot confirm that this is his voice. We'll just make

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1 that correction but you gave evidence that "Okay live fire,
 2 live" was Brigadier Calitz, correct?

3 COLONEL VERMAAK: That is correct.

4 MS LE ROUX: And then if we move on to
 5 the entry at 16:27:40 –

6 CHAIRPERSON: It should be on the next
 7 page, is it?

8 MS LE ROUX: Yes. Chair, I think we're
 9 just facilitating the access of the revised version.

10 CHAIRPERSON: I see Mr Fischer has gone
 11 to assist. 47?

12 MS LE ROUX: 16:27:40.

13 CHAIRPERSON: 16:27:40, that's the one at
 14 the foot of the page.

15 MS LE ROUX: Yes, SAPS member –

16 CHAIRPERSON: "Let them go through, the
 17 area is secure."

18 MS LE ROUX: "Let them go through, the
 19 area is secure" and we submit that that is Brigadier
 20 Calitz's voice. He couldn't confirm one way or the other
 21 but he claims not to have had a radio at the time of the
 22 transmission and you testified that this was Brigadier
 23 Calitz. Given his evidence that he didn't have a radio at
 24 the time, how confident are you that in your recollection,
 25 that this was Brigadier Calitz?

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1 COLONEL VERMAAK: We can listen to the
 2 transcript again –

3 CHAIRPERSON: Let's listen to it again.

4 MS LE ROUX: It's at 30:10 on the Protea
 5 Coin chopper video CC22 30:10. Again we're listening for
 6 "Let them go through, this area is secure."

7 [VIDEO IS SHOWN]

8 COLONEL VERMAAK: Can you play it again
 9 for me, please?

10 MS LE ROUX: If we could play it again?

11 [VIDEO IS SHOWN]

12 MS LE ROUX: Thank you. Lieutenant-
 13 Colonel, are you confident that's Brigadier Calitz?

14 COLONEL VERMAAK: Yes, I'm positive of
 15 that.

16 MS LE ROUX: Okay. Can you help us
 17 understand the context then of what he's saying? When he
 18 says "Let them go through, the area is secure," we
 19 interpret that to mean a reference to the medics being
 20 allowed to come through because they'd indicated a concern
 21 about security. Is that the context?

22 COLONEL VERMAAK: Well, I cannot say
 23 precisely where he was at that stage. To speculate for me
 24 now what did he mean with that instruction, I don't think
 25 it is fair.

<p style="text-align: right;">Page 25972</p> <p>1 MS LE ROUX: Then if we can move on to 2 the entry at 16:32, Lieutenant-Colonel Vermaak says on the 3 radio, "Okay, I saw the 105 with the generals also arrive, 4 they are turning above us." Now you've confirmed this was 5 you and that General Mawela and an SANDF General were 6 inside the chopper. Did you expect the generals to come to 7 Marikana that afternoon? 8 COLONEL VERMAAK: We received a message 9 through the aviation radio from the pilot of the chopper of 10 where the general in, was. He informed us that the Divcom 11 arrived there with him, that they're flying over the area 12 and then they're going to land. That is that stage where 13 we also sent a Squirrel to the LZ where they pick up 14 General Mawela, the Provincial Commissioner and the General 15 of the SANDF. If he was in that chopper of General Mawela 16 I cannot say for sure, but I know they were picked up at 17 the LZ and taken over the area again and they land at 18 koppie 3. We also land with the R44 that evening. 19 MS LE ROUX: And Lieutenant-Colonel 20 Vermaak, just so I'm clear, the first time you hear that 21 any generals are coming is when you're in the air and their 22 sort of air traffic controller is getting hold of you and 23 saying there's a chopper coming. You didn't expect them to 24 come that afternoon. 25 COLONEL VERMAAK: No, we didn't expect</p>	<p style="text-align: right;">Page 25974</p> <p>1 heard somehow about what had happened at Marikana and they 2 proceeded there as quickly as they could, but I don't think 3 that General Mawela has made a statement, has he? I 4 haven't seen one. Anyway, even if he has, I take it he 5 hasn't dealt with this point so – but I'm sure the SAPS 6 legal team can get that information for us. Is that so, Mr 7 Semenya? 8 MR SEMENYA SC: Correct, Chair. 9 CHAIRPERSON: Ms Le Roux, I'm reminded 10 it's nearly 3 o'clock so when we reach a suitable stage – I 11 don't want to suggest you stop now but, for tea, but when 12 you reach a suitable stage in your cross-examination would 13 you let me know? 14 MS LE ROUX: Certainly, Chair. I'm just 15 moving to different points where Lieutenant-Colonel Vermaak 16 can assist us in identifying speakers. I can keep doing a 17 few of those or if you'd like to break now? 18 CHAIRPERSON: Let's do a couple more, 19 seeing as you're doing so well, and then we'll take the tea 20 adjournment. 21 MS LE ROUX: Okay. Lieutenant-Colonel 22 Vermaak, on the Protea Coin video at 14:42, this is the 23 entry at 16:12:12 in the Calitz chronology – 24 CHAIRPERSON: Haven't we had this one, Ms 25 Le Roux? I think we had this one. I think we'd better</p>
<p style="text-align: right;">Page 25973</p> <p>1 the people, the divisional commissioner, at that stage. 2 MS LE ROUX: So as far as you're aware 3 the generals came in response to what happened at Marikana? 4 They weren't pre-planned to come in any event. 5 COLONEL VERMAAK: That will be difficult 6 to answer. 7 MS LE ROUX: But as the air wing 8 commander you weren't informed that there would be generals 9 arriving in the afternoon until you got that communication. 10 COLONEL VERMAAK: No, not prior to their 11 arrival. 12 MS LE ROUX: Would you normally have been 13 made aware if there was a flight expected like that? 14 COLONEL VERMAAK: Normal circumstances, 15 Captain – ag, Colonel Douw du Plessis who is co-ordinating 16 this flight, he would have sent an SMS to me that we can 17 expect a chopper from National more or less at what time 18 and that day we did not receive such an SMS. 19 CHAIRPERSON: Ms Le Roux, do we have to 20 speculate on this? I'm sure if we ask Mr Semenya nicely 21 he'll find out from Lieutenant-General Mawela what he was 22 doing and how it was that he came there because it does 23 sound from what the witness tell us, it wasn't a 24 prearranged visit. So the probability is he was somewhere 25 around in the helicopter with a defence force general, they</p>	<p style="text-align: right;">Page 25975</p> <p>1 take the tea adjournment. Ms Le Roux, I think we've had 2 this one. 3 MS LE ROUX: Yes. 4 CHAIRPERSON: I think we'd better take 5 the tea adjournment. 6 MS LE ROUX: Sure. Thank you, Chair. 7 [COMMISSION ADJOURNS COMMISSION RESUMES] 8 [15:24] CHAIRPERSON: The Commission resumes. 9 Luitenant-kolonel, u is nog gebonde deur u plegtige 10 bevestiging. Ms Le Roux, have you got all your ducks in a 11 row now? Would you like to carry on? 12 MS LE ROUX: I have indeed, Chair, thank 13 you. Chair, I also thought the easiest way for us to do 14 this would be to mark another exhibit, which is a set of 15 interrogatories that we provided to Lieutenant-Colonel 16 Vermaak. I mentioned this to the commissioners in chambers 17 that we've asked him to identify certain speakers in radio 18 communication and he's been able, I think, to do that. So 19 we should be able to now move through those. The easiest 20 way to do that is probably by going to those 21 interrogatories. 22 CHAIRPERSON: Well, wouldn't it be easier 23 if you just read them out into the record because 24 otherwise, you know, when we read the record later we'll 25 then have to look for the exhibits where you set out the</p>

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1 interrogatories. So if you read them out they'll all be
 2 here, won't they and –
 3 MS LE ROUX: That's fine, Chair, I can do
 4 it, I can –
 5 CHAIRPERSON: If you want to put them in
 6 as exhibits so we can follow as you put them to the
 7 witness, is that how you want to do it? Okay.
 8 MS LE ROUX: I think it would assist.
 9 CHAIRPERSON: You're in charge of your
 10 cross-examination.
 11 MS LE ROUX: I think it would assist.
 12 CHAIRPERSON: You do it the way you want
 13 to.
 14 MS LE ROUX: So Chair, I believe that
 15 would be OOO22, interrogatories for Lieutenant-Colonel
 16 Vermaak from the SAHRC.
 17 SALMON JOHANNES VERMAAK: (bevestig
 18 verder)
 19 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 20 Lieutenant-Colonel Vermaak, am I correct that you've had an
 21 opportunity to listen to the relevant bits of the Protea
 22 Coin chopper and Captain Ryland's videos that we identified
 23 for you in this?
 24 COLONEL VERMAAK: That is correct.
 25 MS LE ROUX: So if we start with the

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1 first –
 2 CHAIRPERSON: Have you got copies of the
 3 exhibit for us?
 4 MS LE ROUX: Chair, we're –
 5 CHAIRPERSON: Or give them to us
 6 tomorrow, carry on.
 7 MS LE ROUX: We'll print those out
 8 overnight, apologies, Chair. The first of these where
 9 we're trying to identify the voices that are not either
 10 Brigadier Calitz or Lieutenant-Colonel Vermaak, the first
 11 is at 13:20 on the Protea Coin chopper video, exhibit CC22.
 12 We hear a male voice say, "Shoot again target." Could you
 13 identify who that was, Lieutenant-Colonel Vermaak?
 14 COLONEL VERMAAK: If you can play it?
 15 MS LE ROUX: If we could go then to
 16 exhibit CC22 and it's at 13:20, we hear a male voice say
 17 "Shoot again target."
 18 [VIDEO IS SHOWN]
 19 MS LE ROUX: If we could pause?
 20 Lieutenant-Colonel Vermaak, can you identify the speaker?
 21 COLONEL VERMAAK: That is correct, it's
 22 Brigadier Calitz's voice.
 23 MS LE ROUX: Do you have any
 24 understanding of the context of Brigadier Calitz saying
 25 "Shoot again target?"

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1 COLONEL VERMAAK: No, that's negative. I
 2 haven't got an idea.
 3 MS LE ROUX: Lieutenant-Colonel Vermaak,
 4 if we then move to Ryland 25 in exhibit I1, there at 40
 5 seconds into that recording we hear a male voice say,
 6 "Water cannon, stop spraying, stop spraying, stop
 7 spraying." Then we hear Brigadier Calitz say, "Okay water
 8 cannon, stop spraying, members will be engaged on foot" and
 9 we've asked you to identify the first speaker, "Water
 10 cannon, stop spraying, stop spraying." So it's Ryland 25,
 11 exhibit I1 and it's at 40 to 46 seconds in that recording.
 12 Again Lieutenant-Colonel Vermaak, we'd like your help
 13 identifying the first speaker, "Water cannon, stop
 14 spraying, stop spraying, stop spraying."
 15 [VIDEO IS SHOWN]
 16 COLONEL VERMAAK: Just play again for me,
 17 please?
 18 [VIDEO IS SHOWN]
 19 COLONEL VERMAAK: Phew, I'm not for sure.
 20 MS LE ROUX: Lieutenant-Colonel Vermaak,
 21 I understand you may not be certain, do you have anyone in
 22 mind that it might be? I understand you're not certain.
 23 MR SEMENYA SC: No, Chair, that can't be
 24 a question.
 25 CHAIRPERSON: That kind of speculative

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1 answer won't help us, so I uphold Mr Semanya's objection.
 2 Sorry, I didn't give you a chance to reply but you can
 3 reply and I'll still disallow, I'll still uphold the
 4 objection.
 5 MS LE ROUX: Lieutenant-Colonel Vermaak,
 6 is that General Naidoo?
 7 COLONEL VERMAAK: No, I cannot confirm.
 8 MS LE ROUX: If we could then in the same
 9 video go to one minute 15, we hear a male voice say, "Stop
 10 shooting, cease fire," if you could help us identify that
 11 speaker at one minute 15.
 12 [VIDEO IS SHOWN]
 13 MS LE ROUX: If we could pause?
 14 COLONEL VERMAAK: I cannot identify that
 15 voice.
 16 MS LE ROUX: Then in the same video if we
 17 go to two minutes and two –
 18 CHAIRPERSON: Sorry, before you move on,
 19 it sounded to me like the voice of an African gentleman. I
 20 know it's too – you know, from the accent. I was
 21 wondering, if that's correct obviously it must have been
 22 someone in a position of some sort of commander position.
 23 Do you know who, if there was an African senior officer
 24 present on that scene who would have given that command? I
 25 know that offends against what I stopped a minute ago,

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1 speculation, but I've tried to make it more focused than Ms
2 Le Roux's one. If you can't help us, you can't help us.
3 COLONEL VERMAAK: No, no Chairperson.
4 MS LE ROUX: In the same video if we can
5 now go to the 02:02 mark, two minutes and two seconds and
6 if we could play this for a little while. We hear the
7 speaker that we'd like your help identifying saying, "They
8 are coming, they want to surrender but they never throw
9 their pangas and spears, they want to come out, they want
10 to come out," that's the person we want your help
11 identifying and then shortly after this, you say
12 "Brigadier, it seems to me that person don't know what all
13 these guys do." So I think we play from two minutes
14 because there's a context follow-up question as well, so if
15 we could just play through two minutes two seconds.
16 [VIDEO IS SHOWN]
17 MS LE ROUX: If we can just keep playing?
18 [VIDEO IS SHOWN]
19 MS LE ROUX: Stop there. So the first
20 question, Lieutenant-Colonel Vermaak, can you identify the
21 speaker saying "They are coming, they want to surrender,
22 they never throw their pangas and spears, they want to come
23 out," can you identify that speaker?
24 COLONEL VERMAAK: No, I cannot.
25 MS LE ROUX: And then it's your voice

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1 saying, "Brigadier, it seems to me that person don't know
2 what these, all these guys do." Are you addressing
3 Brigadier Calitz?
4 COLONEL VERMAAK: Ja, that's positive.
5 At that stage they have asked us to bring in the Canters
6 and I was really struggling to get the attention of the
7 drivers of the Canters and direct them to the correct place
8 where the people were arrested in the middle of koppie 3.
9 MS LE ROUX: So when you're saying, "It
10 seems to me the person don't know what these, all these
11 guys do," are you referring to the Canter drivers?
12 COLONEL VERMAAK: That is correct.
13 MS LE ROUX: And Lieutenant-Colonel
14 Vermaak, to be absolutely clear, you weren't responding in
15 any way or commenting on the communication of the unknown
16 speaker saying the people want to come out and surrender?
17 You weren't referencing that at all?
18 COLONEL VERMAAK: No, not at that
19 conversation.
20 MS LE ROUX: Then in, if we can go to
21 exhibit I3 which is Ryland 27? Now this is a very short
22 clip. It commences at 16:35:38. Lieutenant-Colonel
23 Vermaak, we asked you in your interrogatories that we hear
24 a male speaker saying what sounds to us like "People were
25 shot over, Brigadier Calitz is that area secure, we're

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1 trying to leave now." Then somebody else says, "Pappa1
2 this is Whisky1." If you could help us identify both
3 speakers, the person saying "People were shot over,
4 Brigadier Calitz, is the area secure" and the person
5 identifying themselves as Whisky1. And Lieutenant-Colonel,
6 you'll hear yourself referring, that you're going to fly in
7 the direction of the koppie in the middle of that, of the
8 two unknown speakers that we're trying to identify.
9 [VIDEO IS SHOWN]
10 MS LE ROUX: Lieutenant-Colonel Vermaak,
11 can you identify either of the two speakers on either side
12 of your communication?
13 COLONEL VERMAAK: Chairperson, the one
14 was me and the other one was Lieutenant-Colonel Stapelberg
15 of the mounted unit.
16 CHAIRPERSON: Which was which? Who was –
17 COLONEL VERMAAK: The first one was –
18 CHAIRPERSON: What did you say and what
19 did Lieutenant-Colonel Stapelberg say?
20 COLONEL VERMAAK: The first one was
21 Stapelberg and the next one was me.
22 CHAIRPERSON: Ty.
23 MS LE ROUX: And then who is Whisky1?
24 COLONEL VERMAAK: Stapelberg.
25 MS LE ROUX: Lieutenant-Colonel Vermaak,

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1 am I correct that Brigadier Calitz as the operational
2 commander is the member on the ground with the authority to
3 say yes, the area is secure, you can move in or not because
4 the enquiry seems to be directed at him. He's the only
5 person who could say yes, the area is secure, medics can
6 come in or people can leave now, is that correct?
7 COLONEL VERMAAK: It all depends on which
8 side of the scene he was. I believe he'll have to trust
9 his commanders at the other side as well to give him
10 feedback regarding the safeness on their side but yes, at
11 the end of the day he is the final person who will give
12 that command that the area is safe.
13 MS LE ROUX: And Lieutenant-Colonel
14 Vermaak, on this recording we hear Brigadier Calitz being
15 asked, "Is that area secure?" Do you recall if he
16 responded?
17 COLONEL VERMAAK: Can we listen to that
18 part a moment?
19 MS LE ROUX: If we could play the clip
20 again?
21 [VIDEO IS SHOWN]
22 MS LE ROUX: You can pause.
23 COLONEL VERMAAK: That is definitely
24 Colonel Stapelberg and he area that we have flown is due to
25 the fact that they said the area is secure, so we fly a

<p style="text-align: right;">Page 25984</p> <p>1 close circle just to make sure what we can see from the 2 air, what we can assist them with on the ground. 3 MS LE ROUX: And again do you recall 4 Brigadier Calitz responding to Lieutenant-Colonel 5 Stapelberg's enquiry, "Is that area secure?" 6 COLONEL VERMAAK: No, I cannot say for 7 sure. 8 MS LE ROUX: Then lastly, if we go to 9 exhibit I4 which is Ryland 28, this is a clip that 10 commences at 16:37:14. This is also, just for cross- 11 referencing purposes, the final entry in KKK41, the 12 Brigadier Calitz chronology. It's radio communication 13 between yourself and Lieutenant-Colonel Stapelberg where 14 Lieutenant-Colonel Stapelberg says chopper 2, you then say 15 "Okay, now a little bit more quiet, tell me where do you 16 want to go, General Naidoo" and then there's a response, 17 Lieutenant-Colonel Stapelberg "Ja, that's positive, where 18 the first shooting took place." And then you responding, 19 "Okay, this is where we are circling now, where we are 20 circling now, that is where they are. Are you with the 21 horses? Okay, I've got your visual, go straight, go just 22 straight with the horses." Can you just confirm that 23 that's only you and Lieutenant-Colonel Stapelberg if we 24 just listen to the clip? 25 [VIDEO IS SHOWN]</p>	<p style="text-align: right;">Page 25986</p> <p>1 COLONEL VERMAAK: That was General 2 Naidoo. 3 MS LE ROUX: And then when Lieutenant- 4 Colonel Stapelberg says "Where the first shooting took 5 place," was that the first time that the first shooting was 6 mentioned on the radio as far as you can recall, or had it 7 been discussed before that? 8 COLONEL VERMAAK: No, that is the first 9 time, except 15:24/18-23 for me that was reporting it. 10 CHAIRPERSON: Sorry, when they talked 11 about the first shooting, were they talking about scene 1 12 or the first shooting at scene 2? 13 COLONEL VERMAAK: No, it is scene 1, 14 Chairperson. 15 MS LE ROUX: Then Lieutenant-Colonel 16 Vermaak, in your interrogatories we then asked you to look 17 at the Jo'burg water cannon video exhibit CC21 and see if 18 you could identify two older white men that we see walk off 19 in the direction of body C. Have you had an opportunity to 20 look at that clip? 21 COLONEL VERMAAK: No. 22 MS LE ROUX: Okay, if we could then pull 23 that up first. CC21, the Jo'burg water cannon video, in 24 the video time code – if we can start at 25:51. The time 25 reflected on the screen is 15:56:26, that's eTV time</p>
<p style="text-align: right;">Page 25985</p> <p>1 MS LE ROUX: And if we cannot have the 2 image on the screen anymore, just some follow-up questions 3 on that recording, Lieutenant-Colonel Vermaak, is that only 4 you and Lieutenant-Colonel Stapelberg? 5 COLONEL VERMAAK: That is correct, Chair. 6 MS LE ROUX: And then if I could just 7 ask, you say "Now a little bit more quiet," what did you 8 mean by that? 9 COLONEL VERMAAK: At one stage the radio 10 was very busy and it is a problem to direct a person if you 11 only want to go to a specific place while the radio is so 12 busy. So after everything was quieter it was possible for 13 me to talk to him and direct him to a person he was looking 14 for. 15 MS LE ROUX: And you say to Lieutenant- 16 Colonel Stapelberg, "Where do you want to go to, General 17 Naidoo." Had he, had Lieutenant-Colonel Stapelberg 18 already said he wanted to General Naidoo? Why was General 19 Naidoo mentioned as a destination? 20 COLONEL VERMAAK: At one stage we heard 21 that General Naidoo was on the ground and he was at the 22 same side as where Colonel Stapelberg was, so I take it 23 that he wanted to go to the senior member on the scene 24 there. 25 MS LE ROUX: And that was General Naidoo?</p>	<p style="text-align: right;">Page 25987</p> <p>1 16:26:03. Again Lieutenant-Colonel Vermaak, I'm hoping you 2 can identify the two older white men that we see walk from 3 right to left of the screen, if you could identify those 4 two - so again in the video time code from 25:50 until 26. 5 [15:43] MS LE ROUX: We need to play it from 6 25:50 to 26. CC21. Chair, we seem to be having some 7 technical difficulties activating the relevant file. We 8 can pick this up on Thursday, we can come back to it if 9 we're having some trouble getting the file to play. So 10 Lieutenant-Colonel Vermaak, returning then to the theme of 11 radio communications, we understand the evidence of other 12 members that there were difficulties communicating on the 13 single radio channel during the operation and on the two 14 video sources that we have, the Protea Coin chopper and the 15 Ryland series, we've been able to identify about six other 16 voices other than yourself and Brigadier Calitz, in the 17 period from 4 o'clock until 20 past 4 eTV time. And have 18 you been able to listen to all of those clips, the full 19 Protea Coin chopper - 20 COLONEL VERMAAK: Yes, I went through the 21 whole - 22 MS LE ROUX: Okay, and the Ryland clips 23 as well? The Captain Ryland clips - 24 COLONEL VERMAAK: Yes, yes, I did go 25 through it.</p>

<p style="text-align: right;">Page 25988</p> <p>1 MS LE ROUX: - as well. And as I've 2 said, we've been able to identify six voices other than 3 yourself and Brigadier Calitz. Can you, have you been able 4 to identify more than that or is that – 5 COLONEL VERMAAK: No, that's only - the 6 main voices is myself, Brigadier Calitz and Colonel 7 Stapelberg. 8 MS LE ROUX: Now, given how your 9 interaction on the radio and we've been able to identify 10 six other people, in your view would it have been 11 impossible for the JOC or for Major-General Mpembe to also 12 get on the radio and make a transmission? 13 COLONEL VERMAAK: No, definitely not. 14 MS LE ROUX: And do you have any 15 explanation for why the JOC or Major-General Mpembe aren't 16 accessing the radio? 17 COLONEL VERMAAK: No, I haven't got an 18 answer for you on that. 19 MS LE ROUX: Did you ever ask any of the 20 members of the JOC or Major-General Mpembe specifically why 21 they weren't using the radio? 22 COLONEL VERMAAK: No, I didn't. 23 MS LE ROUX: Then we've also had a number 24 of SAPS witnesses testifying that the radio was silent for 25 a period of about four minutes and we've listened to all</p>	<p style="text-align: right;">Page 25990</p> <p>1 conversations. 2 MS LE ROUX: And do you know whether that 3 channel was recorded at all on the day? 4 COLONEL VERMAAK: So far I didn't know. 5 MS LE ROUX: And other than the Jo'burg 6 channel, do you know of any other channels used on the day? 7 COLONEL VERMAAK: No, so far as my 8 knowledge, only that one operational channel that we was 9 working on. 10 MS LE ROUX: Lieutenant-Colonel Vermaak, 11 if I can now move to my next issue in cross-examination 12 which relates to the statement of Gary White and some of 13 the conclusions he draws. You've testified already that 14 you've had an opportunity to read through that statement 15 and its annexures and - you've been able to do that, right? 16 You've read the entire statement as well as its annexures? 17 COLONEL VERMAAK: That's correct. 18 MS LE ROUX: Could I then ask you just to 19 turn to the conclusion section which is at page 125 of that 20 document, this is JJJ178? Do you have that, Lieutenant- 21 Colonel? 22 COLONEL VERMAAK: I have it. 23 MS LE ROUX: And this is paragraph 10.1.1 24 and I'm just going to give you an opportunity with respect 25 to certain of the conclusions that are set out in this</p>
<p style="text-align: right;">Page 25989</p> <p>1 the audio that we have available to us and we can't find a 2 four minute period of silence because even in the inaudible 3 sections you can hear the radio bleeping and obviously 4 being used. You can't discern the voices, what's being 5 said, but you can hear the radio is in use. Do you recall 6 a four minute period of radio silence? 7 COLONEL VERMAAK: No, not at all. 8 MS LE ROUX: And then when Colonel Scott 9 gave his evidence it became clear that the STF had their 10 own radio system on the 16th of August and the STF 11 statements that we put to Colonel Scott seem to confirm 12 that. Could you hear the STF's radio system? 13 COLONEL VERMAAK: Chairperson, I wasn't 14 aware at any stage during the operations that the STF was 15 working on their own channel. 16 MS LE ROUX: And sitting here today, do 17 you know if anyone other than the STF was able to hear that 18 channel? 19 COLONEL VERMAAK: No, negative. 20 MS LE ROUX: Do you know whether any of 21 the other units had their own radio system? 22 COLONEL VERMAAK: Afterwards we heard 23 that some of Johannesburg do have their own hand radios 24 there where they also communicate directly with each other 25 but we in the North-West are not able to pick up that</p>	<p style="text-align: right;">Page 25991</p> <p>1 paragraph, to ask you whether you agree or disagree with 2 the criticism and if you disagree, why you disagree. If we 3 could start with sub-paragraph (a) which states, "The 4 policy framework for public order policing in South Africa 5 is, on the whole, adequate and is unlikely to have 6 contributed to the failure of the operation at Marikana. 7 Instead it was the implementation of or failure to 8 implement that policy which can be blamed for the large 9 number of deaths caused by the police." Do you agree or 10 disagree with that criticism? 11 COLONEL VERMAAK: I do agree that the 12 policy framework for the public order policing in South 13 Africa is adequate. 14 MS LE ROUX: And do you also agree with 15 the conclusion in the second sentence that it was the 16 implementation or the failure to implement the policy at 17 Marikana that led to the large number of deaths? 18 COLONEL VERMAAK: I will not say it's to 19 the failure specifically. At some stages public order 20 police policies were adhered to but on later stages it was 21 not adhered to. 22 MS LE ROUX: If I could ask you to then 23 move on to the conclusion in paragraph B(1), namely that 24 "In terms of planning the operation, the intelligence was 25 inadequate and occasionally inaccurate." Do you agree or</p>

<p style="text-align: right;">Page 25992</p> <p>1 disagree with that?</p> <p>2 COLONEL VERMAAK: I do agree with that.</p> <p>3 MS LE ROUX: With respect to B(4), "The</p> <p>4 officer chosen to write the plan was not a public order</p> <p>5 commander." Do you agree that that is a criticism?</p> <p>6 COLONEL VERMAAK: Yes.</p> <p>7 MS LE ROUX: And you agree with that</p> <p>8 criticism?</p> <p>9 COLONEL VERMAAK: I do agree with that.</p> <p>10 MS LE ROUX: The next one, sub-paragraph</p> <p>11 B(4), that "There was no comprehensive written operational</p> <p>12 plan for stage 3 as required by standing order 262." Do</p> <p>13 you accept that criticism?</p> <p>14 COLONEL VERMAAK: I do accept that.</p> <p>15 MS LE ROUX: And the next one, paragraph</p> <p>16 B(6), "The dynamic plan for the stage 3 disperse, encircle</p> <p>17 and disarm operation as described to the JOCCOM by</p> <p>18 Lieutenant-Colonel Scott contained fundamental tactical</p> <p>19 errors which significantly increased the risk of violent</p> <p>20 confrontation and increased the likelihood of the use of</p> <p>21 live ammunition." Do you agree with that?</p> <p>22 COLONEL VERMAAK: That is correct.</p> <p>23 MS LE ROUX: Then the next conclusion</p> <p>24 B(7), "There was no adequate challenge process for senior</p> <p>25 officers to question and amend the plan or at least there</p>	<p style="text-align: right;">Page 25994</p> <p>1 briefing given to the members as stipulated in the standing</p> <p>2 orders.</p> <p>3 MS LE ROUX: And with respect to your own</p> <p>4 experience, you weren't briefed at all on the final plan</p> <p>5 that was implemented.</p> <p>6 COLONEL VERMAAK: Just repeat your</p> <p>7 question, please?</p> <p>8 MS LE ROUX: With respect to your own</p> <p>9 briefing, you got no briefing on the final plan.</p> <p>10 COLONEL VERMAAK: That's correct, only</p> <p>11 the briefing of the morning JOC. The one in the afternoon</p> <p>12 we didn't have any briefing on.</p> <p>13 MS LE ROUX: Now the criticism set out in</p> <p>14 sub-paragraph (d) we'll come back to because some of these</p> <p>15 relate to your role personally, so we'll come back to those</p> <p>16 on Thursday. If I could then ask you to comment with</p> <p>17 respect to sub-paragraph (e), do you agree that overall the</p> <p>18 police service has not demonstrated a willingness to take</p> <p>19 responsibility for the events at Marikana?</p> <p>20 COLONEL VERMAAK: I cannot totally agree</p> <p>21 with that. There were circumstances where some of the</p> <p>22 officers, the seniors who were here did take some</p> <p>23 responsibility for specific things, so I cannot say they at</p> <p>24 all don't want to take any responsibility.</p> <p>25 MS LE ROUX: And we can, we'll return to</p>
<p style="text-align: right;">Page 25993</p> <p>1 was no adequate challenge made to the plan." Do you agree</p> <p>2 with that?</p> <p>3 COLONEL VERMAAK: I do agree.</p> <p>4 MS LE ROUX: And if you could then turn</p> <p>5 over to B(9), that there was no written contingency plan,</p> <p>6 do you agree with that criticism?</p> <p>7 COLONEL VERMAAK: I do agree with it.</p> <p>8 MS LE ROUX: And then lastly with respect</p> <p>9 to planning, the conclusion that "The plan to engage,</p> <p>10 disarm and arrest the crowd in circumstances where conflict</p> <p>11 was likely, was contrary to SAPS standing orders regarding</p> <p>12 avoiding the use of force at all costs."</p> <p>13 COLONEL VERMAAK: If you look at it in</p> <p>14 the light of the warnings that myself and Captain Isaacs,</p> <p>15 Colonel Isaacs give to them, I do agree with it.</p> <p>16 MS LE ROUX: Then the next conclusion set</p> <p>17 to in sub-paragraph (b) stating that in terms of – sorry,</p> <p>18 (c) – "In terms of the briefing provided to individual</p> <p>19 units, there is evidence of clearly inadequate briefing."</p> <p>20 Now obviously you've read the entire statement where that</p> <p>21 is developed, do you agree that there was inadequate</p> <p>22 briefing?</p> <p>23 COLONEL VERMAAK: I cannot personally</p> <p>24 comment on the briefing that was given to the members</p> <p>25 itself. My only concern is that there was no written</p>	<p style="text-align: right;">Page 25995</p> <p>1 that on Thursday as well. Breaking down the conclusions in</p> <p>2 sub-paragraph (e), do you also agree with the criticism</p> <p>3 that there was inadequate record-keeping?</p> <p>4 COLONEL VERMAAK: That is positive.</p> <p>5 MS LE ROUX: And then lastly, do you also</p> <p>6 agree that the police have not acted in a spirit of full</p> <p>7 and frank disclosure?</p> <p>8 COLONEL VERMAAK: No, I cannot agree on</p> <p>9 that.</p> <p>10 CHAIRPERSON: Well, let's just take that</p> <p>11 one up. You've told us that on the 13th you were in the</p> <p>12 helicopter above the field where the strikers were</p> <p>13 proceeding in the direction of the koppie followed by a</p> <p>14 number of members of the police service and there were also</p> <p>15 Nyalas and so on, on the scene. And you've told us that</p> <p>16 you did not see anybody moving, deviating from the path and</p> <p>17 moving towards the informal settlement –</p> <p>18 COLONEL VERMAAK: That's correct, Chair.</p> <p>19 CHAIRPERSON: You in fact said that you</p> <p>20 couldn't understand why teargas and stun grenades were</p> <p>21 used. Do you remember that evidence?</p> <p>22 COLONEL VERMAAK: That's correct, Chair.</p> <p>23 CHAIRPERSON: Now, I take it you know</p> <p>24 that the case that was presented by the SAPS, inter alia in</p> <p>25 exhibit L, is that the, some of the strikers moved in the</p>

<p style="text-align: right;">Page 25996</p> <p>1 direction of the township, of the informal settlement and 2 that that was the reason why teargas was used. Now in your 3 statement you actually said that, you mentioned the teargas 4 and you said that it was done to prevent people from going 5 to the township and that you said you were told later, that 6 wasn't your own knowledge, but the important point is you 7 know, because that's what you told us, that there was no 8 deviation towards the informal settlement. 9 COLONEL VERMAAK: That is correct, Chair. 10 CHAIRPERSON: So – but the case of the 11 police was that that was why the teargas was fired. So 12 would that be, that part of the police case, could that be 13 described as being characterised by full and frank 14 disclosure? 15 COLONEL VERMAAK: Chair, according to me 16 what we saw from the air is that the people were walking in 17 a line, they were peacefully, from the air as we can 18 observe from the air. They were peacefully and the moment 19 that the teargas and the stun grenade went off you can 20 immediately saw the change of the mood of the people. So 21 they turn around and run into the policemen and that is 22 where the attacks occur. 23 MR SEMENYA SC: Chair, for the record, we 24 would remember the statement of Mr X is that they did 25 deviate. The intention was to go and attack the men in the</p>	<p style="text-align: right;">Page 25998</p> <p>1 CHAIRPERSON: I see, thank you. It's 4 2 o'clock, Ms Le roux. Would it be convenient for you if we 3 take the adjournment now until Thursday morning 9 o'clock? 4 MS LE ROUX: Yes, Chair. 5 CHAIRPERSON: Yes, we can't sit here 6 tomorrow because the Council who very kindly made these 7 premises available to us, require the chamber for their own 8 purposes tomorrow. So Thursday morning 9 o'clock, 9 Commission adjourns. 10 [COMMISSION ADJOURNED] 11 . 12 . 13 . 14 . 15 . 16 . 17 . 18 . 19 . 20 . 21 . 22 . 23 . 24 . 25 .</p>
<p style="text-align: right;">Page 25997</p> <p>1 – 2 CHAIRPERSON: The statement of whom? 3 MR SEMENYA SC: The statement of Mr X. 4 CHAIRPERSON: Ja, I know about the 5 statement of Mr X but I'm not interested at the moment in 6 what Mr X said, I'm interested in what this witness says, 7 the witness's own observation and whether what he observed 8 himself is in accordance with the police, the police case. 9 Mr X will give his evidence and he will be cross-examined 10 and a decision may have to be taken later in the light of 11 that but it's this witness's opinion that I'm interested 12 in. So whether, as far as his knowledge is concerned, that 13 part of the police case can be described as characterised 14 by a spirit of full and frank disclosure. What is your 15 answer? 16 COLONEL VERMAAK: That's correct, sir. 17 CHAIRPERSON: - what's correct? It is 18 characterised by full and frank disclosure or it isn't? 19 COLONEL VERMAAK: Yes, I agree. 20 CHAIRPERSON: You still haven't told me 21 what you agree with. Do you agree it's part of a full and 22 frank disclosure or you agree it isn't? 23 COLONEL VERMAAK: I agree it is - 24 CHAIRPERSON: It is? 25 COLONEL VERMAAK: - Chairperson.</p>	

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