

RealTime Transcriptions

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 243

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64 10th Avenue, Highlands North, Johannesburg
P O Box 721, Highlands North, 2037
Tel: 011-440-3647 Fax: 011-440-9119 Cell: 083 273-5335
E-mail: realtime@mweb.co.za
Web Address: <http://www.realtimesa.co.za>



1 [PROCEEDINGS ON 11 JUNE 2014]
 2 [09:18] CHAIRPERSON: The Commission resumes
 3 somewhat later than anticipated because I understand Adv
 4 Baloyi was involved in a rather awkward and unpleasant
 5 traffic jam and we're very pleased to see that she's
 6 finally arrived. Colonel, you're still under oath.
 7 KAIZER NTLOU MOBIDA: s.u.o.
 8 CHAIRPERSON: Mr Chaskalson.
 9 CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.):
 10 Thank you, Chairperson. Colonel, I must begin by
 11 correcting something I put to you yesterday. You'll recall
 12 that I asked you if you knew Constable Mabasa and I
 13 mentioned that his cartridges had been found in the area
 14 from which NIU members were shooting. You said you didn't
 15 recognise him. In fact I've given you the wrong name. I
 16 read the reference as 14.5, which is Constable Mabasa. The
 17 correct reference is 14.6, that's Constable Poshwa. Do you
 18 recognise Constable Poshwa as a member of the NIU?
 19 COLONEL MODIBA: That's correct,
 20 Chairperson. Poshwa is stationed at NIU.
 21 MR CHASKALSON SC: I apologise for the
 22 confusion around Mabasa. I want to move now to paragraph
 23 13 of your December 2013 statement, ZZZ4, if we could call
 24 that up. We've gone past it, paragraph 13. And in the
 25 first part of this paragraph you describe the confrontation

1 we arrived mostly at the same time.
 2 MR CHASKALSON SC: And that was after the
 3 shooting incident with the charging strikers east of the
 4 koppie?
 5 COLONEL MODIBA: That's correct,
 6 Chairperson.
 7 MR CHASKALSON SC: Did you say anything
 8 to General Naidoo?
 9 COLONEL MODIBA: I didn't say anything.
 10 MR CHASKALSON SC: Can I take you to what
 11 General Naidoo said about this, and it's in the transcript
 12 of the 4th of March, page 23809, if we get 23809 of 4 March,
 13 he was talking about approaching NIU members in that area.
 14 "Now the members you approached, I presume you're talking
 15 about the NIU members?" "That's correct, Chair." "Colonel
 16 Modiba?" "I can't specifically remember him mentioning
 17 anything specific. As I indicated, I arrived by his side
 18 and I discussed, I spoke to him and his members. So who
 19 said a few strikers I can't really specifically indicate,
 20 but it was the members that I arrived at who were trying to
 21 indicate to me what happened, yes." I said to him, "But
 22 presumably you'd have gone to the commander to get a report
 23 on what had taken place." "That's correct, Chair." "And
 24 that would have been Colonel Modiba or Colonel Nkebe?" "It
 25 was Colonel Modiba who I arrived at and he never indicated

1 with the charging strikers. I want to pick it up about
 2 eight lines down at the end of the line and it's after the
 3 confrontation. "I moved in the direction of the big rock
 4 in front. Some members swept bushes and rock to right. I
 5 noticed General Naidoo to my left. General Naidoo climbed
 6 over rocks to left of big rock. I went to right in between
 7 it and bushes, looked at body A; he did not look dead.
 8 There were three or four bodies by body A. They could have
 9 been injured but they were lying there on instructions of
 10 members. When I passed them SAPS members were attending to
 11 them, miners sweeping through bushes to my right because
 12 there were still miners in those bushes. I could see to
 13 the west some miners were charging and running and heard
 14 gunshots coming from there, then I lowered down, shooting
 15 then stopped," and on you go.
 16 My question is when you were in that area just to
 17 the east of the big rock, did you actually meet up with
 18 General Naidoo and discuss the situation with him, or did
 19 you just see him in that vicinity?
 20 COLONEL MODIBA: Chairperson, there was
 21 no discussion between myself and General Naidoo. I just
 22 happened to link up with him at that spot.
 23 MR CHASKALSON SC: Now when you say "link
 24 up with him," what you mean by link up?
 25 COLONEL MODIBA: We almost, I should say

1 a crowd. He said some strikers, and as I said his member
 2 were also alongside him saying 'Yes, there are a few
 3 strikers that charged us and we had to defend ourselves.'
 4 That's where the word "few" comes to mind.
 5 So General Naidoo testified about asking you for
 6 a report on what had happened there and having some sort of
 7 conversation with you. Did that not happen?
 8 COLONEL MODIBA: Chairperson, if I can
 9 recall very well there was no discussion between myself and
 10 General Naidoo and take into account that the situation was
 11 so volatile, there was no time actually to stand there and
 12 discuss anything before the threat was actually addressed.
 13 MR CHASKALSON SC: So you didn't say
 14 anything to General Naidoo?
 15 COLONEL MODIBA: No, I did not say
 16 anything to him.
 17 MR CHASKALSON SC: If we can then go to
 18 another aspect - or well, before we get there, if I
 19 understood your evidence correctly, after you saw General
 20 Naidoo he went up over the rocks to your left and you went
 21 right around the bottom of the big rock to go to those
 22 bushes, go behind those bushes at the koppie. Is that
 23 correct? You parted ways; he went over the rock, you went
 24 around the front of the rock.
 25 COLONEL MODIBA: That's correct,

1 Chairperson.

2 MR CHASKALSON SC: Can I put to you

3 something else from his evidence, and that's from page

4 24075 on the 7th of March. 24075, and it's with reference

5 to a photograph KKK16.5130, so if we could get that as

6 well.

7 COMMISSIONER HEMRAJ: While you're

8 getting that, at the time that you saw the General was

9 anyone else with you from your unit?

10 COLONEL MODIBA: Can I get the question?

11 COMMISSIONER HEMRAJ: Yes, at the time

12 you came across General Naidoo at the scene, were other

13 members of the unit with you?

14 COLONEL MODIBA: That's correct. I was

15 with my members.

16 COMMISSIONER HEMRAJ: Do you know if any

17 of them spoke to General Naidoo?

18 COLONEL MODIBA: It could be possible

19 that he spoke to some of them, but specific with me, that I

20 cannot attest to it.

21 COMMISSIONER HEMRAJ: You didn't see

22 anyone speak with him from your unit?

23 COLONEL MODIBA: I didn't, but it could

24 be that there was such a communication, but to remember now

25 as I indicated earlier to say the area was so volatile,

1 who was with us had a handgun only." Now were you with

2 General Naidoo when he went over those rocks?

3 COLONEL MODIBA: It is not true that I

4 went up with him. I did not take to that direction when I

5 moved from that big rock.

6 MR CHASKALSON SC: Can I ask you about

7 your movements and his movements? He went over the rocks,

8 you went around the front of the rocks. Is there a reason

9 that you chose to go around the front of the big rock

10 rather than going over the big rock at the time?

11 COLONEL MODIBA: The obstruction maybe

12 could be that big rock, but I still wanted to make sure

13 that the bush on my right was cleared, so that is why among

14 other things I decided to turn right there.

15 MR CHASKALSON SC: As I understand it,

16 you were the most senior tactical commander in that

17 immediate vicinity. Is that correct?

18 COLONEL MODIBA: It could be correct.

19 I'm not sure of others that, of other units, if that is the

20 case that on that, at that vicinity, the scene, that I was

21 the only one. Remember there were a number of disciplines

22 there operating on the day.

23 MR CHASKALSON SC: I'm talking about

24 tactical. So you were the most senior NIU commander in

25 that presence, in that immediate vicinity.

1 there was no time for discussion. It could be that he'd

2 spoken to one of the members and thinking that it was me

3 maybe.

4 COMMISSIONER HEMRAJ: Yes, thank you.

5 MR CHASKALSON SC: Maybe if we can just

6 call up KKK16.5130, and if we can zoom in on the SAPS

7 members coming over the left edge of the big rock, which

8 I'm pointing out now, and zoom further in, in particular on

9 I think that man there who seems to be holding a pistol in

10 his hand, because that's what the cross-examination

11 addressed. Now Ms Le Roux of the Human Rights Commission

12 was cross-examining General Naidoo on this issue and was

13 asking him if the man holding the pistol was him and at

14 page 24075 on the 7th of March he said, "Sorry Chair, I'd

15 indicate that I can't say for sure it was me, but it would

16 appear to be around the location where I indicated we

17 arrested those three protesters." Ms Le Roux said, "And

18 Major-General, the NIU line that was with you, none of

19 those members had a handgun, correct, that you recall?"

20 And General Naidoo said, "Chair, not that I specifically –

21 I, as I indicated the two or three members to my left had

22 R5s. Sergeant Harmse I know at some stage stopped, he

23 slung his R5 because he had a problem with the R5 at his

24 back, so possibly he used his handgun, but I wouldn't be

25 able to say whether it was only me. I know Colonel Modiba

1 COLONEL MODIBA: Yes, National

2 Intervention. I was the most one, yes.

3 MR CHASKALSON SC: Now the only other

4 tactical unit that was at koppie 3 was the STF and they

5 weren't in your immediate vicinity there.

6 COLONEL MODIBA: That's correct,

7 Chairperson.

8 MR CHASKALSON SC: So you took a tactical

9 decision – if we can zoom back out on this photograph –

10 CHAIRPERSON: Mr Chaskalson, you will see

11 Mr Wesley has something to show you.

12 MR CHASKALSON SC: Ja, I have five

13 minutes apparently. I may start begging for more a little

14 later, but if I can quickly finish in – can we just zoom in

15 a little bit around here, the area around the big rock, but

16 so that we can see the full extent of the bushes to the

17 right and the open fields. You took the tactical decision

18 not to go over the rocks but rather to go around and

19 essentially deal with what was going on in those bushes to

20 the northeast.

21 COLONEL MODIBA: That's true,

22 Chairperson.

23 MR CHASKALSON SC: Why did you take that

24 decision? Can you explain why you thought that was where

25 you could best be used rather than going over the rocks?

1 COLONEL MODIBA: Chairperson, if we can
2 look at that bush, it still need to be cleared, swept and
3 take whoever was there, because the threat was not yet
4 cleared, as I mentioned earlier on that the armed strikers
5 were hiding behind those rocks, so that bush was still
6 dangerous for us.

7 MR CHASKALSON SC: So that had to be
8 attended to first before it would be appropriate to go over
9 the rocks, was your assessment?

10 COLONEL MODIBA: To go over the rock was
11 not an option. If someone could remember the situation at
12 that time, the bush still posed threat and then it was also
13 not wise of me going over the rock because I could still, I
14 could then be visible for any person who could, perhaps
15 wanted to attack me, so the best option was to clear that
16 bush, make sure that it was safe.

17 MR CHASKALSON SC: If we can briefly then
18 go to ZZZ5 and annexure C again, because I want to deal
19 with you, raise with you now what happened with the people
20 who did go over those rocks, and if we can zoom onto the
21 big rock and what you'll see is that from the big rocks
22 there was a fair amount of shooting that took place. If I
23 can – there's the big rock. Can we just move this picture
24 a little bit left so that we – these are the cartridges
25 that were found on top of the big rock and –

1 COLONEL MODIBA: No. No, I did not. I
2 guess they were at my back. They were, my back was facing
3 them, so I was focussing what was going on in that bush on
4 my right.

5 MR CHASKALSON SC: But you'd have heard
6 17 R5 shots from that vicinity. Wouldn't you have turned
7 around to look to see what was going on?

8 COLONEL MODIBA: You know, tactically,
9 Chairperson, it could not be a good option to turn around
10 while you are still facing with danger ahead of you. So
11 you still need to proceed with what you are busy with in
12 such circumstances.

13 MR CHASKALSON SC: Chairperson, I'm told
14 that my time is now up.

15 CHAIRPERSON: How much more do you need
16 actually? Do you have a number of topics to deal with
17 still?

18 MR CHASKALSON SC: No, I'm cutting my
19 cloth too - but maybe 10 minutes?

20 CHAIRPERSON: Yes, I'll give you 10
21 minutes.

22 MR CHASKALSON SC: Thank you,
23 Chairperson. And you never go a report from any of your
24 officers about the shooting from the top of the rocks,
25 about the circumstances in which they shot?

1 CHAIRPERSON: The cartridges you indicate
2 are those under the description "Rifle carts T1, 2, 3."

3 MR CHASKALSON SC: Yes, Chairperson, and
4 if I can just briefly run through to you whose cartridges
5 they were. One of them was from General Naidoo's 9
6 millimetre pistol. Eight were from Constable Ngwaleni of
7 the NIU, three were from Constable Mogeale, four were from
8 Lieutenant Ndlela, one was Constable Dubeni, and one was
9 Constable Spanyetso. Did you see any of these members
10 shooting from the top of the big rocks?

11 COLONEL MODIBA: No, Chairperson, I did
12 not see them.

13 MR CHASKALSON SC: Can you explain why
14 that would have been the case?

15 COLONEL MODIBA: As I mentioned earlier,
16 I did not go over that rock, so my immediate turn was to
17 go, was my right and my focus was always in that bush. So
18 what on the other side of the rock, it wasn't something
19 that I was focussing at.

20 MR CHASKALSON SC: So you couldn't see
21 them on top of the rock from where you were?

22 COLONEL MODIBA: No, I could not see
23 them. I can –

24 MR CHASKALSON SC: You couldn't see them
25 shooting on top of the rock from where you were?

1 COLONEL MODIBA: No, there was no report
2 that was made available for me except the members declaring
3 as to who shot, what number of shots were fired, so that
4 was the only time I could know that so-and-so has fired
5 with this calibre and so on.

6 MR CHASKALSON SC: Can we go to the
7 exhibit B, which is – sorry, annexure B to this exhibit,
8 which is the preceding annexure. This annexure shows the
9 positions of the people who were killed. I just want to
10 point out to you here are the big rocks.

11 [09:38] There were 17 R5 shots, cartridges, from your
12 members found on top of these big rocks.

13 CHAIRPERSON: The big rocks are the rocks
14 which are to the left of bodies B and A on the slide.

15 MR CHASKALSON SC: And I'm now circling
16 an area just to the left or to the sort of south-west of
17 the big rocks where a great number of people were killed.

18 CHAIRPERSON: Yes, E and D are at the top
19 of the area you're circling.

20 MR CHASKALSON SC: And there were in fact
21 10 people killed in this area which has a radius of no more
22 than 15 metres and which is just below the big rocks to the
23 left –

24 CHAIRPERSON: - I count nine.

25 MR CHASKALSON SC: There is a tenth

1 person because –
 2 CHAIRPERSON: I'm not quarrelling with
 3 you on that but there are nine letters there in the middle
 4 of red stars –
 5 MR CHASKALSON SC: Indeed, Chairperson,
 6 you will recall from when we dealt this with Major-General
 7 Naidoo that between bodies E and K was where Mr Mogae* was
 8 shot and he died en route to hospital later, so he, so Mr
 9 Mogae is not mentioned here but he is almost equidistant
 10 between E and K. So there were 10 people killed in this
 11 area within a radius of 15 metres, just below the point at
 12 which your members fired 17 R5 shots. Have you not
 13 received any explanation from any of your members in
 14 relation to how these 10 people could have died?
 15 COLONEL MODIBA: No, Chairperson, I was
 16 not on that side where these members were, were walking.
 17 CHAIRPERSON: We know you weren't there
 18 but did you not have some kind of debriefing afterwards
 19 with your members? They told you what shots they'd fired,
 20 there was a discharge statement completed I take it, but
 21 did you not have a debriefing with them and say, what
 22 happened, how did you fire these shots, in what
 23 circumstances?
 24 COLONEL MODIBA: That's correct,
 25 Chairperson, there was a debriefing held where each member

1 could be the momentum of the events, what was happening
 2 there, that led them to take that direction. So it was out
 3 of their good initiatives with Lieutenant Ndlele to go to
 4 that direction.
 5 COMMISSIONER HEMRAJ: Thank you.
 6 CHAIRPERSON: Never mind their good
 7 initiatives and the momentum and so on, surely at the
 8 debriefing when it was all over they should have said to
 9 you, they should have told you what happened when they went
 10 there. Isn't that right?
 11 COLONEL MODIBA: That's correct,
 12 Chairperson, I don't dispute that. They did relate as to
 13 what made them to go there. As I mentioned, that the
 14 momentum of the events could have led them to take that
 15 direction. They did explain that situation. I guess that
 16 should be perhaps in their statements as to what happened,
 17 what they saw, what made them to heed to that direction,
 18 Chairperson.
 19 CHAIRPERSON: But sorry, I don't
 20 understand. When they were there, did they tell you they
 21 fired these shots that we can see that fired from the
 22 cartridge cases that were found on the ground?
 23 COLONEL MODIBA: I'm just talking under
 24 correction that if we can – I don't want to make
 25 speculation now. I cannot recall, this is a long way back

1 was saying what has transpired there and I cannot dispute
 2 that those members that were there did not declare the
 3 shooting that took place that side. I cannot recollect now
 4 as to who said what but the members that were in that
 5 direction, if we can revisit their statements we will be
 6 able to know as to how many shots were fired there by who.
 7 COMMISSIONER HEMRAJ: Colonel, the
 8 members that were on the top of the rock, they were under
 9 your immediate command on the day.
 10 COLONEL MODIBA: They were not under my
 11 immediate command. However, I want to point out that they
 12 were with one of my commissioned officers. You know, I was
 13 flanked with officers from national intervention so then I
 14 made to understand or to be aware that they were with
 15 Lieutenant Ndlele who is also an officer in the national
 16 intervention. That is one of my platoon commanders on the
 17 ground.
 18 COMMISSIONER HEMRAJ: Given that, that
 19 your intention was to attend to the miners that might have
 20 been in the bush above B on the slide, how is it that part
 21 of the contingent ended up on the top of the rock and on
 22 whose instructions were they going in that direction
 23 instead of the direction that you wanted to explore?
 24 COLONEL MODIBA: I want to make a point
 25 that that area was volatile. What took them up there, it

1 incident, that so and so told me he fired so many rounds at
 2 this point, that we could perhaps look into their statement
 3 that it will – the statement will definitely tell us, to
 4 clarify that point. It is difficult for me now to really
 5 speculate, Chairperson.
 6 CHAIRPERSON: Mr Chaskalson, is this
 7 incident 9 that's dealt with in slide 232 or mentioned in
 8 slide 232?
 9 MR CHASKALSON SC: I'm not sure, is the
 10 answer, Chairperson. Certainly the shooting of, there's no
 11 attempt – incident 9 may conceivably be, account for the
 12 killing of Mr Xalabile who is body O but there's no
 13 explanation in any of the SAPS statements or in the
 14 presentation of the deaths of the 10 people in that area of
 15 the 15 metre radius.
 16 CHAIRPERSON: Just for when we read the
 17 record later, incident 9 according to slide 232 is
 18 described as follows, "NIU members of the sweep line on
 19 southern side positioned on top of the large rock fire
 20 shots at protesters between the rocks and bushes on the
 21 south-western side of the koppie when they see a firearm."
 22 MR CHASKALSON SC: But I think that, on
 23 the south-western side of the koppie is not – I understand
 24 that to be –
 25 CHAIRPERSON: On top of the large rock.

1 MR CHASKALSON SC: Yes.

2 CHAIRPERSON: Positioned on the top of

3 the large rock.

4 MR CHASKALSON SC: Yes. I understand

5 that shooting to be in the direction down towards the

6 bottom of this page, not across to the left. Certainly

7 there's an arrow in one of the diagrams of exhibit L which

8 makes that point.

9 CHAIRPERSON: Unless I read it

10 incorrectly, I couldn't find a detailed account of incident

11 9 in exhibit L but anyway I won't interrupt your cross-

12 examination, I just mention it while we were dealing with

13 people, NIU people firing from the top of the large rock.

14 Anyway the witness presumably can't help us on that, can

15 you? You were at Roots, weren't you? Were you at Roots?

16 COLONEL MODIBA: Chairperson?

17 CHAIRPERSON: Were you at the conference

18 at Roots when the police presentation was compiled?

19 COLONEL MODIBA: Yes, I did attend at

20 Roots.

21 CHAIRPERSON: There were breakaway groups

22 -

23 COLONEL MODIBA: That's correct, Chair.

24 CHAIRPERSON: - dealt with various

25 aspects and one of the breakaway groups must have been

1 Scott said, or at the briefing people were informed that

2 the national management had instructed that the police must

3 act against the armed strikers. Do you recall any of that

4 from the briefing from Lieutenant-Colonel Scott at 2:30,

5 that national management had instructed that action had to

6 be taken against the strikers?

7 COLONEL MODIBA: No, I don't remember

8 those remarks made by him like that.

9 MR CHASKALSON SC: You didn't hear any

10 reference to national management, any decision from

11 national management?

12 COLONEL MODIBA: No, that I haven't

13 heard. All what I could hear was just we need to, they

14 need to be dispersed and disarmed.

15 MR CHASKALSON SC: Thanks, Colonel, those

16 are all of my questions.

17 CHAIRPERSON: Thank you, Mr Chaskalson.

18 I think you're next, Mr Ntsebeza.

19 CROSS-EXAMINATION BY MR NTSEBEZA SC:

20 Yes, Mr Chairman. Colonel, I've had the privilege of

21 sitting here and listening to your evidence in chief and

22 particularly also to the cross-examination by Mr Chaskalson

23 and before I put questions to you relevant to the material

24 that *11-32 I just want to find out, I'm trying to

25 understand what you understood your mission to be on the

1 devoted to, perhaps more than one, devoted to what happened

2 at scene 2.

3 COLONEL MODIBA: That is true,

4 Chairperson, there were a lot of discussions there during

5 the Roots.

6 CHAIRPERSON: Now in exhibit L, which is

7 the results of Roots, the Roots conference, there's mention

8 of an incident 9 and you heard me read out what it says.

9 It's talking about NIU people on the top of the large rock,

10 firing. Can you tell us anything about that? Do you know

11 anything about that?

12 COLONEL MODIBA: Chairperson, I don't

13 want to make a mistake. I'm still sticking to my guns to

14 say the statements of those individuals that fired from

15 that point, if we can extract that evidence from the

16 statements then that is when now I can be restful to say

17 yes.

18 CHAIRPERSON: I understand, I understand

19 that's - sorry, Mr Chaskalson, forgive me for interrupting

20 you.

21 MR CHASKALSON SC: Chairperson, I think,

22 in fact I have one last question. Colonel, we have seen -

23 it takes us back to the briefing at 2:30 at forward holding

24 area 1 - we have seen a statement from Captain Nhlathi of

25 the NIU which says that at that briefing Lieutenant-Colonel

1 day. Perhaps there are certain things that we can agree

2 on. The first one is that when the shooting at scene 1

3 took place you saw what happened there from the position

4 which you indicated to the Commission you were at when

5 those people were shot at near the kraal, is that right?

6 You saw the shooting at scene 1.

7 COLONEL MODIBA: That's correct,

8 Chairperson.

9 MR NTSEBEZA SC: And my sense, and you'll

10 correct me if I'm wrong here, certainly from some of the

11 footages that we have seen, is that after that shooting the

12 protesters fled to the koppies and the bushes. Do you

13 agree with that?

14 COLONEL MODIBA: Ja, fled and regrouping.

15 I understood it, I understand it that they did regroup, not

16 fled. Fled, we are referring to flee, flee, running away.

17 MR NTSEBEZA SC: No, let - we will

18 probably argue that at the end but are you saying that the

19 protesters who were not killed and injured and/or arrested

20 at scene 1, decided to stay there and fight it out with

21 those who had shot them or are you denying the fact that

22 they ran for the koppies? In fact most of the footage

23 shows them not only running but a Scorpion. There was this

24 - did you see a Scorpion on the day which had that big gun?

25 I see you smile and you nod, you saw the Scorpion that day,

1 didn't you?

2 COLONEL MODIBA: You're referring to the

3 STF vehicle, Chairperson?

4 MR NTSEBEZA SC: Yes.

5 COLONEL MODIBA: Ja, I saw it.

6 MR NTSEBEZA SC: Yes and it had that big

7 gun at the back of it, not so?

8 COLONEL MODIBA: I know it was equipped

9 with some sort of firearm or something.

10 MR NTSEBEZA SC: Yes and in some of the

11 footage which we could show you during one of the breaks if

12 you wanted to, you will see that it is chasing fleeing

13 protesters who are running towards the koppies and those

14 bushes. Do you still disagree with me that after those

15 shootings the remainder of the protesters who had either

16 not been, who had not been killed or injured near that

17 kraal and who had not been arrested near that kraal, fled

18 to the mountain?

19 COLONEL MODIBA: Chairperson, I cannot

20 say they fled. My –

21 MR NTSEBEZA SC: Are you suggesting –

22 COLONEL MODIBA: My observation, they

23 regrouped into koppie 2 first and then after realising that

24 we were forming up outside the barbed wire, the basic line

25 of national intervention, then they further went to koppie

1 understand those answers, your assessment or your answer

2 would be that it was part of their combat plan. You are of

3 the view that those who got killed in scene 1 were killed

4 because they were attacking the police, is that your

5 position?

6 COLONEL MODIBA: That's correct.

7 MR NTSEBEZA SC: The police acted in

8 self-defence against mineworkers who were attacking them,

9 is that your position?

10 COLONEL MODIBA: It is, Chairperson.

11 MR NTSEBEZA SC: And you would then say,

12 having failed to inflict any fatalities on the police, they

13 then decided on a tactical move to flee into the mountain

14 as a combat move to regroup and continue their fight or

15 attacks against the police. Would that be a fair summary

16 of what you are thinking?

17 COLONEL MODIBA: Yes, and as for the fact

18 that at the time they were regrouping they still had their

19 dangerous weapons, that could be the idea of still fight.

20 MR NTSEBEZA SC: Yes. And as I

21 understood it, the tenor of your evidence both in chief and

22 in cross-examination was that those who got killed in scene

23 1 and in scene 2 – you didn't put it in so many words but

24 the tenor of your evidence seems to suggest that they only

25 have themselves to blame. All that the police wanted was

1 3. It was not in a way that they were running away, they

2 were walking while still armed with their assortments of

3 dangerous weapons to koppie 3.

4 MR NTSEBEZA SC: So as I understand that

5 answer, if we argue and submit to the Commission that these

6 people were fleeing, you would counter by saying it was a

7 tactical move on their part, they were regrouping, they

8 were still hell-bent to fight it out with the police.

9 Would that be your answer?

10 COLONEL MODIBA: That is exactly what I

11 can say at the moment, even the fact that at the time they

12 were regrouping, this still on the way to regroup in koppie

13 3, they still set the veld on fire as a tactical way of

14 gaining cover and concealment to conceal their movements.

15 So you can see they knew what they were doing.

16 MR NTSEBEZA SC: And then I'm sure you

17 are saying that not on the basis of any evidence that you

18 have heard from any of the people who were involved there.

19 You are not basing there on some of the people who were

20 arrested and detained and who *17-25 in the koppies. It's

21 your assessment of what you saw on the day, is that right?

22 COLONEL MODIBA: That's correct and it

23 also, Chairperson, involved those mining strikers that

24 regrouped in koppie 3, those that were arrested.

25 MR NTSEBEZA SC: Yes. And so as I

1 for them to give up what you call dangerous weapons,

2 assegais and spears, surrender themselves and submit

3 themselves to arrest. Is that a fair summary of what the

4 police attitude was? Those who do not want to be injured

5 must surrender their weapons because they were illegal

6 weapons, and then submit themselves to arrest. Was that

7 the attitude of the police?

8 COLONEL MODIBA: Chairperson, I think we

9 need to look this thing in two ways. The first is that had

10 those armed striking miners surrendered their armaments,

11 just laid them down, there was no point that the police

12 would still arrest such people. And secondly, the arrest

13 only came when they were still resistant in giving up the

14 arms that they were carrying.

15 MR NTSEBEZA SC: Oh, I see. Maybe let me

16 rephrase that. Are you saying that when you, as a

17 commander of the NIU line that was going to, that was

18 following those who fled into the koppies – I understand

19 that, you know, generally you were going to sweep the area

20 in order to find out whether there are any dangerous

21 weapons there and retrieve those and I assume you would

22 arrest those who still resisted or didn't drop their

23 weapons or whatever. What was your mission in following

24 those protesters who had fled into the mountain?

25 COLONEL MODIBA: As I mentioned, in the

1 beginning the approach was we would allow them to lay down
2 their arms.

3 MR NTSEBEZA SC: Yes.

4 COLONEL MODIBA: And that failed and then
5 after they charged at the police and, for that matter, the
6 whole situation changed now, that arrests still need to be
7 made because already the crime was committed. So the
8 follow-up to koppie 3 where they regrouped was to clear it
9 and effect arrests, Chairperson.

10 MR NTSEBEZA SC: So the follow-up to
11 koppies 2 and 3 was to clear the koppie, clear of? Clear
12 the koppie of what?

13 COLONEL MODIBA: Clear the area where
14 they ran to, that is scene 2, koppie 3. To clear it and
15 effect arrests –

16 MR NTSEBEZA SC: Now what –

17 COLONEL MODIBA: - they still went there
18 being armed.

19 MR NTSEBEZA SC: Yes, I just want to
20 understand what you want to, what I must understand by your
21 testimony that you were to clear koppies 1 and 2.

22 COLONEL MODIBA: To explain the clear
23 part of it, as I mentioned yesterday in my testimony, was
24 that our task as national intervention was to clear koppie
25 1, to clear meaning to retrieve firearms, dangerous weapons

1 MR NTSEBEZA SC: And I just want to be
2 very clear that that is the tenor of your evidence over the
3 last two, three days. Are you saying those that got killed
4 especially in koppies 1 – in scene 2, were those that
5 attacked the police?

6 COLONEL MODIBA: Most probably,
7 Chairperson.

8 MR NTSEBEZA SC: No, you were there. I
9 wasn't there. And you have made statements there that
10 there were people who charged at police lines and the
11 police, acting in self-defence, fired at them. I want you
12 to tell the Commission whether it is your evidence that
13 whoever got killed there by the police who was a protester
14 was killed because they were attacking the police because
15 they had not put down their weapons. Is that your case?

16 COLONEL MODIBA: Yes, Chairperson.

17 MR NTSEBEZA SC: And you say so even in
18 respect of those like Thelejane and Mdizeni whom it
19 appeared from Mr Chaskalson's cross-examination you either
20 didn't see being killed or given the wounds that were
21 inflicted upon them that caused their deaths, it is
22 unlikely that they were attacking the police at the time
23 they died. Are you saying that evidence of yours applies
24 also to those cases?

25 COLONEL MODIBA: Chairperson, all those

1 and those that could still be hiding in those, in that
2 area, koppie 1, to clear that mountain safe.

3 MR NTSEBEZA SC: Yes, to make the
4 mountain safe and the way you would do it would be ask them
5 to drop their weapons and thereafter you would arrest them
6 when you felt it was safe for you to go and retrieve those
7 weapons. I'm just paraphrasing, I'm trying to understand
8 what you mean by clear.

9 COLONEL MODIBA: I explain it two ways,
10 that initially we were hoping that the striking miners were
11 going to lay down because we still had to convey that
12 intention from the police, it was still to be conveyed to
13 say lay down your arms.

14 MR NTSEBEZA SC: Yes.

15 COLONEL MODIBA: And if that failed then
16 there was again a further attempt of dispersing, dispersing
17 and encircling and disarm them.

18 MR NTSEBEZA SC: Yes.

19 COLONEL MODIBA: So as I mentioned, the
20 complexion of the whole idea was changed after the attack
21 from the miners at the police. So then -

22 MR NTSEBEZA SC: I see. Okay.

23 COLONEL MODIBA: Then it was just about
24 to effect arrest to those that, to effect the arrest of
25 those striking miners.

1 striking miners that regrouped at koppie 3, it could be
2 that some of them were still in hiding and others charged
3 at the police and if there was a shooting directed, the
4 shooting directed into the ground as a way of giving
5 warning shots. The warning shots could possibly catch who
6 – due to ricochet action of the bullet – could catch anyone
7 who was in that area.

8 MR NTSEBEZA SC: No, Colonel, I am not, I
9 am going to resist all endeavours to traverse ground that
10 was traversed by Adv Chaskalson. It is clear, and we will
11 argue this, that in respect of one body you didn't even
12 know it was there or you claim you didn't know it was there
13 when you did your clockwise circling of that bushy area.
14 You claim that you saw it only when you came back, so you
15 can't make that claim and also the nature of his injuries
16 are inconsistent with the claims that you make. So I'm not
17 going to get into a debate with you there, I'm simply
18 putting it to you that your generalised statement that
19 those who got killed by the police in the koppies were
20 killed because they were charging at the police with
21 dangerous arms and weapons is not true.

22 COLONEL MODIBA: Chairperson, I said
23 probably it could be the case.

24 MR NTSEBEZA SC: I don't want you to
25 engage in probabilities, Mr – that's what this Commission

1 is seeking to do. The Commission wants to be able to be
2 assisted by people like you who were there, who have made
3 statements in August 2012 where the workers, the strikers
4 have been demonised as the people who were the aggressors
5 and you are one of those who, in a bland way in your
6 statements, continues to say those who got killed were
7 killed because they were attacking the police. I'm simply
8 saying to you it is just not true, certainly in the cases
9 which have been canvassed with you by Mr Chaskalson.

10 CHAIRPERSON: Forgive me, Mr Ntsebeza, Ms
11 Baloyi has turned her light on. Yes, Ms Baloyi?

12 MS BALOYI: Chairperson, the witness has
13 not made, in any of his statements and in his evidence in
14 chief and even under cross-examination by Mr Chaskalson he
15 has not made a statement that the people that were killed
16 at koppie 3 were killed because they attacked the police.

17 That's not his evidence, Chair as I understand it.

18 CHAIRPERSON: Yes, what do you say about
19 that, Mr Ntsebeza?

20 MR NTSEBEZA SC: Maybe, maybe the Colonel
21 must tell us if I have been very – I don't know what this
22 statement is, there have been many of these statements,
23 there's a statement here at paragraph – MMM23, the reason
24 for discharging, paragraph 9, out of the 5 130 R5 rounds
25 issued, 68 rounds were discharged by 17 members. Out of

1 MR NTSEBEZA SC: I want you to – I don't
2 want to determine anything, I just want you to confirm
3 whether you, to confirm that that is the arsenal –

4 CHAIRPERSON: Well, he said that. He
5 said it in his statement.

6 MR NTSEBEZA SC: Yes.

7 CHAIRPERSON: Those are all the – he took
8 77 members of the NIU, 19 stayed behind in koppie 1. In
9 total these were the rifles, this is a list of the rifles
10 and ammunition in their possession. That's conceded, I
11 mean you don't have to underline that again.

12 MR NTSEBEZA SC: Now in relation to that,
13 Colonel, was it your instruction and I'll tell you why I
14 ask the question, was it your instruction to your members
15 as you left scene 1 for scene 2 that they would be
16 justified in using those kinds of firearms when they meet
17 the strikers in the mountain? Let's just look at the
18 rifles themselves, 86 R5 rifles. Now we have been told
19 that – ja, let me ask you a question. Was it your
20 instruction to them that they would be at liberty to use
21 those weapons in an encounter with striking miners?

22 CHAIRPERSON: These were the weapons they
23 had in their possession. Did you give them any
24 instructions about the use of those weapons when they went
25 to koppie 3?

1 the 2 929 pistol 9 millimetre rounds issued, 12 rounds were
2 discharged by four members. Two deaths appear –

3 CHAIRPERSON: Ms Baloyi, the point that
4 you've taken isn't correct. Mr Ntsebeza is relying, or
5 will when he eventually gets there, on the last sentence in
6 paragraph 9 where it is said, "The reason for discharging"
7 and that's reference to all the shots that have been fired
8 before that, "was to defend themselves from charging
9 protesters."

10 MS BALOYI: Chair, I see that.

11 CHAIRPERSON: So your objection is
12 disallowed. You may proceed, Mr Ntsebeza.

13 MR NTSEBEZA SC: Thank you, Mr Chairman.
14 So there you are. In fact I was going to come to that
15 statement relevant to paragraph 9 thereof. Perhaps we need
16 to get there, MMM23 paragraph 8. So after scene 1 or both
17 for purposes of scene 1 and scene 2 that is the arsenal
18 that you assembled in order to confront men and probably
19 women, I'm not so sure that there were women, armed with
20 assegais and spears and knobkerries. Do you confirm that?
21 86 R5 rifles and 5 130 rounds. Do you still recall that?
22 That's your statement.

23 COLONEL MODIBA: It is my statement,
24 Chairperson. I'm just figuring out what the cross-examiner
25 wants to determine.

1 COLONEL MODIBA: Chairperson, I want to
2 point out to say these firearms that are on the slide,
3 these are the equipment that national intervention use when
4 going into a volatile area. So there was no further or any
5 other special instruction to say you must use this firearm,
6 you must do that. As I mentioned earlier on, that we – the
7 members need to take cognizance of section 49 in the
8 manner, the appropriateness of use of force in the event
9 that you, an individual is addressing a threat. It must be
10 proportional to the threat, so there was nowhere that I
11 issued the instruction that go and use these firearms.

12 MR NTSEBEZA SC: Yes, that was my next
13 question because I want to get now to the areas which you
14 testified about. In paragraph 9 of your statement, the
15 November, ZZZ4. December 2013 statement, in paragraph 9
16 thereof you say, "I gave them briefing accordingly as it
17 was said and told them from my own always to take into
18 consideration section 49." And I remember that the
19 Chairman sought to establish from you whether it is in fact
20 section 49 of the Criminal Procedure Act and I won't go
21 into the details of amendments before or after. I will
22 take it that as at that date that is what you were talking
23 about. Is that what you were talking about?

24 COLONEL MODIBA: Chairperson –

25 MR NTSEBEZA SC: Section 49 of the

1 Criminal Procedure Act?
2 COLONEL MODIBA: Yes Chairperson, I was
3 referring to the proportionality of – if you were to
4 negotiate a threat that an individual is faced with, as to
5 take cognisance of the provision of section 49 in that
6 whenever there's a threat and then you have to deal with
7 it, it must be –

8 [10:18] The amount of force that you are going to use
9 must be proportionate to the level of threat, so that's
10 what I was just explaining to them.

11 MR NTSEBEZA SC: Is that what you
12 understand section 49 to mean?

13 COLONEL MODIBA: That's correct,
14 Chairperson.

15 MR NTSEBEZA SC: Are you saying it deals
16 with threat when the police are doing what? Are being
17 attacked?

18 COLONEL MODIBA: I'm talking of if in the
19 event that an officer has to use force, it must be
20 proportionate to the level of threat that he's faced with.
21 It shouldn't be excessive in that regard. That is my
22 understanding of section 49.

23 MR NTSEBEZA SC: Use of force in doing
24 what?

25 COLONEL MODIBA: If you have to resort to

1 slowly to you what section 49 of the Criminal Procedure Act
2 says. Its heading is "The use of force in effecting
3 arrest." "The use of force in effecting arrest. For
4 purposes of this section 'arrestor' means any person
5 authorised under this act to arrest or to assist in
6 arresting a suspect; and

7 (b), 'suspect' means any person in respect of
8 whom an arrestor has or had a reasonable suspicion that
9 such person is committing or has committed an offence. If
10 any arrestor attempts to arrest a suspect and the suspect
11 resists the attempt or flees, or resists the attempt and
12 flees when it is clear than an attempt to arrest him or her
13 is being made and the suspect cannot be arrested without
14 the use of force, the arrestor may in order to effect the
15 arrest use such force as may be reasonably necessary and
16 proportional in the circumstances to overcome the
17 resistance or to prevent the suspect from fleeing, provided
18 that the arrestor is justified in terms of this action in
19 using deadly force that is intended or is likely to cause
20 death or grievous bodily harm to a suspect only if he or
21 she believes on reasonable grounds –

22 (a), that the force is immediately necessary for
23 the purposes of protecting the arrestor, any person
24 lawfully assisting the arrestor, or any other person from
25 imminent or future death or grievous bodily harm;

1 use force one way or the other –

2 MR NTSEBEZA SC: In doing what?

3 COLONEL MODIBA: In defending yourself or
4 other's lives.

5 MR NTSEBEZA SC: Is that what you told
6 your members there, that section 49 deals with a situation
7 where you use force in defending yourself?

8 COLONEL MODIBA: I mentioned specifically
9 about the level of threat you –

10 MR NTSEBEZA SC: No, no, no –

11 COLONEL MODIBA: - in the event that the
12 force is used.

13 MR NTSEBEZA SC: Is that what you told
14 your members there, that section 49 refers to the use of
15 force when you are defending yourself?

16 COLONEL MODIBA: That is basically what I
17 explained in terms of section 49.

18 MR NTSEBEZA SC: And is that what you
19 understand by section 49 of the Criminal Procedure Act?

20 COLONEL MODIBA: To go further with the
21 section 49, it is about the force that once can use that
22 should not be more excessive than what the threat, the
23 level of threat is, should be proportionate to the threat.

24 MR NTSEBEZA SC: Look, I don't have
25 something I could put on the board, but I am going to read

1 (b), that there is a substantial risk that the
2 suspect will cause imminent or future death or grievous
3 bodily harm if the arrest is delayed, or that the offence
4 for which the arrest is sought is in progress and is of a
5 forcible and serious nature and involves the use of life-
6 threatening violence or a strong likelihood that it will
7 cause grievous bodily harm."

8 Will you agree with me that the tenor of this
9 section is that force may be used in effecting an arrest?

10 MS BALOYI: Chairperson, just perhaps for
11 correctness could we confirm with Mr Ntsebeza that this is
12 the provision that was in effect at the time, for what it's
13 worth, so that we are talking about the correct
14 legislation?

15 MR NTSEBEZA SC: No, I can't make that –

16 CHAIRPERSON: What's the point of putting
17 the section, a version of the section to the witness if
18 you're not sure it was the version that was in force on the
19 16th of August? That's what –

20 MR NTSEBEZA SC: Well, the witness
21 himself raised the question of section 49.

22 CHAIRPERSON: No, no, that's –

23 MR NTSEBEZA SC: I'm exploring with the
24 witness, Mr Chairman, whether this is the kind of section
25 that he put to the people.

1 CHAIRPERSON: Yes, I think the point in
 2 fact is that whatever version of the section one uses,
 3 there had been an amended. I'm not sure if actually it was
 4 enforced yet on the 16th of August 2012, but the point is
 5 that I think what's common to all the versions of the
 6 section is it does deal with the situation where an arrest
 7 is being effected.
 8 MR NTSEBEZA SC: That's the point.
 9 CHAIRPERSON: It's justifiable –
 10 MR NTSEBEZA SC: That's the only point
 11 that I'm raising, Mr Chairman.
 12 CHAIRPERSON: - justifiable homicide in
 13 the context of arrests.
 14 MR NTSEBEZA SC: Yes.
 15 CHAIRPERSON: I think that's the answer
 16 to your point, Ms Baloyi. Well, let's just ask the
 17 witness. You understand what counsel is putting to you?
 18 Section 49, whatever version was in force at the time,
 19 dealt with arrests and in circumstances in which force,
 20 even deadly force could be used in the circumstances of the
 21 effecting of an arrest. That's correct, is it not? Mr
 22 Chaskalson, your light is on.
 23 MR CHASKALSON SC: Chairperson, the
 24 amendment came into effect on the 25th of September 2012.
 25 CHAIRPERSON: Yes, that's the point.

1 words to say during the process of effecting arrest use
 2 deadly force. This is a legislation that I pointed out in
 3 terms of applying force, if it has to be applied. So I was
 4 just quoting to them the relevant legislation that needs to
 5 be adhered to.
 6 MR NTSEBEZA SC: Now when you were being
 7 cross-examined by Mr Chaskalson he dealt with the deaths of
 8 Mdizeni and Thelejane.
 9 CHAIRPERSON: Are you now moving on to
 10 topics covered by your application?
 11 MR NTSEBEZA SC: Yes, Mr Chairman.
 12 CHAIRPERSON: I think it's appropriate
 13 then for us to take the first break. You can proceed with
 14 that after the first break has been taken.
 15 [COMMISSION ADJOURNS COMMISSION RESUMES]
 16 [10:49] CHAIRPERSON: The Commission resumes.
 17 Colonel, you're still under oath.
 18 KAIZER NTLOU MOBIDA: s.u.o.
 19 CHAIRPERSON: Mr Ntsebeza.
 20 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):
 21 Thank you very much, Mr Chairman. Now Colonel, the one
 22 thing that was not explored with you, which I want to put
 23 to you would be if the two protesters Thelejane and Mdizeni
 24 were attacking the police at the time that they were shot
 25 and killed, there would have been evidence of their weapons

1 MR CHASKALSON SC: We can get the text of
 2 the pre-amended version.
 3 CHAIRPERSON: Ja, but the point is, I
 4 think the answer is the pre-amended version and the post-
 5 amended version both dealt with the situation of the
 6 justification of force, even deadly force, in the context
 7 of arrests. That I think is common to both those versions
 8 and that underlies the question. Do you understand that?
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 CHAIRPERSON: Alright, now Mr Ntsebeza
 12 hasn't yet started on the topics covered in his application
 13 to cross-examine, so I take it he's going to deal quite
 14 crisply with rounding off this point, but round it off and
 15 then move on to the ones on your application. You've only
 16 got a limited time for those topics. We gave you that time
 17 because we thought you needed it for those topics, so if
 18 you run short it's going to be because you dealt with
 19 something else. But anyway, ask a question, round this
 20 point off and move on.
 21 MR NTSEBEZA SC: Yes, Mr Chairman, I
 22 understand I've got a limited life in cross-examination.
 23 Now is that what you told your members, that when they
 24 effect arrests they can use deadly force?
 25 COLONEL MODIBA: It's not precisely in my

1 in the area of their bodies when they were found. Would
 2 you agree with that?
 3 COLONEL MODIBA: Chairperson, if I can
 4 get clarity; say, are you – is the cross-examiner referring
 5 to the cartridges?
 6 CHAIRPERSON: No, no, no, I think he's
 7 referring to – you see, I think it's looking at the other
 8 angle. He's not interested in the people or persons who
 9 were responsible for shooting at Mr Thelejane; he's
 10 concerned with the question whether Mr Thelejane was one of
 11 the group of strikers who on your evidence was charging at
 12 the police and he says if that is the case he would have
 13 had a weapon, because your evidence I understand is these
 14 people came charging with weapons. They didn't come
 15 charging with bare hands. He says and if that were so you
 16 would expect to find a weapon or weapons perhaps in the
 17 vicinity of Mr Thelejane's body when he was found. That's
 18 your point, isn't it?
 19 MR NTSEBEZA SC: Yes, Mr Chairman. Thank
 20 you very much.
 21 CHAIRPERSON: And is that not the case?
 22 So therefore, he says – this is the conclusion he's leading
 23 up to – would you accept that on the evidence available it
 24 looks very strongly as if Mr Thelejane was not one of those
 25 who was shot while he was charging at you people with

1 weapons, with a weapon or weapons. You agree with that?
 2 COLONEL MODIBA: I just want to clear
 3 this in that he could be one of those. We would recall,
 4 Chairperson, that the dangerous weapons that the armed
 5 strikers had were taken away by some of the officials,
 6 police officials, so it could have been the situation that
 7 he had one and it was taken away when other fellow mine,
 8 striking miners were cleared in that area.

9 MR NTSEBEZA SC: Yes. Now there is
 10 evidence about this and we could show it up to you. It's
 11 day 7, it's the evidence of Captain Mohlaki, T706, lines 1
 12 to 6, if you could put that up for the Colonel to see. Now
 13 Captain Mohlaki, you know Captain Mohlaki, do you?

14 COLONEL MODIBA: I guess he's a
 15 detective, Chairperson.

16 MR NTSEBEZA SC: Yes. Now he testified
 17 to the Commission that there were no traditional weapons
 18 found near either Mdizeni or Thelejane. "Captain, did you
 19 find any traditional weapons close to bodies A and B, and
 20 perhaps because close to may be a relative term, say within
 21 four metres of the spot where you found them, were there
 22 any traditional weapons?" Captain Mohlaki, "No, body A and
 23 body B, there was no close traditional weapons that were
 24 found by myself." You see that?

25 COLONEL MODIBA: Yes, I see the phrase

1 there were dangerous weapons that were lying around in that
 2 area, and –

3 MR NTSEBEZA SC: Did you see –

4 COLONEL MODIBA: I did not see anybody
 5 removing that, but I want to confirm that they were there
 6 before.

7 MR NTSEBEZA SC: Yes. Ja, so we would
 8 have to deal with what Captain Mohlaki says and what you
 9 speculate about what could have happened. Is that a
 10 summation of what your answers are, that we must accept
 11 what Mr – he's positive, he says that there were no
 12 traditional weapons. "No, body A and body B, there were
 13 no," or he says there was, "There were no close traditional
 14 weapons that were found by myself." And he had arrived at
 15 the scene shortly after they had been shot. Do you
 16 understand?

17 COLONEL MODIBA: I do understand,
 18 Chairperson. Shortly, it means that he was there,
 19 immediately after the shooting he was already there, so of
 20 which I know for a fact that detectives were not there when
 21 the shooting occurred. They only came afterwards. So I
 22 cannot dispute that at the time he came at the scene he
 23 couldn't find any dangerous weapon in that area.

24 MR NTSEBEZA SC: Now I would like us to
 25 look at exhibit L, slides 244, which refers to an incident

1 there. However, I want to point out to say at the time
 2 when the incident occurred Mohlaki was not really available
 3 there and I'm still saying that those weapons that the
 4 protesters had, the armed protesters had, could have been
 5 taken by the police officials.

6 MR NTSEBEZA SC: Well, can I just ask one
 7 question relevant to it? You are not testifying that you
 8 saw anybody remove those weapons after the two people were
 9 killed. You are speculating about what could or could not
 10 be. Is that right?

11 COLONEL MODIBA: If it's the inference of
 12 Mohlaki and the picture that shows no weapon around the
 13 area where body A and B were lying, that is my take on that
 14 to say it could have been the case that those weapons were
 15 removed.

16 MR NTSEBEZA SC: But what I'm saying,
 17 under oath you are not in a position to say as a matter of
 18 fact and as a person who was there, I know that what
 19 Mohlaki is saying is irrelevant because I saw arms removed
 20 from near the bodies of Mdizeni and Thelejane? You didn't
 21 see anyone remove the weapons from around the bodies of
 22 Thelejane and Mdizeni. Is that right?

23 COLONEL MODIBA: Chairperson, what I can
 24 testify about what I saw when I got closer to koppie, I
 25 mean to the big rock where Mr Mdizeni's body was found,

1 called by the SAPS, "the second shooting incident." You
 2 see that? "NIU second shooting incident on south-eastern
 3 side occurred at approximately 13 minutes past 4. Members
 4 fire at an armed protester charging at them in the bushes."
 5 You see that?

6 COLONEL MODIBA: Yes, Chairperson.

7 MR NTSEBEZA SC: And if we could go now
 8 to slide – just to orientate ourselves, we go to slide 7 of
 9 MMM47, which shows same thing. Slide 7 of MMM47. Now
 10 that's the same picture you saw in exhibit L. Now if we
 11 could go to page 7, or slide 7, you'll see there
 12 indications M and O. Now M is Mr Pato's body and O is Mr
 13 Xalabile's body. Now it seems to me according to the slide
 14 I showed you earlier, L244 to 245, the incident seems to
 15 have occurred when members were firing at armed protesters
 16 who were charging at them in the bushes and from higher
 17 rocks at the protester with the firearm. Now can you throw
 18 light on how Mr Xalabile and Mr Pato – but I think let's
 19 concentrate on Mr Xalabile – do you have a sense of how he
 20 could have met his fate there?

21 COLONEL MODIBA: Chairperson, I don't
 22 have any sense of that, but if we look into the slide we
 23 can, we are able to realise that body M and O were more on
 24 the south, so that's where, that's the area that I never, I
 25 haven't been there.

1 MR NTSEBEZA SC: Yes, I suspected that
 2 that might be your answer, so is it then your evidence that
 3 you are not able to enlighten the Commission with respect
 4 to the deaths of Xalabile and Pato?
 5 COLONEL MODIBA: That's correct,
 6 Chairperson.
 7 MR NTSEBEZA SC: Because it's an area
 8 that you yourself – to use your phrase – strategically or
 9 tactically decided you wouldn't be going to and you decided
 10 to do the clockwise movement around the bushy area and you
 11 came back to where you had started, and you never went to
 12 the southwest side there. Is that correct?
 13 COLONEL MODIBA: It is correct,
 14 Chairperson.
 15 MR NTSEBEZA SC: Now Mr Chairman, if we
 16 could put up just for orientation before I leave this
 17 subject, which might in fact be cutting short my cross-
 18 examination in view of what the witness is saying, there
 19 was that annexure B, ZZZ5, annexure B to ZZZ5. Now if I
 20 understand you well, if I understood your evidence, if we
 21 get orientation from this photograph, now these are the
 22 deaths for which you say you cannot give an account because
 23 they happened in an area, and these – I'm pointing at that
 24 cluster of red dots from the bottom of the picture and you
 25 say you cannot give an account of these deaths. Do I

1 MR NTSEBEZA SC: Yes.
 2 COLONEL MODIBA: I said I only realised
 3 later that there were members that deviated to the left
 4 from the rock –
 5 MR NTSEBEZA SC: Yes.
 6 COLONEL MODIBA: - with Lieutenant
 7 Ndlela, but now that there was a lieutenant who is a
 8 commissioned officer, one of my officers, as a platoon
 9 commander, I then became comfortable to say that whatever
 10 happened there, he would still take control of the
 11 situation, Chairperson.
 12 MR NTSEBEZA SC: As I understand it,
 13 these being the bodies of Mdizeni and Thelejane, your
 14 evidence was that you went around this bushy area – and I'm
 15 pointing to the bush to the north of the body of Thelejane
 16 – and you went in a clockwise direction around the bushy
 17 area and you came back, that is the area you traversed.
 18 You remember it was, it's just a reorientation of what you
 19 said relevant to another picture, but that more or less is
 20 what you said you did.
 21 COLONEL MODIBA: Yes, Chairperson, I
 22 confirm this assertion.
 23 MR NTSEBEZA SC: Yes, and were you
 24 walking? You were not driving, you were on your feet?
 25 COLONEL MODIBA: Yes, I was walking,

1 understand you also to say you cannot give an account of
 2 the death of Mr Xalabile, who in this picture is designated
 3 as O?
 4 CHAIRPERSON: You're pointing the pointer
 5 at the bush in which O is to be seen.
 6 MR NTSEBEZA SC: Is that your evidence?
 7 COLONEL MODIBA: It's true, I cannot
 8 account to, for those deaths that occurred on that side,
 9 just to, actually to add the comment on that.
 10 MR NTSEBEZA SC: Yes.
 11 COLONEL MODIBA: I didn't know the
 12 activities, I'm not conversant with the activities that
 13 happened there.
 14 MR NTSEBEZA SC: Yes, I think the Chair
 15 and Mr Chaskalson touched upon you having been – I think
 16 ja, it was Commissioner Hemraj who was exploring with you
 17 whether these were not effected by your members, even if
 18 they were not under your direct command, and I understood
 19 your evidence to be saying you delegated immediate control
 20 of the members who went on top of those rocks who may have
 21 been responsible for those deaths to some of your
 22 underlings. Did I hear your evidence correctly?
 23 COLONEL MODIBA: No, you didn't get me
 24 well. Chairperson, I did not say I delegated the officer
 25 and members to take care of that site of south.

1 Chairperson.
 2 MR NTSEBEZA SC: Yes, but I would like to
 3 explore just a little the questions that were begun to be
 4 asked, matters of concern in fact begun to be asked by the
 5 Chair and Mr Chaskalson in this regard. Now do you know
 6 Constable Mogege?
 7 COLONEL MODIBA: Is it T Mogege?
 8 MR NTSEBEZA SC: Yes.
 9 COLONEL MODIBA: Yes, I –
 10 MR NTSEBEZA SC: TG Mogege.
 11 COLONEL MODIBA: Ja, it's a member from
 12 National Intervention, Mthatha.
 13 MR NTSEBEZA SC: Yes, he was in your
 14 group, was he not?
 15 COLONEL MODIBA: Yes, he was in my group,
 16 Chairperson.
 17 MR NTSEBEZA SC: Now we now know, and you
 18 know from the material that was given –
 19 CHAIRPERSON: Mr Ntsebeza, do we not have
 20 to make this statement an exhibit?
 21 MR NTSEBEZA SC: Oh yes, yes, Mr
 22 Chairman. Seeing that –
 23 CHAIRPERSON: While we're doing a bit of
 24 housekeeping, shouldn't we make your other exhibits,
 25 exhibits as well? Or was this the only document you're

1 going to rely on?

2 MR NTSEBEZA SC: I believe there are

3 three, Mr Chairman.

4 CHAIRPERSON: You rely on – insofar as

5 you rely on documents that are already before us, obviously

6 they were exhibits, but –

7 MR NTSEBEZA SC: No, I think there are

8 three statements. My junior can enlighten –

9 CHAIRPERSON: I seem to remember that, I

10 do remember in fact that Ms Lewis came to see us yesterday

11 morning and gave us three statements which were new. Is

12 that right?

13 MS LEWIS: That's correct, Chair, and –

14 CHAIRPERSON: Okay, so what are they –

15 MS LEWIS: And they are new exhibits.

16 CHAIRPERSON: So what are they?

17 MS LEWIS: It's the statement of Mogehe,

18 is the first one that we would need to make an exhibit.

19 [11:09] CHAIRPERSON: Ja, that'll be ZZZ6,

20 statement of – he's a constable.

21 MS LE ROUX: That's correct.

22 CHAIRPERSON: Mokhele, okay. I shall

23 mark that ZZZ6. Then the next one I take it is – they're

24 all stapled together – the next one is this Ntsweleni, am I

25 right?

1 be asking. This is a slide which tells us where the body

2 of Mr Xalabile was found. We say there, viewed from the

3 top of the rock looking south, Xalabile's body was at the

4 foot of the tree and the cartridges were found away from,

5 if you look from Mr Xalabile's body, 2.8 metres. Do you

6 see that? Do you see that, Colonel?

7 COLONEL MODIBA: I'm looking at the

8 slide.

9 MR NTSEBEZA SC: Yes.

10 COLONEL MODIBA: And with what you were

11 reading –

12 CHAIRPERSON: They appear to be, I think

13 they're the yellow cones. Can you see the yellow cones?

14 Do you see the yellow cones?

15 MR NTSEBEZA SC: You did get these

16 materials –

17 CHAIRPERSON: Look at the screen.

18 Colonel, look at the screen. You see Mr Xalabile's body is

19 at the foot of the tree, that's indicated and then there's

20 a rectangle with some writing in it, "Rifle cartridges V1

21 to V3 were 2.8 metres away from and above Mr Xalabile's

22 body" and there's a yellow cone there, do you see that, to

23 which the arrow points. Now I'm not sure, though I suspect

24 that the other two yellow cones we see are probably V2 and

25 V3. I may be wrong in that but certainly the main point is

1 MS LE ROUX: Chair, I think it's

2 Ngwaleni, an IPID statement.

3 CHAIRPERSON: Oh, N-G not S.

4 MS LE ROUX: Yes.

5 CHAIRPERSON: Okay. So it's ZZZ7 is the

6 statement of – is he also a constable?

7 MS LE ROUX: As far as I know, Chair,

8 yes.

9 CHAIRPERSON: Of Constable N-G-W-A-L-E-N-

10 I and that will be ZZZ7 and then we have another one, it

11 looks like –

12 MS LE ROUX: Also Constable Ngwaleni.

13 It's his further statement.

14 CHAIRPERSON: Oh, I see and that – so

15 we'll make them ZZZ7.1 and ZZZ7.2 further statement of

16 Constable N-G-W-A-L-E-N-I. Right?

17 MS LE ROUX: Thank you, Chair.

18 CHAIRPERSON: Are those the three

19 statements?

20 MR NTSEBEZA SC: Thank you, Mr Chairman,

21 may I proceed?

22 CHAIRPERSON: Yes, sorry.

23 MR NTSEBEZA SC: Thank you, Mr Chairman.

24 Now before we – can we turn to exhibit MMM47, slide 30

25 thereof, just to give context to the questions that we will

1 that the first yellow cone that's got the arrow pointing at

2 it, it is said was 2.8 metres away from and above Mr

3 Xalabile's body. Do you see that? That's what Mr Ntsebeza

4 is talking about.

5 MR NTSEBEZA SC: I'm pointing at the

6 slide. Do you see where we say "Rifle cartridges V1 to

7 V3," then there is a yellow cone that points, yes. Do you

8 see that?

9 COLONEL MODIBA: Yes, I can see that,

10 Chairperson.

11 MR NTSEBEZA SC: Ja, we canvassed this at

12 length with General Naidoo. We are simply saying there is,

13 in the material that you got some two hours ago which we

14 provided to you, you'll find that at the bottom, which is

15 why the caption says Xalabile's body was at the foot of the

16 tree. The tree here, and at the bottom about 2,8 metres

17 down, that sort of ridge area, you will find his body and

18 we are saying there are cartridges here at that yellow cone

19 which we will argue are from rifles or from people who shot

20 at Mr Xalabile at the bottom of the tree whilst they

21 themselves were standing there. Do you see what I'm

22 getting to?

23 COLONEL MODIBA: Yes, Chairperson.

24 MR NTSEBEZA SC: In fact, if we turn to

25 FFF8 and entry 8 thereof, that is the discharge sheet,

1 scene 2 – we want to look at entry number 8 there, scene 2
 2 entry number 8. Number 8, you can see there it says
 3 Mokhele.
 4 COLONEL MODIBA: I can see it,
 5 Chairperson.
 6 MR NTSEBEZA SC: Yes.
 7 CHAIRPERSON: If you then go from there
 8 to annexure C which is part of the –
 9 COLONEL MODIBA: I've got it with me,
 10 Chairperson.
 11 CHAIRPERSON: - ZZZ5, ZZZ5. You've got
 12 that? You see that? Now you'll see there the big rock is
 13 depicted, do you see? Perhaps someone could put that up on
 14 the screen for us. The big rock is depicted there. No –
 15 no, we don't have to be – no, a little bit, let's zoom, ja.
 16 There we see the big rock, you see? You see to the left of
 17 the big rock you see body O, that's Mr Xalabile. Then you
 18 see on the rock a number of R5s are depicted and if you
 19 look at the numbers given there you will see that, I think
 20 358026 was Moleke*08-17. If I'm wrong I'll be corrected,
 21 but you see a number of your men were on that rock and the
 22 body of Mr Xalabile was down below in the trees and they
 23 were obviously firing from above. I'm not sure in which
 24 direction they were firing but they would appear to have
 25 been firing from the rock above as the cartridges indicate.

1 that, how Constable Mokhele or Mokhele is linked to those
 2 cartridges by the ballistic analysis of what was found?
 3 COLONEL MODIBA: Yes, Chairperson. What
 4 I see here is a sketch that indicates the cartridge that
 5 was fired out of his R5, which doesn't tell me to say his
 6 R5 was responsible for the death of Mr Xalabile.
 7 MR NTSEBEZA SC: I wouldn't expect to
 8 tell you that but the links are that what you see there is
 9 cartridge cases V1 to V3, are actually linked ballistically
 10 to Constable TG Mokheli. Are you contending with that? I
 11 don't think you are contending that the ballistic
 12 information is incorrect.
 13 COLONEL MODIBA: No, I contest that fact.
 14 MR NTSEBEZA SC: Yes. Now I want to look
 15 at his statement where he talks about this incident, ZZZ6.
 16 I don't know if we have a typed version but from the
 17 written –
 18 CHAIRPERSON: Do you have a typed
 19 version, you didn't give it to us.
 20 MR NTSEBEZA SC: No, we don't apparently,
 21 Mr Chairman. Now if we could plot paragraph 5. He says,
 22 "When we approached the hill in scene 2 they turned against
 23 us and they approached us. I used an R5 rifle and
 24 discharged four shots in the air but facing their
 25 direction." Do you see that?

1 And you can see from the other exhibit we were looking at a
 2 moment ago, if you compare the numbers of the firearms
 3 which are visible here with the numbers of the firearms on
 4 that other exhibit and we can see who the possessors, the
 5 wielders of those firearms were at the time and that is the
 6 point being made to you by Mr Ntsebeza. Do you understand
 7 the point?
 8 COLONEL MODIBA: Yes, Chairperson.
 9 MR NTSEBEZA SC: And - sorry, Mr Chair –
 10 and there ballistic – you see on this slide which is on now
 11 there is also a legend there, "Ballistics conclusion of
 12 firearms involved" that was done by Colonel Pieterse. If
 13 we scroll down we would come to where, 14.8, 14.8 of the
 14 legend. Why doesn't it show on the screen? If you could –
 15 no, no, there do you see, there you are TG Mokheli –
 16 CHAIRPERSON: There we've got Mokheli,
 17 he's on the bottom left-hand corner of the slide.
 18 MR NTSEBEZA SC: Thank you, Mr Chairman.
 19 9 –
 20 CHAIRPERSON: And his firearm you see was
 21 358026. Now if you look at the rock and the firearms on
 22 the rock, you'll see the second one from the left is
 23 358026. So that's where Constable Mokeli's cartridge cases
 24 were found.
 25 MR NTSEBEZA SC: So – ja. Do you see

1 COLONEL MODIBA: Yes, Chairperson.
 2 MR NTSEBEZA SC: And then he says, the
 3 last sentence of that paragraph, "And as they were closer,
 4 used R5 rifle and discharge four round and this time it was
 5 pointed at the ground." Do you see that? You did read
 6 this statement, didn't you?
 7 COLONEL MODIBA: I did read it.
 8 MR NTSEBEZA SC: And that's the only
 9 account that he gives of him having fired. He accounts for
 10 eight shots, is that right?
 11 COLONEL MODIBA: I just want to make sure
 12 –
 13 MR NTSEBEZA SC: Four in the air and four
 14 in the ground. Now that I point it out to you, do you see
 15 that?
 16 COLONEL MODIBA: Yes, I can see that.
 17 MR NTSEBEZA SC: And the ballistic
 18 analysis says he discharged, fired nine shots. You saw
 19 that, didn't you?
 20 COLONEL MODIBA: Yes, Chairperson.
 21 MR NTSEBEZA SC: So on his version, eight
 22 of the nine shots he fired were fired as they were
 23 approaching scene 2 and as protesters were coming at them.
 24 Do you agree?
 25 COLONEL MODIBA: According to how he

1 related in this paragraph, it's four-four.
 2 CHAIRPERSON: The ninth shot is dealt
 3 with in paragraph 7 on the next page.
 4 MR NTSEBEZA SC: Yes. In paragraph 7
 5 where he says, "We proceeded with our task of clearing the
 6 hill." Where does it deal with the ninth shot?
 7 COLONEL MODIBA: It's paragraph 7 from
 8 the bottom.
 9 MR NTSEBEZA SC: Yes. You will correct
 10 me if I'm wrong, it doesn't appear that he says anything
 11 about having fired from the top of the rocks of the koppie,
 12 his statement, where the Chairman showed you the cartridges
 13 which were found from on top of the rock. Correct me if
 14 I'm wrong, it doesn't –
 15 CHAIRPERSON: I'm sorry, Mr Ntsebeza. I
 16 suspect that the top of the rock is what is described as
 17 the smaller hill. If you look in para 5 he describes, you
 18 have a smaller hill. Look at para 5, the 13th line of para
 19 5. If you go up a few lines above that you see he says, "I
 20 used R5 rifle, discharged four shots in the air but facing
 21 their direction. Some of the miners ran away to the small
 22 hill and when we approached them they advanced," et cetera.
 23 Now in the context it only makes sense, I would think, if
 24 the small hill is a reference to the rock because I mean
 25 there was no, it's not suggested he left – yes, "Some of

1 than just we hear the approach, whether you call it a small
 2 hill or the rock, we do not get the sense that they got to
 3 the top of the rock and fired from there as the ballistic
 4 evidence in ZZZ5 indicates.
 5 CHAIRPERSON: Yes. No, you are correct.
 6 MR NTSEBEZA SC: Do you understand the
 7 debate, Colonel?
 8 COLONEL MODIBA: Yes, Chairperson, I'm
 9 following.
 10 MR NTSEBEZA SC: Mokhele doesn't seem to
 11 give an account of what, how will I use a material, a
 12 material fact and that is, they got on top of the rock,
 13 whether they call it a small hill, they got on top of the
 14 rock and they fired from there. That is omitted from your
 15 statement. Do you remember that even you yourself, and I
 16 just digress a little bit just to orientate, even you
 17 yourself said the difference between you and General Naidoo
 18 was that when he did in fact go onto the rock, you yourself
 19 never got onto the top of the rock. Now that is why we say
 20 that material fact is absent from Mokhele's statement. Do
 21 you agree with that?
 22 [11:29] COLONEL MODIBA: Chairperson, I don't
 23 really get what the cross-examiner is saying, that the
 24 material doesn't get to –
 25 MR NTSEBEZA SC: Never mind that legal

1 the miners ran away," that's what I read to you, "to the
 2 small hill and when we approached," et cetera. That's the
 3 13th line. And in the context, well, it appears to me, I'm
 4 not being categorical about it but it appears to me that in
 5 the context the reference to the small hill can, I would
 6 suspect, only be a reference to the large rock which would
 7 have been seen as a small hill in this context, in this, in
 8 the area we're talking about but if I'm wrong on that, you
 9 can correct me obviously.
 10 MR NTSEBEZA SC: I understand, Mr Chair,
 11 except that throughout the statement it doesn't appear, and
 12 the Colonel can correct me if I'm wrong here, it doesn't
 13 appear as though he says anything further than just
 14 approaching.
 15 CHAIRPERSON: No, he goes on, he goes on
 16 – [microphone off, inaudible] – sorry, it goes on. Let me,
 17 "Some of the miners ran away to the small hill. When we
 18 approached them they advanced from that hill or" it looks
 19 like "rock, to our direction." So that reinforces my
 20 belief that the reference to the small hill or rock is a
 21 reference to what is described as a large rock.
 22 MR NTSEBEZA SC: Yes, Mr Chairman, I
 23 think I hear that. What I was exploring with the witness,
 24 because it's the cartridges that we are seeking to locate
 25 and we're saying it's on top of that rock. Now further

1 jargon about material. What you do understand and from
 2 your nodding I think I understand you to be agreeing, that
 3 Mokhele's statement does not put him anywhere on top of the
 4 hill where the cartridges were found or on top of the rock,
 5 small hill, whatever. He doesn't give us that account.
 6 COLONEL MODIBA: It's not clear if, to
 7 comment on that.
 8 MR NTSEBEZA SC: It's more than just not
 9 clear. It doesn't say it. Do you agree with that? Let's
 10 go on because I do not seem to get an answer.
 11 MS BALOYI: Chairperson, I think it's
 12 unfair to the witness to ask him about what this statement
 13 means and then say I don't seem to get an answer. The
 14 statement says what it says and Mr Ntsebeza can, when he
 15 argues, give it whatever interpretation he wants to give
 16 it. I think it's unfair to expect this witness to say what
 17 the statement means.
 18 MR NTSEBEZA SC: My learned friend –
 19 CHAIRPERSON: What do you say about that?
 20 MR NTSEBEZA SC: I don't agree, Mr
 21 Chairman.
 22 CHAIRPERSON: It's a matter you can –
 23 MR NTSEBEZA SC: The witness can –
 24 CHAIRPERSON: It's a matter you can argue
 25 later. You've put the point to him, he –

1 MR NTSEBEZA SC: He was the leader –
 2 CHAIRPERSON: There's either an
 3 explanation he can give us or there isn't. He hasn't given
 4 us an explanation. You can argue at the end that
 5 something, it has some significance.
 6 MR NTSEBEZA SC: Of course, of course, Mr
 7 Chairman. May I just make the point -
 8 CHAIRPERSON: I don't think you can take
 9 it further than that.
 10 MR NTSEBEZA SC: Mr Chairman, may I just
 11 make the point –
 12 CHAIRPERSON: Yes, of course.
 13 MR NTSEBEZA SC: - and the point is this,
 14 that he is not just a colleague of these people. These are
 15 people under his direct command, he is in charge. They
 16 give a statement to him which he does not seem to have
 17 investigated for and then explored in the light of other
 18 evidence like the ballistic evidence that there was there.
 19 That's why therefore I was just putting it to him. It's
 20 not the end of the world.
 21 CHAIRPERSON: Did he say he was under his
 22 direct command? Was Constable Mokhele under your direct
 23 command?
 24 COLONEL MODIBA: Chairperson, I didn't
 25 get you?

1 was shot. Slide B, I mean exhibit B slide 47 I'm sure
 2 shows it better. No – no, I don't want the guns. 47.
 3 CHAIRPERSON: Do we need a warning at
 4 all?
 5 MR NTSEBEZA SC: No, Mr Chairman, it's
 6 just an area which would –
 7 CHAIRPERSON: I see.
 8 MR NTSEBEZA SC: Yes. On top of the
 9 rocks, this point – do you see that? Yes.
 10 COLONEL MODIBA: Yes, I can see it.
 11 MR NTSEBEZA SC: So Ngwaleni was on top
 12 of those rocks as well. Now he says, I mean he fired 25
 13 shots including the one –
 14 CHAIRPERSON: Ms Baloyi has got her light
 15 on, Mr Ntsebeza.
 16 MS BALOYI: Chairperson, I don't know if
 17 it is correct for Mr Ntsebeza to put it as a fact that
 18 Constable Ngwaleni was on top of those rocks. We certainly
 19 do have cartridges on the rocks. We don't have any
 20 evidence that indicates he was on the rocks.
 21 CHAIRPERSON: We have cartridges,
 22 cartridge cases on the rock which were traced to his
 23 firearm, so that's a basis for suggesting that he was on
 24 the rock but perhaps Mr Ntsebeza should put it less
 25 categorically than he does, in which case you'll be

1 CHAIRPERSON: Was Constable Mokhele under
 2 your direct command?
 3 COLONEL MODIBA: Yes, Mokhele was under
 4 my command. However at that time he was on the other side
 5 of the big rock, the southern side where I wasn't, I
 6 haven't gone there. So I believe at that time he was with
 7 Lieutenant Njela but it is difficult for me now to explain
 8 the activities that occurred that side.
 9 MR NTSEBEZA SC: No, I'm not, I'm not – I
 10 was obviously not asking you that. It's just that what I
 11 wanted to say is that he was in your unit.
 12 COLONEL MODIBA: That's correct, he's
 13 from national intervention.
 14 MR NTSEBEZA SC: Yes. Now I would like
 15 to look at Ngalwana, I mean Ngwaleni. Now, let's look
 16 again at annexure B of ZZZ5 and annexure C. 14.2 of – you
 17 see there in the legend, 14.2. There's a cursor which I'm
 18 using, or a pointer.
 19 COLONEL MODIBA: Yes, I can see it.
 20 MR NTSEBEZA SC: 25 cartridges and they
 21 are listed there.
 22 COLONEL MODIBA: Yes, I can see,
 23 Chairperson.
 24 MR NTSEBEZA SC: Now U1 to U6 which we
 25 have found on top of the rocks near to where Mr Xalabile

1 satisfied.
 2 MS BALOYI: Yes, Chair. It should be put
 3 as factually correct as we can.
 4 MR NTSEBEZA SC: Yes, well Mr Chair, as –
 5 it's just that I was less cautious at this stage perhaps in
 6 saying that objective evidence is what it says, we will
 7 argue on the basis thereof –
 8 CHAIRPERSON: Mr Ntsebeza, let me
 9 interrupt you for a moment. The circumstantial evidence we
 10 have appears to indicate that Constable Ngwaleni was also
 11 on the rock because cartridge cases were found on the
 12 rocks, not all 25 that he admits he fired but some
 13 cartridge cases were found which came from his firearm. So
 14 that gives rise to what one can perhaps describe as a
 15 strong indication that he was also on the rock. You
 16 understand the point that's being put?
 17 COLONEL MODIBA: Yes, Chairperson, I hear
 18 what you say. I still want to point out to say cartridges
 19 fly after being discharged. It can land anywhere.
 20 MR NTSEBEZA SC: Fly up a mountain or a
 21 hill?
 22 CHAIRPERSON: Ja, they do fly and
 23 there's, I think there's been some evidence about the
 24 maximum distance that they can travel. That's why I put it
 25 to you on the basis of circumstantial evidence which

1 appears to indicate. I understand your point, it's not
 2 watertight but I don't think Mr Ntsebeza now is putting it
 3 on a watertight basis.
 4 COLONEL MODIBA: Chairperson, I'm not
 5 refuting the fact that the cartridge indicates that it was
 6 on top of that rock according to the sketch. I'm not
 7 refuting that one, I'm just making a statement to say what
 8 position he was, B –
 9 MR NTSEBEZA SC: Yes.
 10 COLONEL MODIBA: - what position he was,
 11 I cannot really be definite about it.
 12 MR NTSEBEZA SC: Yes.
 13 COLONEL MODIBA: Because a cartridge,
 14 when you fire it flies.
 15 MR NTSEBEZA SC: I'm happy with your
 16 response. I mean if I had more time we would get into a
 17 verbal joust but, you know, we don't have – now can we look
 18 at his statement, Mr Ngwaleni? I'm not going to say he's
 19 my colleague. Mr Ngwaleni, Ngwaleni, the ZZZ7.1 statement
 20 and paragraph 5 or at page 5, to the extent you can make
 21 out pages in these written statements but there is
 22 something where he says that "A couple of mine – strikers
 23 charging to our direction with spears and pangas. I warned
 24 them to put their hands up. Some didn't comply. I fired
 25 five warning shots on the air with an R5 rifle and that

1 rifle." Unless there is somewhere else, but in this
 2 statement he doesn't account for more than five shots.
 3 COLONEL MODIBA: Chairperson, I came
 4 across one of his statements that made mention of the rifle
 5 that could have turned to automatic mode.
 6 CHAIRPERSON: Yes, that statement is
 7 ZZZ7.2.
 8 MR NTSEBEZA SC: Yes, we'll get there all
 9 in good time but in this statement are we together, that in
 10 this statement he accounts for five shots which he says
 11 were discharged as they were approaching scene 2. Is that
 12 correct?
 13 COLONEL MODIBA: Yes, that is what is
 14 appearing in the statement.
 15 MR NTSEBEZA SC: In the statement. It's
 16 certainly not an account –
 17 CHAIRPERSON: I'm sorry to interrupt you
 18 but I take it that if you've got an R5 and you think you're
 19 firing five warning shots in the air when in fact your
 20 rifle is on automatic and you fire 25 shots, you're likely
 21 to know that and not think you only fired five, isn't that
 22 right? I mean, isn't that correct? I mean you've fired an
 23 R5 in your time, haven't you? Surely you know the
 24 difference between firing automatic shots and firing, not
 25 firing automatic shots but firing what we can call ordinary

1 instructing them, lie down and drop their weapons. No-one
 2 fell down or injured because of my discharge." Do you see
 3 that?
 4 COLONEL MODIBA: Yes, I'm having the
 5 statement with me.
 6 MR NTSEBEZA SC: It seems to be an
 7 account at scene 2, you would agree with that?
 8 COLONEL MODIBA: No, I don't want to put
 9 myself in a position of agreeing or disagreeing.
 10 MR NTSEBEZA SC: Well, at some stage you
 11 should unless you are being evasive.
 12 CHAIRPERSON: No – no, I don't think
 13 that's an appropriate comment. There may be points, you're
 14 putting the statement of a witness to him, he may be in
 15 what one can, you can call an *11:29/12-06 sort of position
 16 where he can't really express an opinion as to what the
 17 statement means. So I don't think you can accuse him –
 18 MR NTSEBEZA SC: Mr Chair, it's okay,
 19 it's okay Mr Chairman. I don't, I just wanted to avoid
 20 putting it to him at some stage that look, this is so clear
 21 that if you don't agree you are being evasive, but let's
 22 leave it there. He seems to account in this statement, if
 23 we are talking about what we saw at scene 2, he seems to
 24 account for only five shots. Do you see that in this
 25 statement? "I fired five warning shots on there with that

1 shots and firing five. There's a difference, isn't there?
 2 COLONEL MODIBA: It –
 3 CHAIRPERSON: It's difficult to
 4 understand how he could have thought he fired only five if
 5 his rifle was on automatic and he fired, isn't that
 6 correct?
 7 COLONEL MODIBA: Ja, that is why there is
 8 assumption that it might have switched over to automatic
 9 mode.
 10 CHAIRPERSON: Without his being aware of
 11 it, while he thought he only fired five. That sounds a bit
 12 of a tall story, doesn't it?
 13 MR NTSEBEZA SC: You see the point we are
 14 going to be making –
 15 CHAIRPERSON: What's your answer?
 16 MR NTSEBEZA SC: Oh, sorry.
 17 CHAIRPERSON: What's your answer?
 18 COLONEL MODIBA: Can I get the question,
 19 Chairperson?
 20 CHAIRPERSON: No, I said if you've got a
 21 rifle, an R5 rifle and you're intending to fire five
 22 warning shots in the air and you think you've fired five
 23 warning shots in the air but it turns out that you actually
 24 had your rifle on automatic and you fired 25 shots,
 25 wouldn't you be aware of that or would you still think that

1 you only fired five shots? I asked you whether that's not
2 a bit of a tall story.

3 COLONEL MODIBA: You would be aware,
4 that's correct.

5 MR NTSEBEZA SC: In fact, in this
6 statement and I think that's one of the points that we are
7 dealing with, in this statement he does say it was five
8 shots that were discharged. In the next statement, the
9 additional statement, he says that he discharged 25 rounds.
10 So –

11 CHAIRPERSON: He does say he thinks, his
12 explanation for that is that he, as he –

13 MR NTSEBEZA SC: It's possible that his
14 firearm was on automatic.

15 CHAIRPERSON: I think I put a point on
16 the probabilities about that to the witness and I
17 understood him to agree with me. Mr Ntsebeza, when you
18 reach a convenient stage we'll take the tea adjournment and
19 I don't want to stop you at this stage if there are points
20 you still want to make on this aspect.

21 MR NTSEBEZA SC: No, we can take the tea
22 adjournment now, Mr Chairman.

23 CHAIRPERSON: Thank you, Mr Ntsebeza.
24 We'll take the tea adjournment.

25 MR NTSEBEZA SC: Thank you.

1 very clear, or it is arguable that what Ngwaleni is
2 referring to there can only have occurred at scene 2. He
3 can't be referring to scene 1. Do you see that?

4 COLONEL MODIBA: Yes, I read through
5 paragraph –

6 MR NTSEBEZA SC: Paragraph 3.

7 COLONEL MODIBA: - 3.

8 MR NTSEBEZA SC: Paragraph 3 –

9 CHAIRPERSON: It obviously relates to
10 scene 2 because if you read on to 4 he talks about "After
11 the shots they surrender, we search them, handed them over
12 to station, or local police, locked them in the truck.

13 They were arrested. We carry on sweeping till our
14 commander withdraw us in the area of koppies," so he's
15 quite clearly talking about scene 2.

16 MR NTSEBEZA SC: Yes. No, he was –

17 CHAIRPERSON: I think you'll agree with
18 that. That must be right, Colonel, surely? Obviously
19 scene 2 is being talked about.

20 COLONEL MODIBA: Yes, Chairperson.

21 MR NTSEBEZA SC: Yes, thank you. Now the
22 second issue I want to deal with you very quickly is the
23 fact that in relation – we've established that in relation
24 to Mogege, but also in relation to Ngwaleni when you read
25 all his statements it is clear that none of them, and now

1 [COMMISSION ADJOURNS COMMISSION RESUMES]
2 [12:17] CHAIRPERSON: The Commission resumes.

3 Sorry it took us longer than we thought it would, because
4 we had housekeeping matters to discuss which took longer
5 than I anticipated. You're still under oath, Colonel.

6 KAIZER NTLOU MOBIDA: s.u.o.

7 CHAIRPERSON: Mr Ntsebeza –

8 MR NTSEBEZA SC: Thank you very much, Mr
9 Chairman.

10 CHAIRPERSON: I see a piece of paper on
11 my desk headed "Standing Order (General)(251. Police
12 duties, duties of police, use of arms" – is this to do with
13 your cross-examination?

14 MR MPOFU SC: No, it's from me,
15 Chairperson. I'll explain later.

16 CHAIRPERSON: So we'll mark it when you
17 start.

18 MR MPOFU SC: Yes.

19 CHAIRPERSON: Yes, Mr Ntsebeza.

20 MR MPOFU SC: Thank you, Chair.

21 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):

22 Thank you, Chair. Now Colonel, I just want to take you
23 again to ZZZ7.1, the statement by Vuyisile Ngwaleni, and
24 just reading paragraph 3 thereof, I just want you to look
25 at that carefully because what we will argue is that it is

1 let's talk about Ngwaleni, that Ngwaleni also doesn't say
2 at any stage that he ever was on top of that hill and that
3 he fired from on top of that hill, and now we know, in
4 spite of the fact that we now know from ballistic evidence
5 that it is arguable that the cartridges being found on top
6 of that hill may suggest that they were fired by whoever
7 was using their weapon from on top of the hill. Now the
8 question to you is, do you see and confirm from your own
9 readings of all the statements that Ngwaleni does not say
10 that there was at any stage a moment when he was on top of
11 the hill from where he shot? You understand the question?

12 COLONEL MODIBA: I do understand. The
13 way I follow what you want to get is as if now I'm refuting
14 to what he's saying here, of which I'm not refuting to
15 that.

16 MR NTSEBEZA SC: I don't understand. Or
17 I don't know if I understand what you are saying. The
18 question I'm putting to you is a very straightforward one.

19 From all the statements that we have from Ngwaleni there is
20 nowhere where he says he was ever on top of that hill from
21 where he could have shot at whoever he shot at. In this
22 case we are concerned about the deaths of Xalabile, Pato,
23 and everybody else. Do you agree with me that in his
24 statement he doesn't say there was ever at any stage that
25 he was on top of the hill where he shot at whoever that he

1 shot at with those ammunition whose cartridges were found
2 on top of the mountain?

3 COLONEL MODIBA: It is correct,
4 Chairperson; he hasn't mentioned the spot where he was at
5 that time, but the fact of the matter is the shooting did
6 occur at scene 2, or koppie 3. That he does not dispute.
7 The statement doesn't dispute that, Chairperson.

8 MR NTSEBEZA SC: It doesn't say he went
9 on top of the mountain. Like Mogege, the highest watermark
10 about their statements relative to that hill was, or rock,
11 is that as they were approaching, they were approaching,
12 they were approaching. There is nowhere where they say we
13 reached the stage, we climbed the mountain at the top,
14 that's where we were at when we began to fire.

15 CHAIRPERSON: The witness agrees with you
16 on that. The point is of course, you see, that if they
17 were being approached by people with spears and pangas and
18 people who were approaching them were down below and they
19 were up on the top of the rock, they weren't in immediate
20 danger, were they? What he says in para 3 is, "During the
21 approach a couple of mine strikers charged in our direction
22 with spears and pangas. I warned they must drop weapons,
23 put their hands up. Some didn't comply," and so on. Now
24 if they were only being approached by people with spears
25 and pangas and they were on top of the rock, they weren't

1 position. You say that the statement that I put to you is
2 correct if the assumptions on which it is based are
3 correct, but if they aren't, if the members and the
4 attacking strikers were on top of the rock it would be a
5 different situation, and then your concession wouldn't
6 apply. That's right, isn't it?

7 COLONEL MODIBA: Yes, Chairperson.
8 MR NTSEBEZA SC: Now we now know that 10
9 other people died in scene 2 and annexure B of ZZZ5
10 indicated who we are talking about. You saw that slide
11 where there were red dots, many red dots, and you said you
12 wouldn't be able to give an account about that because they
13 were in a – yes, now can I safely proceed on the basis that
14 on the 16th you were aware that those people had died in
15 that area? When you left that place you were aware that
16 there are 10 people who were also shot and killed in that
17 area? Can I safely so assume?

18 COLONEL MODIBA: I don't remember being
19 on that site.

20 MR NTSEBEZA SC: No, I know you were not
21 on your evidence, but when you left that place as the
22 commander who had been leading a group of people to do the
23 sweeping, now it's tjaila time, it's time for everybody to
24 go; can I safely depart from the point that at the end of
25 that day when you called your mission off you were aware

1 in danger, were they? There was no imminent threat to
2 them. That's right, isn't it?

3 COLONEL MODIBA: I get what you say,
4 Chairperson –

5 CHAIRPERSON: Do you agree with it?

6 COLONEL MODIBA: However, he does not say
7 that the charging armed strikers were on – he does not say
8 the spot where they were, whether they were both on top or
9 they were at the bottom of the rock.

10 CHAIRPERSON: Yes, yes, no, yes I
11 understand that, but is there any evidence to suggest that
12 whatever incident took place when shots were fired by
13 somebody from the police from the top of the rock, as
14 appears to be the case, that the strikers were actually up
15 on top of the rock as well? I suppose it's a hypothetical
16 question, isn't it? But you would accept that if they were
17 not on top of the rock with members of the force, the
18 service, it's difficult to mount a case of self-defence in
19 those circumstances. That must be right?

20 COLONEL MODIBA: That's correct,
21 Chairperson. As I'm saying yes, if the deceased was at the
22 bottom of the rock and the member was on top, that couldn't
23 pose danger, yes. However, here it does not show where the
24 two were.

25 CHAIRPERSON: No, I understand your

1 that 10 people had been killed in that area? Or is it so
2 that you were not? What's the position?

3 COLONEL MODIBA: I only got to know about
4 the figures of the miners that were killed, it could be a
5 day after, or in that evening during the debriefing.

6 MR NTSEBEZA SC: And you knew that some
7 of those, those were, some of the people who were not
8 killed in scene 1 would have then had been killed in scene
9 2. That you knew on the following day. Is that your
10 evidence?

11 COLONEL MODIBA: That's correct,
12 Chairperson.

13 MR NTSEBEZA SC: Yes. And you know that
14 at one stage whilst you were doing your walkabout some of
15 the people who were in your unit had gone some other
16 direction in pursuit of the same mission that you were also
17 involved in. That must be so. Is that right?

18 COLONEL MODIBA: I got to know about the
19 deviation –

20 MR NTSEBEZA SC: Yes.

21 COLONEL MODIBA: - after.

22 MR NTSEBEZA SC: Yes. Now you would have
23 then known that your members, or members of the 96 people
24 who you had led from the line after scene 2 to the koppies,
25 that some of your people may have been responsible for

1 those deaths?

2 COLONEL MODIBA: No, I'm not in a
3 position to accept that, and then I also want to bring it
4 to the cross-examiner, Chairperson, that when I'm talking –

5 MR NTSEBEZA SC: You can say Mr Ntsebeza,
6 it's okay, or if you said Ntsebeza, it's okay.

7 COLONEL MODIBA: Okay. When we proceeded
8 to koppie 3, 19 was left at koppie 1, so if you can maybe
9 go through my statement, one of my statements, I mention 77
10 that went, proceeded immediately to koppie 3. 19 was
11 behind at koppie 1, Chairperson.

12 MR NTSEBEZA SC: Well, it's a simple
13 question I'm putting to you. It must, it can only be so
14 that whilst you were doing your walkabout, clockwise, as
15 you testified, and your other 95 members whom you were in
16 command of, whereas –

17 CHAIRPERSON: No, no, no Mr Ntsebeza,
18 you're not understanding the point he's making. He had,
19 was it 95 people or – how many did you have? 95 or 96?

20 COLONEL MODIBA: 95, with me 96, and then
21 77 was left at koppie –

22 CHAIRPERSON: Okay, yes, yes, well that's
23 the point I'm making. There were 96 altogether –

24 COLONEL MODIBA: 96.

25 CHAIRPERSON: 17 were left behind at

1 saying they were responsible. He's saying they may have
2 been responsible. You were, we know that quite a number of
3 shots were fired by some of your people at scene 2. We
4 don't know whether they hit anybody or whether they missed.
5 We don't know whether if they did hit people, people died
6 as a result of it, or were just injured. But the question
7 is put on the basis, all those shots were fired into the
8 bush and in the direction of charging strikers. It is a
9 possibility that some or other of the bullets that were
10 fired actually did hit the target at which they were aimed.
11 That's the question. He's not asking you to concede that
12 they did. He's not even asking you, as I understand at
13 this point to concede it's probable. All he says is that
14 it may have happened, and surely that must be right.

15 MR NTSEBEZA SC: That must be right,
16 Colonel, isn't it?

17 COLONEL MODIBA: I respect your
18 assumption.

19 CHAIRPERSON: Translated into English
20 that means you accept it is a possibility. Is that right?
21 It is right, isn't it? You'll forgive my saying this,
22 but –

23 MR NTSEBEZA SC: I would complain that
24 you are being –

25 CHAIRPERSON: It's a straightforward

1 koppie 1 –

2 COLONEL MODIBA: 19, Chairperson.

3 CHAIRPERSON: Sorry, 19. I beg your
4 pardon, 19, which meant he only had about, including
5 himself there were 77 –

6 COLONEL MODIBA: 77.

7 CHAIRPERSON: So he can answer your
8 question in relation to himself and the remaining 76, but
9 he can't deal with the whole 96 for the reasons he's
10 indicated.

11 MR NTSEBEZA SC: No, I take that – Chair,
12 I take the point of correction in terms of the, you know,
13 accuracy of the numbers that I gave. Maybe let me stay
14 away from numbers. Colonel, the point I seek to canvass
15 with you is that you must have, it must have occurred to
16 you that some of your members, 77 or whatever the number
17 is, the numbers whom you had taken to scene 2, could have
18 been responsible for the deaths that occurred in the area
19 you had not yourself personally gone to. It must be so.
20 You agree?

21 COLONEL MODIBA: No, Chairperson, I
22 cannot –

23 MR NTSEBEZA SC: It didn't occur to you?

24 CHAIRPERSON: I'm sorry, Colonel, forgive
25 me; I'm not sure you understand the question. He's not

1 question. I don't think there's a trick in it. If there
2 was I wouldn't allow it. It seems to me that the question
3 is it may have happened, could have happened. One can't
4 definitely say it did. That's what you're being asked to
5 concede. You say you respect the assumption. That means,
6 I take it, you say it could have happened. Am I correct?

7 COLONEL MODIBA: I will go with the may –

8 CHAIRPERSON: Yes. No, no, that's right.
9 That's all you're being asked to do at this stage.

10 MR NTSEBEZA SC: Thank you, Mr Chairman.
11 That's all. I mean that's sufficient for us to argue at
12 the end. You see, then the question I just want to ask
13 then relative to that is this; why didn't you seek to
14 interview those of your members with whom you had lost
15 touch with just to establish whether they were responsible
16 for any of the killings that took place among the 10 people
17 for whom you cannot assist this Commission?

18 COLONEL MODIBA: Chairperson, that has
19 happened to establish if they could take account to those
20 bodies, but there was no single one of those members that
21 took responsibility to say I was accountable for so-and-so
22 bodies.

23 MR NTSEBEZA SC: You see, I'm asking in
24 light of certainly the statements by Ngwaleni and Mogege.
25 They certainly do give an account of what they did and we

1 are now agreed it was in scene 2, and we have already
2 explored where we felt some of what they say was not
3 touching on material aspects, we're on top of the mountain,
4 this, that, and the next thing. Now all I'm asking is
5 didn't you feel that at least in respect of those at any
6 time, and especially if you saw the ballistic evidence,
7 didn't you think that you had a duty as a commander of that
8 unit on that day from whose activities a number of
9 fatalities took place, or may have taken place, that you
10 needed more by way of an account from each one of them as
11 to what they did, what firearms they had, what they
12 discharged, what was responsible, who do they think they
13 killed? I'm just asking.

14 COLONEL MODIBA: Chairperson, that was
15 done, hence we are having in front of us the records that
16 indicate as to who fired how many shots where, what
17 happened, although there is nowhere in the statements that
18 says I take responsibility of body so-and-so. That we did.
19 [12:37] MR NTSEBEZA SC: You recall that I said
20 to you that as a commander you had statements – I'm sure
21 you were not seeing for instance Mokhele's statement and
22 Ngwaleni's statement for the first time Yesterday or the
23 day before yesterday. You were aware of what they were
24 saying about their participation in the advance on scene 2,
25 koppies 2 and 3. You have been aware since those events

1 ballistic evidence, statements, the case was already being
2 handled by IPID, is that right? A docket had been opened
3 by IPID. IPID were investigating. These members of yours
4 who had shot had been warned by IPID before statements were
5 to be taken from them, is that right?

6 COLONEL MODIBA: Chairperson –
7 CHAIRPERSON: It wasn't for you then to
8 usurp the functions of IPID and conduct a parallel
9 investigation of your own, is that right? The matter was
10 being investigated by IPID, not by you?

11 COLONEL MODIBA: That is what, that is my
12 point here because according to Mr Ngabeza is that I would
13 have initiated that to do some sort of connecting them with
14 the ballistic report, of which it's not what I would have
15 done. It's out of my hands.

16 MR NTSEBEZA SC: I know that my surname
17 is a bit difficult but it's Ntsebeza, just for the record,
18 okay?

19 CHAIRPERSON: You did see the note that
20 Mr Wesley showed you, did you?

21 MR NTSEBEZA SC: Yes, I did, Mr Chairman.
22 I'm just going to deal with the last one point per minute
23 depending on how we answer each other. There is evidence
24 which I want to put to you which suggests that some of the
25 people, protesters at scene 2, and we'll argue this, may

1 happened.

2 COLONEL MODIBA: That's correct,
3 Chairperson.

4 MR NTSEBEZA SC: Yes. Now what I'm
5 trying to get to is if you were doing, you know a TARA
6 analysis also of the ballistic evidence, which I am sure
7 you have been privy to before you came testify here, am I
8 right? Let me just first clear, you have been aware of
9 that ballistic evidence before you came to testify to this
10 Commission, is it not?

11 COLONEL MODIBA: Yes, I did go through
12 it, Chairperson.

13 MR NTSEBEZA SC: Now what we are saying
14 is that when you have that kind of ballistic evidence you
15 have statements from people who were in your unit, was it
16 not your duty – and we will argue that it was – that you
17 would sit down everyone who gives an account that may have
18 led to the deaths of which you yourself personally cannot
19 account for. Now if that is so, do you have an explanation
20 why it appears that you didn't do so?

21 COLONEL MODIBA: Chairperson, it was not
22 my duty then to investigate the members. Looking on the
23 basis of the ballistic it is out of my jurisdiction, I
24 cannot investigate members.

25 CHAIRPERSON: By the time you saw the

1 have been shot while they were trying to surrender. I
2 don't know if you are aware of that.

3 COLONEL MODIBA: I'm not aware,
4 Chairperson.

5 MR NTSEBEZA SC: Now you will obviously
6 have been given statements or – yes, IPID statements.
7 There are, Mr Phatsha for instance who was one of the
8 injured and arrested, testified in this Commission and you
9 can find that at day 50, 5442 lines 2 to 10. Mr Phatsha's
10 evidence was, "What happened is at the time people were
11 raising their hands and asking forgiveness. They were
12 being shot at." And then somewhere else he says, "The real
13 shooting took place at the small kraal, the people were
14 raising their hands. Even when they did so, they were shot
15 at." Do you want to comment?

16 CHAIRPERSON: It's not being shown on the
17 screen at the moment. Yes, we've now got it. It's line 7
18 that's now on the screen, thank you.

19 MR NTSEBEZA SC: Ja. The first quote is
20 at p.5442 lines 2 to 10 and the second one is at 5676 lines
21 22 to 24.

22 CHAIRPERSON: 5676, what day is that?

23 MR NTSEBEZA SC: Day 50.

24 CHAIRPERSON: We've just been looking at
25 day 50. 5676, I see.

1 MR NTSEBEZA SC: Yes, Mr Chairman.
 2 CHAIRPERSON: We've looked at the first
 3 passage you put, now we've been taken to 5676. It looks,
 4 it'll be the next day, the day after the one we've been
 5 shown. That's day 53, 5676. What line on page 5676?
 6 MR NTSEBEZA SC: 22 to 24.
 7 CHAIRPERSON: If we could have that
 8 please. Yes, "That is where the real shooting took place."
 9 He talked about "I reached the small koppie, that's where
 10 the real shooting took place and where people died, people
 11 raising their hands. Even if their hands were risen, they
 12 were shot at."
 13 MR NTSEBEZA SC: Do you see that,
 14 Colonel?
 15 CHAIRPERSON: In other words those two
 16 passages that were put to you of evidence to the effect
 17 which, that people, as they were surrendering raising their
 18 hands, were shot. Are you able to comment at all? Is that
 19 evidence true to your knowledge or –
 20 COLONEL MODIBA: Chairperson, I just want
 21 to orientate myself. Are we now referring to scene 1 or
 22 scene 2?
 23 CHAIRPERSON: It looks like scene 2
 24 because 21 on page 5676 says, "I then could run and reach
 25 the small koppie. That's where the real shooting took

1 statements were given to the witnesses, rather to the
 2 witness, and perhaps if he could be specific as to what he
 3 is –
 4 CHAIRPERSON: Were the IPID statements in
 5 which allegations of this kind were made ever shown to you
 6 at any stage?
 7 COLONEL MODIBA: I never came across any
 8 statements with such allegations, Chair.
 9 CHAIRPERSON: Yes. Mr Ntsebeza, carry
 10 on.
 11 MR NTSEBEZA SC: In our list of documents
 12 I'm made to understand we referred to statements that would
 13 be relied upon and one of them I've just indicated, exhibit
 14 MMM48.1, the statement of Nkosikhona Mjuba, MMM48.2 the
 15 statement by Zwelimangele Mvakalelwa, exhibit MMM48.3 a
 16 statement by –
 17 CHAIRPERSON: You've made your point, a
 18 number of statements contained –
 19 MR NTSEBEZA SC: Yes.
 20 CHAIRPERSON: You were given a list of
 21 documents to which the counsel for the families intended
 22 referring in the course of your cross-examination, is that
 23 correct, and you were then given copies of the statements
 24 also to study.
 25 COLONEL MODIBA: I should have the

1 place where people died, people raising their hands."
 2 That's not a description of scene 1 at all, so it's clearly
 3 a reference to scene 2 and what is alleged by this witness
 4 is that people were shot as they were surrendering, as they
 5 were raising their hands. Now are you able to help us on
 6 that, on that aspect? Can you deal with that allegation?
 7 COLONEL MODIBA: I haven't at any stage
 8 witnessed someone being shot while raising his hands in the
 9 air. All what –
 10 MR NTSEBEZA SC: Did you get any reports
 11 about this happening? Did you get any reports at all -
 12 COLONEL MODIBA: No, I did not –
 13 MR NTSEBEZA SC: - where there were
 14 allegations about people – there are so many IPID
 15 statements that I could give to you. I'm sure you were
 16 given some. You read the ones that were given to you,
 17 exhibit MMM48 –
 18 CHAIRPERSON: Mr Ntsebeza –
 19 MS BALOYI: Yes.
 20 CHAIRPERSON: Ms Baloyi – I see your time
 21 is up but that's not the point Ms Baloyi is raising, I take
 22 it. It's not for her to raise it, anyway. What point are
 23 you raising, Ms Baloyi?
 24 MS BALOYI: Chairperson, I wanted to deal
 25 with Mr Ntsebeza saying he's sure that some of the

1 copies, Chairperson.
 2 CHAIRPERSON: Alright. What Mr Ntsebeza
 3 is doing now is he's putting to you that at least three of
 4 the statements, there may be more but it's not the number
 5 that's important it's the facts, he says some of the
 6 statements, at least three of the statements contained
 7 allegations of the kind similar to the passage in the
 8 evidence of Mr Phatsha that's been read to you. Is that
 9 your point, Mr Ntsebeza?
 10 MR NTSEBEZA SC: Very much so, Mr
 11 Chairman.
 12 CHAIRPERSON: Would you like to take the
 13 point to its conclusion and we can see if we can get an
 14 answer?
 15 MR NTSEBEZA SC: Now I assume you read
 16 those statements or do you want me to remind you what they
 17 say? My time is up but you know, the Chairman will give
 18 you a –
 19 CHAIRPERSON: You're in injury time at
 20 the moment.
 21 MR NTSEBEZA SC: Indeed, Mr Chairman.
 22 CHAIRPERSON: Did you read those
 23 statements?
 24 MR NTSEBEZA SC: Did you read the
 25 statement by Nkosikhona Mjuba, MMM48.1? That's supposed to

1 be your homework –

2 COLONEL MODIBA: Chairperson, I could be

3 having a statement with me but I cannot say, be definite to

4 say I recall such allegations.

5 MR NTSEBEZA SC: Well, for instance MMM1,

6 MMM48.1 in paragraph 5 says, "Some mineworkers hid

7 themselves" –

8 CHAIRPERSON: Mr Ntsebeza, he's got to be

9 given a chance to find the statement in the bundle that

10 he's got. No, he's not – expect him to read from the

11 screen. He's got a bundle of documents in front of him, a

12 file. He's entitled to find his place there and then

13 answer. Have you got a bundle of the statements or a file

14 containing the statements to which Mr Ntsebeza referred,

15 prepared for you I take it by the police attorney?

16 COLONEL MODIBA: I've only seen MMM –

17 MR NTSEBEZA SC: When you don't do your

18 homework, Colonel, that's what happens.

19 CHAIRPERSON: No, Mr Ntsebeza, let's not

20 get involved with nonsense. MMM48.1 –

21 COLONEL MODIBA: Yes, I've got it. Thank

22 you, Chairperson.

23 CHAIRPERSON: Alright, now if you look at

24 page 2 of that statement you'll see it says the following

25 in paragraph 5. Have you got that in front of you, page 2?

1 that I put to you is that if the Commission in the end

2 accepts this statement, we would be able to argue that you

3 and the SAPS cannot claim that when people were shot in

4 those circumstances it was in self-defence. Do you want to

5 –

6 CHAIRPERSON: That must be so. If that's

7 correct, if that's correct then you can't say that the

8 police shot in self-defence because they were shooting

9 people who were surrendering and raising their hands, if

10 that's correct. But you say you weren't aware of conduct

11 of that kind on the part of police, members of the police

12 in your presence, is that correct?

13 COLONEL MODIBA: In all the statements

14 that I came across on the side of the police or my members,

15 there was no-one who mentioned that he fired at some, at a

16 miner who was raising his hands in the air.

17 CHAIRPERSON: It would have been

18 surprising if they'd made that admission in a statement you

19 saw, wouldn't it?

20 COLONEL MODIBA: No, that one I cannot

21 say yes, the witness here is correct with what he's saying

22 because –

23 CHAIRPERSON: If you'd seen anything of

24 that kind you'd have taken action. If that sort of thing

25 had happened and you saw it –

1 Page 2 of the statement, paragraph 5 reads as follows.

2 "Some mineworkers hid themselves with trees and some under

3 the rocks. The police officers started shooting the

4 mineworkers with long and short firearms. Some mineworkers

5 put their hands on air to show they aren't

6 fighting/attacking the police officers but they were shot."

7 That's the allegation that this witness, Mr Nkosikhona, or

8 this deponent really, Mr Nkosikhona Mjuba made in his IPID

9 statement. So did you have – I know you were given the

10 file to read, did you, were you able to read it before you

11 came to give your evidence?

12 COLONEL MODIBA: I did, I did see this

13 statement before, Chairperson.

14 CHAIRPERSON: There you have the

15 allegation that people were putting their hands in the air

16 to show that they weren't fighting or attacking the police

17 but were nevertheless shot. So you did see that, did you?

18 Just recently when you got the file of statements you did

19 see that?

20 COLONEL MODIBA: Yes, Chairperson, I

21 recall seeing this statement.

22 CHAIRPERSON: Alright. Now Mr Ntsebeza

23 is going to ask you a couple of questions about that before

24 he ends his cross-examination.

25 MR NTSEBEZA SC: No, the question really

1 COLONEL MODIBA: Definitely –

2 CHAIRPERSON: - what would you have done

3 about it?

4 COLONEL MODIBA: Definitely I would have

5 done something about it.

6 CHAIRPERSON: What would you have done?

7 COLONEL MODIBA: If I saw it, I happened

8 to see it, I would have done something about it.

9 CHAIRPERSON: What would you have done?

10 COLONEL MODIBA: I would comply with the

11 law.

12 CHAIRPERSON: Which means? What would

13 you have done?

14 COLONEL MODIBA: If I saw a police

15 official killing someone –

16 CHAIRPERSON: Surrendering, if you saw a

17 policeman –

18 COLONEL MODIBA: - surrendering –

19 CHAIRPERSON: - yes, what would you have

20 done? What would you have done?

21 COLONEL MODIBA: I would take steps

22 against that police official.

23 CHAIRPERSON: I take it you'd either

24 arrest him yourself or have him arrested, is that right?

25 COLONEL MODIBA: That's correct,

1 Chairperson.
 2 CHAIRPERSON: Okay. Sorry, Mr Ntsebeza,
 3 I took over your cross-examination. I'm not sure I helped
 4 you but anyway.
 5 MR NTSEBEZA SC: Mr Chairman, you did and
 6 in fact this would be a convenient stage to take the lunch
 7 adjournment because my cross-examination has come to an
 8 end.
 9 CHAIRPERSON: You don't want to have the
 10 privilege of hearing Mr Mpofo for five minutes. Mr Mpofo,
 11 have you got a five minute point? Thank you, Mr Ntsebeza.
 12 You got a five minute point?
 13 MR MPOFU SC: No, Chairperson, I think Mr
 14 Ntsebeza was making that request on my behalf.
 15 Chairperson, if I can have an indulgence, can we resume at
 16 two? There's a matter that I have to –
 17 CHAIRPERSON: Alright, we'll resume at
 18 two.
 19 MR MPOFU SC: Thank you, Chairperson.
 20 CHAIRPERSON: I'll write, I'll make a
 21 note in my book that you owe me 15 –
 22 MR MPOFU SC: Five minutes.
 23 CHAIRPERSON: 15.
 24 MR MPOFU SC: Thank you, Chairperson.
 25 MR NTSEBEZA SC: Thank you, Mr Chair.

1 You wrote this CV yourself?
 2 COLONEL MODIBA: I did.
 3 MR MPOFU SC: Yes.
 4 COLONEL MODIBA: My response to that, I
 5 say as far as possible I know the provision of the law.
 6 MR MPOFU SC: Oh, you don't have
 7 extensive knowledge of law, as it says here?
 8 CHAIRPERSON: Before you get into the
 9 subject of this witness's legal knowledge –
 10 MR MPOFU SC: Yes.
 11 CHAIRPERSON: - which I don't propose
 12 dealing with in the report at the end, but some
 13 housekeeping; ZZZ8 is a document you handed us this
 14 morning –
 15 MR MPOFU SC: Yes, Chairperson.
 16 CHAIRPERSON: A portion from Standing
 17 Order (General) 251.
 18 MR MPOFU SC: 251, that's correct,
 19 Chairperson. You make that ZZZ8, yes. In fact this
 20 question is related to that. Yes, and –
 21 CHAIRPERSON: And the witness had an
 22 opportunity to read it, because I know, I take it police
 23 officers should know the standing orders, but has he had an
 24 opportunity to read this –
 25 MR MPOFU SC: Yes. Yes, while we are on

1 [COMMISSION ADJOURNS COMMISSION RESUMES]
 2 [14:08] CHAIRPERSON: The Commission resumes, a
 3 little bit later than we thought, but we were asked by Mr
 4 Mpofo to give him a little bit extra time, which we did.
 5 You're still under oath, Colonel.
 6 KAIZER NTLOU MOBIDA: s.u.o.
 7 CHAIRPERSON: Mr Mpofo.
 8 CROSS-EXAMINATION BY MR MPOFU SC: Thank
 9 you, Chairperson and Commissioners, I'm indebted for the
 10 extra time. Thank you very much. Good afternoon, Colonel.
 11 COLONEL MODIBA: Afternoon, Sir.
 12 MR MPOFU SC: How are you?
 13 COLONEL MODIBA: I greet.
 14 MR MPOFU SC: Yes, you have given us your
 15 CV, a very, very experienced member of the police service,
 16 correct?
 17 COLONEL MODIBA: That's correct,
 18 Chairperson.
 19 MR MPOFU SC: And among the things that
 20 you put in your CV is that you have extensive knowledge of
 21 law, with special emphasis on criminal law, criminal
 22 procedures and law of evidence. Is that correct?
 23 COLONEL MODIBA: As far as possible, it's
 24 correct.
 25 MR MPOFU SC: No, it doesn't say so here.

1 your CV and capabilities, we gave you ZZZ8 and I said I was
 2 not going to ask you before lunch. As it happened I didn't
 3 ask you anything before lunch. You've had a look at it?
 4 COLONEL MODIBA: That's correct,
 5 Chairperson.
 6 MR MPOFU SC: And the question I wanted
 7 to ask you, are you familiar with that standing order?
 8 COLONEL MODIBA: Chairperson, yes, I am.
 9 MR MPOFU SC: Thank you. Okay, and also
 10 your CV, apart from the extensive knowledge of law you say
 11 you have advanced operational skills and confidence. Is
 12 that correct?
 13 COLONEL MODIBA: That's correct,
 14 Chairperson.
 15 MR MPOFU SC: And you also, under your
 16 qualifications you list legal principles and use of
 17 firearms. Those are some of your expertise, correct?
 18 COLONEL MODIBA: That's correct,
 19 Chairperson.
 20 MR MPOFU SC: I'm on page 2 of the CV,
 21 which is ZZZ1. The last one on that page is the combating
 22 of high-risk public violence, excluding day-to-day crowd
 23 management operations. That's also your speciality,
 24 correct?
 25 COLONEL MODIBA: That's correct,

1 Chairperson.

2 MR MPOFU SC: And the planning,
3 preparation and execution of medium to high-risk
4 operations, correct?

5 COLONEL MODIBA: Correct, Chairperson.

6 MR MPOFU SC: Yes, alright. Now you do
7 understand that your evidence must be based mostly on
8 things that you've observed, rather than your own
9 imagination or assumptions, correct?

10 COLONEL MODIBA: That's correct,
11 Chairperson.

12 MR MPOFU SC: And would you agree with me
13 that some of your evidence is largely based on assumptions
14 that you made and your imagination?

15 COLONEL MODIBA: Chairperson, making
16 assumption, imagination, cannot be wrong.

17 MR MPOFU SC: Okay, I'll come back to
18 that. Generally what is the purpose of the NIU, what is
19 its purpose?

20 COLONEL MODIBA: Chairperson, when NIU
21 was established there was a need about its establishment,
22 particularly about the stabilising and combating the
23 serious and violent crimes, and also police the high-risk
24 public violence, as well as rendering of specialised
25 operational support to other clients, including our own

1 also goes in that order, correct?

2 COLONEL MODIBA: That's correct.

3 MR MPOFU SC: Yes, and the so-called
4 tactical units, TRT, NIU and STF, carry lethal weaponry,
5 yes?

6 COLONEL MODIBA: Lethal, are we then
7 referring to rifle or –

8 MR MPOFU SC: Lethal – no, ja, I'm
9 talking things that can kill people. That's what lethal
10 means.

11 COLONEL MODIBA: I believe even 9
12 millimetre calibre can still kill.

13 MR MPOFU SC: Ja, I'm including that
14 lethal –

15 COLONEL MODIBA: That is the case,
16 Chairperson. Even ordinary police officials at station
17 level, they carry those firearms that you just mentioned.

18 MR MPOFU SC: Okay, no I'm not talking
19 about sidearms and all that. I'm talking about the tools
20 of trade. Your tools of trade are lethal weapons in those
21 tactical units, correct?

22 COLONEL MODIBA: I don't just get the
23 question, Chairperson.

24 CHAIRPERSON: It seems that it is a
25 little bit vague. Obviously a member of the police service

1 forces.

2 MR MPOFU SC: Yes, and would it be
3 correct generally speaking to say in terms of the levels of
4 dangerousness, for lack of a better word, you would have,
5 POP would be where a situation is generally mild, normal
6 crowd violence – sorry, crowd control with or without
7 violence, POP would usually suffice, correct?

8 COLONEL MODIBA: That's correct,
9 Chairperson.

10 MR MPOFU SC: And as it gets more and
11 more dangerous you might involve TRT, correct?

12 COLONEL MODIBA: That's correct.

13 MR MPOFU SC: And if it gets even more
14 dangerous then you might call NIU as well, correct?

15 COLONEL MODIBA: Yes, the situation would
16 always determine that, Chairperson.

17 MR MPOFU SC: Ja, that's what I'm saying.

18 COLONEL MODIBA: Yes.

19 MR MPOFU SC: And if really now the world
20 is going to come to an end, then you'd bring the ultimate,
21 the Special Task Force, the paramilitary force, correct?

22 COLONEL MODIBA: That's the sequence of
23 the components of ORS.

24 MR MPOFU SC: Yes, and that also in terms
25 of their training and the capacity to use lethal force, it

1 in the course of carrying out his or her duties will be
2 obliged from time to time –

3 MR MPOFU SC: We've dealt with that –

4 CHAIRPERSON: - to use a firearm, and
5 therefore the firearm is part of the ordinary equipment
6 which a member of the service uses every, potentially uses
7 every day. That's the point you're making.

8 MR MPOFU SC: Yes, we've dealt with that.
9 I've acknowledged that from the witness. I'm asking
10 something completely different now. I'm saying that part
11 of the weaponry that they use in the execution of their
12 duties, as opposed to the others who might have batons and
13 all things like that, theirs involve strictly lethal
14 weaponry. Is that correct?

15 COLONEL MODIBA: It's hard to say it is
16 correct to what - to make it simple to be understood is
17 that we do use firearms which are lethal.

18 MR MPOFU SC: Yes, thank you, and unlike
19 POPS –

20 CHAIRPERSON: I think he's busy – sorry,
21 I think Mr Mpofu is busy with another point. The ordinary
22 constable has got a truncheon for example, a baton, right.
23 Ordinary constable has got a number of things that he or
24 she uses in the course of doing his or her work. A member
25 of the NIU, what is the basic equipment NIU members use?

1 COLONEL MODIBA: We use, Chairperson, we
 2 use R5, which is also used at the station –
 3 CHAIRPERSON: Yes –
 4 COLONEL MODIBA: - as I mentioned to him.
 5 We also use side firearm. It's the same. We use same
 6 firearm.
 7 CHAIRPERSON: Yes, but an ordinary
 8 constable doesn't use his or her firearm all the time. An
 9 ordinary constable uses a baton for example and handcuffs
 10 and things like that. Isn't that right?
 11 COLONEL MODIBA: No, Chairperson, that is
 12 the equipment which a member possess when executing duties.
 13 It doesn't matter what the position, or the rank of that
 14 particular member, but my response to the question is that
 15 NIU uses R5, NIU uses pistol, the same as POPS that is
 16 using the same, anyone that use that. It could be that the
 17 training is different. That is maybe the point.
 18 MR MPOFU SC: Ja. No, I think you know
 19 exactly what I'm asking. I think you're just – can we go
 20 to exhibit Q, which is unfortunately not numbered. It's
 21 the 10th page from, after that – ja, the heading will say
 22 "Selection phase 1, weapons phase." Carry on. Or I'm
 23 sorry, the – ja, go to page 69, I think, and then go 10
 24 pages after that. I suppose that's 79, ja. Ja, that one,
 25 yes. In your phase 1 of the training, are you trained for

1 Ja, no, I'm saying – I'm sorry – in case the protesters
 2 attacked the police, as they did on the 13th. That was your
 3 understanding.
 4 COLONEL MODIBA: That is my
 5 understanding, looking at that one element of our mandate,
 6 rendering specialised operational support, yes.
 7 MR MPOFU SC: Yes.
 8 COLONEL MODIBA: It's in line with that.
 9 MR MPOFU SC: Yes, so that was what I've
 10 called assumptions. That was one of the key assumptions
 11 that you were operating under, was that the protesters had
 12 attacked the police on the 13th.
 13 COLONEL MODIBA: I cannot just say yes
 14 only the protesters if they attacked the police. Our
 15 presence there among other things was to carry out that
 16 part of the mandate which I made in that statement, which
 17 it is similar of course with what happened on the 13th –
 18 MR MPOFU SC: Who told you what happened
 19 on the 13th?
 20 COLONEL MODIBA: I know what, on the 13th
 21 the police were attacked and killed. So for me to be
 22 there, I always had that in mind that this could happen.
 23 So –
 24 MR MPOFU SC: Ja.
 25 COLONEL MODIBA: - there is nothing wrong

1 NIU in R5 assault rifles, pistols Z88 and PX4, submachine
 2 guns Uzi and mini-Uzi, R1 assault rifles and Musler
 3 shotguns? Is that what your phase 1 training involves?
 4 COLONEL MODIBA: That's correct,
 5 Chairperson.
 6 MR MPOFU SC: Ja, alright. Now what I
 7 want to understand is what was the mindset of how you were
 8 approaching your task in general when you were deployed
 9 there. Am I correct that your mission was that you must
 10 provide support for various disciplines in case the
 11 protesters attack the police, as they had done on the 13th?
 12 COLONEL MODIBA: That is what I wrote in
 13 my statement.
 14 MR MPOFU SC: I know it's what you wrote
 15 in your statement. I'm checking whether that is the
 16 mindset in which you approached this operation, was that
 17 yours was to protect people in case the police attacked
 18 the –
 19 CHAIRPERSON: I think it's the other way
 20 around. Their job was to protect people –
 21 MR MPOFU SC: I'm sorry. Well –
 22 CHAIRPERSON: In case the police were
 23 attacked, I think.
 24 MR MPOFU SC: Yes, yes. Ja, well, I was
 25 just stating what actually happened on the 13th. Sorry.

1 with that.
 2 MR MPOFU SC: Exactly. Well, whether
 3 there's nothing wrong is another question, but you always
 4 have that in your mind, as you put it, correct?
 5 COLONEL MODIBA: I did not have in mind
 6 to – what I had in mind is this is what happened, I must
 7 just be alert. What happened on the 13th could as well
 8 happen any time while I was there.
 9 MR MPOFU SC: Yes, that's also – alright,
 10 okay. But that mind of yours, what you had in your mind,
 11 did it include the fact, or did you know that the events of
 12 the 13th had been sparked by the police?
 13 COLONEL MODIBA: No, I don't know if it
 14 was sparked by the police.
 15 MR MPOFU SC: No, I'm asking you did you
 16 know if it was sparked by the – I'm telling you it was
 17 sparked by the police, by the way, but did you question it,
 18 did you know it?
 19 CHAIRPERSON: No, I think his answer is
 20 he didn't know. He said "I don't know" -
 21 MR MPOFU SC: Ja, he says he doesn't now.
 22 CHAIRPERSON: Well, if he doesn't know
 23 now, he didn't know then, surely.
 24 MR MPOFU SC: Ja.
 25 COLONEL MODIBA: I did not know.

1 MR MPOFU SC: You did not know, ja. If
2 you knew that that event was sparked by the police, I'm
3 sure it would have affected your approach, correct? In
4 other words what you'd be guarding against would be that
5 the police must not spark the violence as they sparked it
6 on the 13th.

7 COLONEL MODIBA: No, the police haven't
8 sparked the violence on the 13th.

9 MR MPOFU SC: No, Colonel Modiba, listen
10 to me very carefully. You were not there on the 13th. I'm
11 telling you that it is common cause from the police
12 themselves that the events of the 13th were sparked by them.
13 So don't debate that with me. I'm not –

14 COLONEL MODIBA: I did not have that
15 information that the police sparked the violence.

16 MR MPOFU SC: Yes, I'm giving you that
17 information now. The violence on the 13th was sparked by
18 the police. Now all I'm asking you, if you knew that the
19 violence on the 13th was sparked by the police, would that
20 have affected your approach, yes or no?

21 COLONEL MODIBA: I don't have an answer
22 for that.

23 MR MPOFU SC: Well, can you try?

24 COLONEL MODIBA: No, I don't have an
25 answer because already it's if you, when I start from the

1 canister and thereafter another member fired one or two –
2 we won't bother about the numbers – stun grenades, and at
3 that point the strikers then turned around and attacked the
4 police with pangas and so forth, and the result of it all
5 was that two policemen were killed, one on the scene and
6 one after he got to hospital, and a third one was injured
7 and some of the strikers also died in the ensuing events.
8 But General Mpmembe conceded in his evidence that the spark
9 that caused the trouble was the initial firing of the
10 teargas and the stun grenade, and that is the evidence he
11 gave. That's the basis, and obviously you didn't know that
12 before, but that's the basis of Mr Mpofo's question. Is
13 that correct?

14 MR MPOFU SC: That's correct,
15 Chairperson. Okay, so now I've told you and the
16 Chairperson has told you, so let's put that aside. The
17 only question I want to ask you is had you – and I accept
18 that you didn't know because you've answered that question
19 – had you known that the events of the 13th which obviously
20 played a big role in your mind, as you've already
21 testified, had you known that those had been sparked by the
22 police would that have affected your approach to the entire
23 operation or not?

24 COLONEL MODIBA: No, I don't know if that
25 would have affected, because I was sent to Marikana on

1 point of that the police sparked the violence, then that I
2 did not, I was not informed of that.

3 MR MPOFU SC: I understand that.

4 COLONEL MODIBA: Then now I should say I
5 would have approached the situation differently, it's, I'm
6 not going to comment on that because I did not know if the
7 police sparked the violence.

8 MR MPOFU SC: Okay –

9 CHAIRPERSON: Can I help you? Sorry, Ms
10 Baloyi, you want to object?

11 MS BALOYI: Chairperson, I wanted to say
12 perhaps, the witness has not been sitting through the whole
13 evidence since we started, and in fairness to the witness I
14 think Mr Mpofo should be specific about what he means when
15 he says that –

16 CHAIRPERSON: I was proposing to help the
17 witness in that regard. The evidence is that the – this is
18 the evidence so far that we've heard, was that, and
19 basically General Mpmembe's evidence; General Mpmembe says
20 that as the strikers were proceeding from the railway line
21 on the 13th, the railway line near the Karee Shaft,
22 proceeding to the koppie, being escorted by the police, one
23 of the members of the police fired without receiving a
24 command from General Mpmembe, who was the only person in a
25 position to give commands of this kind, fired a teargas

1 command, so if my authorities found it necessary that I go
2 to Marikana, that means it was necessary for me to get to
3 Marikana.

4 MR MPOFU SC: Ja, I accept that, Colonel
5 Modiba. So what you are saying to the Commission is
6 whether or not you had the following situation, you were
7 going to be dealing with a group of 3 000 or so people who
8 without any provocation are in the habit of attacking and
9 killing policemen, whether that was the situation.

10 [14:27] Or you had another situation where you had gone
11 to deal with a group of people who, if the police provoke
12 them and they spark something, we'll attack them back or
13 whatever. That would make no difference to you. It would
14 be the same. You would just approach the task as if
15 there's no difference. That's your evidence.

16 COLONEL MODIBA: Chairperson, I think any
17 situation would determine what to do when events surfaces.
18 So I would still deal with the situation as it surfaces.
19 So the situation would determine for me what to do.

20 MR MPOFU SC: That's your answer.

21 COLONEL MODIBA: Yes.

22 MR MPOFU SC: Ja. Okay. Well I put it
23 to you that I'm going to argue at the end that your
24 approach or mind-set as you've called it was based on a
25 wrong assumption insofar as you didn't know what I've told

1 you and what the chairperson have told you. You would at
 2 least agree with that, correct?
 3 COLONEL MODIBA: No it was only informed
 4 because I knew for a fact that there was fatalities on
 5 Monday, if that was the case so, and I'm still saying that
 6 situation would tell to say this is how to go about. It
 7 would dictate for me.
 8 MR MPOFU SC: Ja, but to the extent that
 9 you have now learned in the past five minutes new
 10 information as to how the thing started, you were
 11 misinformed or ill informed to that extent because you
 12 didn't know who had started the thing. Would you agree
 13 with that?
 14 COLONEL MODIBA: Chairperson, I was not
 15 at any stage brought and briefed about that this is what
 16 happened, except now that chairperson has explained -
 17 MR MPOFU SC: So you're better -
 18 COLONEL MODIBA: - on some of the
 19 allegations, but I'm still saying that as an NIU, or an
 20 ordinary police official, I would always act according to
 21 the circumstances that I'm faced with. That is my position
 22 in that regard.
 23 MR MPOFU SC: Don't you also act
 24 according to the level of danger, or the potential of
 25 danger?

1 That's the information I got.
 2 MR MPOFU SC: Ja not succeed means fail,
 3 you know.
 4 COLONEL MODIBA: Yes.
 5 MR MPOFU SC: Were you told that that
 6 thing had not succeeded, in other words it had failed?
 7 COLONEL MODIBA: That is correct,
 8 Chairperson.
 9 MR MPOFU SC: Thank you. Alright, so
 10 that was the other assumption you were labouring under as
 11 you were approaching your mission, correct?
 12 COLONEL MODIBA: That is not assumption,
 13 I'm talking of what I was informed about to say look, there
 14 have been negotiations. I knew about that. That the
 15 negotiations did not succeed in getting the armed strikers
 16 to lay down their arms. It didn't succeed then -
 17 MR MPOFU SC: Ja. Well - okay.
 18 COLONEL MODIBA: This is the way forward.
 19 So that is not an assumption.
 20 MR MPOFU SC: Alright, here we go again.
 21 I'm telling you now that at that stage the effort by Mr
 22 Mathunjwa was still ongoing. I can accept that you did not
 23 know that, do you understand, and that is what you were
 24 told. That's why I'm calling it an assumption. You were
 25 working on the assumption that what you were told was

1 COLONEL MODIBA: Chairperson, hence I'm
 2 saying the circumstances would tell how do you deal with
 3 the situation that you are faced with. That is -
 4 MR MPOFU SC: Ja. No, but that's what
 5 I'm saying, the potential of danger. If you say you Mr
 6 Modiba, Mr NIU, you are going to go, there's a bank
 7 robbery. There's one person carrying a knife or there are
 8 ten people carrying grenades, are you saying the level of
 9 danger of the mission makes no difference to you? Is that
 10 what you're saying? Is that your evidence?
 11 COLONEL MODIBA: No obviously I'll be
 12 knowing that I'm facing a dangerous situation.
 13 MR MPOFU SC: Alright. Okay, so the
 14 other wrong assumption was that you were - or maybe this
 15 one was not your fault. Is it correct that Lieutenant-
 16 Colonel Scott when he briefed you at about 2:30 or so on
 17 the 16th he indicated that the Mathunjwa effort, for lack of
 18 a better word, the effort to get the circle to disarm
 19 voluntarily, had failed.
 20 COLONEL MODIBA: What I understood there
 21 is there was a loggerheads that the armed strikers, as it
 22 was previously said that they would be laying down their
 23 arms -
 24 MR MPOFU SC: Ja.
 25 COLONEL MODIBA: - did not succeed.

1 factually correct. Maybe let me put it that way. Correct?
 2 COLONEL MODIBA: I think what Colonel
 3 Scott was referring, remember a day before there was an
 4 undertaking, or a promise from the armed striking miners to
 5 say they would lay down their arms. They would leave their
 6 arms by the mountain. So they shouldn't brought that
 7 because they would be holding some rituals in the night.
 8 Night vigil. So that's where arms would be left. So the
 9 police should not bother them, therefore in the morning, as
 10 expected, nothing of that happened and then still
 11 negotiation went on. It could be that at the time when
 12 Colonel Scott was giving the briefing of that nature, he
 13 was referring to the actual promise, the commitment that
 14 was made by the armed strikers while Mathunjwa was busy
 15 with them.
 16 MR MPOFU SC: When you were told that
 17 those talks had not succeeded, did you understand that
 18 there are prospects of the laying down of the arms had now
 19 dissipated - was done - and were now moving to another
 20 phase so to speak.
 21 COLONEL MODIBA: Chairperson, there was
 22 still another effort that would have been made by the
 23 operational commander at the time we were to arrive at
 24 scene 1 to give the orders to the armed strikers to lay
 25 down their arms before we could proceed with others. That

1 was what I understood.
 2 MR MPOFU SC: Please listen to me
 3 carefully. When you were briefed by Lieutenant-Colonel
 4 Scott, from his briefing, did you deduce that - the long
 5 story that you've just said, the process of voluntary
 6 laying down of arms from the promise of the previous day
 7 and so on and so on, that that had aborted?
 8 COLONEL MODIBA: Ja with my understanding
 9 there was still difficulties since we expected those arms
 10 to be laid by a certain time, which it never happened.
 11 MR MPOFU SC: Alright. Ja. Okay. You
 12 also had an assumption that there were going to be
 13 negotiations with the strikers, is that correct?
 14 COLONEL MODIBA: Yes, which it was what I
 15 had in mind, that it would still carried on before -
 16 MR MPOFU SC: Ja.
 17 COLONEL MODIBA: - other approaches.
 18 MR MPOFU SC: Yes. No, that's what I
 19 mean. When you say what I had in mind is an assumption,
 20 I'm saying - that was also as a matter of fact wrong.
 21 There were no further negotiations with the strikers, but
 22 you didn't know that, correct?
 23 COLONEL MODIBA: The strikers would still
 24 be addressed, Chairperson, in relation to the laying down
 25 of the arms. They would still be addressed. That was -

1 COLONEL MODIBA: Yes.
 2 MR MPOFU SC: And you were wrong in that
 3 assumption as well. I'm telling you that's the third
 4 assumption on which you were wrong.
 5 COLONEL MODIBA: However it's not causing
 6 a harm to me if I was wrong.
 7 MR MPOFU SC: Okay, but do you accept
 8 that you were wrong in the assumption, even if it did not
 9 cause any harm?
 10 COLONEL MODIBA: No, I wasn't wrong
 11 because there were -
 12 MR MPOFU SC: There were negotiations.
 13 COLONEL MODIBA: - they were still at -
 14 my impression was they would still - the negotiations would
 15 still carry on before the final order.
 16 MR MPOFU SC: Yes, but they didn't, so
 17 you were wrong. Agree?
 18 COLONEL MODIBA: I'm not sure if it
 19 wasn't done.
 20 MR MPOFU SC: I'm telling you I'm sure
 21 that it wasn't done, so you're wrong.
 22 COLONEL MODIBA: I can you tell you what
 23 -
 24 CHAIRPERSON: I take it he's got to take
 25 your word for it. I mean you tell him he is wrong, he must

1 I'm talking of the events before - at the time that I was
 2 attending the briefing. Those were the things that were
 3 still to take place, Chairperson.
 4 MR MPOFU SC: We started by saying you're
 5 a very experienced policeman, correct?
 6 COLONEL MODIBA: Ja I can stand my
 7 ground, Chairperson.
 8 MR MPOFU SC: You can stand your ground.
 9 COLONEL MODIBA: Yes.
 10 MR MPOFU SC: So if you can stand your
 11 ground do you know the difference between negotiations and
 12 the giving of a warning as you can stand your ground,
 13 correct?
 14 COLONEL MODIBA: I can differentiate
 15 that.
 16 MR MPOFU SC: Ja. So what you had in
 17 mind was not the one or the other or confusion between the
 18 two, you thought that there were still going to be
 19 negotiations with the strikers, correct?
 20 COLONEL MODIBA: That is what I thought
 21 to say -
 22 MR MPOFU SC: Ja.
 23 COLONEL MODIBA: - there would still be
 24 further negotiations and thereafter an order.
 25 MR MPOFU SC: Ja.

1 assume -
 2 MR MPOFU SC: Yes. Well, I'm sure by now
 3 we would -
 4 CHAIRPERSON: - that you are correct.
 5 MR MPOFU SC: He must, ja, otherwise I'm
 6 sure there would have been an objection by now. So it was
 7 a wrong assumption, Colonel, if I'm right?
 8 COLONEL MODIBA: Maybe I would say it
 9 could be - it is acceptable assumption, Sir.
 10 MR MPOFU SC: Ja. Do you find it
 11 difficult to simply just concede on an obvious point?
 12 CHAIRPERSON: Mr Mpofo, he says he's
 13 prepared - the assumption he is prepared to make is a
 14 reasonable assumption, you can carry on.
 15 MR MPOFU SC: Ja. Ja after 20 questions
 16 on an obvious point, Chairperson. I think I'm entitled to
 17 be exasperated. Thank you, Chairperson.
 18 CHAIRPERSON: Well, do your best to keep
 19 your exasperation in check.
 20 MR MPOFU SC: Thank you. So as a man who
 21 says that I've experienced an operational - all these
 22 things that you've said here, you would accept, just as a
 23 general statement, that when you're approaching an
 24 operation, it's very important to have the true fact rather
 25 than the incorrect facts and assumptions as you approach

1 your - any mission. I'm sure that's something you teach to
2 your people as well. Get all the facts correct. What are
3 we dealing with, what's the level of danger, that kind of
4 thing. It's very important to have the basic facts
5 correct, isn't it?

6 COLONEL MODIBA: Ja, when analysing the
7 information we look at that that level.

8 MR MPOFU SC: Ja. You agree. Do you
9 agree with me -

10 COLONEL MODIBA: Am I agreeing with the
11 statement I'm making that when you get a task to perform -

12 MR MPOFU SC: Ja.

13 COLONEL MODIBA: - a task to perform, you
14 still have to analyse it to see if it can be performed or
15 not.

16 MR MPOFU SC: Okay, now you've answered
17 your own question. Can you answer my question? Is it
18 important for, when you're approaching an operation, to
19 have your basic facts and the basic parameters correct
20 rather than having them incorrect and working on incorrect
21 assumptions. Is this something you teach to some of the
22 youngsters that you lead?

23 COLONEL MODIBA: What I can say,
24 Chairperson, is you analyse the information you get.

25 MR MPOFU SC: Yes, Colonel, again this is

1 MR MPOFU SC: Thank you. Just another
2 quick point, the briefing, also for this kind of size,
3 you've never seen any operation of this magnitude, correct?
4 This is one of the biggest operations that you were
5 involved in.

6 COLONEL MODIBA: That's correct,
7 Chairperson.

8 MR MPOFU SC: Ja, and you would agree
9 that for that - for someone in your position who had to
10 brief 90 people, 70 people whatever, for an operation of
11 this magnitude you would have needed time to do that so
12 that you can take them through, particularly given that
13 some of them came from far away places, correct?

14 COLONEL MODIBA: Maybe, Chairperson, we
15 should look into that we have been there days before the
16 incident occurred. So everyone already had the background
17 of what was happening in Marikana. So for me to relay what
18 decision taken at the briefing, where I attended the
19 briefing, it didn't need hours to carry it out or to be
20 understood.

21 MR MPOFU SC: Okay maybe not hours but at
22 least an hour to do that to so many people, correct?

23 COLONEL MODIBA: Fortunately,
24 Chairperson, we had a background. There was no need for me
25 to spend hours, even 30 minutes, because already we had -

1 an obvious thing. I'm saying if there's a - let's use the
2 bank robbery again. If I say the bank robbery is in Fox
3 Street and it turns out that it's on Main Street, is it
4 correct that I must be given the correct information before
5 I approach my mission or not? Is it something that is
6 important to you as a leader of an operation?

7 COLONEL MODIBA: I wouldn't say it's
8 always correct to say I must first get the right location
9 before I could go there, you still have to be getting the
10 information further before the execution.

11 MR MPOFU SC: Yes but must the
12 information - is it important that it must be correct
13 whenever you get it?

14 COLONEL MODIBA: It is important.

15 MR MPOFU SC: Thank you. And one of the
16 reasons why it's important is because it might determine
17 the success or failure of an operation if you are working
18 on the wrong assumption. Isn't that correct? That's
19 obvious. That one, nè. Agree?

20 COLONEL MODIBA: No I'm not -

21 MR MPOFU SC: So you think if you work on
22 the basis of the incorrect information it might not affect
23 the success or failure of the operation?

24 COLONEL MODIBA: It could have that
25 effect.

1 we were at a mission area. We knew, we had a background
2 what happened previously, so -

3 MR MPOFU SC: So how much time do you
4 think would be reasonable for you to understand what
5 Lieutenant-Colonel Scott was saying to be able to brief
6 your people as the standing orders say, and allow them to
7 ask questions and all that. How much time, reasonably,
8 would you think you needed?

9 COLONEL MODIBA: Chairperson, we have
10 been following the events and we have been getting briefing
11 on a daily basis, so they wouldn't be difficult for anyone
12 of us to - not to understand what is supposed to be done
13 when given the instruction to execute.

14 MR MPOFU SC: Are you going to answer the
15 question?

16 COLONEL MODIBA: If the time is a factor,
17 here, my response to the time factor that I see you're
18 wanting to know, it was not a problem of me to do the
19 briefing within a reasonable time.

20 MR MPOFU SC: Are you going to answer the
21 question?

22 ARBITRATOR: Repeat the question again.

23 COLONEL MODIBA: Ja, I'm sure by now
24 you've forgotten. Colonel Modiba, how much time, in your
25 estimation, given all these things you've said, you were

1 there before, warra-warra and all that, given all that, how
2 much time do you think you needed to listen to Lieutenant-
3 Colonel Scott, understand what he's saying, go and relate
4 to your people, give them an opportunity to ask questions
5 for clarification until you would be satisfied that they
6 were ready to carry out this - one of the biggest
7 operations that you've been involved in, in your life.

8 COLONEL MODIBA: Chairperson, I'm not
9 able to comment on the amount of time that I would needed
10 because what I got during the briefing I was able to carry
11 it over to the members.

12 MR MPOFU SC: And Mr Ntsebeza has already
13 asked you about section 49 which you said you people must
14 take into account. Do you accept now that section 49 does
15 not relate to the issues that you thought it relate to?

16 COLONEL MODIBA: No, I don't accept that.
17 I mention that section 49, that was relevant legislation
18 to consider when using the force. So that was related
19 legislation. That was my point, Chairperson.

20 MR MPOFU SC: But remember that you have
21 extensive knowledge of law, with special emphasis on
22 criminal law and criminal procedures and the law of
23 evidence. So I'm saying that do you accept that section 49
24 of the Criminal Procedure Act in respect of which you have
25 extensive knowledge deals with situations where that force

1 the day.

2 MR MPOFU SC: Ja. Well, Mr Ntsebeza
3 asked you I think about four times, the record will show,
4 to say use of force in respect of what, what circumstances?
5 And you never mentioned arrest, so now you're telling us
6 that you had actually applied yourself specifically to the
7 fact of the applicability of section 49 to arrest. Is that
8 your evidence now, this afternoon, correct?

9 COLONEL MODIBA: It's not now, it was
10 always my take.

11 MR MPOFU SC: Okay, even in the morning?

12 COLONEL MODIBA: The day I wrote it, the
13 day I explained to my members, that was what was in my
14 mind.

15 MR MPOFU SC: Yes.

16 COLONEL MODIBA: So it's not in the
17 morning or today or tomorrow, I mean yesterday.

18 MR MPOFU SC: Yes. No - no, I know, your
19 mind, we are dealing with it now and your imagination. I'm
20 saying what you are saying to us now is that what you were
21 seeking to convey to your members when you said that they
22 must remember section 49 was specifically related to the
23 arrest part of the mission. Is that your evidence?

24 COLONEL MODIBA: That's correct,
25 Chairperson.

1 is used in the context of an arrest, which is not what you
2 were seeking to convey to your members.

3 [14:47] COLONEL MODIBA: Chairperson, the reason
4 why I mention section 49, arrest was among other actions
5 that were to be carried out. So that is why I'm talking of
6 the relevancy of section 49. That was the relevant
7 legislation.

8 MR MPOFU SC: Oh, I see. So now the
9 reason why you mentioned section 49 was because the arrest
10 was one of the things you were going to do?

11 COLONEL MODIBA: That's correct,
12 Chairperson.

13 MR MPOFU SC: So you knew before Mr
14 Ntsebeza read it out to you and the Chairperson explained
15 it to you, that section 49 deals with, specifically with
16 the questions of arrest.

17 COLONEL MODIBA: When I mentioned section
18 49 I did not go into details but you look at, if we look at
19 the principle of section 49 it encompasses the act of
20 arrest when applying the force that would be proportional
21 to the level of threat that whoever is effecting the arrest
22 might have been faced with. So section 49 to me was the
23 relevant legislation that would be, that should be
24 considered at all times, knowing well that the arrest was
25 amongst other things that we were going to do at the end of

1 MR MPOFU SC: And can you then explain in
2 relation to the arrests what did you want them to do with
3 section 49?

4 COLONEL MODIBA: In the event that a
5 police official had to effect an arrest and there's a
6 threat that prohibits him from doing that, a threat that
7 posed danger, that he has to resort to use of force, it
8 should be proportionate to the level of threat so that he
9 can effect such arrest.

10 MR MPOFU SC: Another assumption that you
11 made in executing your task was that somebody had told the
12 protesters to disperse and disarm and that they had
13 resisted it. That's before the shooting at scene 1, is
14 that correct?

15 COLONEL MODIBA: That's when I saw the
16 protesters running along the Nyala which was busy deploying
17 the barbed wire.

18 MR MPOFU SC: Yes, that's correct. I'm
19 also talking about that time. You made an assumption that
20 at that point someone had told them to, had addressed them
21 to lay down and disperse their arms and disperse and that
22 they had resisted that, correct?

23 COLONEL MODIBA: Looking at my
24 observation told, suggested that to me.

25 MR MPOFU SC: Yes, so you made an

1 assumption, Colonel, you know? Because of your observation
 2 you made the assumption that someone had told them when you
 3 saw them walking alongside that Nyala. You did not
 4 actually see someone saying it, you assumed that it had
 5 happened, correct?
 6 COLONEL MODIBA: That's correct,
 7 Chairperson.
 8 MR MPOFU SC: Yes. Well, again let me –
 9 I'll tell you nicely that that assumption was also wrong.
 10 Nobody at that point had done anything of the sort which
 11 was resisted by the protesters. So you are wrong again,
 12 correct?
 13 CHAIRPERSON: If your assumption, if what
 14 you put to him correct.
 15 MR MPOFU SC: Ja – ja, as usual. If I am
 16 correct you're wrong, correct?
 17 COLONEL MODIBA: As you say it's
 18 assumption, assumption could be wrong, right.
 19 MR MPOFU SC: This one was wrong, right?
 20 COLONEL MODIBA: Chairperson, the thing
 21 what Mr Mpofo is going all along is about assumption,
 22 assumption –
 23 MR MPOFU SC: Not my assumption –
 24 CHAIRPERSON: Just to cut it short, if
 25 what he puts to you is correct then it follows that what

1 and teargas" and so on "with an effort to disperse the
 2 crowd." That's what you assumed to be the sequence of
 3 events, correct?
 4 COLONEL MODIBA: That is exactly what you
 5 were saying, I assumed at that time.
 6 MR MPOFU SC: Yes.
 7 COLONEL MODIBA: But then all the forces
 8 assembled there, if we look into that paragraph,
 9 Chairperson. So that was my explanation. All forces
 10 assembled there.
 11 MR MPOFU SC: Yes.
 12 COLONEL MODIBA: At scene 1.
 13 MR MPOFU SC: And after that the crowd
 14 was addressed to disperse, to lay down the – and so on and
 15 so on – and then there was resistance. That was your
 16 understanding or assumption.
 17 COLONEL MODIBA: It could be my
 18 assumption –
 19 MR MPOFU SC: Yes.
 20 COLONEL MODIBA: - given what I saw on
 21 the day when the protesters were running in a violent
 22 manner alongside the Nyala -
 23 MR MPOFU SC: Yes, sir. Now –
 24 COLONEL MODIBA: - that suggested to me
 25 that that means it didn't work.

1 you assume was wrong, but that depends upon whether on the
 2 first part of the statement, that if what he puts to you is
 3 correct then what you assumed was wrong. That is so. Of
 4 course it doesn't follow that what he's putting to you is
 5 correct but we're assuming for the sake of further cross-
 6 examination that that's so. That's the way it works, isn't
 7 it? You nod your head but that doesn't come on the record.
 8 MR MPOFU SC: You agree with the
 9 Chairperson at least, even if you don't agree with me.
 10 COLONEL MODIBA: I understand,
 11 Chairperson.
 12 MR MPOFU SC: Okay, then let's do this
 13 the hard way. Can we go to ZZZ2.2? That's your statement,
 14 correct?
 15 COLONEL MODIBA: That's correct,
 16 Chairperson.
 17 MR MPOFU SC: Ja. Now the question I'm
 18 going – I'm asking you like this. Go to paragraph 5 of
 19 that statement. Did you understand the sequence of events
 20 to have occurred as it is stated in that paragraph which
 21 says "At approximately 15:30 to 16:00, forces mentioned in
 22 paragraph 3 lined up behind one another. The crowd was
 23 addressed to disperse and lay down their weapons, namely
 24 pangas, assegais, spears, axes and knobkerries. There was
 25 resistance from the crowd and POP units used water cannons

1 MR MPOFU SC: Ja, ja.
 2 COLONEL MODIBA: For them to lay down
 3 their arms.
 4 MR MPOFU SC: Yes. No, I understand
 5 that. You've already said that from the way they were
 6 walking or whatever, that that's the assumption you made.
 7 I can accept that. All I'm saying to you is that that
 8 assumption was wrong, as a matter of fact, okay? Now do
 9 you accept that you were labouring under the wrong
 10 impression because this was not a sequence of events, as a
 11 matter of fact. Why you did it, I forgive you but do you
 12 accept that it was the wrong assumption because I say so,
 13 the evidence says that there was no such thing that
 14 happened at that time?
 15 COLONEL MODIBA: Chairperson, I would say
 16 there was a mistake with my observation.
 17 MR MPOFU SC: Yes, yes, that's fine. If
 18 it was a mistake then it was wrong. Right?
 19 COLONEL MODIBA: If that makes you
 20 comfortable to use that word.
 21 MR MPOFU SC: No, but I have not – don't
 22 worry about my comfort level. Do you accept that it was a
 23 wrong assumption?
 24 COLONEL MODIBA: There was a mistake with
 25 my observation, Chairperson.

1 MR MPOFU SC: And if it was a mistake
 2 then it was wrong.
 3 CHAIRPERSON: That's what the word
 4 "mistake" means. I don't think you'd have to worry –
 5 MR MPOFU SC: Ja, well, I want the
 6 witness to answer the question. If it was a mistake it was
 7 wrong. You have to learn to accept when something is
 8 wrong.
 9 COLONEL MODIBA: Chairperson, I'm
 10 comfortable in using the word "mistake" in with my
 11 observation, not wrong.
 12 MR MPOFU SC: So it was not wrong?
 13 COLONEL MODIBA: There was a mistake with
 14 my observation, Chairperson.
 15 MR MPOFU SC: And was it right?
 16 CHAIRPERSON: If it was a mistake it
 17 couldn't be right, could it? So if it wasn't right, it
 18 must have been wrong. So I think we can move on, don't you
 19 think? You can't have a mistake that's right. The very
 20 fact that it's a mistake means it's wrong. That is so, so
 21 we can move on, I think.
 22 COLONEL MODIBA: With the interpretation
 23 I cannot contend it.
 24 CHAIRPERSON: No – You've got a wrong
 25 mistake there, Mr Mpofu, you can carry on. I'm going to

1 mistake again. Sorry, Colonel. It was wrong. You are a
 2 murder suspect, correct? You were told that you're a
 3 suspect for murder and attempted murder?
 4 CHAIRPERSON: I think the question is a
 5 bit vague, but what Mr Mpofu means in the IPID
 6 investigation into what happened at Marikana on the 16th a
 7 number of members of the police service have been treated
 8 as suspects and you are one of them. Presumably it's
 9 because you fired shots.
 10 COLONEL MODIBA: Ja, by the virtue of
 11 having discharged my firearm, that's correct, Chairperson.
 12 MR MPOFU SC: Yes. No, it's not vague at
 13 all. It says, "I conducted an interview with a suspect,
 14 name Kaizer Ntlou Modiba." That's you, correct?
 15 COLONEL MODIBA: Those are my
 16 particulars, Chairperson.
 17 MR MPOFU SC: Yes, so in this file of
 18 murder and attempted murder, when it says the suspect, it
 19 means you, correct?
 20 COLONEL MODIBA: The IPID file, yes.
 21 MR MPOFU SC: Yes, thank you. Now
 22 according to you, you fired five shots allegedly to the
 23 ground. Is that correct?
 24 COLONEL MODIBA: That's correct,
 25 Chairperson.

1 take tea at about 3 o'clock but obviously I'll only do so
 2 once you tell me that it's convenient for the purposes of
 3 your cross-examination.
 4 MR MPOFU SC: Well, yes. I think you can
 5 take, make the assumption that it can be done right now,
 6 Chairperson.
 7 CHAIRPERSON: I'm scare of these wrong
 8 assumptions.
 9 MR MPOFU SC: Thank you, Chair.
 10 CHAIRPERSON: Right, we'll take the tea
 11 adjournment now. Try to be back at quarter past three.
 12 [COMMISSION ADJOURNS COMMISSION RESUMES]
 13 [15:23] CHAIRPERSON: The Commission resumes.
 14 Colonel, you're still under oath.
 15 KAIZER NTLOU MOBIDA: s.u.o.
 16 CHAIRPERSON: Mr Mpofu.
 17 CROSS-EXAMINATION BY MR MPOFU SC (CONTD.):
 18 Thank you very much, Chairperson. Captain – or Colonel,
 19 yes, you –
 20 CHAIRPERSON: That is the wrong mistake.
 21 MR MPOFU SC: Yes, that's it, yes.
 22 That's a very –
 23 COLONEL MODIBA: And I take offence of
 24 it, Chairperson.
 25 MR MPOFU SC: Okay, no, I won't make that

1 MR MPOFU SC: And the people you were
 2 with also fired to the ground?
 3 COLONEL MODIBA: That of them firing into
 4 the ground –
 5 MR MPOFU SC: Ja, as I –
 6 COLONEL MODIBA: Those were the, how
 7 they –
 8 MR MPOFU SC: Explained it to you.
 9 COLONEL MODIBA: - explained themselves
 10 at later stage –
 11 MR MPOFU SC: Yes.
 12 COLONEL MODIBA: - that they fired into
 13 the ground.
 14 MR MPOFU SC: That's correct. Yes, no,
 15 that was your evidence –
 16 COLONEL MODIBA: I'm talking specific
 17 about myself.
 18 MR MPOFU SC: I'm sorry. I'm sorry to
 19 cut you. I understand. Your evidence when Mr Chaskalson
 20 was questioning you was that you fired to the ground and
 21 they also fired to the ground. What you are explaining now
 22 is not like you saw them firing to the ground, but that's
 23 what they said to you. Do I understand you correctly?
 24 COLONEL MODIBA: That's correct,
 25 Chairperson.

1 MR MPOFU SC: Yes. So to your knowledge
2 none of your group fired at people's heads or bodies, they
3 fired to the ground, and I think your explanation was that
4 if they died as a result of that firing it might be because
5 the bullets might have, there would have been ricochet of
6 the bullets, correct?

7 COLONEL MODIBA: That's correct,
8 Chairperson.

9 MR MPOFU SC: You're quite sure about
10 this?

11 COLONEL MODIBA: Yes, I'm sure with
12 what –

13 MR MPOFU SC: Ja.

14 COLONEL MODIBA: - what I am suggesting.

15 MR MPOFU SC: Yes, correct.

16 COLONEL MODIBA: Yes, I'm –

17 MR MPOFU SC: So – sorry, sorry again.

18 So you can't say, let's assume that you're correct then
19 that the ricochets caused the deaths of those two people,
20 you can't say which of the people who fired killed those
21 people, correct?

22 COLONEL MODIBA: Yes, Chairperson.

23 MR MPOFU SC: It could be you. You could
24 have killed those two people.

25 COLONEL MODIBA: No, with me I know my –

1 MR MPOFU SC: No, we don't need ballistic
2 evidence for that. We already know, you have already said
3 that those people were killed by the shots which were fired
4 by people, including yourself, to the ground. So we don't
5 need ballistic evidence, because the ballistic evidence
6 will also show the same thing, that they were killed by the
7 bullets that came from your group. All I'm saying is that
8 it is possible that from the five bullets you shot, two of
9 them could have killed the two people who died. It's
10 possible. It might be somebody else, but it could be you,
11 correct?

12 COLONEL MODIBA: It's possible.

13 MR MPOFU SC: Thank you, and it is for
14 that reason then, because of that possibility that you
15 would be a murder suspect.

16 COLONEL MODIBA: Being a murder suspect
17 is not an issue with me, it's a charge as it is –

18 MR MPOFU SC: Yes.

19 COLONEL MODIBA: - because I was involved
20 in the shooting, so –

21 MR MPOFU SC: And people died.

22 COLONEL MODIBA: So it could be described
23 that way, that I'm a murder suspect. It's nothing, there's
24 no harm with me being a suspect in that regard.

25 CHAIRPERSON: Mr Mpofo, we're talking

1 as I say because of firing into the ground and then in a
2 rocky area, yes that could be the case, yes.

3 MR MPOFU SC: Okay, yes. So you could
4 have killed both of those people.

5 COLONEL MODIBA: No, I'm not taking
6 responsibility, Chairperson.

7 MR MPOFU SC: No –

8 CHAIRPERSON: [Microphone off, inaudible]

9 take responsibility. He's suggesting to you that in view
10 of the fact that you fired into the ground, in view that
11 there's always a chance that a bullet will ricochet, that
12 one can't exclude the possibility that your bullets, two of
13 your bullets may have killed these two people. That's the
14 point Mr Mpofo is putting to you.

15 MR MPOFU SC: That's correct.

16 CHAIRPERSON: He's not asking you to
17 accept responsibility; he's merely saying the possibility
18 that your bullets killed these people cannot be excluded.

19 MR MPOFU SC: That's correct,
20 Chairperson.

21 COLONEL MODIBA: However, Chairperson, we
22 still have to extract that from the ballistic evidence that
23 if there was any link with my firearm, that we can arrive
24 to that to say my firearm might have also, or has caused
25 the death of the two victims.

1 about bodies A and B, I take it.

2 MR MPOFU SC: That's correct,
3 Chairperson, it Mr Mdizeni and Thelejane, I think.

4 CHAIRPERSON: Yes.

5 MR MPOFU SC: Yes.

6 CHAIRPERSON: Now if one looks at the
7 exhibit JJJ5, page 13, it appears that – page 13 in respect
8 of the first body and page 14 in respect of the second, it
9 appears that each of them was killed by high-velocity
10 bullets, R5 bullets. Now what firearm did you have?

11 COLONEL MODIBA: I had side firearm,
12 pistol, which we cannot describe it as a high calibre.

13 CHAIRPERSON: Yes, in any event according
14 to the reports that I've read these two deaths were caused
15 by high-velocity R5 bullets, so you clearly didn't fire
16 them.

17 COLONEL MODIBA: I did not carry, I was
18 not having R5 with me. I had a pistol.

19 CHAIRPERSON: So you didn't fire the
20 bullets that killed those two bodies, those two people.

21 COLONEL MODIBA: That's my, that was my
22 point to say it could not be me since, well, we should
23 still look at the ballistic evidence in that regard.

24 MR MPOFU SC: Your evidence is that it
25 could not be you, it's no longer that it is possible?

1 COLONEL MODIBA: I said I don't know if
 2 ballistic evidence could link my firearm. That was –
 3 MR MPOFU SC: You never said –
 4 COLONEL MODIBA: That was my point. Now
 5 the Chairperson is saying that the ballistic evidence
 6 suggests that it was high calibre, which could probably be
 7 R5, and I was not carrying R5.
 8 MR MPOFU SC: Yes, but you don't know if
 9 they suffered any other wounds, do you?
 10 COLONEL MODIBA: I don't know,
 11 Chairperson.
 12 MR MPOFU SC: Ja, okay, and you did
 13 earlier say it was possible that you could be the killer –
 14 COLONEL MODIBA: But if I –
 15 MR MPOFU SC: - before the Chairperson
 16 intervened. Didn't you?
 17 COLONEL MODIBA: No, I did not –
 18 MR MPOFU SC: You didn't?
 19 COLONEL MODIBA: I did not agree with you
 20 that I could be a killer.
 21 CHAIRPERSON: Mr Mpofo, Ms Baloyi wishes
 22 to say something.
 23 MS BALOYI: Thank you, Chairperson, we
 24 have been referred to the medical records. Unless Mr Mpofo
 25 wants to dispute what's contained there and then he wants

1 MR MPOFU SC: Chairperson, with the
 2 greatest respect, if I can be asked to ask my question.
 3 I'm not about any of this what Ms Baloyi is saying at all.
 4 I'm asking the witness whether before that explanation was
 5 given he had said it was possible that he's a killer or
 6 not.
 7 CHAIRPERSON: And I take it the answer to
 8 that is yes, you did make that concession that it was a
 9 possibility that couldn't be excluded, but in the light of
 10 the ballistic evidence to which your attention has now been
 11 drawn, do you wish to withdraw that concession?
 12 MR MPOFU SC: No, no, that's your
 13 question, Chairperson.
 14 CHAIRPERSON: I know it is my question.
 15 MR MPOFU SC: I'll still ask mine.
 16 CHAIRPERSON: There's nothing wrong with
 17 – I'm allowed to ask questions too. Thank you. You heard
 18 my question. You made the concession, the possibility that
 19 one of your bullets or two of your bullets might have
 20 killed these two people could not be excluded, and you said
 21 yes, that was so. Your attention was then drawn to the
 22 fact that according to the post mortem reports these two
 23 men died as a result of high-velocity R5 bullets and you
 24 said you didn't have an R5. Therefore do you withdraw the
 25 concession that you made?

1 to pursue this line of cross-examination, perhaps that he
 2 can do, but the records that we have, and that was also
 3 what Mr Chaskalson proceeded on the basis of yesterday that
 4 both victims were killed by R5 rifles, it cannot be put to
 5 this witness that you are therefore a killer, or you could
 6 possibly be a killer, when he says I carried only a pistol.
 7 MR MPOFU SC: No, maybe my learned friend
 8 was obviously not listening, as well as the witness. I'm
 9 saying did he or did he not say before that long
 10 explanation –
 11 CHAIRPERSON: No, no, he did. He did say
 12 that.
 13 MR MPOFU SC: Yes, well that's all I'm
 14 asking. Then I mustn't be told that I'm asking something
 15 else.
 16 CHAIRPERSON: But his attention was then
 17 drawn to the ballistic –
 18 MR MPOFU SC: I know that, but –
 19 CHAIRPERSON: - which tended to nullify
 20 the concession that he'd previously made. But you're
 21 correct, he did make the concession that there was a
 22 possibility, the possibility couldn't be excluded, but in
 23 the light of the ballistic evidence to which his attention
 24 has now been drawn, the concession would appear to fall
 25 away. I think that's the point.

1 COLONEL MODIBA: That's correct,
 2 Chairperson.
 3 MR MPOFU SC: Do you accept that the fire
 4 from you or someone else with less calibre weaponry might
 5 have injured them?
 6 CHAIRPERSON: Let's look at the two.
 7 Let's not place the witness necessarily at a disadvantage.
 8 In exhibit ZZZ5 at page 13 we have a summary of the post
 9 mortem report in relation to these two persons, 13 and 14.
 10 In the first case it's said he sustained a single high-
 11 velocity R5 bullet injury to his spine, pelvis and hip, and
 12 then in respect of the second person it is said there was a
 13 high-velocity R5 bullet wound of the head, and another,
 14 that's obviously another high-velocity R5 bullet via the
 15 pelvis from the right to the left side. Injuries were
 16 together both severely incapacitating. There is no
 17 suggestion here, and I haven't got the main exhibit, but I
 18 take it the summary is a correct one. There's no
 19 suggestion here that there were any other injuries
 20 sustained by bullets fired from pistols, so that appears to
 21 be the correct position.
 22 MR MPOFU SC: Well, Chairperson, that may
 23 well be so. That's not my question at all. I'm not
 24 putting it as something that's in a post mortem, or even
 25 something that has occurred. I'm saying does he accept the

1 possibility that his bullets might have injured the people.
 2 That's all. A very simple question.
 3 CHAIRPERSON: Which people are you
 4 talking about? We're talking about these –
 5 MR MPOFU SC: The people you are talking
 6 about.
 7 CHAIRPERSON: If we're talking about
 8 these two people, there's no possibility because there's
 9 no, the post mortem doesn't reveal any other injuries.
 10 MR MPOFU SC: Well, that doesn't mean
 11 they were not injured, just because the post mortem doesn't
 12 say so.
 13 CHAIRPERSON: Well, you can argue that at
 14 the end, if you like. Let's move on to something else.
 15 MR MPOFU SC: Anyway, the next point is
 16 that you yourself, if anyone said that the group fired at
 17 the protesters, that would be wrong; they fired to the
 18 ground?
 19 COLONEL MODIBA: That's according to the
 20 shottists.
 21 MR MPOFU SC: Yes. And you would then
 22 accept that, or rather so those people who fired to the
 23 ground include those who fired with pistols, like you, and
 24 those who fired with R5, correct?
 25 COLONEL MODIBA: I don't get the

1 possibility that they were killed as a result of the bullet
 2 that ricocheted.
 3 MR MPOFU SC: Yes, from the warning
 4 shots.
 5 CHAIRPERSON: The proposition you put to
 6 him doesn't follow logically from what went before, that it
 7 was also possible that these persons were killed by, as a
 8 result of shots fired from other members of the service –
 9 MR MPOFU SC: Ja, well there might be a
 10 million –
 11 CHAIRPERSON: - who were not under the
 12 command of this witness.
 13 MR MPOFU SC: Ja, Chairperson, there
 14 might be a million other possibilities. I'm asking him
 15 about a specific possibility that –
 16 CHAIRPERSON: No, you put it on the basis
 17 that if they were –
 18 MR MPOFU SC: Killed by the group that
 19 he –
 20 CHAIRPERSON: If the bullets that were
 21 fired to the ground ricocheted, then –
 22 MR MPOFU SC: Yes.
 23 CHAIRPERSON: - they were killed by them.
 24 It follows that that possibility exists, but of course also
 25 a possibility they were killed by other members of the

1 question. I need clarity.
 2 MR MPOFU SC: Did the group that you say
 3 fired to the ground include people who fired pistols and
 4 those who fired R5s?
 5 COLONEL MODIBA: That's correct,
 6 Chairperson.
 7 MR MPOFU SC: So the earlier evidence
 8 that they might have been killed by ricochet bullets
 9 includes from those members of your group that were firing
 10 R5s, correct? Seeing that we know that they were killed by
 11 R5 rifle, correct?
 12 COLONEL MODIBA: There is such
 13 possibility, Chairperson.
 14 MR MPOFU SC: Yes, now if that is so you
 15 would accept that what you were doing at that stage
 16 according to your evidence was to give warning shots,
 17 correct?
 18 COLONEL MODIBA: That was the objective –
 19 MR MPOFU SC: Yes.
 20 COLONEL MODIBA: - at the time when the
 21 charging was taking place, yes Chairperson.
 22 MR MPOFU SC: Yes, so from your evidence
 23 so far we must accept that those people were killed by
 24 warning shots.
 25 COLONEL MODIBA: I said there could be a

1 service –
 2 MR MPOFU SC: Ja, well –
 3 CHAIRPERSON: - who were approaching from
 4 another angle to the koppie.
 5 MR MPOFU SC: Ja, well I don't know,
 6 maybe I didn't ask the question clearly. I did this
 7 deliberately just to avoid this kind of debate. If as we
 8 accepted that these people were killed by members of your
 9 group, and if according to the shottists in your group
 10 everybody fired to the ground, including the R5-wielding
 11 people, then those people would have been killed in the
 12 course of warning shots, by warning shots. Is that correct
 13 or not correct, Colonel Modiba?
 14 COLONEL MODIBA: It could be as a result
 15 of the ricochet from the warning shots.
 16 MR MPOFU SC: Yes.
 17 COMMISSIONER HEMRAJ: There is a
 18 statement that says, Mr Mpofu, that one of the constables
 19 fired into the air as well. It's not only into the ground.
 20 MR MPOFU SC: Yes, ja. Thank you, yes,
 21 that's correct, Commissioner. We'll assume, we can forgive
 22 that one. If they fired to the air hopefully it was not in
 23 the air that was around the people. So assuming, putting
 24 that aside, the person who fired from the air, then those
 25 people would have been killed in the course of warning

1 shots. You and I have agreed at least, correct?

2 COLONEL MODIBA: As I said, due to the

3 ricochet, that is –

4 MR MPOFU SC: Ja.

5 COLONEL MODIBA: - the action of the

6 bullet from the ground.

7 MR MPOFU SC: Ja.

8 COLONEL MODIBA: It's possible, because

9 of the place was, this is a rocky area.

10 MR MPOFU SC: Ja. Now the purpose of

11 warning shots as I understand it is when you see some

12 danger you fire a warning shot, and if the danger persists

13 you might fire at the person, correct?

14 COLONEL MODIBA: That's correct,

15 Chairperson.

16 MR MPOFU SC: But after you've fired

17 warning shots, if the danger does not persist then you

18 wouldn't fire at the person, correct?

19 COLONEL MODIBA: That's correct,

20 Chairperson.

21 MR MPOFU SC: In other words the purpose

22 of warning shots is to warn the person that should they

23 take another step then you might be forced to fire at them,

24 correct?

25 COLONEL MODIBA: That's correct,

1 that your warning shot caused the death of the person who

2 was charging, it could as well be justifiable looking at

3 how the warning shots was fired, it will depend how the

4 warning shot was fired, Chairperson.

5 MR MPOFU SC: Yes, okay, that's good. So

6 it will depend. So sometimes it would be justifiable,

7 sometimes it won't be.

8 COLONEL MODIBA: We look at the

9 intention.

10 MR MPOFU SC SC: Ja.

11 COLONEL MODIBA: Intention of discharging

12 a fire.

13 MR MPOFU SC: Ja.

14 COLONEL MODIBA: The intention would be a

15 main factor yes, Chairperson.

16 MR MPOFU SC: Yes, and in your case the

17 intention was to fire warning shots, correct?

18 COLONEL MODIBA: That's correct,

19 Chairperson.

20 MR MPOFU SC: And that's what I'm trying

21 to explain to you. So there's a difference between that

22 situation where you have an intention to fire warning shots

23 and by some misfortune they ricochet and kill a person.

24 That's different from a situation where your intention is

25 to fire at the person because your life is threatened,

1 Chairperson.

2 MR MPOFU SC: Yes, so then we can accept

3 that at the time that you are firing the warning shot – or

4 let me put it this way; there are also situations that may

5 arise where you don't have time to fire warning shots,

6 where the danger is just imminent, correct?

7 COLONEL MODIBA: That's correct.

8 MR MPOFU SC: Yes, and those situations

9 must be distinguished from the situation where you have an

10 opportunity to fire warning shots, stage 1, and then see

11 what happens, and then fire at the person, correct?

12 COLONEL MODIBA: Ja, it varies from

13 situation to situation, correct.

14 MR MPOFU SC: Yes. So if the person, if

15 you shoot a person, if that person dies as a result of the

16 warning shot then it must be accepted that at that stage

17 the danger was not so imminent that your life was

18 threatened at that stage. There was, it was the situation

19 number 1 where you have an opportunity to fire warning

20 shots, correct?

21 COLONEL MODIBA: No, the issue here is if

22 you resort to firing warning shot, by so doing you are

23 trying to negotiate threat that is coming your way.

24 [15:43] MR MPOFU SC: Ja.

25 COLONEL MODIBA: And then, should it be

1 because sometimes you don't have the luxury of warning

2 shots, we accept that, but do you understand the difference

3 between those two situations?

4 COLONEL MODIBA: Yes I do understand,

5 Chairperson.

6 MR MPOFU SC: Yes. So in the one your

7 intention is to fire to the ground, but unfortunately it

8 ricocheted, in the other situation your intention is to

9 kill the person but you have a legal justification. Do you

10 understand that?

11 COLONEL MODIBA: Hence I said,

12 Chairperson, the situation is different.

13 MR MPOFU SC: Yes. I know, that's my

14 whole point that it's different, but I'm saying your

15 situation was that you were firing on the ground with the

16 other people and the R5 wielding people and maybe,

17 unfortunately, the people were killed by ricochet. It is

18 not the other situation where you were firing at the

19 people.

20 COLONEL MODIBA: No that was the - the

21 intent was to fire warning shots.

22 MR MPOFU SC: Yes.

23 COLONEL MODIBA: Let alone how it

24 resulted - the result of the warning shot - but the intent

25 was to fire a warning shot.

1 MR MPOFU SC: Yes.

2 COLONEL MODIBA: That is my base.

3 MR MPOFU SC: Yes. No, that I accept.

4 We're not talking about intent, we're talking about

5 unlawfulness since you are a legal expert. I'm saying to

6 you the point of - your intention at that stage was to fire

7 to the ground, it was not to fire at the person and defend

8 yourself in that way, correct?

9 COLONEL MODIBA: Firing a warning shot

10 could also be another method of defending myself because by

11 mere firing it could detain the attacker to change his

12 mind.

13 MR MPOFU SC: Yes but, Colonel, I'm sure

14 you understand what I'm saying. I'm saying to you there

15 are two separate situations and you were in situation 1 as

16 opposed to situation 2. The one situation is you fire a

17 warning shot and whatever happens, happens. The other

18 situation is you fire at the person to kill them, or maim

19 them or whatever. You were in situation number 1. You

20 were firing warning shots to the ground.

21 COLONEL MODIBA: That's correct.

22 MR MPOFU SC: Thank you. Then let's just

23 go back to scene 1. We were dealing - before tea we were

24 dealing with the mistake and the assumption and all that.

25 After you saw the crowd running - I think your evidence was

1 COLONEL MODIBA: - I said a large crowd

2 came around. That could be approximately 30 in number.

3 MR MPOFU SC: Yes, okay, the large group

4 came around. Okay how many then managed, apart from the

5 group that went around the kraal? Estimate, obviously you

6 didn't count them.

7 COLONEL MODIBA: Chairperson, I was not

8 close as I mentioned in my statement that I was

9 approximately 80 to 100. I couldn't really have that good

10 view to say so many managed, so many did not manage.

11 MR MPOFU SC: Yes. No I grant that. You

12 were far away and therefore I can't pin you down. You

13 can't say 26 and live or die by it, I'm just saying that

14 small group that managed in your view, how many were they,

15 roughly.

16 COLONEL MODIBA: I'm not able to give

17 estimate, Chairperson.

18 MR MPOFU SC: More than one?

19 COLONEL MODIBA: It could be one, it

20 could be two, Chairperson.

21 MR MPOFU SC: It could be two.

22 COLONEL MODIBA: It could be one, it

23 could be two. I was -

24 MR MPOFU SC: It could be three.

25 COLONEL MODIBA: - I was far. My

1 that they were moving parallel with Nyala number 4. You

2 might not have known the number then now, but what you now

3 know is Nyala number 4. Do you remember that part?

4 COLONEL MODIBA: Yes I do remember,

5 Chairperson.

6 MR MPOFU SC: Ja, and your evidence was

7 that, I think the chairperson put it appropriately, that

8 effectively it was a race towards the kraal between the

9 Nyala and the crowd. Kind of, they were racing each other

10 towards the kraal, correct?

11 COLONEL MODIBA: Correct, Chairperson.

12 MR MPOFU SC: And your evidence is that,

13 I think, the crowd - well the Nyala won the race but about

14 20 or 30 of them managed to go through is that correct?

15 COLONEL MODIBA: My observation I said

16 some managed and the large group ran around the kraal.

17 MR MPOFU SC: Yes. No, no we are

18 together. I'm saying if you're talking about the whole

19 group you would say the Nyala won the race, but your

20 evidence is that about 20 or 30 managed to sneak through.

21 COLONEL MODIBA: No I did not say 30

22 managed to sneak through, I said it could be a group of 30

23 but not those specific that managed to - that I saw

24 managing to get in front of the Nyala -

25 MR MPOFU SC: Okay.

1 distance was not -

2 MR MPOFU SC: Ja.

3 COLONEL MODIBA: I was not having a good

4 view considering the fact that there were a lot of

5 movements there.

6 MR MPOFU SC: Ja, I accept that. So it

7 could be five, it could be ten.

8 COLONEL MODIBA: I'm saying my view was

9 not such good because of the movements that were taking

10 place in front of me. I was at a distance of 80 to 100

11 metres -

12 MR MPOFU SC: Yes but, Colonel -

13 COLONEL MODIBA: - which that could

14 interfere with my view.

15 MR MPOFU SC: Yes.

16 COLONEL MODIBA: Then my observation was

17 it could be that there were those that managed, whether one

18 or two, that could be possible, but the large number that

19 came in there running, they were around the kraal.

20 MR MPOFU SC: No I accept that, but you

21 must accept a human being is not like an ant. I mean if

22 you saw a group of 10 or 20 human beings, it's different to

23 if you see a group of 5 000. I'm not asking - that's why

24 I've said to you I'm not asking you for a specific number,

25 but you said a number of them managed to go through.

1 Roughly how many?

2 COLONEL MODIBA: Chairperson, I would

3 repeat again to say I cannot be specific because my view

4 was not such good and if one managed, it couldn't be a lot.

5 It could be one or two.

6 MR MPOFU SC: So when you say in your

7 statement, "some managed to go through the gap between the

8 Nyala and the barbed wire", when you say "some" what would

9 you wish to convey?

10 COLONEL MODIBA: Chairperson, some could

11 be two people. Two persons.

12 MR MPOFU SC: I understand, but it could

13 also be 100 people. That's why, what I'm trying, Colonel

14 Modiba, to really get you to assist the Commission. Some,

15 you're right, could mean two people, it could mean 2 000.

16 COLONEL MODIBA: Ja, with my observation

17 if that some, I would have referred to a maximum of two.

18 MR MPOFU SC: Ja. Alright fine. Those

19 who managed, two or so, or more or less, they proceeded

20 towards Nkaneng I suppose, correct?

21 COLONEL MODIBA: Repeat your question?

22 MR MPOFU SC: Well those people who

23 managed to go through, whatever their number is, managed to

24 proceed to the squatter camp. You might not know its name.

25 They carried on, correct?

1 CHAIRPERSON: You're talking about the

2 ones who went round the kraal and came down on the right-

3 hand side of the kraal, isn't that right? As you're facing

4 the koppie you've got the kraal in front of you. Now on

5 the left-hand side, that's where the Nyala ended up with

6 the barbed wire, and you say some people got through there

7 between the Nyala and the kraal, that's correct. Others

8 went round the kraal and came down through, what we call

9 the corridor, on the right side of the kraal as you face

10 the koppie. That's correct isn't it? So you're talking,

11 as I understand it, about the ones who went round the kraal

12 and came down the right side. Mr Mpofo is talking about

13 the ones who managed to get through between the Nyala and

14 the left-hand wall of the kraal. You understand the point?

15 COLONEL MODIBA: I do get it,

16 Chairperson. As I mentioned to Mr Mpofo that my

17 observation on the day, I thought I was seeing one or two.

18 If you can go back to my statement I said some, which could

19 be two persons, and there were a lot of movement that could

20 have distracted my view, but the large crowd that came

21 around, that I'm certain what I'm saying.

22 MR MPOFU SC: Yes. No, I understand all

23 that. I'm even prepared to accept, Colonel, that after

24 those people made it through that gap something else

25 distracted your attention. I'm not saying you had a duty

1 COLONEL MODIBA: I didn't see what

2 happened with the two if that was two or one, what I could

3 see was the aggressive armed strikers that came around the

4 kraal, charging at the police.

5 MR MPOFU SC: Yes, but you've never - no-

6 one has said to you that something other than the carrying

7 on with whatever direction they were going to, happened to

8 those two or so people who managed to beat Nyala 4. In

9 other words, we can assume that they carried on with their

10 way to Nkaneng.

11 COLONEL MODIBA: No those that I saw did

12 not go to Nkaneng or squatter camp next to the kraal, they

13 came around to the kraal running, charging, in a violent

14 manner towards the police.

15 MR MPOFU SC: No, Colonel, we're coming

16 to the violent manner -

17 CHAIRPERSON: You understand? What Mr

18 Mpofo is talking about - am I right, you're talking about

19 the people who got through between the Nyala and the kraal

20 wall on the -

21 MR MPOFU SC: That's correct,

22 Chairperson.

23 CHAIRPERSON: - the left-hand side of the

24 kraal as one faces the koppie.

25 MR MPOFU SC: That's correct.

1 to look at what they were doing because, as you say, the

2 situation was volatile. All I'm saying is that there's

3 nothing that you know of that suggests that those people

4 who went through there did anything other than just to

5 proceed to Nkaneng. In your view. There's nothing that

6 you know.

7 COLONEL MODIBA: No I don't know

8 anything, Chairperson.

9 MR MPOFU SC: Ja. Thank you. And the

10 others who were not as lucky as those ones, who were beaten

11 by the Nyala -

12 CHAIRPERSON: Assuming the ones who went

13 around the kraal.

14 MR MPOFU SC: Yes, your favourite group.

15 Ja. The ones who didn't make it through that gap went

16 around the kraal, correct?

17 COLONEL MODIBA: That's correct,

18 Chairperson.

19 MR MPOFU SC: Ja. And the evidence that

20 has been led is that the people who were rushing towards

21 the kraal were like the ones who made it, as you say, on

22 their way to Nkaneng. You can't dispute that. You're not

23 in their heads, correct?

24 COLONEL MODIBA: I don't get the

25 question, Chairperson.

1 MR MPOFU SC: Okay. I'm saying you and I
2 have had a discussion about the people who were blocked by
3 Nyala 4, correct? Yes. I'm saying the evidence of some of
4 those people who were blocked by Nyala 4 is that - like the
5 ones, like all the others who had gone through that very
6 same place before Nyala 4 closed it. They were proceeding
7 towards Nkaneng. You can't dispute that.

8 COLONEL MODIBA: I did not see anyone
9 proceeding to Nkaneng but what I saw, the large group that
10 came around the kraal, running. That's what drew my
11 attention. The action of those that ran around drew my
12 attention. Maybe those two that I mentioned could have -
13 could not be visible as to what they were doing there.

14 MR MPOFU SC: Alright, then can you go to
15 exhibit L191, or 193. 193. Okay, you can take it from me
16 that that is taken at 15:43 which is round about the time,
17 or just before the time that you and I are discussing now,
18 and the police are saying that, "the protestors, organised
19 group remained with the others in the koppies while a
20 number of protestors are departing" and if you zoom into
21 the long white line, that coincidentally happens to be
22 where the other people were killed. That's where it's
23 pointing - if you can zoom closer, you'll see that there
24 were people who were departing, using that very same place
25 that you and I are talking about. Do you see that?

1 CHAIRPERSON: One of the routes to
2 Nkaneng.

3 COLONEL MODIBA: As I said, it could be
4 even furthest on the north of that kraal to go to Nkaneng.

5 MR MPOFU SC: No.

6 CHAIRPERSON: Doesn't it depend on which
7 part of Nkaneng you want to go to? Nkaneng runs all along
8 there. We can't see it but it's below the bottom of the
9 screen, but Nkaneng runs all along there from one side to
10 the other you see, and depending which part of Nkaneng you
11 were going to you might - if you're at the far end of
12 Nkaneng you go on the northern side of the kraal, if you
13 were on the side closer to the left-hand side of the
14 picture, you might go there. It depends on a number of
15 factors isn't it?

16 COLONEL MODIBA: Yes, Chairperson, it
17 could be one of the routes leading to Nkaneng.

18 MR MPOFU SC: But the evidence is that -

19 CHAIRPERSON: Nkaneng is quite big
20 actually. You have seen pictures of that. You were there
21 and you've also seen pictures of it. It's quite a big
22 area.

23 COLONEL MODIBA: But according to my
24 observation, Chairperson, I doubt if there could be anyone
25 walking past there the way the situation was.

1 COLONEL MODIBA: Yes I see, Chairperson.

2 MR MPOFU SC: Yes. So you can accept
3 that shortly before that gap was closed, people were using
4 that road to depart towards Nkaneng. You can accept that
5 as a fact, correct?

6 COLONEL MODIBA: Chairperson, at that
7 area where the white line is, it couldn't -

8 MR MPOFU SC: White arrow.

9 COLONEL MODIBA: White arrow, yes. It
10 couldn't be a place that might have attracted whoever
11 wanted to go to Nkaneng to walk there, they could walk far
12 away from the kraal. The others, on the northern side of
13 the kraal, it was unlikely that whoever was - wanted to go
14 to Nkaneng, could walk there.

15 CHAIRPERSON: I don't think that's right.
16 Can you see the road - can you see from the end of the
17 white line where the arrow is. As you go down there, do
18 you see the road? Your evidence is that road is one of the
19 possible routes to Nkaneng. So if you were going to
20 Nkaneng you might walk along there. Perhaps they can show
21 you a bigger photograph where you'll see that that is so.
22 Here - we can't see Nkaneng here because it's off the
23 screen you see, but the evidence is that that road is one
24 of the routes -

25 COLONEL MODIBA: One of the routes yes -

1 MR MPOFU SC: So you think that picture
2 is lying?

3 CHAIRPERSON: Sorry, don't put it that
4 way. You see all those people in the picture below the
5 white head of the arrow? Do you see that? All those
6 people. Now where are they going to? Going to Rustenburg?
7 They're going somewhere, aren't they, and the direction
8 they're going is Nkaneng, isn't it?

9 COLONEL MODIBA: Chairperson, are we
10 saying on that arrow we see people walking towards Nkaneng?

11 MR MPOFU SC: Yes.

12 CHAIRPERSON: Walking somewhere. The
13 most likely [inaudible] they're going to is Nkaneng.

14 COLONEL MODIBA: Can we zoom it and see
15 the movements or -

16 CHAIRPERSON: You mean un-zoom it?
17 Alright. Well unless they're all standing still, they're

18 walking in a direction -

19 MR MPOFU SC: It's common cause they are
20 departing, according to the police.

21 CHAIRPERSON: Yes.

22 MR MPOFU SC: So we don't have to zoom
23 anything.

24 CHAIRPERSON: Let's un-zoom. Let's un-
25 zoom.

1 MR MPOFU SC SC: Yes, okay.
 2 MS BALOYI: Chair, it might be helpful
 3 perhaps if the witness could be directed to look at that
 4 clearer screen over there.
 5 CHAIRPERSON: Yes. Now you see what the
 6 police inscription says is this.
 7 [16:03] "Protester organised group remained with others
 8 on the koppies," and then you see, and it goes on, "While a
 9 number of protesters are departing," now you'll see there
 10 are, there's a red arrow which goes down to a circle and
 11 the police case is that those people in the red circle are
 12 the so-called organised group.
 13 Then you've got two groups of people visible at
 14 the heads of the yellow arrows. That the police say, or
 15 those the police say are two other groups of strikers who
 16 were staying near the koppie, on the koppies. Then they've
 17 got the white arrow, which goes down to the bottom right-
 18 hand corner of the photograph, and that deals with the
 19 number of protesters who are departing according to the
 20 writing at the top, and that is the, what the police say is
 21 depicted on this photograph, you see.
 22 Now there are people, they're not just all
 23 standing there on that road. Obviously they're walking
 24 somewhere and the police say they are departing. So that
 25 does seem to indicate that there was a number of people who

1 see the broken yellow lines, after the initial rollout of
 2 the barbed wire a number of the people started departing
 3 using that road, and as I say just by coincidence the arrow
 4 goes almost exactly to where the others were later killed.
 5 Do you accept that?
 6 COLONEL MODIBA: Chairperson, it could
 7 have been that there were those that already passed there
 8 before that Nyala came.
 9 MR MPOFU SC: Thank you.
 10 CHAIRPERSON: Is this a note upon which
 11 we can take the adjournment till tomorrow?
 12 MR MPOFU SC: Ja, I –
 13 CHAIRPERSON: You have about an hour and
 14 a quarter left, I think.
 15 MR MPOFU SC: Well, Chairperson –
 16 CHAIRPERSON: Is that right, Mr Wesley?
 17 MR MPOFU SC: Chairperson, I think we
 18 must take into account the rate at which answers are
 19 extracted, or obtained. But we can do that tomorrow.
 20 Thank you, Chairperson.
 21 CHAIRPERSON: [Microphone off, inaudible]
 22 MR MPOFU SC: Thank you, Chairperson.
 23 We'll deal with that – I'll do my best, Chairperson.
 24 MR WESLEY: Chair, it's approximately an
 25 hour and a half, one hour and 33 minutes.

1 were walking down along that road towards Nkaneng.
 2 The police case, as I say, is that the organised
 3 lot, the ones with the dangerous weapons and so on, those
 4 are the ones who stayed behind for a while, and there's a
 5 lot of evidence in dispute actually about what exactly
 6 happened with them and what they were doing thereafter, but
 7 this time, 15:43, is some time before the actual shooting,
 8 shows people departing along the road marked by the white
 9 arrow. Do you understand that? So that's to try to orient
 10 you.
 11 It's nearly 4 o'clock, Mr Mpofu. Would you like
 12 to ask a couple of questions on this and then we'll take
 13 the adjournment until tomorrow morning? Because I've tried
 14 to put the witness in the picture.
 15 MR MPOFU SC: I'm indebted to you,
 16 Chairperson. If I can get an answer, then we might all –
 17 CHAIRPERSON: Ask the question and then
 18 see if you can get an answer.
 19 MR MPOFU SC: Yes. Do you accept that it
 20 is common cause that shortly before the events that you and
 21 I were discussing where Nyala 4 blocked that road and those
 22 lucky two people would have been the last ones to follow on
 23 these ones, actually the evidence is that this was the main
 24 access road towards the koppie and away from the koppie and
 25 that a number of people as depicted there, after, if you

1 MR MPOFU SC: Thank you, Chairperson.
 2 CHAIRPERSON: [Microphone off, inaudible]
 3 by the time we take the first break tomorrow [inaudible].
 4 MR MPOFU SC: Thank you, Chairperson.
 5 CHAIRPERSON: [Microphone off, inaudible]
 6 [COMMISSION ADJOURNED]
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