

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 27 12 DECEMBER 2012 PAGES 2790 TO 2911

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 12 DECEMBER 2012]
 2 [10:05] CHAIRPERSON: Good morning. The
 3 Commission resumes. Mr Mathunjwa, I must remind you, you
 4 are still under oath. Mr Mpofo, have you got any questions
 5 to ask the witness?
 6 MR MPOFU: Indeed I do, Chairperson,
 7 thank you. Mr Mathunjwa, good morning.
 8 MR MATHUNJWA: Good morning.
 9 MR MPOFU: I know you've been here since
 10 the 27th of November, but hopefully today, we will tell you
 11 to go. I just wanted to, because of the gap that – between
 12 the last time I was cross-examining you and now, I am going
 13 to just start by recapping some of the issues that we dealt
 14 with and then continue from where we left off. Is that
 15 okay? You made, I think about seven or eight important
 16 statements. The first one, just to remind you was that in
 17 your estimation, that the group was not made up of a
 18 homogenous, much of the same religious or cultural belief.
 19 Remember that?
 20 MR MATHUNJWA: Yes, I do.
 21 MR MPOFU: And we also established that
 22 in your allegedly –
 23 CHAIRPERSON: Mr Mpofo, I don't want to
 24 be difficult, but I think it's necessary for cross-
 25 examination, remember you are cross-examining the witness,

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1 it's not necessary to put everything to him you said
 2 before, and then ask him a question about it. Make your
 3 question, you know –
 4 MR MPOFU: Chairperson –
 5 CHAIRPERSON: - the time we have is
 6 limited, we must use it as sensibly and gainfully as we
 7 can. I don't want to stifle your cross-examination, but
 8 please keep this recapitulation section as brief and short
 9 as you can -
 10 MR MPOFU: I will keep it very brief.
 11 CHAIRPERSON: - so that we can get to the
 12 meat of the –
 13 MR MPOFU: Yes, yes, Chairperson –
 14 CHAIRPERSON: - that you want to cover.
 15 MR MPOFU: Yes, Chairperson, I will keep
 16 it very brief. I am simply doing it because these are
 17 extraordinary circumstances where there've been five or six
 18 days between the cross-examination. In fact, in response
 19 to the Chairperson's intervention, what I'll do is, I will
 20 read out these points, I don't have to ask you every time
 21 and you will at the end confirm that that was the summary
 22 of your evidence.
 23 CHAIRPERSON: What's the point of him
 24 confirming this is a summary of his evidence, it's the
 25 evidence he gave, it's on record. We have the evidence on

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1 record, the evidence doesn't become stronger because you
 2 get the witness to say it twice or thrice or four times.
 3 Ask him questions arising from the points that he made. If
 4 he has difficulty in understanding where you are coming
 5 from or what exactly the point's about, he can ask for an
 6 explanation and you can then give it to him, but I fear
 7 that it sounds to me as if time will be wasted otherwise.
 8 MR MPOFU: Chairperson, I am also doing
 9 it for the benefit of the witness, because of the break.
 10 CHAIRPERSON: But I said to you –
 11 MR MPOFU: But I accept your -
 12 CHAIRPERSON: I am sorry, Mr Mpofo, I
 13 said to you, ask your question, if the witness requires
 14 elucidation, because he doesn't under what you're asking
 15 him about, then he will say so, and you can then give it to
 16 him, but it's not necessary to assume in advance that he's
 17 an idiot and he won't understand what you are putting to
 18 him.
 19 MR MPOFU: No, Chairperson, with greatest
 20 respect, I don't think that remark can be attributed to me
 21 at least. I never assumed anyone was an idiot, let alone
 22 the witness.
 23 CHAIRPERSON: I don't think he's an idiot
 24 at all, he is obviously a very intelligent and articulate
 25 man. But anyway, proceed with this evidence on that basis.

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1 MR MPOFU: Thank you. Mr Mathunjwa,
 2 okay, I will, when the opportunity arises during your
 3 cross-examination, remind you or take you back to some of
 4 the things you said, but when we left it off, we were
 5 dealing with the important issue of the fact that you had
 6 gone to the mountain on the two occasions on the 16th, and
 7 you said, on your own accord without the police.
 8 MR MATHUNJWA: That's correct.
 9 MR MPOFU: And for your first visit, you
 10 had requested without any success to be given a police
 11 escort and a vehicle, correct?
 12 MR MATHUNJWA: That's correct.
 13 MR MPOFU: And yet, according to you
 14 there were Nyalas which could fill a football stadium.
 15 CHAIRPERSON: Mr Mpofo, what's the
 16 question that you are asking?
 17 MR MPOFU: It's a legal question,
 18 Chairperson. Okay, maybe I will put it as a question –
 19 CHAIRPERSON: Mr Mpofo, that's what
 20 cross-examination consists of, questions.
 21 MR MPOFU: Ja, but leading questions can
 22 be put as statements, Chairperson.
 23 CHAIRPERSON: I didn't say you couldn't
 24 ask leading questions, because this is cross-examination,
 25 but I said, it would help if you asked questions and didn't

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1 just make statements because you are wasting time by just
2 making statements.

3 MR MPOFU: Okay, is it correct that
4 according to your evidence there were Nyalas that could
5 fill up a stadium, a football stadium?

6 MR MATHUNJWA: Yes, I said all kinds of
7 vehicles, - vehicles.

8 MR MPOFU: And then for your second visit
9 which is where we left it off whenever it was, five days
10 ago, and I was asking this in relation to evidence that was
11 given by Bishop Seoka, you said that according to you,
12 nobody stopped you or told you that you could not go
13 because it was a security zone or –

14 CHAIRPERSON: You are saying it again, Mr
15 Mpofo. I have spoken to you, I don't know how many times,
16 I am trying to save time, more time has been wasted in my
17 trying to save time than anything else. Please ask
18 questions.

19 MR MPOFU: Chairperson –

20 CHAIRPERSON: That's the way I expect
21 counsel to behave in this Commission. Please ask
22 questions, if the witness needs some context, doesn't
23 understand what the question is about, he will ask you, you
24 can see that, I've already said he's an intelligent,
25 articulate man, we can rely on him to look after himself.

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1 MR MPOFU: Well, Chairperson, with the
2 greatest of respect, this is the first time in my life that
3 I hear that I cannot put a statement to a witness, who can
4 either confirm it or not confirm –

5 CHAIRPERSON: If it's the first time in
6 your life that you've heard you can only ask questions in
7 cross-examination, then it's appropriate that the time has
8 arrived that you can tell that.

9 MR MPOFU: Well, okay, I'll, in fact
10 everything I say with, "is it correct?" so that it's in the
11 form of a question. Is it correct that nobody stopped you
12 at the koppie on the second day?

13 CHAIRPERSON: He told us that.

14 MR MPOFU: On the second day, and nobody
15 said it was a security zone or cordoned off. He has not,
16 Chairperson, I've not mentioned the word "cordoned off,"
17 this is, I am saying, what I am saying is before - it's in
18 relation to Bishop Seoka's – when did he tell us that?

19 CHAIRPERSON: The question is, when you
20 went back, was the section in question cordoned off?

21 MR MATHUNJWA: No.

22 MR MPOFU: Chairperson, honestly, I don't
23 want us to go on like this in my cross-examination, it is
24 the first time the witness is testifying about cordoning
25 off.

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1 MR MATHUNJWA: He said that it wasn't
2 cordoned off, carry on with your cross-examination from
3 that.

4 MR MPOFU: He said, he has already told
5 us.

6 CHAIRPERSON: In order to make sure it
7 was on record, I then asked the question myself, and the
8 question was formed –

9 MR MPOFU: Thank you, Chairperson.

10 CHAIRPERSON: - and I got the answer that
11 I think you were trying to get.

12 MR MPOFU: Thank you. Okay, I am also
13 going to relate the following issues, also to Bishop
14 Seoka's evidence, and the similarities between yours and
15 his. I know that you are not like Bishop Seoka, an expert
16 in negotiations, but did you also find it important to deal
17 with the workers at the koppie on a face to face basis and
18 preferably not from a police Nyala?

19 MR MATHUNJWA: Yes, that is correct.

20 MR MPOFU: And did you also, like Bishop
21 Seoka, observe that the Provincial Commissioner's demeanour
22 was that of a rudeness?

23 MR MATHUNJWA: Yes, that is correct,
24 according to my engagement with him – with her, sorry.

25 MR MPOFU: And were you also told like

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1 Bishop Seoka by the Provincial Commissioner that she was
2 not in interested in the labour issues but only on security
3 issues?

4 MR MATHUNJWA: Yes, during my explanation
5 of the lateness on the 16th, it's where he showed that I
6 make commitment to go to the workers. He doesn't bother
7 with what transpired before that.

8 MR MPOFU: And also, you were of the –
9 were you of the view like Bishop Seoka, that the survivors
10 needed psychological counselling?

11 MR MATHUNJWA: I'll will say, because
12 there was a letter that we wrote to management which we
13 were extending that, saying that the workers, they need to
14 be given an opportunity, hence their management were cited
15 that they've been for counselling so the same opportunity
16 should be afforded to those workers which we believe they
17 were traumatised.

18 MR MPOFU: Thank you, and if I may take
19 the opportunity through you as a witness, but also to
20 inform the Commission that very sadly during the five day
21 break that we've had, one of the injured people that we
22 represent, committed suicide, and at least his relative
23 related it to the trauma –

24 CHAIRPERSON: What's his name, Mr Mpofo?

25 MR MPOFU: His name is Marvellous

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1 Mpofana.

2 CHAIRPERSON: Sorry, how to spell his

3 name?

4 MR MPOFU: Marvellous, Marvellous.

5 CHAIRPERSON: He's Marvellous, yes?

6 MR MPOFU: Ja. And Mpofana, M-P-O-F-A-N-

7 A.

8 CHAIRPERSON: Are any of his relatives

9 here in the auditorium today?

10 MR MPOFU: I think his acquaintances,

11 maybe not directly – because he is one of the people who

12 used to come here quite frequently.

13 CHAIRPERSON: So those who knew him well,

14 who are present today, I think on behalf of my colleagues

15 and myself, we wish to express our sympathy to them and to

16 his family. I understand the circumstances which may well

17 have led to his suicide, and it's obviously a matter for

18 concern and also for commiseration. Thank you for bringing

19 it to our attention.

20 MR MPOFU: Thank you very much,

21 Chairperson, and we will convey those sentiments to the

22 family as well.

23 CHAIRPERSON: Thank you, Mr Mpofu.

24 MR MPOFU: Now, before we move off from

25 the two visits to the mountain, I just wanted to remind, to

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1 refresh my own memory that the three rules of engagement

2 were that you would go with the three people from - and you

3 would go with the police and thirdly that there would be

4 supervision of the visit by the police. I might not be

5 putting it exactly as it is, can you confirm that?

6 MR MATHUNJWA: That's correct, that's how

7 we were told.

8 MR MPOFU: And on the previous visit at

9 least, not the ones that you did on your own accord, the

10 one of the 15th, where representatives of management

11 present during that visit?

12 MR MATHUNJWA: Not in the car where I

13 was, but surely they were part of the visit.

14 MR MPOFU: Part of the visit. So they

15 too, like the police must have heard your exchange with the

16 – or did they hear that, were they in a position to hear

17 the exchange between you and the workers?

18 MR MATHUNJWA: Yes, I believe so.

19 MR MPOFU: Okay, thank you. Now, I want

20 us to move to the events of the 11th of August. Was it

21 your evidence that the workers made it clear to you that

22 the shootings of the 11th were responsible firstly for the

23 fact that they had armed themselves?

24 MR MATHUNJWA: Yes, such was confirmed

25 during the debriefing of the GS and the national organiser

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1 after they went to the mountain, and further was confirmed

2 on the 15th.

3 MR MPOFU: Is it also your evidence that

4 the reason why the workers assembled at the koppie in

5 particular in the first place, was also related to the

6 events of the 11th.

7 MR MATHUNJWA: That's correct.

8 MR MPOFU: And would I be correct to say

9 that the gist of their dissatisfaction, to put it mildly,

10 was the fact that they had been shot at by, according to

11 them by a union, by their own union, so to speak?

12 MR MATHUNJWA: I will ask you to repeat

13 that question.

14 MR MPOFU: Is it so that the gist, in

15 other words, the main content of their dissatisfaction was

16 the fact that according to them, they had been shot at on

17 the 11th by a trade union?

18 MR MATHUNJWA: If I will answer that, the

19 reason of being at the mountain was because they were, that

20 was their safe haven because they were shot at by the union

21 which they belonged to.

22 [10:25] MR MPOFU: Yes, that's where I am coming

23 from, in other words, the significance of the event of the

24 11th of August is such that had that event not happened, we

25 would not be talking here about koppie 1, koppie 2 and

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1 koppie 3 according to the workers, at least, is that

2 correct?

3 MR TIP SC: Mr Chair, I have to object to

4 that. That's a proposition that goes well beyond what has

5 already been led from the witness.

6 MR MPOFU: Okay.

7 MR TIP SC: And that's a conclusion of a

8 -

9 CHAIRPERSON: I'm sorry, Mr Tip, this is

10 cross-examination. It's true that there's a close

11 association between the cases put by representatives of the

12 survivors and AMCU and SERI, as I understand it, is

13 instructing both, but you know in a criminal case, accused

14 number 1 and accused number 2 of the same offence, accused

15 number 2's counsel can cross-examine accused number 1

16 putting – ask all sorts of leading questions to buttress

17 his evidence. The authorities say that that is permissible

18 although the weight of the answers elicited by that cross-

19 examination are not very great and we're having a spectacle

20 of that again today. So I overrule your objection. Mr

21 Mpofu can proceed.

22 MR MPOFU: Thank you, Chairperson -

23 MR TIP SC: Mr Chair, sorry, forgive me.

24 MR MPOFU: Okay, sorry, Mr Tip.

25 MR TIP SC: Just hang on. Mr Chair, I

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1 hadn't objected to the previous questions. This is a
2 particular objection because what is being canvassed now
3 from this witness is that had there not been an incident on
4 the 11th then the entire events in the week thereafter,
5 including the shooting on the 16th would not have taken
6 place.

7 CHAIRPERSON: Now - isn't he entitled to
8 ask that question? He may get a favourable answer, he may
9 not, but this is cross-examination. It doesn't have to be
10 - it's not like re-examination. It doesn't have to be
11 related to what he said before. It doesn't have to be
12 related to questions he was asked in cross-examination. I
13 don't see on what basis I can stop him.

14 MR TIP SC: Well may I suggest a basis
15 and that is that really what the witness is being asked to
16 do is to express a view in respect of causation of a
17 conclusive nature in relation to the events as a whole and
18 that conclusion is a - with respect, for the commission to
19 determine in good time.

20 MR MPOFU: Okay, Chairperson, can I make
21 it easier. I'll rephrase the question.

22 CHAIRPERSON: I thought the question was
23 posed on the basis is that what the workers told you?

24 MR MPOFU: Yes.

25 CHAIRPERSON: Again it would be hearsay.

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1 What weight it would have is another matter. I didn't
2 understand you, Mr Mpofo, to be asking the witness to
3 express an opinion, conclusive opinion as it were -

4 MR MPOFU: Because -

5 CHAIRPERSON: - the matter in respect of
6 which he has no expertise and which is one of the matters
7 we have to decide. If you had asked a question or if I had
8 understood the question to be posed that way, I would've
9 upheld the objection.

10 MR TIP SC: Thank you.

11 CHAIRPERSON: But you phrased the
12 question in the way I think you phrased it, or intended to
13 phrase it, then the objection will be disallowed.

14 MR MPOFU: Thank you. Yes, Chairperson,
15 I agree with you, the objection should be disallowed but
16 for the sake of progress, I'll - yes, for the sake of
17 progress I'll just ask the question differently. Maybe let
18 me put it this way. Evidence will be led in this
19 commission that had it not been for the events of the 11th,
20 the protestors would not have assembled in the koppie in
21 the first place or is that in line with what you were told
22 by the workers?

23 MR MATHUNJWA: Based on what they told us
24 that they're at the koppie it was the only place that they
25 could run to after they were shot at, yes.

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1 MR MPOFU: Thank you. Now there's also
2 been evidence or rather, cross-examination which suggested
3 that you used the events there opportunistically. Is it
4 correct that the reason that you had anything to do with
5 this, that you were involved, was because you had been
6 invited by Lonmin?

7 MR MATHUNJWA: Yes, it is not correct
8 that I went there for my own selfish interests, but it is
9 correct to say I was there by invitation at Lonmin by
10 management.

11 MR MPOFU: Then just for clarification as
12 well, I'm now dealing with the cross-over between the
13 events of the 15th in the early evening and the 16th.
14 We've already established that you were there and you say
15 representatives of the police and management were there and
16 so on, but when I read the statements there seems to be
17 confusion as to what was expected. Can you just help us,
18 was it expected that the workers would return -

19 CHAIRPERSON: Sorry -

20 MR MPOFU: Sorry, I'm sorry.

21 CHAIRPERSON: - expected by whom?

22 Expected by whom? You said was it expected that -

23 MR MPOFU: No, I hear -

24 CHAIRPERSON: - expected by whom?

25 MR MPOFU: Yes, Chairperson, to that

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1 extent it's vague. Let me put it this way. Was there any
2 agreement that the workers would return to work at 9
3 o'clock the following day?

4 MR MATHUNJWA: No.

5 MR MPOFU: Was there agreement instead
6 that you would return to the mountain at 9 o'clock the
7 following day?

8 MR MATHUNJWA: Yes.

9 MR MPOFU: Now I want you to help me with
10 this. Is it correct that in your own estimation you had
11 budgeted, for lack of a better word, a period of about an
12 hour between you meeting with management at 8 and returning
13 to the koppie at about 9? You testified the fact that on
14 the day you were late, 20 minutes late or whatever, but was
15 that your plan?

16 MR MATHUNJWA: Yes.

17 MR MPOFU: Now, you've given evidence
18 that to your surprise in the morning management had reneged
19 on its commitment. I think that's how you put it.

20 MR MATHUNJWA: Yes, that's correct.

21 MR MPOFU: Now if it was not for that
22 fact of management allegedly reneging from its commitment,
23 what would you have done that morning?

24 MR MATHUNJWA: I would've gone back to
25 the mountain. Not to say that I didn't return back to the

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1 mountain -

2 MR MPOFU: Ja, no –

3 MR MATHUNJWA: - you know, ja.

4 CHAIRPERSON: Make it simpler than that.

5 If they had given you the information that you sought, that

6 they would – they were prepared to negotiate with the

7 workers, that – and what the arrangements would be for

8 their coming back to work and being inducted and so forth

9 so they could go underground again, you would've gone back

10 at 9 o'clock, reported to them what the management had

11 said, what the arrangements for their re-induction were –

12 obviously you couldn't – you didn't do that because you

13 couldn't do that because the management hadn't given you

14 the information that you had sought. But I take it that's

15 effectively what would've happened.

16 MR MATHUNJWA: Thank you, that's correct.

17 CHAIRPERSON: - it appears from what you

18 told us previously that your opinion was or your impression

19 was that that would've brought the whole problem to an end

20 because that would've been accepted by the workers and the

21 – a non-violent conclusion would've been – would've

22 resulted from your involvement. Is that – that's basically

23 your evidence, isn't it?

24 MR MATHUNJWA: That is correct because

25 they were willing to engage the following day.

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1 MR MPOFU: Thank you, Chairperson. With

2 my lack of skills you saved me about 6 questions.

3 CHAIRPERSON: Then I achieved my purpose.

4 MR MPOFU: Sorry, I didn't get that,

5 Chairperson.

6 CHAIRPERSON: I will tell you when we

7 adjourn.

8 MR MPOFU: Thank you, Chairperson. Now

9 let's just – taking from the chairperson's welcomed

10 intervention, I just want to unpack what the – your

11 expectations was or rather the methodology that you are

12 using to try and defuse the situation. Is it correct that

13 we – at – as of the 15th at least, there was a chicken and

14 egg situation where the employer was saying we'll talk to

15 you if you go back peacefully and the workers were saying

16 we'll return if you talk to us about our wage demand. That

17 was almost – I know I'm paraphrasing a long thing, but how

18 the stalemate could be characterised, is that correct?

19 MR MATHUNJWA: Would you please repeat

20 again.

21 MR MPOFU: Yes. I appreciate it was a

22 bit of a long one. In summary, was the situation that you

23 were faced with on the 15th, could it be summarised as

24 follows, that on the one hand management was saying we will

25 not talk to them until they renounce violence and they

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1 disarm and so on and on the other hand the workers were

2 saying we will not disarm or leave the koppie until

3 management talks to us?

4 MR MATHUNJWA: Ja, one can summarise it

5 in that – that's the reason the called the following

6 meeting on the 16th at 9 o'clock.

7 MR MPOFU: And that the reason why you

8 thought there was a breakthrough - was the reason that you

9 thought there was a breakthrough the fact that having gone

10 to the workers and put the management position as it were,

11 they said to you, come back. It's late now, come back

12 tomorrow morning and we welcome the fact that management is

13 prepared to talk to us, but let's finalise everything at 9

14 in the morning. Is that a fair summary?

15 MR MATHUNJWA: Yes, I can confirm that.

16 MR MPOFU: And that this positive

17 momentum was the – would it be correct to say then it was

18 broken by your discovery in the morning that management and

19 I think this is the word you used, was no longer prepared

20 to talk to the workers?

21 MR MATHUNJWA: That's correct.

22 MR MPOFU: And that information was

23 conveyed to you by Mr Kwadi?

24 MR MATHUNJWA: That's correct.

25 MR MPOFU: Another theory, for lack of a

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1 better word, that we have said in our opening address we

2 will establish, is the nature of the relationship between

3 Lonmin and the police in relation to these events. You've

4 already testified that on the one hand you put the blame, I

5 think your word was, squarely on management because of

6 failing to have that meeting on the 10th. Do you remember

7 that?

8 MR MATHUNJWA: Maybe one will answer by

9 saying, if I remember I said I put the blame squarely to

10 management because of acting outside the bargaining

11 structures if engaging the workers directly. I think

12 that's –

13 MR MPOFU: Okay, maybe you blame for that

14 as well, but did you also put the blame on them for failing

15 to respond to your request for a meeting on the 10th?

16 MR MATHUNJWA: Yes, Somewhere – I think

17 there is a letter that we suggested such processes which

18 was never realised.

19 MR BURGER SC: Chair, can I just get

20 clarity on this? Is the meeting on the 10th then a meeting

21 outside of structures with the unprotected strikers or what

22 is my learned friend putting?

23 CHAIRPERSON: I think he will make it

24 clearer, but I understood him to be talking about something

25 that's happened before that –

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1 MR MPOFU: Yes.

2 CHAIRPERSON: - when management had

3 spoken to representatives with the rock drill operators and

4 put an offer of R700 on the table and his complaint has

5 always been, even on his radio – when he was on the radio

6 on the 15th, it was that action by management which he said

7 was inappropriate and was the spark that led to all the

8 trouble. That's my –

9 MR BURGER SC: No, Chair, my learned

10 friend, Mr Mpofo, wasn't satisfied with that answer. That

11 wasn't the one he was eliciting in his cross-examination.

12 He had that answer, but he is coming back to a meeting

13 which had to be held on the 10th of February – of August

14 and that's the one I'm not sure of. Does he suggest there

15 should've been a meeting on the 10th of August and then

16 between whom and whom, in which structure?

17 CHAIRPERSON: Mr Mpofo, you heard what Mr

18 Burger's attempt at obtaining clarity in regard to your

19 question, can you reformulate the question –

20 MR MPOFU: Yes –

21 CHAIRPERSON: - so that the point he

22 raises is dealt with.

23 MR MPOFU: Yes, Chairperson. I'll try

24 and do it while we are looking for the letter, I'll do it

25 by way of questions. On the 10th – is it correct that on

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1 the 10th of August you were contacted by Lonmin management

2 saying that there was some unrest or worker's action

3 brewing?

4 MR MATHUNJWA: That's correct.

5 [10:45] MR MPOFU: During that conversation were

6 you also told that Lonmin would not be prepared to take a

7 memorandum from the workers, but that the police would be

8 asked to do so.

9 CHAIRPERSON: But Mr Mpofo, it may

10 shorten the questioning –

11 MR MPOFU: Yes –

12 CHAIRPERSON: - scenarios of achieving,

13 if you refer to Exhibit 001 which is the letter of the 10th

14 of August sent by AMCU to Lonmin.

15 MR MPOFU: Absolutely, thank you, Chair,

16 yes, we were looking for it, thank you Chairperson, we've

17 just found it here. Have you got Exhibit 001?

18 MR MATHUNJWA: A letter –

19 MR MPOFU: This letter dated 10th August.

20 MR MATHUNJWA: Yes, I do have.

21 MR MPOFU: And just to save time, is this

22 a letter that you wrote in response to this telephone

23 conversation that I've just asked you about?

24 CHAIRPERSON: He told us that in chief.

25 MR MPOFU: Yes. Well, Chairperson, we

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1 only just found a letter now, ja. Okay, -

2 CHAIRPERSON: We read it when he gave

3 evidence in chief anyway, never mind, carry on.

4 MR MPOFU: Yes, okay. Okay, sorry, Mr

5 Mathunjwa, in this letter or rather were you, did you

6 request a meeting which was not acceded to by means of this

7 letter?

8 MR MATHUNJWA: Yes, this letter also

9 emanates from previous calls that we had with Mr Barnard,

10 which in the simple term we're saying, call the meeting and

11 let's work this thing out.

12 MR MPOFU: Yes, and is it your evidence

13 that the failure by management to exceed to your request

14 for such a meeting was one of the things that you blamed

15 them for during the Kwala interview at SAFM?

16 MR MATHUNJWA: Yes, in that interview I

17 did mention the sequence of events, yes.

18 MR MPOFU: And maybe you can then assist

19 my learned colleague, in that meeting that you proposed was

20 going to be between whom and whom?

21 MR MATHUNJWA: With all the stakeholders

22 at the workplace.

23 COMMISSIONER TOKOTA: Sorry, but Mr

24 Mathunjwa, that meeting was in fact called but AMCU was

25 excluded, it flowed from the cross-examination by Mr

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1 Burger.

2 MR MATHUNJWA: Yes, it was mentioned that

3 there was a meeting but specifically from our side we had

4 no knowledge of such a meeting and then according to the

5 response from management by Jo Kwadi, I think in the cross-

6 examination I mentioned, when I asked him he said, they had

7 a meeting with UASA and Solidarity and other stakeholders.

8 Then I asked him why we were not invited, hence we

9 requested a meeting, thank you.

10 MR MPOFU: Sorry, are you referring to

11 the meeting of the Sunday, the 12th?

12 MR MATHUNJWA: Yes, which he referred me

13 to.

14 MR MPOFU: But do you know whether that

15 was the meeting you requested or another meeting?

16 COMMISSIONER TOKOTA: Ja, but what

17 difference will it make because he called for it and he

18 asked for a meeting, the meeting was called but he was

19 excluded, what difference would it make?

20 MR MPOFU: Chairperson, I think it would

21 make a world of a difference between the following two

22 scenarios, scenario one is, -

23 CHAIRPERSON: The matter to me –

24 MR MPOFU: No –

25 CHAIRPERSON: Why don't you reformulate

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1 the question to the witness in a way which deals with the
2 point raised by my brother, Commissioner Tokota, and it
3 saves time and we'll get a clearer focussed answer from the
4 witness?

5 MR MPOFU: Chairperson, -

6 CHAIRPERSON: Or would you like me to do
7 it? Mr Mathunjwa, -

8 MR MPOFU: I am answering the question
9 that was put by Mr Tokota.

10 CHAIRPERSON: Okay, I understand you, but
11 Mr Mathunjwa, you've heard there was a meeting which was
12 organised, from which your union was excluded, correct?

13 MR MATHUNJWA: Yes.

14 CHAIRPERSON: I take it you didn't know
15 about it at the time, you only heard about it subsequently,
16 is that correct?

17 MR MATHUNJWA: That's correct.

18 CHAIRPERSON: Now the question that is
19 being debated at the moment is whether, if your union had
20 been present through representatives at that meeting, is it
21 your view that that would have made a difference to what
22 happened subsequently?

23 MR MATHUNJWA: We believe that we could
24 have contributed positively in that meeting.

25 MR MPOFU: With respect, Chairperson, two

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1 things, the one is -

2 CHAIRPERSON: I've asked the question,
3 I've got an answer.

4 MR MPOFU: Ja, but the question has got
5 nothing to do with what I was trying to put to the witness.

6 CHAIRPERSON: I know that, I give you
7 back the platform and go on.

8 MR MPOFU: Thank you, Chair, but also
9 Chair, if a commissioner ask me a question which suggests
10 that I shouldn't follow a particular line of questioning
11 then I am obliged to respond, I can't just carry on as if
12 nothing has happened. The point, the simple point that I
13 want to make, Mr Mathunjwa, is really this, do you know
14 whether the meeting that happened on the 12th happened as a
15 result of your request to have a meeting or whether it
16 happened maybe as a result of somebody else's request, in
17 other words that it was an unrelated meeting?

18 MR MATHUNJWA: I wouldn't know whether
19 was it a result of my letter or not.

20 MR MPOFU: Thank you very much. You also
21 testified, - did you also testify that the management at
22 least had confirmed that they had called the police from
23 the very beginning which is the 5th and your evidence is
24 that maybe the police could have also prevented some of the
25 events?

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1 MR MAHLANGU: The 5th of what?

2 MR MPOFU: Not the 5th, the Friday,
3 sorry, -

4 MR MAHLANGU: I am making -

5 MR MPOFU: The Friday which is the 10th.

6 MR MAHLANGU: Mr Chairperson, if the
7 question could be repeated, I am not very clear.

8 MR MPOFU: Ja, it was your evidence when
9 we were last here that, and I think that came from, just a
10 minute, -

11 CHAIRPERSON: I don't think you have to
12 find it in the transcript at this stage, if it is
13 challenged you can perhaps look.

14 MR MPOFU: It was also your evidence or
15 at least the testimony or the statements by, I think Mr
16 Mokoena in the Kwala interview that management had called
17 the police assistance since the Friday, the 10th, do you
18 remember that?

19 MR MATHUNJWA: Yes, I could remember
20 that.

21 MR MPOFU: Now we also know that in terms
22 of the relationship between the two entities, we also know
23 that the joint operation centre was located at Lonmin
24 premises. To what extent did you observe the two parties
25 working together in that jog?

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1 MR MATHUNJWA: Would you please repeat
2 that question please for me?

3 CHAIRPERSON: What counsel wants to know
4 is, to what extent did you notice Lonmin and the police
5 working together at the JOC, you were there?

6 MR MATHUNJWA: I would say what I have
7 observed, on the 15th when we had the meeting with the
8 police generals, general and other officers and management,
9 NUM and ourselves, after NUM requested for a caucus then we
10 were left behind and subsequent to that, when we asked
11 their whereabouts they told us they are at the joint
12 operation centre, we must join them, and then when we
13 arrived there we found NUM, the police and management which
14 they left us behind and subsequent to that on the 16th, in
15 the morning of the 16th NUM, management, SAPS, they were in
16 the same building again at the LPD offices. So surely
17 there was some collaboration, for the lack of a better
18 word, because there was no other union which was present
19 according to what I've observed.

20 MR MPOFU: And were you aware that the
21 equipment that was being used to monitor the activities at
22 the koppie by the police belongs to Lonmin?

23 MR MATHUNJWA: No.

24 MR MPOFU: Were you aware that General
25 Mbombo was taken for a whistle tour of the affected area in

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1 a Lonmin aircraft?
 2 MR BURGER SC: May I invite my learned
 3 friend whether that is his evidence and whether he will
 4 lead evidence to that effect before he puts that.
 5 CHAIRPERSON: Helicopter which belonged
 6 to a security company, it wasn't a Lonmin helicopter. I
 7 don't know where, - now if that evidence, if it wasn't
 8 challenged at the time it was given, if you wish to
 9 challenge that evidence and lead contrary evidence, of
 10 course it will be interesting to hear it but unfortunately
 11 it wasn't challenged at the time. If the question is asked
 12 under a misunderstanding of the true facts it would better
 13 be reformulated.
 14 MR MPOFU: Ja, Chairperson, thank you,
 15 let me just clarify, I think there is a major confusion. I
 16 am not referring to the, Chairperson, remember at the
 17 beginning we referred to what you call the Lonmin
 18 helicopter?
 19 CHAIRPERSON: I think there was reference
 20 earlier to that –
 21 MR MPOFU: To the helicopter, yes –
 22 CHAIRPERSON: A Lonmin helicopter.
 23 MR MPOFU: Yes.
 24 CHAIRPERSON: It later transpired that it
 25 wasn't a Lonmin helicopter –

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1 MR MPOFU: It was a Coin –
 2 CHAIRPERSON: It was the security
 3 helicopter.
 4 MR MPOFU: Yes, so that's the point –
 5 CHAIRPERSON: That's the helicopter, if
 6 it was, if that's the helicopter that you mean –
 7 MR MPOFU: No –
 8 CHAIRPERSON: - then you can ask
 9 questions about it, but if that isn't what you mean and
 10 you're referring to something else that we haven't heard
 11 about at all, then Mr Burger is entitled to say, is that
 12 the evidence that you are proposing to lead.
 13 MR MPOFU: Chairperson, I stand corrected
 14 then, I will look for the exact passage, but my
 15 recollection is that this is evidence that comes from the
 16 police themselves, that in the morning General Mbombo was
 17 taken in a Lonmin, a separate, not that one of the Coin
 18 Security, in a Lonmin helicopter and I am just going to
 19 find it in the –
 20 CHAIRPERSON: Anyway, I think you're
 21 asking the witness whether he knew about it, if the answer
 22 is going to be similar to the answer we got to your
 23 previous question, that he didn't know about it, then you
 24 don't even have to look because it won't be relevant. Did
 25 you know that the general has been taken on a

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1 reconnaissance trip by helicopter, in a helicopter which
 2 belonged to Lonmin?
 3 MR MATHUNJWA: No, I don't have the
 4 knowledge.
 5 CHAIRPERSON: You can stop that question,
 6 Mr Mpofu, we can carry on to the next point.
 7 MR MPOFU: Thank you, Chairperson, I will
 8 nevertheless find the thing from Mr Burger.
 9 MR BURGER: No, my learned friend
 10 shouldn't be concerned about me, I am not confused.
 11 MR MPOFU: With the greatest of respect,
 12 I differ. I think there is no confusion –
 13 CHAIRPERSON: - the auditorium after we
 14 have adjourned.
 15 MR MPOFU: Yes.
 16 CHAIRPERSON: I don't want to waste the
 17 people's time –
 18 MR MPOFU: I'll find the passage, that's
 19 all I am saying, Chairperson, and clear the confusion on
 20 anybody's part here.
 21 CHAIRPERSON: Alright, have you got much
 22 more cross-examination for the witness? How long do you
 23 think you are likely to be?
 24 MR MPOFU: Chair, if you can give me the
 25 indulgence, I just want to round off but we can take the

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1 break, I will one or two questions.
 2 CHAIRPERSON: Alright, I give you three
 3 more questions and then we'll take a break.
 4 MR MPOFU: Well, Chairperson, -
 5 CHAIRPERSON: On the assumption that –
 6 MR MPOFU: It is a term of art, three or
 7 four questions.
 8 CHAIRPERSON: No, no, I don't, if you've
 9 got three or four –
 10 MR MPOFU: Can we take the break, please
 11 Chairperson, I won't be long, I promise, it will save time
 12 actually because I just have one or two.
 13 CHAIRPERSON: Alright, we'll take the
 14 short adjournment.
 15 [COMMISSION ADJOURNS COMMISSION RESUMES]
 16 [11:26] CHAIRPERSON: Yes, Mr Mpofu. I think you
 17 said you had about three questions left.
 18 MR MPOFU: I was hoping you had
 19 forgotten, Chairperson.
 20 CHAIRPERSON: No, I don't think,
 21 overestimate my amnesia.
 22 MR MPOFU: Okay, we'll make it three
 23 issues.
 24 CHAIRPERSON: That's probably a more
 25 accurate term of art.

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1 MR MPOFU: Thank you, Chairperson. Just
 2 in the same vein that I was asking you, my last issue on
 3 what I call the collusion, were you aware that, or rather
 4 you know that there was a court interdict that was sought
 5 by Lonmin?
 6 MR MATHUNJWA: Yes.
 7 MR MPOFU: Were you aware that the
 8 suggestion or the advice to launch that interdict was made
 9 by the police?
 10 CHAIRPERSON: I don't think we've been
 11 told that. Are you proposing to lead evidence to establish
 12 that as a fact?
 13 MR MPOFU: Yes, and there's no objection
 14 so far.
 15 MR BURGER SC: Let me oblige my learned
 16 friend, I object to the question. If there's no evidence,
 17 I don't know –
 18 CHAIRPERSON: Hang on, Mr Semenya, turned
 19 his machine on first. So we've got then two objections, no
 20 less than two objections to your question. Let's hear what
 21 counsel have to say and get your reply and then we'll see
 22 whether you can carry on.
 23 MR MPOFU: Thank you, Chairperson.
 24 MR SEMENYA SC: Chair, we object to that
 25 question unless the foundation is laid for it. But

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1 secondly, to leave it at the level of police is not
 2 helpful. We'll have to be told which police, what day,
 3 what place that was made.
 4 CHAIRPERSON: I'm not sure as detailed an
 5 interrogatory as that will be allowed but Mr Burger, you
 6 also wanted to motivate these issues?
 7 MR BURGER SC: Well at least to identify
 8 the person on my side with whom I can speak to get
 9 instructions, Chair.
 10 CHAIRPERSON: Alright. Mr Mpofu, what do
 11 you say about those -
 12 MR MPOFU: Chairperson, that person, Mr
 13 Burger will find is Mr Jomo Kwadi and I'll refer for Mr
 14 Semenya's foundation laying to, and with the help of Ms
 15 Pillay, hopefully, page 139 of the Lonmin documents.
 16 Volume 1. And I might as well just read it out, Chair,
 17 just to save time.
 18 CHAIRPERSON: Are you referring to an
 19 exhibit that's been put in already? It was in cross-
 20 examination.
 21 MR MPOFU: In fact Chair, we'll make it
 22 an exhibit. It's on page, I don't think it's been used
 23 before. I was not here for the full cross-examination but
 24 it's part of the papers. I know that it was referred to,
 25 the interdict was referred to but I didn't think that the

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1 specific court papers were –
 2 CHAIRPERSON: Alright, well what you say
 3 is, you're referring to a statement by Mr Kwadi which is in
 4 the Lonmin papers.
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: You've given the Lonmin
 7 reference. If it's not an exhibit yet, then it will be
 8 given an exhibit.
 9 MR MPOFU: Thank you, Chairperson.
 10 CHAIRPERSON: Copies, you have copies
 11 prepared.
 12 MR MPOFU: I will, Chairperson.
 13 CHAIRPERSON: And marked, and Ms Pillay
 14 will give us the next exhibit designation.
 15 MR MPOFU: Thank you very much,
 16 Chairperson.
 17 CHAIRPERSON: And then you can read it
 18 out and then Mr Burger and Mr Semenya will hopefully be
 19 satisfied. But if you're going to suggest that the police
 20 were involved, unless Mr Kwadi says who the policeman is.
 21 MR MPOFU: He does.
 22 CHAIRPERSON: He does?
 23 MR MPOFU: Ja.
 24 CHAIRPERSON: Okay, Ms Pillay?
 25 MS PILLAY: Chair, it's RR1.

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1 MR MPOFU: RR1.
 2 MS PILLAY: And if just for purposes of
 3 clarity, Chair, we could get a better description of which
 4 document Mr Mpofu is referring to.
 5 MR MPOFU: Okay, it's the founding
 6 affidavit in the application. Let's rather make the whole
 7 application RR1, maybe, in case there are other.
 8 MR BURGER SC: It's a massive document.
 9 MR MPOFU: Okay, it's quite big, yes,
 10 just the affidavit. Thank you, Chair, in the application.
 11 CHAIRPERSON: The founding affidavit in
 12 the application for an interdict brought by Lonmin on –
 13 MR MPOFU: Under case number J2070.
 14 CHAIRPERSON: Ja okay. The founding
 15 affidavit in the Lonmin interdict application.
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: Is that the particularity
 18 you require, Ms Pillay?
 19 MS PILLAY: Thank you, it does, Chair.
 20 CHAIRPERSON: Mr Mpofu, we haven't got
 21 the document in front of us yet, if you could give us the
 22 paragraph number that you're quoting from, we can read
 23 from?
 24 MR MPOFU: Paragraph 16, Chairperson.
 25 CHAIRPERSON: Para 16, that's fine.

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1 We'll lead that to the witness and then we'll see whether
2 he can answer the question -

3 MR MPOFU: Mr Mathunjwa, before I read
4 the passage, although you didn't oppose this application,
5 it was served on AMCU, correct, because AMCU was one of the
6 respondents?

7 MR MATHUNJWA: That's correct.

8 MR MPOFU: Okay, thank you. I'm going to
9 read paragraph 16, the relevant passage and then I'll ask
10 you the questions. This is what Mr Kwadi says in an
11 affidavit under oath, "The SAPS has informed me that due to
12 the volatile situation management should not try to address
13 the threat to further respondent." The threat to further
14 respondents were the strikers. "The situation is very
15 tense and the SAPS has advised that the applicants should
16 consider obtaining an interdict in an endeavour to
17 encourage the threat to further respondents to return to
18 normal work so that their grievances can be aired and
19 addressed in terms of existing internal procedures such as
20 the grievance procedures. Now that the foundation has been
21 laid, the question is -

22 CHAIRPERSON: That of course doesn't
23 answer Mr Semenya's point. That statement of Mr Kwadi
24 doesn't identify the policeman made the suggestion, but
25 presumably that will come out in the fullness of time. You

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1 can ask a question of the witness based upon that statement
2 you've read to him.

3 MR MPOFU: Thank you, Chairperson, thank
4 you very much, Chairperson. And yes, I'm sure when Mr
5 Kwadi comes here he'll give us the chapter and verse of
6 which policeman spoke to him and so on. Now, the question
7 was were you aware - but I suppose now it will be, are you
8 aware now - that the interdict was sought on the advice of
9 the SAPS?

10 MR BURGER SC: I object to that question.
11 This doesn't support it at all. I was listening to a
12 suggestion that there's collusion between my client and the
13 police. If this is the high water mark of collusion, I'd
14 like to know it because I can deal with it. But with
15 respect, the question does not arise from this statement.
16 There is a debate with the police and my client then
17 applies for an interdict, not at the insistence of the
18 police.

19 CHAIRPERSON: Over-egged the pudding, Mr
20 Mpofu, when you asked your question based on the paragraph.
21 Let me ask the question. Mr Mathunjwa, were those papers
22 served upon AMCU?

23 MR MATHUNJWA: Yes, it was served.

24 CHAIRPERSON: Did you read them at the
25 time?

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1 MR MATHUNJWA: No, I was not at the
2 office by the time it was served. I never read it.

3 CHAIRPERSON: So you only discovered
4 subsequently that that statement was made by Mr Kwadi in
5 the founding affidavit? It's been read to you now, I
6 suppose.

7 MR MATHUNJWA: Now yes.

8 CHAIRPERSON: Alright. Mr Mpofu wants to
9 ask you for your reaction. I'm not quite sure how helpful
10 it's going to be, but anyway, let's get your reaction to
11 that statement in the way that Mr Mpofu wants to ask you
12 the question. If he can do so in a manner that doesn't
13 provoke further objections from some of his learned friend.

14 MR MPOFU: I'll try, Chair and I promise
15 I'll give up if there's an objection.

16 CHAIRPERSON: Give up if there's a well-
17 founded objection. You won't give up if there's an
18 objection -

19 MR MPOFU: Of course not, Chair.

20 CHAIRPERSON: Ask the question, let's not
21 waste time, ask the question.

22 MR MPOFU: Okay, now that you are aware
23 of this, what would be your reaction in relation to the
24 topic we are talking about of the co-operation, let's try a
25 nice word, between the police and Lonmin?

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1 CHAIRPERSON: With respect, how does the
2 - I shouldn't say, with respect - but I say it sincerely,
3 how does the witnesses' reaction to that statement help us?
4 You allege that there's a, what you called a toxic
5 collusion between the police and Lonmin, it sounds as if
6 you're going to rely on that statement as one of the items
7 of evidence in support of the conclusion that you ask us to
8 come to.

9 MR MPOFU: Correct.

10 CHAIRPERSON: Now we will do so based on
11 the evidence you put before us. The witness' reaction to
12 that particular item of evidence, whatever his reaction may
13 be, isn't going to help us one way or the other in deciding
14 whether the allegation to your making in this regard is
15 correct or not. So I don't propose allowing you to ask him
16 to get the witness' reaction. You might ask him something
17 else, which takes the matter further, but that question
18 doesn't, I'm afraid.

19 MR MPOFU: Okay, Chair, I misled you, I'm
20 not giving up at the first instance, I'll give up after
21 this one.

22 CHAIRPERSON: It's not to mislead me
23 again. I'll let you carry on.

24 MR MPOFU: Thank you, Chair. Okay, now
25 that this statement has been read to you and given the fact

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1 that I've said to you that at the end of the case we're
 2 going to be arguing that there was a form, there was toxic
 3 collusion between the police and Lonmin, you've also given
 4 a few instances such as the location of the JOC and what
 5 have you, would you agree that this is an instance or an
 6 example of such collusion?
 7 MR BURGER SC: I object to that question,
 8 Chair.
 9 MR MPOFU: I give up. You don't have to
 10 answer, Mr Mathunjwa.
 11 CHAIRPERSON: I note the point which
 12 counsel is trying to make. Now the allegation is that
 13 there's this collusion, which is being so described between
 14 Lonmin and the police. Now are you able, from your own
 15 knowledge, to tell us anything which can help us to decide
 16 whether that allegation which apparently is being made is
 17 correct or not? If you know nothing from your own
 18 knowledge, well then you must just say so. Because if
 19 there's some extra information that you have which is part
 20 of your own knowledge, then it's appropriate for you to
 21 tell us.
 22 MR MATHUNJWA: I wonder whether would
 23 this be of assistance but I'm subject to your correction.
 24 When I was reading documents of the debriefing of the 15th,
 25 the subject that was discussed between management, NUM and

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1 police is totally different than what we were discussing
 2 with Mr Mpmembe. In the debriefing of NUM and management,
 3 you find that they are talking about putting someone within
 4 the group to split the group inside but in our debriefing,
 5 we don't have that instances where the generals are talking
 6 of how can we try means of dispersing or try to sew the
 7 seed of division, for lack of a better word, within the
 8 leaders. I don't know whether would that be regarded as –
 9 CHAIRPERSON: We take the point. When
 10 the generals give evidence, presumably they'll be asked
 11 about that, and when the NUM people give evidence, they'll
 12 also be asked about that. It's just a point you put on the
 13 table, but you can't make much of it yourself. Something
 14 may or may not be made of it later.
 15 MR MPOFU: Okay, Mr Mathunjwa, last
 16 question on this. In your experience as a trade unionist,
 17 is it usual or unusual, in your experience, that an
 18 employer would bring an application under advice of the
 19 police?
 20 CHAIRPERSON: I don't know that advice is
 21 the right word. Perhaps partly at the suggestion of, might
 22 be a way that we get past Mr Burger. But you've heard my
 23 amendment to his question. You're a trade unionist, you've
 24 been in the trade union business for a long time, have you
 25 ever in your experience, come across a case where an

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1 employer seeks an interdict stopping a strike at the
 2 suggestion, at least in part, of the police?
 3 MR BURGER SC: In all fairness, it should
 4 be part of that question that it is unlawful strike, as the
 5 witness has said, a stoppage which was unlawful.
 6 MR MPOFU: Yes -
 7 CHAIRPERSON: Yes, that's correct. You
 8 in fact conceded – add that to my amendment of the question
 9 – as you conceded in your evidence in chief that because it
 10 was an unprotected strike, there was no point in opposing
 11 and that's why AMCU didn't enter into the list, as it were,
 12 to defend the application because you accepted,
 13 effectively, that the interdict would have to be granted
 14 because the strike was an unprotected one, right? Let's
 15 reformulate the question so that there can be no argument
 16 later. In your experience, as a trade unionist of many
 17 years, have you ever come across a case where the employer
 18 has sought an interdict stopping an unprotected strike and
 19 has done so, partly at least, at the suggestion of the
 20 police?
 21 MR MATHUNJWA: No, to my experience, I
 22 have never come across such.
 23 MR MPOFU: Thank you. Can we quickly
 24 move to something else. Thank you very much. Now the, I'm
 25 just going to read you something from the statement of

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1 General Mbombo and then invite your comment. It's
 2 paragraph 19.3. She says, this is about the 16th, "He,
 3 Mathunjwa – incorrectly spelt – indicated that he had been
 4 at Lonmin offices since 7:00 and management is ignoring
 5 him." That's the first thing. "I prevailed upon him that
 6 he should keep his promise." Then I'm just going to jump
 7 one sentence. And then she says, "At our short meeting I
 8 reminded him of his promise" – this is the important part –
 9 "he asked for transport to go to the koppie and if the
 10 request was acceded to, but he later changed his mind and
 11 made use of his vehicle.
 12 [11:46] MR MATHUNJWA: The first question is not
 13 7am, it was about 8:20am.
 14 MR MPOFU: Okay.
 15 CHAIRPERSON: The promise had been eight
 16 o'clock, as far as I remember. You actually got there at
 17 8:20.
 18 MR MATHUNJWA: That's correct.
 19 CHAIRPERSON: You promised to come at
 20 eight, but you had a problem and you got there late. The
 21 second question is, did you first ask for a vehicle, a
 22 police vehicle and then later change which was made
 23 available and did you then change your mind to go in your
 24 own vehicle, that's the second part of it.
 25 MR MATHUNJWA: The second part of the

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1 question, we requested the transport and was ever granted,
 2 they never changed their mind. I decided to use my private
 3 vehicle because there was no transport granted by SAPS.
 4 MR MPOFU: And finally, Mr Mathunjwa, and
 5 I won't go in to the details, for all the reasons that you
 6 have already given to the commission, were you convinced
 7 around the time of your second visit to the koppie on the
 8 16th that the police were going to kill the protestors?
 9 MR MATHUNJWA: Yes, based on the manner
 10 in which things happened after our first visit with no
 11 cooperation from the police, from the management of Lonmin
 12 and subsequent to my effort at the operation area where the
 13 Nyalas were, where I requested the intervention of the
 14 person who was in charge of the operation, where he said he
 15 will call Mr Naidoo, to no avail and then surely to me it
 16 was clear that the worse is coming.
 17 MR MPOFU: And indeed within some minutes
 18 after you left the koppie a gentleman called Jomo called
 19 you and said the police are killing the workers. How long
 20 after you had the left koppie did you receive that call?
 21 MR MATHUNJWA: Let's correct this, Jomo
 22 never phoned me, he received the call while they were in
 23 the car and he told us that there is someone phoning,
 24 telling him that the police are killing the people at the
 25 koppie.

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1 CHAIRPERSON: Ja, he made that, but what
 2 is the time elapse which in your departure from the koppie
 3 and the receipt by Jomo of that phone call?
 4 MR MATHUNJWA: I could say maybe plus
 5 minus 20 minutes, it could be over 20 minutes or so.
 6 MR MPOFU: This time it is really
 7 finally, Chairperson. If I can just check, what is the
 8 status of QQ3, I seem to remember that, it was in and then
 9 it was out, if maybe Ms Pillay can help us?
 10 MS PILLAY: It was after.
 11 MR MPOFU: Was it after?
 12 MS PILLAY: We don't have an Exhibit QQ3,
 13 Chairperson, so I think it was removed.
 14 CHAIRPERSON: QQ3 was intended to be a
 15 transcript of the –
 16 MR MPOFU: The 15th.
 17 CHAIRPERSON: What was said here on the
 18 video clip of the events at the railway line, but it was
 19 them removed because I think it had been interpreted in the
 20 course of the clip being shown and so it was in the
 21 transcript and didn't have to become his evidence, as far
 22 as I remember.
 23 MS PILLAY: That's correct and Mr
 24 Ntsebeza agreed not to hand it in.
 25 MR MPOFU: Well, then can I hand it in,

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1 and I am not going to take you through it, I promise, Mr
 2 Mathunjwa. The only point I want to make about QQ3 is the
 3 fact, and you can take my word for it, the fact that on QQ3
 4 the strikers said on ten occasions that they were not
 5 fighting with anybody and they were not fighting with the
 6 government or the police, and the question is, would that
 7 kind of evidence be in accordance with your observance of
 8 the workers on the 15th and the 16th which you described as
 9 calm?
 10 MR MATHUNJWA: Let me answer by saying on
 11 the 13th I was not present but the clip that was presented
 12 by SAPS when the person was talking, he relayed that they
 13 are not fighting. Coming to, on the 16th, yes, when I
 14 arrived there, I mean people were sitting down, they were
 15 calm.
 16 MR MPOFU: And did they repeat this
 17 refrain, we are not fighting, we are not fighting?
 18 MR MATHUNJWA: Yes, they wanted to see
 19 their employer and to talk to their employer, so they were
 20 not fighting, and again, I mean that is why I keep on
 21 referring to my second visit when they said they won't
 22 attack any police, they will sit here and let the police
 23 come and kill them, but they won't move until the employer
 24 comes.
 25 MR MPOFU: Thanks, Chairperson, no

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1 further questions, and thank you for your indulgence,
 2 Chairperson.
 3 CHAIRPERSON: Any other counsel who wants
 4 to ask any further questions in cross-examination?
 5 Firstly, any counsel who hasn't asked a question yet, I
 6 think we've exhausted every counsel who would otherwise ask
 7 questions at the first instance. Before Mr Bruinders re-
 8 examines, it looks from the expression on Mr Tip's face and
 9 the fact that he's turned his microphone on, that he wants
 10 to apply to be allowed to ask further questions in cross-
 11 examination, is that correct? I think you'll have to
 12 motivate the application just briefly.
 13 MR TIP SC: I intend to briefly. Chair,
 14 you'll recall that in the course of the cross-examination
 15 by Mr Ntsebeza and Mr Mathunjwa was taken through the City
 16 Press article in which he dealt with the disciplinary
 17 proceedings that were held at the Douglas Colliery in 2000,
 18 and described in unflattering terms what the process had
 19 been, we said that we would have to take instructions,
 20 which we have done. I am in the position to put certain
 21 propositions as to what –
 22 CHAIRPERSON: You understand it is a
 23 collateral point –
 24 MR TIP SC: Yes –
 25 CHAIRPERSON: - but in as much as the

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1 allegations were made it might be relevant in respect of
 2 the attitude of NUM to the witness and vice versa. I'll
 3 allow you to deal with it but very briefly - have a full
 4 debate about a disciplinary inquiry that was held or wasn't
 5 held, I think this is over the 20 years ago?
 6 MR TIP SC: Well, that is correct. Mr
 7 Chair, let me just briefly indicate what our attitude is.
 8 We consider this to be essentially irrelevant to the terms
 9 of reference. It is, although there has been placed before
 10 the commission an investigation of what is contended to
 11 have been an unlawful removal of Mr Mathunjwa from his
 12 position as chair, the difficulty that we have is that this
 13 has been broadcast, it has been published and we think that
 14 it would be fair at the very least for us to put eight or
 15 nine brief propositions –
 16 CHAIRPERSON: No, I'll allow you to that,
 17 obviously the witness must then get a chance to deal, I
 18 hope with a similar degree of brevity, with the
 19 propositions. The relevance of it seems to me that it
 20 might be used in an argument to suggest that there was some
 21 kind of longstanding animosity between NUM and this witness
 22 and therefore his organisation. It would be rather far
 23 removed from the issues we have to decide, but I wasn't
 24 certain that we wouldn't be presented with argument on that
 25 basis, I didn't stop the cross-examination but I'll allow

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1 you –
 2 MR TIP SC: Yes –
 3 CHAIRPERSON: - to deal with it in the
 4 manner I've described.
 5 MR TIP SC: Mr Chairperson, we appreciate
 6 that, I may say that it is our view that it is remote. I
 7 am simply going to put the propositions, Mr Chair and to Mr
 8 Mathunjwa, I am sure we'll deal with them briefly, I am not
 9 going to put any questions by way of cross-examination
 10 whatsoever. Mr Mathunjwa, you followed, it is really just
 11 a brief response to each of the propositions, please.
 12 First of all the disciplinary proceedings involved not only
 13 –
 14 CHAIRPERSON: I suggest you put them all
 15 at once and then he can then deal with them separately if
 16 he wishes, I don't want there to be a proposition, an
 17 answer, a propositions, an answer.
 18 MR TIP SC: Yes. I will just give the
 19 interpreter an opportunity every now and then. Mr
 20 Mathunjwa, the disciplinary steps that were instituted
 21 against you were at the same time also instituted against
 22 Mr Simon Khosa who was your branch secretary at the time.
 23 The disciplinary proceedings or committee was chaired by
 24 Paul Mokoena, a regional NUM official and member of the
 25 regional committee at the time and that was the position

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1 throughout. No disciplinary committee was established by
 2 NUM national office nor chaired by the general secretary –
 3 MR MAHLANGU: He said it was chaired by
 4 Paul.
 5 MR TIP SC: I beg your pardon, Mokoena.
 6 MR MAHLANGU: Paul Mokoena?
 7 MR TIP SC: Yes. I'll continue, there
 8 was no role played by NUM national office in these
 9 proceedings at all and in particular no role played by Mr
 10 Gwede Mantashe, that you and Mr Khoza refused to attend the
 11 disciplinary committee hearing that had been convened by
 12 the Highveld region on at least two occasions. In
 13 consequence the two of you were found guilty in absentia
 14 and your memberships of the union were terminated. Letters
 15 confirming the outcome of the disciplinary proceedings were
 16 delivered to the two of you personally by the then regional
 17 president of NUM Highveld region, Mr Piet Matosa. The
 18 letters were handed to the two of you in the offices of the
 19 Douglas Colliery Resource manager but both of you refused
 20 to accept them. Mr Matosa then left the letters together
 21 with an instruction from NUM to Douglas Colliery to stop
 22 the membership subscriptions from the two of you and those
 23 letters were left with the Human Resource manager at the
 24 colliery. That concludes the propositions, would you care
 25 to comment on that, please?

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1 MR MATHUNJWA: Thank you, what I recall
 2 was the disciplinary hearing that was called in the head
 3 office of NUM at Rissik Street which was supposed to be
 4 chaired by Mr Gwede Mantashe which I refused to attend into
 5 it until such time he recused himself, and the reason for
 6 that is because he was highly involved in the issues of the
 7 branch. And for that reason, as far as my recollection
 8 goes I was informed by management that I am no longer a
 9 member of NUM, and subsequent to that effect again I
 10 realised to my salary advice or payslip that there was no
 11 deduction effected for NUM, and for that reason I was not
 12 acting on my own at the branch, the branch was not
 13 comprised with Joseph Mathunjwa, there were other members
 14 of the branch committee. There was the shop steward where
 15 we normally report all the events, I mean at the mine.
 16 That is the position as far as I know.
 17 MR TIP SC: Nothing to add, Mr Chair.
 18 CHAIRPERSON: Do the other counsel wish
 19 to ask any further cross-examination arising from points
 20 that had arisen? Before Mr Bruinders re-examines
 21 Commissioner Tokota wishes to ask some questions.
 22 COMMISSIONER TOKOTA: Mr Mathunjwa, I
 23 appreciate that you've been here for such a long time,
 24 perhaps it should have been shorter, just judging from some
 25 of the cross-examination but anyway we have seen the clips

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1 that were played here. I am referring in particular to the
2 clip that was played at the railway or near the railway
3 line and the one at the koppie where the people were armed
4 with pangas, spears and assegais. From my point of view,
5 speaking for myself, it was a terrifying situation, would
6 you agree with me?

7 MR MATHUNJWA: Ja, in any event when
8 someone is carrying something that –

9 CHAIRPERSON: It is not just the carrying
10 around, but they're swinging them around and clash one
11 against the other, that makes it more scary, doesn't it?
12 [12:06] MR MATHUNJWA: Not in the sense, I mean,
13 if you sing the song as I've explained in the earlier
14 cross-examination, that whenever we sing the song, if you
15 don't have anything in your hand, you'll clap our hands
16 like as I have explained. So it happened on that day that
17 they have those weapons, so they had to clash with the
18 rhythm of the song.

19 COMMISSIONER TOKOTO: We have also seen
20 you on the video clip kneeling down, and pleading with the
21 people.

22 MR MATHUNJWA: That is correct.

23 COMMISSIONER TOKOTA: But you've also
24 considered that at least in those clips in none of them,
25 did you say to the people, "lay off your arms, go back to

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1 the work."

2 MR MATHUNJWA: Inasmuch as I've said in
3 the cross-examination, I might not be said explicitly as
4 you are saying, as I've explained the environment which one
5 find himself in, but I'll definitely say that there's still
6 another day, guys, to return back to work, these issues can
7 be addressed in a better way, within the labour framework.
8 And the answer, it is not entirely correct to suggest that
9 I never told the workers that to lay their arms. If you
10 remember from the 15th, I even mentioned that there is a
11 rifle that the police are saying is there, anyone must
12 leave anything, they will come and collect it.

13 COMMISSIONER TOKOTA: Now, let's not
14 argue that because maybe you are going to agree with the
15 impression I got, but I must tell you that in none of those
16 clips did you explicitly say, "lay off your arms, go back
17 to your work," but let's leave that, but if I understood
18 your evidence, you were saying, look, this is not a
19 situation where one can simply say to the people in that
20 situation, in that volatile situation, "lay off your arms,
21 go back to your work."

22 MR MATHUNJWA: It is correct, I've made
23 them in the very same evidence before this Commission, that
24 I mean, you've been to management, making an undertaking.
25 Subsequent to that effect, they reneged to those, you have

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1 to go back to those workers, you have to have the way of
2 how to address them in order to gain their trust and to
3 bring hope to them. That's what the best that I could do,
4 in that day, that was the best I could do and I didn't see
5 any clip of any person who availed himself in that mountain
6 to present what I've presented myself, better than what I
7 could. That was my best ability that I could do in that
8 particular day. And the Commissioner also should also take
9 into account that we were by ourselves. No police were
10 willing to escort us into that mountain. We had no
11 armoured vehicle next to us. We had no security
12 whatsoever. We were on our own, our lives were also in
13 danger inasmuch as one could say. Not that I am running
14 before you, but you will remember that there was a protocol
15 that was laid down to attend the mountain. They said no
16 one should use his private vehicle, you will be escorted by
17 the police because of the assessment by the police, but in
18 that particular day, all that protocol was never observed.
19 We were on our own.

20 COMMISSIONER TOKOTA: When you knelt down
21 there, was it after of that man, that said, "we will finish
22 you here?"

23 MR MATHUNJWA: I might not have a
24 recollection on the timing whether it was after or was
25 before.

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1 MR TOKOTA SC: Right, you see, am I
2 correct then in gaining the impression that in fact what
3 you were doing there, you were trying to say, that you
4 people "lay off your arms, otherwise there will be
5 bloodshed here, even if you think you will face these
6 policemen, they will kill you, go away." Isn't that
7 statement correct?

8 MR MATHUNJWA: For me it was to cool the
9 situation, let it be no bloodshed at that day. That was my
10 ultimate prayer inasmuch that at the end of the day it was
11 like a sucker stick, I mean it was a joke, I was a laughing
12 stock before the Commission, by kneeling before those
13 workers, pleading with them.

14 CHAIRPERSON: Commissioner Hemraj now
15 wishes to ask you a question.

16 COMMISSIONER HEMRAJ: Mr Mathunjwa, did
17 you perhaps think that if you, in so many words said, put
18 down your weapons and go back to work, that you might
19 alienate them, you might alienate the strikers?

20 MR MATHUNJWA: I don't understand that
21 question, Ma'am.

22 COMMISSIONER HEMRAJ: Did you perhaps
23 think that if you said to them in so many words, "put down
24 your weapons, please go back to work," that it might look
25 as though you were not on their side, in not understanding

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1 their position?

2 MR MATHUNJWA: One could think that, but

3 what I was saying on that day, it's something that I've

4 never studied, it's something that I've never prepared.

5 All what I was saying there, was the heat of the moment,

6 that was my level best, that I was trying to say, guys, if

7 you retreat as a lamb it's not that is all lost, this can

8 be still, your grievances can be addressed in an amicable

9 way. So by leaving the mountain, to me is to say, leave

10 armament, leave violence if there's any violence and return

11 back to normality and take your issues within the legal

12 labour framework.

13 COMMISSIONER HEMRAJ: You see, Mr

14 Mathunjwa, you are repeatedly being asked if your mandate

15 was to say to them, "put down the weapons and go back to

16 work," why it is that you didn't explicitly say that?

17 MR MATHUNJWA: If you remember from the

18 15th, Ma'am, I did mention the very same thing, and

19 subsequent to that, there was an understanding between the

20 parties, that you'll come the following day, and let's take

21 this matter further, and see to how you return back to

22 work. And then subsequent to that, you return back to the

23 same workers which is not my constituency, which is not

24 majority members of AMCU, the situation has changed

25 altogether. And also I've been called there to intervene,

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1 so in all fairness that was may intervention. That was the

2 best that I could do on the day.

3 COMMISSIONER HEMRAJ: Yes, I understand,

4 thank you, Mr Mathunjwa.

5 CHAIRPERSON: Taking that point further,

6 I just want to make sure I understand what you are saying,

7 but before I do that, I want to say this, that I hope you

8 didn't really get the impression that you were a laughing

9 stock because you knelt, we didn't regard that as the basis

10 for your being a laughing stock at all.

11 MR MATHUNJWA: Thanks, Mr Commissioner.

12 CHAIRPERSON: You made a genuine and

13 sincere effort to persuade the people to behave sensibly,

14 and not expose themselves to a potential massacre.

15 Whatever criticism there may be about you, it will be to

16 your eternal credit that you tried your best. I said I

17 wanted to see that I understood you, what you were saying.

18 You said that you didn't say expressly they must lay down

19 their arms, and leave the koppie, but you said so

20 implicitly, and I understood that means that you were

21 referring to two passages, in particular in your evidence –

22 in your speech. The first one was where you said to the

23 workers, you must have another strategy. That's at page of

24 exhibit 009. You said to them they must have another

25 strategy which meant different to the one they were using,

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1 and you explained the strategy by saying that they must

2 endeavour to get a certificate from the CCMA so there will

3 be protected strike. Now implicit in that, was they had to

4 go back to work first and they couldn't go back to work,

5 waving their pangas and assegais and so forth.

6 MR MATHUNJWA: That's correct.

7 CHAIRPERSON: So by urging them to go for

8 a protected strike, you were in effect telling them to stop

9 the unprotected strike, go back to work, and allow the

10 ordinary bargaining processes, and the procedures laid out

11 in the Labour Relations Act, to be invoked. Is that right?

12 MR MATHUNJWA: That is correct.

13 CHAIRPERSON: So my understanding of your

14 evidence on that point is correct?

15 MR MATHUNJWA: Correct.

16 CHAIRPERSON: Mr Bruinders, re-

17 examination?

18 RE-EXAMINATION BY MR BRUINDERS SC: I do.

19 When you met with the NUM management and the SAPS on the

20 15th, where exactly at Lonmin, did you meet?

21 MR MATHUNJWA: We were at the place

22 called LPD offices in one of the board rooms there.

23 MR BRUINDERS SC: And when you later saw

24 the NUM and management, where was that?

25 MR MATHUNJWA: At the place called JOC, I

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1 think it's Joint Operations Centre.

2 MR BRUINDERS SC: On the 16th, you say

3 you saw NUM officials or office-bearers at Lonmin.

4 MR MATHUNJWA: I think I've seen the

5 members of NUM at the foyer.

6 MR BRUINDERS SC: Who were they?

7 MR MATHUNJWA: I wouldn't distinguish,

8 they were wearing their shirts, NUM shirts.

9 MR BRUINDERS SC: Are you saying you

10 could not identify who they were? Sorry, let me rephrase

11 that. Do you say you couldn't tell what the names of the

12 people were, but you could tell that they were from the

13 NUM, because of their T-shirts?

14 MR MATHUNJWA: Yes, their names are not

15 known to me.

16 MR BRUINDERS SC: I am going to put in

17 front of you now, a document prepared by Lonmin, and I am

18 going to ask that it be handed up to the Commission –

19 CHAIRPERSON: It's got to be an exhibit.

20 MR BRUINDERS SC: Correct.

21 CHAIRPERSON: So Ms Pillay will tell us

22 how we can do it.

23 MS PILLAY: Chair, it will be SS1.

24 MR BRUINDERS SC: Chair, should I ask,

25 should not be –

<p style="text-align: right;">Page 2850</p> <p>1 MS PILLAY: Alternatively OO19 because OO 2 was AMCU's.</p> <p>3 CHAIRPERSON: OO19, how are we going to 4 describe it?</p> <p>5 MR BRUINDERS SC: It's a list of the rock 6 drill operators who were on strike at Lonmin during that 7 period. Before I ask you, Mr Mathunjwa, about the document 8 itself, could I ask you this, when you went to the koppie 9 on, particularly on 16 August, which was during the day and 10 you saw the strikers, was it your impression that AMCU, 11 that the majority or the minority of these people belonged 12 to AMCU.</p> <p>13 [12:26] MR MATHUNJWA: It will be difficult to 14 say because, I mean, they were intertwined, they were 15 sitting – there was no gap between – the lefties were AMCU 16 and the right were NUM.</p> <p>17 MR BRUINDERS SC: So when you went there, 18 you could not tell whether the majority or the minority of 19 the people on the koppie were members of AMCU?</p> <p>20 MR MATHUNJWA: Yes, that is correct. 21 Unless if maybe one to call one person, he stood up saying 22 as we are here, and especially the person who was, I mean 23 who was telling us that there is no difference between the 24 two, what's its name, we are workers, jointly as we are.</p> <p>25 MR BRUINDERS SC: Now what you have in</p>	<p style="text-align: right;">Page 2852</p> <p>1 CHAIRPERSON: You see – 2 MR BRUINDERS SC: - and what we've done 3 is, I can explain – 4 CHAIRPERSON: - the information I sought 5 from him is relevant, I think, in relation to the answer 6 that you hope to elicit from the witness because it relates 7 back to certain evidence he gave about what the general 8 said as to how the people on the koppie – 9 MR BRUINDERS SC: But what he's done – 10 CHAIRPERSON: - could be divided up. But 11 anyway, perhaps you can give that information, it's a bit 12 unorthodox to ask a question of counsel in re-examination 13 from the bench as it were before the witness answers but it 14 may actually help us to get a focused answer more quickly 15 than otherwise.</p> <p>16 MR BRUINDERS SC: That exercise has been 17 done and perhaps I can explain it this way. You'll see 18 that there are two columns for the union on the right-hand 19 side. The one on the far right-hand side is the one that 20 is least favourable to AMCU, in other words there are more 21 AMCU members in the far right-hand than the penultimate 22 right-hand column. We've excluded people on leave and 23 we've excluded people whom times are given because 24 presumably – we don't understand what that means but that 25 presumably means somebody went to work at that time.</p>
<p style="text-align: right;">Page 2851</p> <p>1 front of you, and I'd just ask you to have a quick look at 2 it, is a list of the rock drill operators –</p> <p>3 CHAIRPERSON: Can I ask you a question 4 about that, Mr Bruinders, before he carries on? There 5 appears to be 131 pages, starting at page 515 to page 645 6 and each page, as far as I can see, has got 30 names on it. 7 So that gives us 3 930 by my arithmetic. One of them is 8 described as – two of them, on the first page are described 9 as being on annual leave. I'm not quite sure how you can 10 be on strike when you're on annual leave but that's 11 something that can be explained to us. But in the last 12 column is presumably the trade union affiliation of the 13 persons concerned and there are quite a lot of AMCU – I 14 haven't in the time available been able to count them but 15 presumably someone has. Then there are a number – some of 16 them also annual leave people apparently who were members 17 of the NUM and there are also no union people. Now, so 18 described in quotation, no union is the phrased used. Now, 19 have you done the exercise? Has someone done the exercise? 20 Tell us how many of these 3 930 people are described as 21 being AMCU members? How many are described as being NUM 22 members and how many are described as being no union?</p> <p>23 MR BRUINDERS SC: You raise a, obviously 24 a very good point, Chair, with respect. We have done that 25 exercise –</p>	<p style="text-align: right;">Page 2853</p> <p>1 CHAIRPERSON: I don't know how you can be 2 strike if you're on leave.</p> <p>3 MR BRUINDERS SC: No, we've excluded 4 that.</p> <p>5 CHAIRPERSON: You know, they were – that 6 will be explained to us in due course presumably. I take 7 it you can show your support for the strikers by joining 8 with them on the koppie, but you're not technically 9 yourself on leave if you're on – I mean not technically on 10 strike if you're on leave.</p> <p>11 MR BRUINDERS SC: No, you're not on 12 strike –</p> <p>13 CHAIRPERSON: That's something that will 14 be explained to us in the fullness of time. Let's hope 15 it's sooner rather than later –</p> <p>16 MR BRUINDERS SC: But we have done the 17 exercise. In other words we've excluded, in this exercise, 18 we've excluded the people who are stated to be on annual 19 leave in this list and we've also excluded people for whom 20 times are given and if you do that then the numbers you get 21 are the following. In the far right-hand column. The non- 22 unionised are 446. AMCU is 1 204. And NUM is 1 961. And 23 that gives you a total of 3 611 employees who – which 24 excludes those who were on annual leave and for those for 25 whom times are given. And if you do a quick percentage</p>

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1 calculation, the non-unionised members would be 12% of that
 2 number, that 3 611, AMCU 35% and the NUM 52%. I hope that
 3 helps the commission.
 4 CHAIRPERSON: Now you can – now the
 5 witness has heard it, you can now put the question to him
 6 or the aspect in respect of which you ask him to comment.
 7 MR BRUINDERS SC: Mr Mathunjwa, you've
 8 earlier said that your own impression was that you could
 9 not tell what AMCU membership was on the koppie. Do you
 10 remember that?
 11 MR MATHUNJWA: Yes.
 12 MR BRUINDERS SC: The employer has given
 13 us a list of the rock drill operators who were employed at
 14 Lonmin at the time. Do you understand that's the list in
 15 front of you?
 16 MR MATHUNJWA: Yes.
 17 MR BRUINDERS SC: I have given the
 18 commission what the numbers are in that list, you've heard
 19 that.
 20 MR MATHUNJWA: Yes.
 21 MR BRUINDERS SC: Is there anything you
 22 can add to what I have told the commission?
 23 MR MATHUNJWA: Except that it reflects
 24 that AMCU was the minority at the koppie at the time.
 25 MR BRUINDERS SC: Can I return to

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1 something that seems to have vexed quite a few people here.
 2 Now you've told the chair of the commission that your call
 3 to the employees on the koppie to the rock drill operators
 4 to return was implicit rather than explicit. You remember
 5 that?
 6 MR MATHUNJWA: Yes.
 7 MR BRUINDERS SC: And that was on the
 8 16th, the first time you spoke to them?
 9 MR MATHUNJWA: Yes.
 10 MR BRUINDERS SC: Why do you speak
 11 implicitly rather than explicitly that first time you spoke
 12 to the rock drill operators on strike on the koppie?
 13 MR MATHUNJWA: The reason is that the
 14 management has reneged from its commitment. And again, the
 15 previous day I was there. I communicated what the employer
 16 was saying to these workers. And today I'm coming with the
 17 different communication. So based on that I had to explain
 18 very much deep and try to gain the trust to these workers,
 19 because the plan has changed. Management has changed its
 20 plan.
 21 MR BRUINDERS SC: Why was it necessary
 22 then to call on them to return to work in implicit language
 23 rather than explicit language because of this change in
 24 plan by management?
 25 MR MATHUNJWA: Yesterday I committed that

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1 the management have committed into an A process and then
 2 the following day it was no longer that way and now the
 3 area which I was in, it was not AMCU constituency, it was
 4 not members of AMCU per se and also I was called in, in
 5 that situation to intervene so that's the best that I could
 6 do, the manner in which I've explained myself to the
 7 situation.
 8 MR BRUINDERS SC: Why did you not, on
 9 that first occasion on the 16th when you spoke to them, say
 10 put down your weapons, go back to work?
 11 MR MATHUNJWA: By kneeling I was
 12 explaining the very same thing that guys, let's leave
 13 koppie.
 14 MR BRUINDERS SC: Now in the transcript
 15 which is 009 at page 13, the part where it appears that you
 16 might've been kneeling, you say this – "We are requesting
 17 you, brothers, sisters, men, I am kneeling down. Coming to
 18 you as nothing, I say let us stop this blood that NUM
 19 allowed this employer to let flow. We do not want
 20 bloodshed but we want your problems to be solved and get
 21 your salaries, Comrade. You should benefit from this
 22 platinum." Is that what you said when you were kneeling?
 23 MR MATHUNJWA: It could be one of them, I
 24 mean, those because it was a long story, that one who was
 25 talking there. But all was going to the one direction to

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1 plead with the workers that let them leave the koppie.
 2 MR BRUINDERS SC: What did you hope for
 3 after you made that first call to the workers at the
 4 koppie?
 5 MR MATHUNJWA: That the workers will
 6 leave.
 7 MR BRUINDERS SC: For where?
 8 MR MATHUNJWA: To their respective place
 9 of stay or where they -
 10 MR BRUINDERS SC: And then -
 11 MR MATHUNJWA: Which then will result
 12 returning back to work.
 13 CHAIRPERSON: Excuse me, Mr Bruinders,
 14 may I ask a question before you go? You've told us that
 15 you implicitly told them to go back to work and you and I
 16 went through the passages where you had in effect said that
 17 to them, by talking about a protected strike. You also
 18 said you didn't say explicitly, in as many words, to them
 19 put down your arms and go back to work.
 20 MR MATHUNJWA: Yes, Sir.
 21 CHAIRPERSON: The question is why you
 22 didn't do that and what my colleague, Commissioner Hemraj,
 23 was asking you, I'd like to ask you again. You were
 24 concerned to get the trust of the workers. As we know the
 25 majority of the workers weren't members of AMCU anyway.

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1 MR MATHUNJWA: Yes.

2 CHAIRPERSON: And you obviously didn't

3 know the numbers but you certainly knew that a number of

4 them weren't AMCU members. Is that right?

5 MR MATHUNJWA: Correct, yes.

6 CHAIRPERSON: You went out of your way to

7 gain their trust –

8 MR MATHUNJWA: Yes, to give them hope

9 that their problem can be resolved in another way.

10 CHAIRPERSON: Now do you – did you fear

11 that if you put it to them directly, lay down your arms, go

12 back to work, you would lose their trust? Is that why -

13 either you lose their trust or not gain their trust and is

14 that why you put the appeal to them in the implicit way

15 that you and I have discussed?

16 [12:46] MR MATHUNJWA: Yes, I mean when you mean

17 the trust, meaning that they will know that there are

18 issues that can be dealt with in the better way. So I

19 concur, I am putting myself in their shoes, hence this

20 side, the management, what it has done, they renege, they

21 change altogether what we committed the previous night.

22 CHAIRPERSON: Mr Bruinders, I am sorry I

23 intervened, but that may help.

24 MR BRUINDERS SC: It certainly did. How

25 did you fear the strikers might respond if you said to them

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1 simply, put down your weapons, go back to work?

2 MR MATHUNJWA: Can you repeat that

3 question, please?

4 MR BRUINDERS SC: How did you fear the

5 strikers might respond if you simply said to them, put down

6 your weapons, go back to work?

7 MR MATHUNJWA: You must also remember

8 that I was one foot behind now, I mean my steps were no

9 longer accurate because management had took something that

10 I communicated to them, so at the end of the day I might be

11 labelled by something else. So in that situation, so I had

12 no platform, much ground, firm ground that I can stand on

13 and pursue the manner in which, that was the wisdom that

14 prevail to me by that time.

15 MR BRUINDERS SC: What do you think might

16 have happened if you simply said to them, lay down your

17 weapons, go back to work?

18 MR MATHUNJWA: I cannot pre-empt what

19 could have happened.

20 MR BRUINDERS SC: That's why I asked, how

21 do you think they might have responded if you addressed

22 them in that way?

23 MR MATHUNJWA: One can draw an opinion

24 that they might be annoyed and saying, I am a traitor.

25 MR BRUINDERS SC: I have no further

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1 questions.

2 CHAIRPERSON: Mr Mathunjwa, thank you

3 very much, you're excused. You may stay if you like, but

4 you don't have to.

5 MR MATHUNJWA: Thank you very much, I

6 hope at the end of the day the commissioner will have the

7 truth and will live by the truth, thank you.

8 [NO FURTHER QUESTIONS - WITNESS EXCUSED]

9 CHAIRPERSON: I am only objective.

10 MR BRUINDERS SC: Chair, if you're

11 anticipating that we might call a second witness then you

12 would be wrong, not at the moment, Chair.

13 CHAIRPERSON: Therefore if I adjourn

14 until two o'clock will my expectations be better founded?

15 MR BRUINDERS SC: Not even then, Chair.

16 CHAIRPERSON: Mr Semenya, there was talk

17 of you producing a witness who will tell us about public

18 order policing, is that going to happen?

19 MR SEMENYA SC: That's going to happen,

20 Chair.

21 CHAIRPERSON: At two o'clock?

22 MR SEMENYA SC: At two o'clock.

23 CHAIRPERSON: Unless you want to start

24 now?

25 MR SEMENYA SC: We think it might be

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1 useful just to have some discussion with the evidence

2 leaders.

3 CHAIRPERSON: Very well, the commission

4 will adjourn until two o'clock.

5 [COMMISSION ADJOURNS COMMISSION RESUMES]

6 [14:06] CHAIRPERSON: The Commission resumes. Mr

7 Semenya, do you have anything to tell us?

8 MR SEMENYA SC: Thank you, Chair. We beg

9 leave to call Brig Mkhwanazi and my learned colleague, Mr

10 Ngalwana, will lead the witness.

11 CHAIRPERSON: What your full names,

12 Brigadier?

13 BRIG MKHWANAZI: Zepsania.

14 CHAIRPERSON: Will you spell it for me

15 please?

16 BRIG MKHWANAZI: Z-E-P-S-A-N-I-A.

17 CHAIRPERSON: Zepsania, and how do you

18 spell Mkhwanazi?

19 BRIG MKHWANAZI: It's M-K-H-W-A-N-A-Z-I.

20 CHAIRPERSON: N-I-Z-I.

21 BRIG MKHWANAZI: That's right.

22 CHAIRPERSON: So it's Mkhwanazi.

23 BRIG MKHWANAZI: No, non N-A –

24 CHAIRPERSON: I thought so, Mkhwanazi.

25 BRIG MKHWANAZI: That's right.

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1 CHAIRPERSON: Alright. Would you stand,
2 please, Brigadier? Are you prepared to swear or do you
3 wish to affirm?
4 ZEPSANIA MKHWANAZI: Let me swear.
5 CHAIRPERSON: Swear. You raise your
6 right hand. Do you swear the evidence you will give before
7 this Commission, will be the truth, the whole truth and
8 nothing but the truth? Please say, "so help me, God. I
9 swear, so help me, God."
10 BRIG MKHWANAZI: So help me, God.
11 CHAIRPERSON: Please be seated. Yes, Mr
12 Ngalwana.
13 EXAMINATION BY MR NGALWANA: Thank you,
14 Chairperson. Brigadier, you joined the Police Force in
15 1986. Could you take the Commission –
16 CHAIRPERSON: Have we not got a summary
17 of his evidence?
18 MR NGALWANA: I believe you do have a
19 statement, Chairperson. Perhaps if you don't have it in
20 your possession, I can have it distributed among the three
21 of you.
22 CHAIRPERSON: Yes, I don't remember
23 getting one. I certainly haven't read it, but if you have
24 copies for us, it would be helpful, and then with the
25 assistance of Ms Pillay, we will give it an exhibit number.

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1 MS PILLAY: Chair, it will be SS1.
2 CHAIRPERSON: Thank you. I see your full
3 names are Zepsania Mkhwanazi.
4 BRIG MKHWANAZI: Correct.
5 CHAIRPERSON: You've given us your
6 personal cell number, which is a useful piece of
7 information, what can we do with it?
8 BRIG MKHWANAZI: I think I am used to it,
9 you know.
10 MR NGALWANA: Thank you, Chairperson.
11 MR HANABE: If the counsel could just
12 tell what is his name, that they want to know your name?
13 MR NGALWANA: V for villain, U for
14 Uruguay, Y for yo-yo, A for alpha, N for Nellie, I for ivy,
15 Ngalwana, N for Nellie, G for George, A for alpha, L for
16 Lima, W for whisky, A for alpha, N for Nellie, A for
17 Arthur.
18 CHAIRPERSON: I trust the recording
19 officials were able to follow the spelling as amplified.
20 MR NGALWANA: I like leaving nothing to
21 doubt, Chairperson. Brigadier, you say in your statement
22 that you started in the Police Service in 1986. Could you
23 take the Commission through your training, from 1986 until
24 today?
25 BRIG MKHWANAZI: Thank you. I actually

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1 joined the South African Police Service in 1986. By then
2 it was a station called CR Swart Square in Durban. It
3 was 86, 25 of August. I stayed as a Student Constable
4 until 1987, I went to do basic training in Pretoria, here
5 in – sorry, in Hammanskraal. When I finished my training –
6 MR NGALWANA: What does the basic – what
7 did the basic training involve?
8 BRIG MKHWANAZI: Basic training was
9 including the legislation, was including the riot
10 situation, how to handle riot situation. We were some of
11 us taken to Maluskop while we were still in training to go
12 and do riot course –
13 MR NGALWANA: Sorry, if you could give
14 the interpreter an opportunity to interpret.
15 BRIG MKHWANAZI: Then after we finished
16 up our training, I was deployed to Alexandra to form a riot
17 unit. I proceeded with Alexandra, working in Alexandra,
18 doing crowd – I mean, doing riot control at that stage,
19 until it was changed to internal stability.
20 BRIG MKHWANAZI: From what period to what
21 period, from what year to which year are you now with the
22 riot police in Alexandra?
23 BRIG MKHWANAZI: I was in Alexandra since
24 1987, January – I mean July the 3rd until 2004, whereby I
25 had to leave, after getting the post in head office in

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1 Pretoria.
2 MR NGALWANA: Could you take the
3 Commission briefly, Brigadier, on your duties and
4 responsibilities while you were at the Alexandra Riot
5 Police.
6 BRIG MKHWANAZI: In Alexandra I was
7 actually responsible for operations as well as the training
8 of the members in the unit. I was on ad hoc called in head
9 office, to present training in different training centres.
10 Most of the time I will go in and come back depending to
11 the duration of the course. I will present most of the
12 time, come back. On my return I will proceed with the
13 operations.
14 MR NGALWANA: Right. Could you give an
15 indication of what sort of training you gave at that time,
16 and whether you were – perhaps let me ask one question at a
17 time. During your stint at the Alexandra Riot Police, did
18 you have any operational experience there?
19 BRIG MKHWANAZI: That's correct, as I
20 have indicated, I was involved with operations most of the
21 time. I will be involved in issues whereby there are some
22 sort of problems like in area Johannesburg, we were very
23 much involved in those days working on those areas.
24 MR NGALWANA: The Riot Unit, is it what's
25 called the POPs now, or is it a different kettle of fish?

<p style="text-align: right;">Page 2866</p> <p>1 BRIG MKHWANAZI: It was Public Order 2 Policing, even though the names were changing most of the 3 time, but it was Public Order Policing. 4 MR NGALWANA: You say you also performed 5 training duties, is that the training of Public Order 6 Policing or as you term it at that time, the Riot Unit? 7 BRIG MKHWANAZI: It is correct, the 8 training I was providing, it was for Public Order Policing, 9 hence in Public Order Policing we got in service training 10 trainers who provide training in Public Order Policing 11 members on continuous basis just to keep them in shape, if 12 anything happened, they can be able to deal with crowd 13 management situations. 14 MR NGALWANA: Now the training to which 15 you refer, remember we are now dealing with the period from 16 1987 to 2004, does the curriculum that appears in paragraph 17 5 of your statement bear any resemblance to the training 18 you gave at that time? 19 BRIG MKHWANAZI: It is correct, it's the 20 one for Public Order Policing. 21 MR NGALWANA: Now, could you place for 22 the record, what's contained in paragraph 5, just get out 23 your statement. Do you have a copy of your statement, 24 Brigadier? 25 BRIG MKHWANAZI: That is correct, I've</p>	<p style="text-align: right;">Page 2868</p> <p>1 CHAIRPERSON: - not as described there. 2 BRIG MKHWANAZI: Okay. Thank you, Sir. 3 Maybe if I may indicate what we are presenting, with your 4 permission, that under the Constitution of the Republic we 5 were actually focusing on section 205 paragraph 3 which 6 actually gives the mandate what SAPS members should 7 actually do when performing their duties. Under South 8 African Police Act we were actually focusing especially 9 under section 13, which is section 13(a) and (b) which 10 actually talk about the use of force, the minimum force all 11 that is contained in that position, that's what we go 12 through into it, most of the time. Regulation of 13 gathering, we actually here take the whole Act, we don't 14 choose because we have to make sure that members under 15 Public Order Policing understand how to deal with the 16 situation especially during the unrest. Then the standing 17 order, general 262, we are looking to the levels, mostly to 18 the levels to say what levels and how the job has to be 19 done, who do what, at what time, and when members of Public 20 Order Policing must be actually be actively involved in 21 what type of a situation is what we teach the members in 22 this position. 5.2 Platoon commander training, that is 23 PCT. This is a module that is presented to members, 24 especially like the senior members, the captains upward, 25 that are in charge of the platoon, that is the platoon</p>
<p style="text-align: right;">Page 2867</p> <p>1 got it. 2 MR NGALWANA: Can you go to paragraph 5? 3 BRIG MKHWANAZI: Yes, in paragraph 5 we 4 are having platoon members training which is PMT, with a 5 duration of three weeks course presented for Public Order 6 Policing. 7 MR NGALWANA: Yes, and it deals with the 8 legal framework which is Module 1, which covers the 9 Constitution and so on, do you want to just go through 10 those, just for the record. Perhaps if you can read that, 11 through the record. I know it's a long way of doing it but 12 it has to be in the record. 13 BRIG MKHWANAZI: That's correct. We were 14 actually, or we are still actually receiving or members are 15 still receiving this type of training. We have the 16 Constitution of the Republic, Act 108 of 1996 - 17 CHAIRPERSON: It's no longer called Act 18 108 of 1996, it's now just the Constitution of the 19 Republic, the name was changed to give recognition to its 20 special status. 21 BRIG MKHWANAZI: Okay. 22 CHAIRPERSON: And while you are about 23 that, the Act listed in 5.1.1.3 is the Regulation of 24 Gatherings Act - 25 BRIG MKHWANAZI: Yes.</p>	<p style="text-align: right;">Page 2869</p> <p>1 commanders, we actually teach them, and the main thing here 2 is to say how they have to draft the tactical plan if they 3 are actually supposed to do their job. 4 5.2.1 Crowd management incidents. We are looking 5 to crowd dynamics, conflict resolution scale, use of force, 6 constitutional powers of the Police, deadly force, tactical 7 communication, maybe in short, with the crowd dynamics, is 8 where we look, okay, it's where, okay, I will you a chance. 9 5.3 is the operational commander training, which is OCT, 10 this course is where actually people or members of senior 11 positions are actually taught how to draft an operational 12 plan that's actually supposed to be used in any type of a 13 situation whereby we are confronted with a situation that 14 needs to deploy members. Then we have 5.3.1 crowd 15 management equipment. We as well go through here, teaching 16 members as well how to work or maintain their equipment, as 17 they are mentioned all of them here, how to use them and 18 how to utilise them and how and when we actually teach them 19 how to use that. 20 MR NGALWANA: Brigadier, perhaps for 21 purposes of the record, you might want to read in the 22 equipment listed in 5.3.1.1. 23 BRIG MKHWANAZI: Okay. Thank you. I 24 will go through, we say 5.3.1.1 the use and maintenance of 25 equipment. The equipment we are referring to, is the</p>

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1 helmet, gasmask and filter, body armour, domfa, shield,
 2 shotgun, double bore rubber rounds, pepper spray, teargas
 3 CS, CS rifle grenade, 40 millimetre CS rounds, stun
 4 grenade, pyrotechnics, we have smoke grenade flares and 40
 5 millimetre grenade launcher.
 6 [14:26] MR NGALWANA: I see there's no mention of
 7 an R5 or pistol in that list. Is there any reason for
 8 that?
 9 BRIG MKHWANAZI: Yes, that's correct,
 10 Advocate. The reason is that the R5, the 9 millimetre is
 11 actually been given during basic training. Members already
 12 are equipped. They know about it unless maybe if they go
 13 for advance training on that position.
 14 MR NGALWANA: What is the primary weapon
 15 for a POPS person?
 16 BRIG MKHWANAZI: In Public Order
 17 Policing, members are actually equipped mostly with a
 18 shotgun, hence it actually demand more that we actually
 19 take action with our less lethal technique if we do
 20 something. Shotgun is the main firearm or rifle that is
 21 being utilised.
 22 MR NGALWANA: Now when you say shotgun,
 23 what does the shotgun fire?
 24 BRIG MKHWANAZI: Yes, a shotgun which is
 25 muzzle, we are using, it actually can take different types

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1 of ammunitions but what we are using now, we are using
 2 rubber as the most ammunition we are using.
 3 MR NGALWANA: Then paragraph 5.4.1, if
 4 you could read that into the record.
 5 BRIG MKHWANAZI: Yes, Sir. "Crowd
 6 management techniques. These are the techniques we are
 7 teaching people to say how members can actually advance or
 8 deal with the situation if there's a crowd management. We
 9 are actually teaching them with foot techniques, how to do
 10 their work on foot techniques, platoon and section
 11 formation, how they move as a platoon and sections.
 12 Vehicle formation, indoor techniques, principles and rules
 13 of intervention and to say how they must intervene, looking
 14 to legality, situational appropriateness, optimisation as
 15 well as the proportionality we actually presented to them
 16 to make sure that they understand what they should do."
 17 MR NGALWANA: And then paragraph 5.5.1.
 18 BRIG MKHWANAZI: Paragraph 5.5.1 is crowd
 19 management operation. There it's how to write an
 20 operational plan for platoon commanders. Actually it comes
 21 from the side of the PCT, it's the same – nearly the same
 22 thing. The operational commander training for senior
 23 officers, that is the OCT as well that we provide with the
 24 members. As we spoke from the other side which is, if I'm
 25 correct, it's under – where we spoke about – ja, it's under

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1 5.3. It's similar to that.
 2 MR NGALWANA: Brigadier, when you were
 3 setting out the legal framework under module 1 for the
 4 training of POPs or as you then called them the riot unit,
 5 you referred to a section 2053 of the constitution, could
 6 you just elaborate briefly about what that section entails
 7 as regards the duties of the police?
 8 BRIG MKHWANAZI: Yes. It's actually
 9 speak to the mandate what we're supposed to do as police
 10 official, especially where it clearly indicates that our
 11 task is to investigate crime, is to uphold the constitution
 12 of the republic, is to combat crime prevention. It
 13 actually sets clearly how we should actually do our work.
 14 And the last one will be to maintain public order as well.
 15 MR NGALWANA: Is it fair to say that what
 16 POPs police – what the POPs do or does depending on whether
 17 one looks at as a collective noun or not, is it fair to say
 18 that what they do is informed by the principles of the
 19 constitution?
 20 BRIG MKHWANAZI: That's correct. It is
 21 informed, Sir.
 22 MR NGALWANA: Now regarding the
 23 Regulation of Gatherings Act, is there –
 24 CHAIRPERSON: The Regulation of
 25 Gatherings Act.

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1 MR NGALWANA: Thank you, Chairperson, I
 2 thought that's what I said. Evidently I'm wrong.
 3 Regarding the Regulation of Gatherings Act, are there any
 4 specific provisions in that Act on which emphasis is put in
 5 the training of the POPs?
 6 BRIG MKHWANAZI: That's correct. We look
 7 mostly to the fact that we look to the provision of Section
 8 4 whereby we emphasise that in any gathering that take
 9 place, there must be a notice given and there must be a
 10 meeting convened by the responsible officer, the authorised
 11 member as well as the convener which is actually the
 12 organiser, whereby we emphasise clear that in that meeting
 13 conditions must be put in place to ensure that when people
 14 actually embark in that particular march, what they must do
 15 and what they must not do. Those are the issues and we as
 16 well emphasise the issues of the appointment of the
 17 marshals because we believe that – or the Act as well state
 18 clear that if people manage themselves everything can be
 19 successful, but if there are no meetings or no notification
 20 given for the march, it won't be possible that we can have
 21 a proper managing of that particular march. So there must
 22 be marshals, there must be the meetings condition put in
 23 place, making sure that when that march take place
 24 everything is done properly. And these actually we
 25 emphasise as well the dialogue with the leaders, dialogue

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1 with the people who participate in the march, just to make
 2 sure that there mustn't be any confrontation with the
 3 police or with the people who are actually within that area
 4 where they're going to march. Dialogue must be in place,
 5 we emphasise that and emphasise as well tolerance as well
 6 to say members must actually demonstrate or indicate
 7 tolerance in most of the time because a lot of things can
 8 happen during the march itself, but members must be –
 9 tolerance be able to deal with the situation properly. And
 10 as well we emphasise Section 9 of the Gathering Act, the
 11 use of force or the powers of the police to say when and
 12 what time actually members can intervene if there is a
 13 situation and what procedures need to be followed as well
 14 if it come to that position as well, that use of force has
 15 to be actually be used if the situation goes wrong.

16 MR NGALWANA: Right. Now we've covered
 17 the period 86 to 2004, so far. From 2004 where did you
 18 then go within the ranks of the SAPS?

19 BRIG MKHWANAZI: Yes, Sir. 2004,
 20 December, I was appointed to be a crowd management training
 21 manager in head office and my task there was to look to all
 22 training presented in the province – in different
 23 provinces, nationally, and to ensure that everything is
 24 done properly. That was my job to do at that time, sitting
 25 in head office.

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1 MR NGALWANA: Until what period? What
 2 year were you there?

3 BRIG MKHWANAZI: It was 2004, December,
 4 until 2005, if I'm correct, 2005 August then that's where I
 5 was appointed as a skill development facilitator now for
 6 specialised units. Meaning all units falling under – that
 7 time it was division visible policing. I have to –

8 COMMISSIONER HEMRAJ: I'm so sorry, I
 9 missed that. You said skills development?

10 BRIG MKHWANAZI: Skills development
 11 facilitator and my task was just to extract the training
 12 needs of all specialised units within Division visible
 13 policing.

14 MR NGALWANA: Would you care to elaborate
 15 what comprised these specialised units at that time, 2004
 16 to 2005?

17 BRIG MKHWANAZI: Yes, Sir. What we have
 18 that time under division visible policing, we have
 19 specialised units like special task force. It was a
 20 national intervention, it was public order policing,
 21 however only public order policing, their training needs
 22 were being collected directly from the provinces to
 23 division SRD which is by that time it was division
 24 training. However was as well looking to others as well
 25 such as other officers within division visible policing as

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1 well which is the division, all the members inside support
 2 and all that, I was actually taking care of their training
 3 needs at that time.

4 MR NGALWANA: Just to be clear,
 5 Brigadier, you've mentioned 3. It's unit – specialised
 6 unit. It's the STF – special task force, the NIU, national
 7 intervention unit and POP, public order policing.

8 BRIG MKHWANAZI: Public order policing
 9 air wing, air wing was part of that as well.

10 MR NGALWANA: Now from 2005 going
 11 forward, where do you – where were you then placed?

12 BRIG MKHWANAZI: I was at the same place,
 13 division visible policing doing the same task collecting
 14 the training needs or extracting the needs of those
 15 particular units and submit them to division SRD whereby
 16 they will be in a position to make sure that they actually
 17 facilitate the issues of budget as well as the
 18 implementation of the plans in each financial year. I will
 19 just do that part. After it's done that they will actually
 20 indicate what is approved and what is not approved.

21 MR NGALWANA: Until when did you perform
 22 those functions? We know that recently you've –

23 BRIG MKHWANAZI: Yes, it's until 2012,
 24 February this year.

25 MR NGALWANA: What position do you now

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1 hold in SAPS?

2 BRIG MKHWANAZI: Ja, presently I was
 3 appointed at Northern Cape as a provincial head as a
 4 brigadier 2012, February.

5 MR NGALWANA: And what are your day to
 6 day functions in that position?

7 BRIG MKHWANAZI: In Northern Cape my job
 8 involve making sure that I'm handling the issues of public
 9 order policing. They report to me, make sure that issues
 10 of crowd management – I take care of them. All that is
 11 actually falling under me, TRT as well as TRT public order
 12 policing as well as external deployment. And the last one,
 13 I forgot, it is border policing. All the port of entries,
 14 I'm taking care of them as well.

15 MR NGALWANA: Let me take you slightly
 16 back to your immediate previous life. You say in paragraph
 17 6.2 that part of what you used to do was to compile a
 18 report with recommendations. Could you give the commission
 19 an example of a such – of one such report and a
 20 recommendation?

21 BRIG MKHWANAZI: Yes, Sir. That's
 22 correct. Normally what we do, we will visit some of the
 23 operations and we'll check what is happening in the
 24 operations. If everything – if there is a problem on it,
 25 we'll make a report and we'll make a recommendation and if

<p style="text-align: right;">Page 2878</p> <p>1 I can make an example, especial with Ellis Park incident 2 that took place, we actually made recommendation which 3 assisted by the commission as well, it's a recommendation 4 whereby we came up with the writing of the operational 5 commander training which is the OCT. It came up from that 6 position to say let's have this kind of a program that 7 actually assist in how the operational plan must be 8 compiled when actually we do our duties. 9 MR NGALWANA: Have those recommendations 10 been implemented? 11 BRIG MKHWANAZI: Yes, they will – they do 12 get implemented. 13 MR NGALWANA: Right. Brigadier, you know 14 that we are here to deal with the events of the 16th – 15 Thursday the 16th of August 2012 and the events leading up 16 to that date. Let me ask you this, are you in a position 17 to give first hand account of the events of the 12th – I 18 beg your pardon, of the 16th of August 2012 and the events 19 leading up to that date? 20 BRIG MKHWANAZI: Chairperson, it will be 21 a speculation. I won't be in a position to give anything 22 because I was not involved on that day. 23 MR NGALWANA: Did you play any role, any 24 role at all, in the planning of or for the operation? 25 BRIG MKHWANAZI: No.</p>	<p style="text-align: right;">Page 2880</p> <p>1 sit and say, yes, this could have been done or it could 2 have been done this way, definitely it will be a complete 3 speculation. No matter how much information is given to 4 me, you know it is always better to see yourself to be 5 involved with planning, to be part of the operation and if 6 you're not part of it, really it would be total speculation 7 irrespective of how much information I have. I have 8 experience as deferred, but it won't be correct for me to 9 speculate especially if I was not there. 10 COMMISSIONER HEMRAJ: Brigadier, you say 11 that about the actual operations, what about the planning 12 of it, would you not be able to comment on the planning of 13 the operations, whether the plans on the contingencies were 14 appropriate? 15 BRIG MKHWANAZI: That's correct, with the 16 planning as well, Chairperson, is that you need to receive 17 information, you need to plan based on what's going to 18 happen and for me to comment with a plan that has been 19 actually down and has been executed, it will be totally 20 unfair, Chairperson. 21 CHAIRPERSON: I don't understand that 22 answer, Brigadier. One of the things that you do is you 23 give instruction as part of the operation commander 24 training that you do, in writing operational plans for 25 platoon commanders, is that correct?</p>
<p style="text-align: right;">Page 2879</p> <p>1 [14:46] MR NGALWANA: Did you play any role 2 operationally from the 9th too and including the 16th of 3 August 2012? 4 MR MKHWANAZI: I never took part. 5 MR NGALWANA: So if you were to be asked 6 questions regarding the events of the 16th and the events 7 leading up to that, you wouldn't be in a position to shed 8 any light, is that correct? 9 MR MKHWANAZI: That's correct, Sir. 10 CHAIRPERSON: Aren't you being unduly 11 modest, you must have substantial amount of expertise on 12 the handlings public order, policing situations and you 13 would accordingly be able to express an opinion, I take it, 14 on facts presented to you, as to what happened or allegedly 15 happened on the day in question, is that not correct? You 16 can't just raise a defence of - of the whole thing, can 17 you? If questions are put to you on the basis of what 18 allegedly happened, as an expert you could presumably 19 express an expert opinion, can't you or is your modesty 20 justified? 21 BRIG MKHWANAZI: That's correct, 22 Chairperson, but my taking is that with the issue regarding 23 to operations, there are lots of issues that get influenced 24 or influence the operation when it goes on day by day and 25 as a result for me while I am sitting here, if I can just</p>	<p style="text-align: right;">Page 2881</p> <p>1 BRIG MKHWANAZI: That's correct, Sir. 2 CHAIRPERSON: So presumably you have the 3 exercise, you put facts to the trainees and you say, this 4 is the information, this is what's going to happen, please 5 draft an operational plan to deal with the situation, 6 correct? 7 BRIG MKHWANAZI: Correct. 8 CHAIRPERSON: Now I don't know whether 9 you looked at the operational plans that the attorneys give 10 you and mark them out of 10, but presumably that's the kind 11 of exercise that you would perform, would you not? 12 BRIG MKHWANAZI: That's correct, yes. 13 CHAIRPERSON: So if we put the facts to 14 you in this case, well, not we but if the facts in this 15 case were put to you, and the plan that was drafted was put 16 to you, you will be able to tell us how many marks out of 17 10 you would give the person who drafted the plan, would 18 you not? 19 BRIG MKHWANAZI: Can you repeat your 20 question, Sir? 21 CHAIRPERSON: If someone were to put to 22 you the facts that were available in the present situation 23 when the plan was drawn up and if you were then to be shown 24 the plan that was drawn up, you would be able, I take it to 25 tell us how many marks out of ten you would give the</p>

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1 persons who drafted the plan?

2 BRIG MKHWANAZI: Ja –

3 CHAIRPERSON: You would, wouldn't you?

4 You see the thing is –

5 BRIG MKHWANAZI: Mr Chairperson, I hear

6 your point very well to say if there is a plan and I look

7 to the plan, can I be in a position to say out of ten how

8 many points I am giving to that particular plan.

9 CHAIRPERSON: Yes, you see the further

10 point is, we also presumably will be told what went wrong

11 in this case. I take it the plan wasn't to kill 34 people,

12 the plan wasn't to kill anybody, that must be so. They had

13 the media, the international media there, that would have

14 been, they clearly didn't intend killing anybody, they

15 intended disarming and disbursing the people peacefully, I

16 take it that's a given. Now it didn't happen like that, 34

17 people were killed, hundreds of bullets were fired in eight

18 seconds, 34 people died. Now something went wrong. The

19 question is, was the contingency of the plan failing

20 foreseeable and was the plan appropriate to deal with

21 something of the nature that went wrong, going wrong, you

22 see, that's the sort of issue that we're concerned with.

23 Now I take it that's a matter within your field of

24 expertise.

25 BRIG MKHWANAZI: Chairperson, as I have

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1 indicated from the beginning that for me it can be a very

2 difficult position to say, because this is the plan which

3 was actually compiled for the purpose of execution, to say

4 what went wrong, why the plan never succeeded. It is going

5 to be very difficult for me unless if I had an opportunity

6 to be involved right from the beginning, from the onset, I

7 can be in a position to say, even though I may not be an

8 operational commander on that day, but I can be able to say

9 or advise, this is how it should be, but this is an

10 operational plan that has been executed and for me to be

11 able now to say this is what went wrong, it can be totally

12 difficult for me to say.

13 CHAIRPERSON: We know or we will know

14 eventually, we know the facts, the basic facts and

15 presumably we will be able to ascertain what went wrong.

16 That's with hindsight of course, you know you can see

17 things more clearly with hindsight than you can with

18 foresight, but we know what went wrong or we will know by

19 the end of the inquiry, and I would hope that this whole

20 failed exercise will be carefully studied and in future

21 training, as part of the training that you're concerned

22 with, this will be held up as a lesson for things that

23 should be foreseen, the things that can go wrong and the

24 way of avoiding them, or am I being unduly optimistic when

25 I put that to you?

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1 BRIG MKHWANAZI: That's correct, Sir, I

2 believe after the commission will be able to have a proper

3 indication and how to move forward.

4 CHAIRPERSON: Further than that, I would

5 suggest it would be compulsory, a compulsory subject of

6 study for all future people taking your training, would I

7 be right?

8 BRIG MKHWANAZI: That's correct.

9 CHAIRPERSON: Yes.

10 MR NGALWANA: Yes, thank you. Brigadier,

11 let's see if you can at least to some extent be of some

12 assistance to the commission. Given your extensive

13 experience in POPS and the training of POPS, if you were

14 given a set of facts that says you have a group of between

15 a thousand and, I think it is three and a half or four

16 thousand people planted on a hill, many of whom armed with

17 pangas, assegais, spears an R5 rifle possibly, a pistol, is

18 such a crowd a crowd of the sort with which POPS is trained

19 to deal?

20 BRIG MKHWANAZI: The public order

21 policing is trained to deal with issues of public violence

22 or crowd management situations, however when it goes to the

23 level whereby we talk about people armed with R5, with the

24 type of weapon being mentioned, it always becomes a

25 challenge because in their position they are actually

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1 carrying shotguns, that actually load rubber in most cases.

2 For them to be able to deal with situation where there is

3 R5 it means somehow they will have to do some transition to

4 change to the type of a firearm that will actually be

5 proportionate to the situation they got before them.

6 However most of the time we have one or two members within

7 public order police who carry R5s, but in that situation we

8 talk about 2,000, 3,000, it is a lot of people, it will be

9 difficult for public order police to handle that type of a

10 situation.

11 Yes, of course they got 9 millimetre in their

12 position, the side firearm, they can make use of it, but to

13 use that, it means a member has to go for the 9 millimetre,

14 at the same time taking care of the short gun in his

15 position which will make the member to be inaccurate

16 because if you're going to fire within the group of people

17 you may shoot a wrong person and kill a person you are not

18 intended actually to be able to disarm and arrest, then I

19 think in that position it is totally difficult for public

20 order police in that situation.

21 MR NGALWANA: I am going to put the

22 question slightly differently or in a brief fashion. Does

23 POPS training prepare POPS to deal with the situation I

24 just gave you?

25 BRIG MKHWANAZI: No, not at all.

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1 MR NGALWANA: Is their training adequate
 2 to deal with people who are armed with pangas, assegais,
 3 R5, pistol and spears?
 4 BRIG MKHWANAZI: No, no.
 5 MR NGALWANA: Can I take you back,
 6 Brigadier, to your statement, paragraph 5.2? Perhaps it
 7 might be useful to put things in perspective. Could you
 8 take the commission through, very briefly but without
 9 issuing detail, if you can do that, crowd dynamics? What
 10 does that entail exactly, module 2?
 11 BRIG MKHWANAZI: Yes, if we talk about
 12 crowd dynamics we are actually referring to the crowd
 13 perspective. In actual fact how the crowd view this police
 14 or how do we view the crowds, because if we deal with the
 15 crowds we talk about a crowd that's going to be marching in
 16 a certain area and there are people living in that certain
 17 area, and how people look to these crowds, how do they take
 18 this crowd. We've got a crowd that march which is
 19 traditional, which are cultural and these are the type of
 20 crowd to say how do we handle them, and we got the type of
 21 crowds or type of people, if they look to the crowd they
 22 will sometime say the crowd is dangerous. They will
 23 sometimes say the crowd is barbaric, they will say maybe
 24 sometimes the crowd is not trusted, so these are the
 25 dynamics we need to look at.

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1 That means members must understand this type of a
 2 situation that if we deal with a crowd we must know we will
 3 have a crowd that is cultural, that is traditional, that
 4 actually people can perceive it as dangerous, as barbaric,
 5 as a crowd that cannot be trusted, but what is important at
 6 the end of the day is to say, this crowd is part of the
 7 society, the same as the police official is part of the
 8 community, he is part of the society as well, the only
 9 thing is to say how do we handle the situation, looking to
 10 tolerance and everything and make sure that we are
 11 successful at the end of the day.
 12 MR NGALWANA: Staying with the crowd
 13 dynamics and how you described it, is it fair to say that
 14 the, we're dealing with POPS, is it fair to say that POPS
 15 would react differently to a gathering of a crowd of
 16 churchgoers than a crowd of people sitting on a hill armed
 17 with the weapons I described to you earlier?
 18 BRIG MKHWANAZI: Yes, there will be a bit
 19 of difference, but at the same time it will depend to the
 20 type of a threat that we have, what is the threat on a
 21 churchgoer and what is the threat on the crowd that is
 22 sitting on the hill. Then that will determine to say how
 23 public order police will react. Obviously there will be a
 24 difference between the two, it cannot be handled the same,
 25 given the level as well.

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1 MR NGALWANA: Now if the POPS commander
 2 of course having disseminated the news as well to his
 3 charges, if he/she were to be informed of the crowd sitting
 4 on a hill that killed a couple of policemen, would that
 5 make any difference to their approach? In other words
 6 between an otherwise peaceful crowd and a crowd about whom
 7 he is told had killed a number of police and surveillance
 8 on days previously?
 9 BRIG MKHWANAZI: As you indicate that a
 10 person has been killed, however I would say from my side
 11 that it will, actually what will give a good indication is
 12 to say what the operational commander on the day will
 13 actually conduct his/her assessment regarding the
 14 situation, with that assessment he/she will be in a
 15 position to say how to handle that particular situation.
 16 [15:06] MR NGALWANA: Conflict resolution,
 17 5.2.1.2, what does that entail?
 18 BRIG MKHWANAZI: Under Conflict
 19 Resolution, if you remember, Chair, I started saying we
 20 need to ensure that we engage in dialogue. If we engage in
 21 dialogue it's to say how do we deal with the situation
 22 before us? You will have a situation between the two
 23 people most of the time and in that situation is that the
 24 police must come between and ensure the two parties start
 25 talking and solve the problem that is before the two people

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1 to ensure that there is some sort of understanding between
 2 the two and so in such a way that they can be able to go
 3 forward and have everything resolved properly.
 4 MR NGALWANA: I think constitutional
 5 powers of the police, we've touched upon, is that a
 6 reference to Section 2053 of the Constitution or there
 7 anything else to which you wish to refer?
 8 BRIG MKHWANAZI: But maybe we can add
 9 Section 17 as well of the Constitution.
 10 MR NGALWANA: You also refer to, in
 11 5.2.1.3 Brigadier, to scale use of force. What does that
 12 entail?
 13 BRIG MKHWANAZI: Yes, I'm actually
 14 looking to the Provisioning of the Gathering Act where we
 15 look as well to say how we should actually administer the
 16 use of force. If we use force, where should we start if we
 17 actually teach the people how they must actually use force.
 18 You cannot just come, you arrive before the people, you
 19 start doing or maybe shooting with rubber or throwing tear
 20 gas, there must be some sort of way how do you actually go
 21 step by step, especially if you do gradual police response.
 22 It's where you have to go step by step into that. Then it
 23 escalates, if it escalates, then how and what level of
 24 force can we use as it goes up?
 25 MR NGALWANA: Would that scale use of

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1 force be informed by the crowd dynamics?
 2 BRIG MKHWANAZI: That's correct as well.
 3 It will actually, as I've said, is more factors that can
 4 influence during the operation itself.
 5 MR NGALWANA: Talk to the Commission if
 6 you can, if you may, please, about deadly force.
 7 BRIG MKHWANAZI: Yes, if we look to
 8 deadly force, it's where we are actually teaching people
 9 especially we look first to three main words that is
 10 jeopardy, ability as well as opportunity.
 11 MR NGALWANA: Sorry, what was the first
 12 one?
 13 BRIG MKHWANAZI: First one, jeopardy,
 14 jeopardy, yes, jeopardy, yes. When we talk about that, we
 15 are looking to say if you act where you're actually
 16 protecting the next man or your buddy or what was the
 17 position? Jeopardy is to say was there a chance that the
 18 person could have maybe injured or killed the other person
 19 working with you? Yes we look to the ability as well as
 20 the opportunity, taking into consideration necessity, self
 21 or private defence, whereby maybe you can use 9 millimetre
 22 R5 shotgun or R1, but at the same time making sure that it
 23 must be proportionate to the threat, it must be reasonable
 24 to the circumstances and it must be seized as soon as the
 25 objective has been accomplished. That's what actually we

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1 teach people around that position.
 2 COMMISSIONER HEMRAJ: I'm sorry, we
 3 didn't get all that down. You said proportionate to the
 4 circumstances and?
 5 BRIG MKHWANAZI: Yes, it has to be
 6 proportionate to the circumstances.
 7 COMMISSIONER HEMRAJ: Yes, and?
 8 BRIG MKHWANAZI: And it has to be
 9 reasonable to the, proportionate to the threat, I'm sorry,
 10 proportionate to the threat, reasonable to the
 11 circumstances, be seized as soon as the goal has been
 12 achieved, in other words you don't have to go on and on and
 13 on. Stop as soon as you achieve the necessary –
 14 MR NGALWANA: Tactical communication?
 15 BRIG MKHWANAZI: Here under tactical
 16 communication is where we talk about how do we intervene?
 17 Tactical communication, it can be between members each
 18 other, how do they communicate, and how they communicate to
 19 the operational commander as well, all those issues comes
 20 into that under tactical communication.
 21 MR NGALWANA: Now just slightly back to
 22 deadly force, if a crowd of people, let's say for argument
 23 sake, 12, 15 people charge at you – I'm not talking about
 24 what happened, I'm giving you scenario outside what
 25 happened – if a crowd of people armed with a pistol and

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1 spears, pangas and assegais charge at you as the POP
 2 member, is that a justification or not for using deadly
 3 force?
 4 BRIG MKHWANAZI: Ja, Chairperson, as you
 5 have said that they charge towards you, the only thing is,
 6 I'm not sure if they charge towards you is because they are
 7 shooting at you or they are fighting with you, what is the
 8 position, if maybe we can have clarity on that?
 9 MR NGALWANA: That's what I mean.
 10 BRIG MKHWANAZI: They are shooting at
 11 you? Your question is, is it justifiable to use –
 12 MR NGALWANA: To use deadly force.
 13 BRIG MKHWANAZI: To use –
 14 CHAIRPERSON: That's really a legal
 15 question, isn't it? But viewed from the expertise of
 16 public order policing, I'll allow him to answer, but I
 17 point out that strictly speaking it's a legal question, but
 18 I suppose the legal answer would be informed by the kind of
 19 consideration to which he will refer, so I'll allow him to
 20 carry on. Answer the question.
 21 MR NGALWANA: Thank you, Chairperson.
 22 MR BURGER SC: Chair, can I just get for,
 23 Chair, may I just ask, I'm not following the debate. We
 24 hear a lot of evidence on the training of public order
 25 police and that I understand. Does my learned friend

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1 intend to apply that to the facts of that case so that we
 2 understand why the Brigadier is giving evidence? Or is he
 3 putting hypothetical to the witness which doesn't assist me
 4 at all? And with great respect, it wouldn't assist the
 5 Commission to come to a conclusion.
 6 CHAIRPERSON: The question that he put to
 7 the witness was purportedly hypothetical but in fact it was
 8 quite close to the facts of the present case and it was on
 9 that basis that I am prepared to allow it. But the point
 10 you make is a correct one that we're not here performing a
 11 classroom exercise, we're here to dissect and consider the
 12 facts of a particular set of circumstances. But the
 13 question was, despite the protestations to the contrary,
 14 was in fact based on the facts in the present case.
 15 MR BURGER SC: May I just assume, Chair,
 16 that we are going to then apply this theoretical syllabus
 17 to the facts of the case by the leader of the evidence?
 18 Because if not, really, we're not producing our, we're not
 19 using our time productively.
 20 MR MPOFU: Sorry, if I may add so that Mr
 21 Ngalwana can deal with both objections. I think what has
 22 been said is more so when the examiner in chief has sought
 23 to close the door to such cross-examination by saying
 24 everything you said has got nothing to do with the 16th,
 25 and then go onto –

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1 CHAIRPERSON: I think that door's now
2 been opened, Mr Mpofu, don't worry about that anymore.
3 MR MPOFU: Well that's exactly the point
4 I'm making, Chair, that makes, it makes it even more
5 prejudicial if as the Chair correctly points out the
6 hypothetical example actually deals in a way with the
7 events of the 16th. Thank you.
8 CHAIRPERSON: Yes, a point being put to
9 me by my colleague, Commissioner Hemraj is that you're
10 putting hypothetical, even though they are based on the
11 facts of this case. Really the complete picture should be
12 put, you can't just take little bits and pieces. But,
13 because that might lead to a misleading answer in the
14 circumstances. On the other hand we have an expert on
15 public order policing. One of the things we have to
16 consider is the reasonableness of the response. So it's
17 appropriate to have evidence from an expert to enable us to
18 decide what a reasonable response would be. So that's why
19 I'm not averse to the question being asked and answered,
20 provided the sort of caveats that have been stated by
21 counsel are borne in mind. But anyway, you've heard the
22 debate. I propose to allow you to continue but try to
23 focus it and keep it in the channels that we've been
24 talking about.
25 MR NGALWANA: Well thank you,

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1 Chairperson. I've been trying to do that to the almost
2 best of my ability given the time I've had to prepare.
3 COMMISSIONER HEMRAJ: Mr Ngalwana, can I
4 just ask you something, has this witness been provided with
5 anything to do with the SAPS presentation or the plan or
6 the contingencies or anything at all? Is he privy to any
7 of that information as he testifies at the moment?
8 MR NGALWANA: Not that of which I'm
9 aware. What he is privy to is the presentation that was
10 given for training, POPS training. Perhaps we can ask him.
11 I don't know if he has looked at the police presentation,
12 I'm not aware of that.
13 COMMISSIONER HEMRAJ: But just from the
14 witness' point of view, to be completely fair to him, if
15 he's expected to answer those questions, then he should
16 have had time to look at those plans, if that's what you're
17 embarking on now?
18 MR NGALWANA: No, that's not what I'm
19 embarking upon. He wasn't called upon here to give a
20 factual account, first-hand factual account of what
21 happened on those days because he wasn't there.
22 COMMISSIONER HEMRAJ: I understand that.
23 CHAIRPERSON: He can't be expected to do
24 that because that will be hearsay, but you call a man who's
25 an expert on public order policing and the training of

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1 those concerned with that. I don't understand the
2 relevance. Is he telling us about the training, unless it
3 goes further, otherwise the whole exercise wastes time.
4 Inasmuch as we will be called upon to decide at some stage
5 at the end whether what was done was reasonable in the
6 circumstances, clearly it's a matter for expert evidence
7 and this man is an expert on that field. So I haven't got
8 a problem with that. But the point put to you by my
9 colleague, Commissioner Hemraj, is that we mustn't be
10 unfair to the witness either. And if they, and I suspect,
11 I may be reading the auspices incorrectly, but I suspect
12 some questions may be asked in cross-examination on these
13 lines. It might be fair if the witness hasn't had a chance
14 to read exhibit L to give him a chance to do that before
15 questions of this kind such as the ones you're asking him,
16 and other questions that may be asked by others are put to
17 him. I don't know how you respond to that.
18 MR NGALWANA: Chairperson, perhaps let's
19 park that question for now.
20 CHAIRPERSON: Are there other questions
21 that you can ask the witness before we take the adjournment
22 at the end of the day's evidence, and give him a chance to
23 look at exhibit L in the meanwhile?
24 MR NGALWANA: If that is the way the
25 Chairperson of the Commission are inclined, we can take the

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1 adjournment now.
2 CHAIRPERSON: Unless you've got other
3 material. I don't want to waste time. If there's other
4 material that you want to cover which doesn't involve that,
5 we can use the time between now and the adjournment
6 usefully covering that material.
7 MR NGALWANA: Yes, I do, it's just issues
8 that arise from his statement, Chairperson. I'm easily
9 distracted, Chairperson, there are a lot of murmurs on my
10 left hand side.
11 CHAIRPERSON: Your learned leader is
12 giving you some advice-cum/instruction. Now if you would
13 like a short adjournment to enable him to do that in a
14 dignified way outside the auditorium, then we'll allow him
15 to do that.
16 MR NGALWANA: No, those are not the
17 murmurs to which I was referring, Chairperson. I was
18 referring to the murmurs farther to my left, but – thank
19 you, Chairperson. Brigadier, may I take you to paragraph
20 5.4 of your statement dealing with crowd management
21 technique? It's presented in a rather, shall we say,
22 elliptic fashion. I just want you to add some meat to the
23 bones. When you refer to foot technique, what does that
24 entail exactly?
25 BRIG MKHWANAZI: Yes, if we actually

<p style="text-align: right;">Page 2898</p> <p>1 discuss or talk about foot technique it's where we are 2 referring to say how members must actually engage or 3 intervene on foot, not using vehicles. 4 MR NGALWANA: Are you able to give a 5 practical example of how that happens? 6 BRIG MKHWANAZI: Yes, for an example, if 7 you have to come to a situation, you will have to maybe, to 8 deploy members, they will come out of the vehicle, they 9 will form up and there will be instruction given what 10 they're supposed to do if they intervene and they will do 11 that in a foot formation, in a sort of formation whereby 12 they will stick together and they will intervene to the 13 situation. 14 MR NGALWANA: And platoon and section 15 formation? 16 BRIG MKHWANAZI: Platoon and section 17 formation, it's nearly similar to the first one but here it 18 can be either with vehicles or on foot as well, but staying 19 together as a platoon. 20 MR NGALWANA: How many members would be 21 in a platoon and how many in a section? 22 BRIG MKHWANAZI: We've got 32 members in 23 a platoon and 8 members in a section. 24 MR NGALWANA: Vehicle formation? 25 BRIG MKHWANAZI: Vehicle formation, it's</p>	<p style="text-align: right;">Page 2900</p> <p>1 it up to you, the legality situation, appropriateness, 2 because they are dealt with separately in the various 3 policies. 4 BRIG MKHWANAZI: Yes, Sir, that's 5 correct, with legality it's where we ensure that we check 6 if whatever we are doing is within the legal frame of work, 7 or legal framework, and with the situation appropriateness 8 we actual look to the situation, how the situation is, bit 9 ensuring that when we teach members, is that if they 10 intervene, they must not create problems, they must make 11 sure they solve the problem instead of creating the bigger 12 problem. Actually, they mustn't be the cause of a 13 situation, whereby we will have an outcome that is not 14 acceptable. Optimisation, we are talking about the 15 resources we need to deal with the situation. What do we 16 need to make sure that we can be in a position to deal with 17 the situation, talk about the equipment we have. What 18 equipment do we need to deal with that type of the 19 situation under optimisation. Proportionality, it's where 20 we look to the point that when we take our actions, we 21 should just make sure that it's proportionate, in actual 22 fact it must be, we must strike the balance between the 23 two. You cannot come with a different solution whereby the 24 situation, it doesn't need that. We need just to make sure 25 that you balance the two in most of the time, if you do</p>
<p style="text-align: right;">Page 2899</p> <p>1 here, here you will actually have to intervene using 2 vehicles but there are some sort of formations we are 3 utilising depending to the terrain how it look like. 4 Actually members can just intervene using vehicles, not 5 coming out of a vehicle. 6 MR NGALWANA: I take it the number of 7 vehicles will be informed by the situation that is 8 unfolding? 9 BRIG MKHWANAZI: That's correct. 10 [15:26] MR NGALWANA: And the type of vehicle. 11 BRIG MKHWANAZI: That's correct as well. 12 MR NGALWANA: Indoor techniques, what 13 does that entail? 14 BRIG MKHWANAZI: Yes, in the techniques 15 normally we are teaching members, especially if they have 16 to deal with a situation in a closed door whereby they have 17 to get somebody out from that position, and normally if I 18 may make an example, in prison, it is where maybe prisoners 19 refusing to go inside the cells, then members must be able 20 to know how to go in and deal with that of situation inside 21 the doors, indoors. 22 MR NGALWANA: Now 5.4.1.5 is rather a 23 pregnant one, it deals with a couple of issues. Would you 24 want to touch on the principles and rules of intervention 25 regarding legality to begin with, or perhaps let me leave</p>	<p style="text-align: right;">Page 2901</p> <p>1 whatever intervention you come up with. 2 MR NGALWANA: Yes, I think you've taken 3 the Commission through that. You said proportionate to the 4 threats, reasonable to the circumstances, that it must 5 cease where – 6 BRIG MKHWANAZI: Yes, yes. 7 MR NGALWANA: - the goal has been 8 achieved. Does that talk to the proportionality aspect? 9 BRIG MKHWANAZI: It talks to 10 proportionality. 11 MR NGALWANA: At 5.5.1, can you give the 12 Commission the theoretical, if you like, or a real life 13 example, of how an operational plan, how you teach people 14 to write an operational plan, the platoon commanders. 15 BRIG MKHWANAZI: Yes, if we talk about 16 platoon commanders, it's where we look to a tactical plan. 17 A tactical plan actually is a small plan that talks to a 18 bigger plan. In actual fact, a captain or platoon 19 commander or a Lieutenant-Colonel, who is in charge of the 20 platoon, will receive instruction and he has to reduce that 21 instruction into a smaller plan that says how the platoon 22 will actually execute the task. You've got 32 members, 23 these 32 members, there are four sections, and how do you 24 want those sections actually to execute the task, in other 25 words, who will be on the right, who will be in the middle,</p>

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1 who will be on the left and all those things must be
 2 actually be put together by the platoon commander as quick
 3 as possible to be able to deal with the situation. And the
 4 operational commander training, which is the OCT it
 5 addresses the whole situation, it's where actually we need
 6 to talk about the holistic plan, that will actually run the
 7 operation as a whole, where we talk about the situation,
 8 the mission, the operational concept, we talk about the
 9 execution and the administration part at the end to say,
 10 how are we going to deal with that type of an operation?
 11 MR NGALWANA: Now, Chairperson, with
 12 regard to the next question I wish to ask, I am not sure if
 13 standing order 262 has an exhibit, and whether that has
 14 been distributed.
 15 CHAIRPERSON: Those questions have to be
 16 addressed to Adv Pillay, they mustn't be addressed to me.
 17 MR NGALWANA: Well, I seek to do so
 18 through the Chairperson to Adv Pillay.
 19 MS PILLAY: Chair, the standing order
 20 hasn't been entered as an exhibit as yet.
 21 CHAIRPERSON: Do you have copies for us?
 22 MR NGALWANA: No, Chairperson.
 23 CHAIRPERSON: Then why do you ask the
 24 question?
 25 MR NGALWANA: Because I imagine that the

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1 evidence leaders have them, because we –
 2 MS PILLAY: We have the document, Chair,
 3 but we weren't aware that SAPS use it as an exhibit, so we
 4 don't have copies on us at the moment.
 5 CHAIRPERSON: Well, clearly copies can be
 6 prepared overnight, and it will presumably be – what will
 7 the exhibit number be?
 8 MS PILLAY: SS2.
 9 CHAIRPERSON: SS2, are you able to ask
 10 questions now, without the copy before us, or would you
 11 prefer those questions to stand over until tomorrow morning
 12 when you have copies which will be before us as exhibit
 13 SS2.
 14 MR NGALWANA: As the Chairperson pleases.
 15 CHAIRPERSON: No, no, not as I please, I
 16 am asking you.
 17 MR NGALWANA: Yes, I am a creature of
 18 habit, Chairperson, it's difficult to deal with it
 19 otherwise, yes, I think the Chairperson's suggestion is
 20 quite sound. It's best to deal with it tomorrow.
 21 CHAIRPERSON: Yes, Mr Mpofo?
 22 MR MPOFU: Chairperson, just before we
 23 leave, if I may just interpose a small issue.
 24 CHAIRPERSON: Before we get to a you
 25 small issue, I am not sure whether your learned friend has

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1 got other questions to ask the witness before we adjourn.
 2 MR MPOFU: Oh, yes, no, no, I assume he
 3 had.
 4 CHAIRPERSON: He has decided to hold over
 5 the standing order until tomorrow, but there may be
 6 something else he wants to deal with, let's find out first,
 7 before you interpose your small matter.
 8 MR NGALWANA: No, Chairperson.
 9 MR MPOFU: Thank you, Chairperson.
 10 CHAIRPERSON: You are asking, moving for
 11 an adjournment until tomorrow?
 12 MR NGALWANA: As the Chairperson pleases.
 13 CHAIRPERSON: - my pleasure is irrelevant
 14 in these matters. You are asking for it, on the basis that
 15 you can't carry on with your examination-in-chief –
 16 MR NGALWANA: Yes, Chairperson.
 17 CHAIRPERSON: - until certain other
 18 things happen, right. So we can find out what Mr Mpofo's
 19 small matter is.
 20 MR MPOFU: Well, Chairperson, it may turn
 21 out not to be that small. Chairperson, this is a matter
 22 that I want to raise with all humility, and please don't
 23 shoot the messenger. If Chairperson will give me just a
 24 couple of minutes, it's regarding the – and also because I
 25 am not going to be here tomorrow, so I have been instructed

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1 to raise it now. It is regarding the issue of next week,
 2 Chairperson. I have spoken to some of my colleagues,
 3 admittedly not all of them, and I can - them this morning,
 4 and had 100% support at least of those that I spoke to, and
 5 I did not carefully avoid in others that I thought might
 6 not support it. It was just a coincidence. But
 7 Chairperson, having said that, I am raising from the point
 8 of view of the people we represent. The proposal, and I
 9 offered to discuss it with Mr Madlanga who is not here, the
 10 proposal that next week evidence should be led in-chief
 11 only for people to be cross-examined next year is, as I
 12 understand it, the kind of via media that was proposed. We
 13 would like to appeal very sincerely to the Chairperson and
 14 the Commissioners, that the – to put it bluntly, that the
 15 sittings of next week should not take place along those
 16 lines, or at all, and that is because, Chairperson with the
 17 greatest respect, particularly with the kinds of people
 18 that we represent, we are quite reticent to have them
 19 examined-in-chief, and then wait for a month or so before
 20 the cross-examination, even though of course, one can
 21 relook at the transcript and so on and so on. But the
 22 reality is that if you have four or five witnesses who have
 23 been backed up with evidence-in-chief all queuing up for
 24 cross-examination in January, let's say, the reality is
 25 that the witness number 5 or number 6 might end up being

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1 cross-examined some time in February, and although I am
 2 quite aware that the Chairperson and all of us are pressed
 3 for time, this appeal is simply to say that I am sure all
 4 the parties would co-operate as much as possible to make up
 5 the lost time somehow when we get back, rather than having
 6 this arrangement which is – might be prejudicial at – I
 7 won't put it higher than that, to some of the witnesses,
 8 and my appeal, I know the Chairperson's feelings on this,
 9 is that one of the ways I will protect myself is that to
 10 appeal to the Chairperson to consider this matter overnight
 11 and so that when the Chairperson reacts then I won't be
 12 here, and also that – but in more seriousness Chairperson,
 13 we really would like to make that appeal for that reason,
 14 but also simply because the – if the seniors are not going
 15 to be here, which is clear from my unscientific poll, then
 16 also that raises other issues about those people being led
 17 in the absence of the leaders of the team. I will say no
 18 more, Chairperson, and I would like them, the Commission
 19 can now adjourn if I take a risk. Sorry, Chairperson.

20 CHAIRPERSON: I have the difficulty of
 21 course, that at the very first meeting of this Commission,
 22 it was indicated that we would not sit in certain days for
 23 various reasons, but we would sit until the 21st and that
 24 was agreed to by everybody. There wasn't a single
 25 dissention. Now we are being asked to take away four days,

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1 which will amount to something of the order of 20 hours.
 2 When we are going to make them up, I don't know. But Mr
 3 Budlender, do you have any comments to make?

4 MR BUDLENDER: Chairperson -

5 CHAIRPERSON: I will call on the other
 6 counsel as well, if necessary.

7 MR BUDLENDER: - it might be helpful if I
 8 gave some indication of how from our side we see the rest
 9 of the time, the rest of the hearing proceeding from today.
 10 It's clear, the Brigadier has given evidence which goes
 11 well beyond the statement with which we were provided. I
 12 am not making a complain about it, what I am saying is that
 13 he's clearly likely to be cross-examined for a substantial
 14 period whereas initially it looked as though his evidence
 15 was largely formal, that's clearly not the case. So my
 16 anticipation is that the Brigadier will be with us, I would
 17 guess for the rest of this week. We then have – and
 18 possibly even beyond. We then also have the evidence to be
 19 given by Mr Xilitjane of the NUM. It has been arranged
 20 that his evidence will be in-chief only, at this stage,
 21 that also take us further into next week, and so the – and
 22 then there may be two or three days, optimistically, there
 23 will be two or three days left next week. I've had a brief
 24 discussion with my learned friend, Mr Semanya, about the
 25 possible availability of a major police witness to give

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1 evidence again in-chief only next week, so that we could
 2 deal with that, we could get his evidence rolling and he
 3 can be cross-examined when the matter resumes. If it plays
 4 out that way, we will have enough evidence, I would think
 5 for the bulk of the balance of the hearing without
 6 troubling Mr Mpofo and his clients to appear, very un-keen
 7 to be troubled right now.

8 CHAIRPERSON: To be fair, I must say I
 9 can understand where Mr Mpofo is coming from, the kind of
 10 witnesses that he's calling are the sort of witnesses that
 11 will be giving evidence on factual matters, their
 12 credibility is likely to be attacked I would suspect. I
 13 would think they're probably fairly unsophisticated people
 14 and if I was appearing for them, I wouldn't be happy for
 15 them to give evidence-in-chief and then have to stand over
 16 for a month. So I can sympathise with that point. The
 17 same consideration don't apply to the other witness or
 18 potential witness you mentioned. We've only got two days
 19 left this week, and normally we adjourn at 3 on Friday, so,
 20 it's not a full two days anyway, although we try to have a
 21 shortened lunch time to allow for that. And then the week
 22 after that is also only four days. So it sounds to me as
 23 if the suggestion you make may well be correct that we will
 24 in fact without troubling Mr Mpofo's clients, we may well
 25 be able to use up this time. Otherwise, we've got to make

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1 20 hours up at some stage in the future. That's not so
 2 easy to do. But I don't know whether any other counsel
 3 want to say anything at this stage, but it seems to me that
 4 regard being had to the imponderables, which you've
 5 mentioned, it would be difficult for us to make a decision
 6 on the matter overnight and come back tomorrow with a
 7 definite answer because there's so many things that we
 8 don't know, how long the Brigadier will be in the box, we
 9 don't know how long the NUM witness will be, they may well,
 10 I am not sure that what has happened in the past is
 11 necessarily an accurate indication of the future, but
 12 certainly it may well indicate that those two alone may
 13 take us to the end of next week, and certainly if a high
 14 placed policeman is available to give evidence-in-chief, it
 15 would obviously cover a substantial period of time. That's
 16 not the kind of witness who will have a problem of standing
 17 over for a month, as Mr Mpofo's witnesses would. So I
 18 would have thought it's too early to make the decision that
 19 Mr Mpofo wants made, but I don't know whether any of the
 20 other counsel that are sitting in the front row on my left,
 21 or even those sitting further back, wish to say anything.

22 MR BUDLENDER: Chair, may I just say one
 23 other thing, that I, what I said is I need to qualify
 24 carefully, I raised with my learned friend, Mr Semanya, at
 25 lunch time the possible availability of a major police

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1 witness, he in fairness to him, has not had an opportunity
 2 to check on the availability of the person we've discussed.
 3 He's been very helpful and said he will try to ensure that
 4 he is available, but he is not able to answer that question
 5 yet.

6 CHAIRPERSON: And of course it provides
 7 the further reason for no decision to be made on this
 8 aspect, until there's feedback on that point.

9 MR SEMENYA SC: Chair, we have circulated
 10 the statement of the witness, we have precognised the
 11 witness but about his availability there has not been any
 12 contact made.

13 CHAIRPERSON: We will hold over further
 14 discussion of this matter. Unfortunately, in the absence
 15 of Mr Mpofo who will I am sure forgive us in the
 16 circumstances. Mr Tip, do you want to say anything?

17 MR TIP SC: Mr Chair, we have kept
 18 ourselves available to the 21st on the basis that those
 19 were the days. If we have a situation where witnesses were
 20 being clamped up, who were the kinds of witnesses who
 21 should be held over for cross-examination, we share the
 22 concern that Mr Mpofo has identified. It appears to us,
 23 just on the basis of the past few hours, that Brig
 24 Mkhwanazi is a substantial witness and more substantial
 25 than had been anticipated. I think the evidence in chief

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1 is likely to be quite extensive. Our NUM witness is
 2 available, we anticipate that his evidence in chief will
 3 not be more than three hours or so, perhaps a little more
 4 allowing for interpretation and if one of the generals were
 5 available we also share the view that that would largely
 6 occupy the time we have with three witnesses in chief who
 7 could be dealt with come the resumption next year.

8 [15:46] CHAIRPERSON: It seems appropriate then
 9 at this stage to take the adjournment until tomorrow
 10 morning at half past nine and we may have more information
 11 for Mr Semanya at that stage anyway, to enable us to take
 12 the issue that's presently under debate further.

13 MR MPOFU: Thanks, Chairperson, that went
 14 better than I've expected.

15 CHAIRPERSON: The life is full of
 16 surprises, Mr Mpofo. The commission will adjourn until
 17 09:30 tomorrow.

18 [COMMISSION ADJOURNED]

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