

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

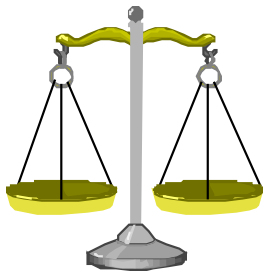
THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC

HELD ON

DAY 29 14 DECEMBER 2012 PAGES 3044 TO 3165

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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Page 3044

1 [PROCEEDINGS ON 14 DECEMBER 2012]
 2 [09:30] CHAIRPERSON: The Commission resumes.
 3 Brigadier, you're still under oath. Mr Budlender, you are
 4 still cross-examining?
 5 MR BUDLENDER SC: Yes, Chair.
 6 CHAIRPERSON: But before you pose your
 7 next question, you will remember, Brigadier, I asked you a
 8 question last night before we adjourned.
 9 BRIG MKHWANAZI: Correct, Chairperson,
 10 yes.
 11 CHAIRPERSON: Have you had an opportunity
 12 to think of the answer?
 13 BRIG MKHWANAZI: Chairperson, I've got an
 14 answer. Can I give?
 15 CHAIRPERSON: Yes, please give it.
 16 BRIG MKHWANAZI: Yes. Chairperson, I
 17 have actually tried and looked to few issues that maybe
 18 were of a shortcoming and become more of the issues that we
 19 have to have a lesson and see which direction we can take
 20 in future, and those are firstly, number 1 would be command
 21 and control. Command and control. Under command and
 22 control I will clarify why I'm saying that, is that the
 23 magnitude of the operation provided important information
 24 in terms of managing operation for the future, in the
 25 sense, the unified command and span of control to address

Page 3045

1 the issues of accountability and the leadership should be
 2 entrenched in the operational doctrine. What I mean is
 3 that under Public Order Policing we've got a span of
 4 control. However, SAPS as police, we have chain of
 5 command. So the two, we need just to look at it and
 6 revisit, especially if we have a unified command of
 7 control, because looking to the situation in Marikana, we
 8 have a vast area, it was too big in a sense that each and
 9 every section must have its own tactical commander, and its
 10 own tactical commander must all the time communicate with
 11 the operational commander, of which somehow I have a
 12 feeling that there was some sort of break of communication
 13 in some other areas most of the time. We need to start
 14 improving on that and see if how can we shape it properly
 15 to make sure that in future we don't have a problem around
 16 that. That includes the communication, all what actually
 17 we assist, the training that will assist as well to
 18 understand this command and control situation during the
 19 operation itself, because the operational commander or the
 20 overall commander, they will always rely to the tactical
 21 commanders to give information with the situation they are
 22 faced with before them at that stage.
 23 The other point I looked at it was the less
 24 lethal options. Under less lethal option I'm looking to
 25 the following, that more less lethal options must be

Page 3046

1 integrated into the SAPS operational approach during public
 2 order operations. If we talk about the less lethal weapon,
 3 we are looking to the use of water canon, use of police
 4 gradual response, use of teargas, use of rubber as a last
 5 resort, but however I'm saying there is a gap always, there
 6 will be a gap when we do our operations. So the best thing
 7 is to have more options. We must not only rely to teargas
 8 only because the main purpose of the teargas is to saturate
 9 the area to make sure that spectators can be able to
 10 disperse or to move away from the position. But if you
 11 fail with the teargas, what next? Now it becomes a
 12 problem. So we need just to close that gap by implementing
 13 more, other less lethal weapon just to see if maybe if
 14 teargas fails, what else can come up, until we deal with
 15 the situation amicably.
 16 The other point I'm going to mention,
 17 Chairperson, is a point which actually creates a bit of a
 18 bad image to the SAPS, that during the integrated Public
 19 Order Policing a gas mask must be made available to all
 20 members to avoid contamination. In other words what I mean
 21 here is that the gas mask is the one that we utilise to
 22 make sure members are not affected with the teargas if it's
 23 being used. If one's checking the visuals you will see
 24 some of the members of SAPS, they move back, and some of
 25 them, they show that they actually get affected with the

Page 3047

1 teargas. So some of those members are from the side of TRT
 2 and those members are not in possession of that type of
 3 equipment. So what I'm saying is at least in future let's
 4 make sure that we make those equipment available for them.
 5 At the same time let's give training to them as well how to
 6 utilise them so that if we come to this type of operation
 7 whereby we have an integrated operation where multi-
 8 discipline are brought together, at least those members
 9 must actually manage to deal with the situation properly.
 10 The last point, Chairperson, I want to indicate
 11 is that I think what is important, after everything we need
 12 to embark on a research. The research we need to conduct,
 13 it should be at least on a less lethal and lethal weapon,
 14 which actually whereby we'll be checking what is currently
 15 utilised by other police agencies. That includes outside
 16 South Africa. As you know very well, I mentioned from the
 17 beginning that Public Order Policing as a programme after
 18 '94, there were changes, but we learn from Belgium and I
 19 think as well on less lethal weapon we need to explore and
 20 see other countries as well what they are using on this
 21 less lethal weapon, not only to rely to ourselves in South
 22 Africa, but go out, maybe looking to places like England,
 23 looking like to USA, and see what they are having so that
 24 we can be able as well to say how can we close the gap if
 25 one equipment fails to deal with the situation, on

Page 3048

1 continuous basis; at the end of the day we sort out the
2 problem. This is the end of my contribution, Sir.
3 CHAIRPERSON: Thank you very much,
4 Brigadier. Mr Budlender, you said you had two questions
5 you wanted to ask last night before we adjourned –
6 MR BUDLENDER SC: Yes.
7 CHAIRPERSON: And I suggested you wait
8 until you have this answer before you proceed with them. I
9 take it you may have some other questions as well.
10 MR BUDLENDER SC: Yes, Sir, I'm afraid
11 it's an Mpofu-like two questions, Chairperson, but it will
12 be a bit more. Brigadier, you've been giving evidence as
13 an expert, in order to express an expert opinion on whether
14 the SAPS acted correctly on the day in question.
15 BRIG MKHWANAZI: Yes, my understanding,
16 Chairperson, is that it's to be able to indicate in some
17 areas where I can be able to indicate, I will be in that
18 position to do that.
19 MR BUDLENDER SC: And you understand that
20 when an expert gives an opinion, he or she has to do so by
21 weighing all of the information in an independent and
22 objective manner?
23 BRIG MKHWANAZI: That's correct, and
24 that's my aim, Sir, that I give the truth and the only
25 truth.

Page 3049

1 MR BUDLENDER SC: You were at
2 Potchefstroom for the SAPS meeting at which the events at
3 Marikana were analysed and discussed?
4 BRIG MKHWANAZI: Yes, I was at
5 Potchefstroom and what was there, my main task was on
6 policies, national instructions, as well as the standing
7 orders, to look at them and be able to assist in the
8 compilation for the submission for the Commission.
9 MR BUDLENDER SC: The meeting lasted for
10 seven days.
11 BRIG MKHWANAZI: I'm not in a position to
12 say yes or no because I only managed to be with the group
13 for three days, Counsellor.
14 MR BUDLENDER SC: During those three days
15 each of the units reported on what it had done on the day
16 in question.
17 BRIG MKHWANAZI: Counsellor, it is
18 correct. However, the groups were divided. People were
19 divided into groups. They worked into groups, and our task
20 was only to meet with them when they give the final
21 product.
22 MR BUDLENDER SC: And the reports they
23 gave were on what they had done on the day in question.
24 BRIG MKHWANAZI: That's correct,
25 Counsellor. It's the one, exhibit L.

Page 3050

1 MR BUDLENDER SC: Well they didn't
2 present exhibit L. They first, I take it all reported what
3 each of them had done and then L was put together after
4 that?
5 BRIG MKHWANAZI: Yes, it was the
6 information leading to the final product for exhibit L.
7 MR BUDLENDER SC: Yes, and your task was
8 to listen to what the units reported as to what they had
9 done and to consider whether they had acted correctly?
10 BRIG MKHWANAZI: It is correct,
11 Counsellor. We're support to go through the final, or
12 consolidated information.
13 MR BUDLENDER SC: At the end of the
14 process you worked on the draft presentation, L, which was
15 the output of the workshop, and you suggested some changes
16 to it?
17 BRIG MKHWANAZI: Chairperson, what
18 happened is after they have actually put the information
19 together with everything, it was presented before all of
20 us. We made our comments from the floor with the
21 presentation in front and those comments we made, they were
22 ratified, especially by Lieutenant-Colonel Scott, with some
23 of the assistant, into that position. I was not involved
24 like to sit down and say let's write this way, but we
25 actually all contributed where we actually listened, but as

Page 3051

1 I've said yesterday, mostly what I contributed at was about
2 the Police terminology, the terms and everything. That's
3 where I played a big role, especially on Public Order
4 Policing side with the terminologies and all that.
5 MR BUDLENDER SC: About how many people
6 were at the meeting at Potchefstroom while you were there?
7 Approximately.
8 BRIG MKHWANAZI: Yes, I will be
9 definitely making a mistake, Chairperson, if I say how many
10 there were, but I would say almost all tactical commanders,
11 commanders, senior officers, were present in that meeting,
12 but with figures I will definitely not be sure.
13 MR BUDLENDER SC: No, I understand you
14 can't give a number, you were not asked to count them. But
15 I'm asking you for an estimate. Is it more like 20, or
16 more like 50, or more like 100, or more like 200?
17 BRIG MKHWANAZI: I will put, Counsellor,
18 around about 80 above. Ja, not, there were many,
19 definitely.
20 MR BUDLENDER SC: Thank you. Now in the
21 three days that you were there did you here any one of
22 those 80 people, approximately 80 people, express the view
23 that things might have been done differently?
24 BRIG MKHWANAZI: No, Counsellor.
25 MR BUDLENDER SC: Not one in three days,

Page 3052

1 after this event, suggested that things might have been
2 done differently?
3 BRIG MKHWANAZI: Not if I recall,
4 Counsellor.
5 MR BUDLENDER SC: Well, I have to put a
6 question to you, Brigadier, which is a serious question.
7 Was this a meeting aimed at analysing what went wrong at
8 the day, or aimed at touching together a version to put
9 before the Commission?
10 BRIG MKHWANAZI: On my understanding,
11 Counsellor, and with a letter which was sent to my
12 province, the letter was stating that we will contribute on
13 policies, contribute on national instructions, as well as
14 standing orders. That's how my letter was and the
15 explanation I received was only based on that, and on my
16 arrival as well that's all what actually we speak on. As
17 the groups were divided doing their tasks, coming back,
18 giving us their product, we have to interact on that.
19 MR BUDLENDER SC: Let me put the question
20 differently. Was it a meeting which had as one of its
21 goals to identify matters which had gone wrong on the day
22 in question?
23 [09:50] BRIG MKHWANAZI: I would say no,
24 Counsellor, because I think at that stage it was going to
25 be wrong if we have a meeting that identifies mistakes,

Page 3053

1 hence already the Commission has been appointed and the
2 members who were dealing with them, these are the
3 commanders who were involved with an operation. That is my
4 opinion, but as I have said, on my arrival I didn't pick up
5 any position whereby we were supposed to close the gaps
6 except to address the issues as such.
7 MR BUDLENDER SC: Brigadier, I also just
8 need to remind you that previously, on Wednesday you said
9 you couldn't give evidence on the correctness or otherwise
10 of the events of the 16th because you first needed to read
11 exhibit L, is that correct?
12 BRIG MKHWANAZI: It is correct and the
13 reason is, Counsellor, is that after the final product of
14 exhibit L and brought before the Commission, I never had an
15 opportunity to go through it. That was the reason anyway,
16 if I never explained that.
17 MR BUDLENDER SC: So you wanted to remind
18 yourself of the version of the Police which was put
19 together at the meeting at Potchefstroom which you
20 attended?
21 BRIG MKHWANAZI: Chairperson, not only
22 that. We have gone above everything to understand because
23 if I can only understand this exhibit L, I won't be able to
24 answer all questions properly here. I had to go through
25 everything that is available to acquaint myself properly

Page 3054

1 because when I came here, the main, sole purpose for me to
2 come here was to talk about training, of which I prepared
3 myself about training, but when I sat here, everything was
4 changed now that I have to as well embark on this side of
5 the operational side. Then I have to definitely try and
6 get myself acquainted so that I can give information if I
7 have to give information.
8 MR BUDLENDER SC: Brigadier, the South
9 African Police Service have a tremendously important and
10 difficult task to perform for all of us.
11 BRIG MKHWANAZI: That's correct,
12 Counsellor.
13 MR BUDLENDER SC: In order to be able to
14 perform that task effectively, they need the trust and
15 support of the public.
16 BRIG MKHWANAZI: That's correct, we
17 cannot achieve this work without the community.
18 MR BUDLENDER SC: And I want to suggest
19 to you that if something goes badly wrong, that trust and
20 support will be promoted if the SAPS admitted frankly, and
21 say what they will do to make sure that it doesn't happen
22 again. Do you agree with that?
23 BRIG MKHWANAZI: I will agree with you,
24 and at the same time, after the truth has been unveiled
25 properly and a recommendation is there, I think definitely

Page 3055

1 it will actually promote trust between Police and
2 community.
3 MR BUDLENDER SC: And I want to suggest
4 to you that that trust and support which the Police need,
5 will be undermined if the Police doggedly insist that there
6 was nothing wrong in an operation which resulted in 34
7 people being killed. Do you agree with that?
8 BRIG MKHWANAZI: Counsellor, that's
9 correct. Witnesses need to be pointed out if they were
10 there, that's correct.
11 MR BUDLENDER SC: Now you've told us this
12 morning of weaknesses which you've identified on reflection
13 overnight.
14 BRIG MKHWANAZI: That's correct, Sir.
15 No, okay.
16 MR MAHLANGU: If the question can be
17 repeated.
18 MR BUDLENDER SC: The question was you've
19 told us this morning of weaknesses which you identified on
20 reflection overnight.
21 BRIG MKHWANAZI: It's correct,
22 Counsellor.
23 MR BUDLENDER SC: The weaknesses you've
24 identified are that the command and control system needs to
25 be improved for unified operations on a large scale.

Page 3056

1 BRIG MKHWANAZI: It's correct. As I
 2 indicated yesterday that we have all disciplined – deployed
 3 especially on spotting event. However, on issues we face
 4 with Marikana, there was definitely a challenge that we
 5 brought a lot of discipline. However, we need just to look
 6 at it as well to say when it come to that position, how are
 7 we going actually to deal with those issues of command and
 8 control so that the vastness of the area, it need to be
 9 coordinated properly; at the end of the day we are
 10 successful.

11 MR BUDLENDER SC: Secondly, there is a
 12 need to conduct research and find ways of obtaining less
 13 lethal options for dealing with public order operations.

14 BRIG MKHWANAZI: That's correct.

15 MR BUDLENDER SC: And thirdly, the
 16 members who were present on that day should've been issued
 17 with gas masks.

18 BRIG MKHWANAZI: Yes, that's correct. I
 19 mentioned that, Counsellor, especially as a witness to the
 20 side of the Police especially if a member will indicate
 21 that he's feeling something is contaminated, then that need
 22 to be addressed, hence some of the members are not issued
 23 with gas masks because they don't work with public order
 24 policing.

25 MR BUDLENDER SC: Now the failure to

Page 3057

1 issue some members with the gas masks is an error or
 2 mistake, which you've identified, which happened on the
 3 day.

4 BRIG MKHWANAZI: It's a shortcoming, I
 5 picked it up on that day.

6 MR BUDLENDER SC: Have you been able to
 7 identify any other error or mistake or shortcoming of what
 8 was actually done on that day?

9 BRIG MKHWANAZI: Counsellor, up to so
 10 far, this is the only part I managed to come up with,
 11 unless if I've got a chance to go further as well even in
 12 going to the scene and talk with the rest of people, I will
 13 be able to come up with more information. Up to so far I
 14 got this.

15 MR BUDLENDER SC: I want to take you to
 16 an answer you gave yesterday to a matter that was raised
 17 with you. You will remember that you said that there was
 18 something missing from the plan, namely an adequate
 19 assessment of the risk because the risk of an attack on the
 20 Police was not mentioned. Do you remember that?

21 BRIG MKHWANAZI: Counsellor, what we
 22 addressed there was the risk analysis, whereby my point was
 23 that if you address the risk analysis, the risk analysis
 24 must be addressed under operational concept to say how are
 25 we going to deal with them, linking them to the execution

Page 3058

1 as well. So what the question by the counsellor yesterday
 2 was, was this part of the breaching identified, attack on
 3 the police identified under the risk analysis, and my
 4 question was, it was not addressed because if we check to
 5 the risk analysis, the plan before me, it was not actually
 6 identified.

7 MR BUDLENDER SC: But you said you
 8 thought there was a valid explanation for this, namely that
 9 they were, Police were anticipating that the strikers would
 10 hand over their weapons on the morning of the 16th of
 11 August.

12 BRIG MKHWANAZI: You're correct,
 13 Counsellor. It was my opinion that maybe it may happen
 14 that the planners, they relied to the information received
 15 that the following day the weapon will be laid down and if
 16 they will be laid down completely it shows that there's a
 17 sign of peace, of which it never happened on the day. But
 18 my answer, it cannot be exactly correct, but it's my
 19 opinion, I'm thinking of that.

20 MR BUDLENDER SC: Brigadier, your answer
 21 can't simply not be possibly not – I can't remember the
 22 phrase you used. I put it to you, your answer can't
 23 possibly be correct, the explanation you give, and let me
 24 tell you why. The first reason is that Colonel Scott's
 25 plan was drawn on the 14th of August before the alleged

Page 3059

1 undertaking to surrender weapons on the 16th of August. So
 2 the failure to hand over weapons on the 16th can't be the
 3 reason why that risk wasn't mentioned. Or rather, sorry,
 4 let me put it differently. The expectation that weapons
 5 would be handed over on the 16th, can't be the reason why
 6 that risk wasn't mentioned on the 14th.

7 BRIG MKHWANAZI: With that duration,
 8 Counsellor, you are correct. It cannot be possible in that
 9 position. However, it's one of the things that I'm
 10 receiving information when I ask from people. That can be
 11 the reason as well.

12 MR BUDLENDER SC: But whoever may have
 13 told that to you, you agree that it's not a valid reason?

14 BRIG MKHWANAZI: As I have said,
 15 Counsellor, from the beginning, that there are a lot of
 16 influencing factors if you draw, or you compile an
 17 operational plan. If it was done on the 14, that was the
 18 information present from Intelligence, from informers or
 19 from anybody who can give information. If they have that
 20 information, definitely it can be difficult for me to say
 21 what was the position. But I agree with you, on the 14 to
 22 have the position to say how people will stand, how people
 23 will attack, all those type of things, maybe it can be a
 24 difficult position for the planner to say is it going to
 25 happen or not, unless the information is given.

Page 3060

1 MR BUDLENDER SC: That relates to Colonel
 2 Scott's plan, but I want to put it to you that there's also
 3 the operational plan which is part of SS3. Do you have
 4 exhibit SS3?
 5 BRIG MKHWANAZI: Yes, I've got it, Sir.
 6 MR BUDLENDER SC: If you will go to the
 7 third page of that bundle –
 8 BRIG MKHWANAZI: The date marked 8/08/13,
 9 that's correct, Sir.
 10 MR BUDLENDER SC: That is the operational
 11 plan compiled with effect from the 13th of August 2012.
 12 BRIG MKHWANAZI: That is the 13th, that
 13 was the date it was compiled.
 14 MR BUDLENDER SC: And then if you'll go
 15 to the next page, under paragraph 1.3 you'll see under risk
 16 analysis, various risks are identified.
 17 BRIG MKHWANAZI: That's correct.
 18 MR BUDLENDER SC: And as you pointed out
 19 yesterday, that risk does not include the risk of an attack
 20 on the Police by the strikers.
 21 BRIG MKHWANAZI: I agree, Sir.
 22 MR BUDLENDER SC: I want to suggest to
 23 you, and I'm going to try to show you this a bit later
 24 today, that that was an accurate risk analysis. On 13th of
 25 August there was no risk of an attack on the Police, and

Page 3061

1 what created the risk was the implementation of Colonel
 2 Scott's plan. There are a lot of conclusions in that,
 3 Brigadier. It's not fair to ask you to answer yes or no.
 4 I'll try to show you in due course why I say that. Can we
 5 then move on to Standing Order 262, which I think is also –
 6 CHAIRPERSON: Are you moving away from
 7 the risk analysis, or the lack of a risk analysis?
 8 MR BUDLENDER SC: Yes, I am, Chairman.
 9 CHAIRPERSON: I'd like to ask a question
 10 about that. You said yesterday and today that you – I'm
 11 not quite sure whether this was what you understood from
 12 other people or whether this was just your own theory, but
 13 you explained the lack of a risk analysis in Colonel
 14 Scott's plan on the basis that there had been an
 15 undertaking to lay down weapons at 9 o'clock on the 16th
 16 and therefore there was no risk of any attack by the
 17 strikers directed against the Police. But Mr Budlender put
 18 to you that doesn't work because Colonel Scott's plan had
 19 been compiled before there was a suggestion of an alleged
 20 undertaking to lay down the weapons. But I've got a
 21 further problem I want to put to you, and that is that by
 22 the time the plan was activated, was put into operation, it
 23 was known that the weapons hadn't been handed over and
 24 weren't going to be. So if the failure - and I use the
 25 word "failure" with its full meaning - if the failure to

Page 3062

1 incorporate this problem in the, to incorporate a risk
 2 analysis based on a possible attack on the Police had
 3 originally be occasioned by the alleged undertaking to hand
 4 the weapons down, the plan would've required revision and
 5 the incorporation of the risks flowing from the fact that
 6 the weapons had not been handed over. Would you agree with
 7 that?
 8 [10:10] BRIG MKHWANAZI: Chairperson, normally
 9 what can happen is that if the information is received
 10 through intelligence that says weapon won't be actually
 11 laid down by the participants, normally there will be,
 12 actually it will be normally be documented and maybe that
 13 document will be available as an annexure to the plan as
 14 well, if possible, but if I indicate that without having it
 15 been included, it's just my opinion, Chairperson, to say
 16 maybe it was an agreement, but I still maintain the point
 17 to say if the information is through maybe intelligence,
 18 always it's on paper, it's written, and maybe it can come
 19 up as an annexure added to the plan itself, because to go
 20 back and write it again, it won't be, occur in that way.
 21 CHAIRPERSON: My point is slightly
 22 different. Whether or not a plan is based upon written
 23 intelligence, if it becomes clear before the plan is put
 24 into operation that one of the assumptions on which the
 25 plan is based is incorrect, then doesn't the plan require

Page 3063

1 reconsideration and possible amendment to cater for a risk
 2 which has now appeared to be one that has to be dealt with?
 3 BRIG MKHWANAZI: Chairperson, it is
 4 correct. From the beginning I indicated the influence of
 5 factors when you plan the operation, whereby actually the
 6 whole thing comes by the information that comes
 7 continuously from Intelligence and it can come from
 8 different people on the meeting, or whatever position.
 9 Obviously there will be changes to ensure that there's some
 10 of sort of plan how to deal with that type of situation.
 11 But I won't have a proper position to say what happened on
 12 the day, why it was incorporated and how they plan to deal
 13 with it, but as I mentioned from the beginning,
 14 Chairperson, I mentioned my opinion, of which they may have
 15 a different answer on that position.
 16 MS HEMRAJ SC: Brigadier, if a plan is
 17 made and intelligence comes in which affects the execution
 18 of that plan in an effective way, surely that plan is then
 19 subject to being amended, edited, revised?
 20 BRIG MKHWANAZI: Chairperson, as I
 21 indicated yesterday that before the plan can be compiled,
 22 especially in a march or a gathering of this nature there
 23 must be a meeting that takes place. Within that meeting at
 24 least there must be information that comes out there how
 25 the gathering will be held, how the march will be held, if

Page 3064

1 it is a march, and there must be conditions. All that
 2 information comes from the position, and Intelligence will
 3 embark as well, coming through with information, indicating
 4 what they pick up in the situation where the march will
 5 take place, and all that. Then the plan will be compiled.
 6 However, it's a little bit difficult after the plan has
 7 been compiled and it's ready to be operationalised and
 8 something comes up. That's why I'm saying if it is on
 9 writing, obviously it will come as an annexure. If it is
 10 verbal there must be a way to say how to deal with that
 11 position. On my position it's a little bit difficult to
 12 say what they could have done if they received that
 13 information, but what I could have done myself is that if I
 14 receive it on writing, will be annexure that talks to that
 15 and will be a way to say how we're going to deal with that
 16 because it comes, we need to receive information
 17 continuously. We plan. It doesn't mean it will be just
 18 like that. It will change. We will definitely have to be
 19 flexible to deal with a new situation that comes out.
 20 MR BUDLENDER SC: Brigadier, just to
 21 clarify one point that I raised with you, I put to you the
 22 suggestion that the report, the contingency plan of the
 23 13th of August was in fact correct in its assessment of
 24 risk because there was at that time no risk of an attack on
 25 the Police. You remember I put that to you? I don't ask

Page 3065

1 you to comment on that; I'm just reminding you of what I
 2 put. Now we know that in fact two policemen were killed on
 3 the 13th of August by certain of the, apparently by certain
 4 of the strikers. You're aware of that, I think.
 5 BRIG MKHWANAZI: Yes.
 6 MR BUDLENDER SC: And really just what I
 7 want to put by way of clarification is that the action
 8 which was taken by the Police on the 13th of August on the
 9 instructions of General Mpembe created an unanticipated
 10 risk of an attack on the Police.
 11 BRIG MKHWANAZI: Maybe Chairperson, if I
 12 may ask, the instruction we are talking about is the
 13 request by General Mpembe to lay down the firearm from the
 14 participants?
 15 MR BUDLENDER SC: I'm referring to the
 16 instruction to attack certain of the strikers with teargas
 17 and stun grenades.
 18 BRIG MKHWANAZI: Counsellor, my comment,
 19 it would be difficult because I'm not sure why he gave that
 20 instruction, if he gave it, Sir.
 21 CHAIRPERSON: Sorry, Brigadier, I have
 22 difficulty with understanding that. If one looks at slide
 23 79, one sees – this is under the heading "The operational
 24 plan," the plan involved –
 25 BRIG MKHWANAZI: 79?

Page 3066

1 CHAIRPERSON: 79. This is in exhibit L,
 2 involved using water canon on the protesters, administering
 3 teargas to them, and following up with stun grenades, and
 4 what is then said, and then furthermore rubber rounds as
 5 well, and then on slide 80 it said, "Should the protesters
 6 attack the members of POP in the dispersion line then
 7 second line of armed members of the Tactical Response Team,
 8 backed by the NIU and STF and following behind the POP
 9 line, would respond proportionately to address the threat."
 10 So the plan involved, as I understand it, using water
 11 canon, teargas, stun grenades, and rubber rounds, to
 12 disperse the protesters, and if that didn't work and they
 13 weren't dispersed and they attacked the members of the POP,
 14 then the response would be from the second line of armed
 15 members of the Tactical Response Team. So it does appear
 16 that this aspect was considered to some extent, according
 17 to what appears in slides 79 and 80, or am I not following
 18 what you're saying?
 19 BRIG MKHWANAZI: Chair -
 20 MR BUDLENDER SC: The witness and I are
 21 looking at each other. I think we were talking about
 22 something different. We were talking about –
 23 CHAIRPERSON: The problem is, I jumped
 24 ahead.
 25 BRIG MKHWANAZI: Yes, Chair.

Page 3067

1 CHAIRPERSON: You were talking about the
 2 13th, what happened on the 13th, giving a clue as to what
 3 is likely to happen on the 16th if certain things happened,
 4 and the operational plan as set out in slide 79 and 80
 5 deals with the 16th, but yes, possibly this aspect will
 6 have to be revisited later on in the cross-examination.
 7 MR BUDLENDER SC: It certainly will be,
 8 Chair. Right, Brigadier, then if we go to Standing Order
 9 262 –
 10 BRIG MKHWANAZI: Got it, Counsellor.
 11 MR BUDLENDER SC: Paragraph 7 deals with
 12 the threat assessment, correct?
 13 BRIG MKHWANAZI: Paragraph number?
 14 MR BUDLENDER SC: Paragraph 7.
 15 BRIG MKHWANAZI: Paragraph 7, got it.
 16 MR BUDLENDER SC: It deals with the
 17 threat assessment and it says at the highest level, level
 18 3, the ACCU takes operational command. Is that correct?
 19 BRIG MKHWANAZI: That's correct, Sir.
 20 MR BUDLENDER SC: And we know that the
 21 ACCU is one of the many previous names for the people in
 22 charge of Public Order Policing.
 23 BRIG MKHWANAZI: Public Order Policing.
 24 MR BUDLENDER SC: And then paragraph 9 on
 25 the same page 6 deals with the pre-planning of operations.

<p style="text-align: right;">Page 3068</p> <p>1 BRIG MKHWANAZI: Correct.</p> <p>2 MR BUDLENDER SC: On the next page, step</p> <p>3 5 identifies information which must be collected.</p> <p>4 BRIG MKHWANAZI: Which paragraph is that,</p> <p>5 Counsellor?</p> <p>6 MR BUDLENDER SC: It's step 5 under</p> <p>7 paragraph 9, sub 2 –</p> <p>8 BRIG MKHWANAZI: Ja, I see it now, thank</p> <p>9 you.</p> <p>10 MR BUDLENDER SC: And if we look at that</p> <p>11 we see that it's anticipated that in this ACCU controlled</p> <p>12 operation under 5, sub 2, there might be an outbreak of</p> <p>13 violence and under 5, sub 4, there might be firearms held</p> <p>14 presumably by the participants.</p> <p>15 BRIG MKHWANAZI: Correct, Sir.</p> <p>16 MR BUDLENDER SC: So from this we can</p> <p>17 conclude that POPs, or the ACCU may have operational</p> <p>18 control where violence is likely and where the participants</p> <p>19 have firearms?</p> <p>20 BRIG MKHWANAZI: It is correct, Sir.</p> <p>21 However, we need to ensure what type of firearm are they</p> <p>22 having in their possession, and the danger is poses to the</p> <p>23 members of SAPS during the operation, or the other members</p> <p>24 of the community. Then thereafter we have to see is it</p> <p>25 going to be sufficient only for Public Order Policing to</p>	<p style="text-align: right;">Page 3070</p> <p>1 violence.</p> <p>2 BRIG MKHWANAZI: That information I got</p> <p>3 it, Sir.</p> <p>4 MR BUDLENDER SC: That's consistent with</p> <p>5 what you've been told.</p> <p>6 BRIG MKHWANAZI: That's information I got</p> <p>7 it, Sir, that there were, actually there was that gap.</p> <p>8 However, there were lot of activities that were taking</p> <p>9 place which were not violently at all, yes.</p> <p>10 MR BUDLENDER SC: So at the time when the</p> <p>11 operation was, or at the time when stage 3 was initiated</p> <p>12 just before 4 o'clock, there had been no violence for 48</p> <p>13 hours.</p> <p>14 BRIG MKHWANAZI: That's how I got</p> <p>15 information up to so far, Sir.</p> <p>16 MR BUDLENDER SC: The barbed wire was</p> <p>17 then rolled out. Within 30 minutes 34 people had been</p> <p>18 killed and more than 70 had been injured. Is that correct?</p> <p>19 BRIG MKHWANAZI: I do get the position,</p> <p>20 Sir, that 34 people were actually killed. However, I'm not</p> <p>21 certain with the comment to say the barbed wire was</p> <p>22 deployed, then 34 were killed. I'm not sure the – maybe</p> <p>23 you can clarify it better.</p> <p>24 CHAIRPERSON: Yes, Mr Semenya?</p> <p>25 MR SEMENYA SC: Chairperson, I don't know</p>
<p style="text-align: right;">Page 3069</p> <p>1 handle that situation. If not, we can have to look to</p> <p>2 others as well.</p> <p>3 MR BUDLENDER SC: I understand. Now</p> <p>4 yesterday you, and I think perhaps on the previous day, you</p> <p>5 told us about what seems to me to be a very important rule,</p> <p>6 the rule of situational appropriateness.</p> <p>7 BRIG MKHWANAZI: Situational</p> <p>8 appropriateness?</p> <p>9 MR BUDLENDER SC: Yes.</p> <p>10 BRIG MKHWANAZI: Yes, I spoke –</p> <p>11 MR BUDLENDER SC: You spoke about that.</p> <p>12 BRIG MKHWANAZI: This is the rules of</p> <p>13 intervention.</p> <p>14 MR BUDLENDER SC: Yes, and that's a very</p> <p>15 important rule which states that the intervention must not</p> <p>16 create a bigger problem with an outcome which is not</p> <p>17 acceptable.</p> <p>18 BRIG MKHWANAZI: Okay.</p> <p>19 MR BUDLENDER SC: In other words, the</p> <p>20 intervention should not aggravate the situation.</p> <p>21 BRIG MKHWANAZI: Correct.</p> <p>22 MR BUDLENDER SC: Now if we go to the</p> <p>23 16th of August, just before stage 3 was commenced, that was</p> <p>24 just before 4PM on the 16th of August, at that time for the</p> <p>25 last 48 hours there had been no single incident of</p>	<p style="text-align: right;">Page 3071</p> <p>1 whether my understanding of the evidence is correct. The</p> <p>2 victim with a skull on the chest would have been the</p> <p>3 Tuesday.</p> <p>4 CHAIRPERSON: Yes, but that's where the</p> <p>5 48 hours comes from, from the – there's some suggest, I</p> <p>6 think, wasn't the body found about 2:30 on the Tuesday</p> <p>7 afternoon? Something of that, I'm not quite sure –</p> <p>8 MR SEMENYA SC: It does say that –</p> <p>9 CHAIRPERSON: - how early he'd actually</p> <p>10 been killed, and I think Mr Budlender's 48 hours runs from</p> <p>11 about 2:30 on the Tuesday to, in fact more than 48 hours,</p> <p>12 to about 4 o'clock on the Thursday. That is 46 hours or 45</p> <p>13 and a half. Sorry, it's 49 and a half or 50 hours. I</p> <p>14 think that's the basis of the question.</p> <p>15 MR BUDLENDER SC: That is so, Chair.</p> <p>16 Brigadier, we know that the Police shootings took place</p> <p>17 after the barbed wire had been rolled out. Is that</p> <p>18 correct?</p> <p>19 [10:30] BRIG MKHWANAZI: Counsellor, it's</p> <p>20 information I'm getting that after the barbed wire has been</p> <p>21 deployed, there was, okay immediately it was deployed there</p> <p>22 was a – then that's where the police officials started –</p> <p>23 MR BUDLENDER SC: I want to put to you</p> <p>24 some propositions which might –</p> <p>25 BRIG MKHWANAZI: Take action to make sure</p>

Page 3072

1 that people doesn't go through. That is information I
2 received –

3 MR BUDLENDER SC: - experienced – and
4 tell me whether I'm right – in a large demonstration the
5 people who were involved ran – from the very deeply
6 committed, to the middle group, to people who are really
7 just hangers-on – we'll come to the extent necessary to how
8 it happened – the shootings took place, although you have
9 no first-hand knowledge of that and so it may not be
10 appropriate to ask you much about it, but all I –

11 BRIG MKHWANAZI: That's correct, I agree
12 with you.

13 MR BUDLENDER SC: We must have been at
14 the same demonstration, Brigadier. Secondly, there is
15 usually a relatively small core of deeply committed
16 participants. All I'm putting to you is that –

17 BRIG MKHWANAZI: My knowledge,
18 Counsellor, especially with – the crowd dynamics is that
19 normally people or individuals, they get absorbed into a
20 crowd and at the same time they fall into the same identity
21 – of the crowd.

22 MR BUDLENDER SC: - cause that the
23 shootings happened – and after – yes, I understand that,
24 but there is usually a relatively – core of deeply
25 committed people who are the leaders of the demonstration –

Page 3073

1 wire was rolled out.

2 BRIG MKHWANAZI: I agree.

3 MR BUDLENDER SC: And without the leaders
4 the demonstration or gathering is quite likely to lose
5 energy or even dissipate.

6 [10:50] BRIG MKHWANAZI: That's correct. Each
7 and every gathering there must be leaders that actually
8 lead in that gathering.

9 MR BUDLENDER SC: The evidence from the
10 South African Police Service is that there was a relatively
11 – it was like that there was a small core group that
12 remained on the koppie at night. Or let me not put words
13 in. The evidence from the South African Police Service is
14 that there was a small group that remained on the koppie at
15 night.

16 BRIG MKHWANAZI: I got that information,
17 that's correct.

18 MR BUDLENDER SC: Common sense tells us
19 that it would be likely to include all or at least some of
20 the key leaders.

21 BRIG MKHWANAZI: I hear from your side,
22 Sir, I'm not sure.

23 MR BUDLENDER SC: I'm putting to you it's
24 common sense, it's likely that the leaders who are at the
25 core would be amongst the core who remained overnight.

Page 3074

1 BRIG MKHWANAZI: It's possible.

2 MR BUDLENDER SC: I put it to you that
3 it's also common sense that if the strikers had firearms,
4 they would be more likely to keep them on the koppie at
5 night where they were safe than to carry them home through
6 the streets.

7 BRIG MKHWANAZI: I'm not sure,
8 Counsellor, on that, where the safeness of the weapon will
9 be, I'm not sure. I'll hear it from you.

10 MR BUDLENDER SC: Well, if you have
11 weapons which are at risk of – which you fear might be
12 confiscated, you're not likely to walk through the streets
13 with them.

14 BRIG MKHWANAZI: Counsellor, in my
15 experience as a police official, from constable until now,
16 I have many incidents in the street. I've arrested
17 somebody in possession of a firearm, unlicensed, used for
18 other criminal activities right in the street, not inside
19 the house only.

20 MR BUDLENDER SC: I think I'm not putting
21 my question clearly, Brigadier. Let me put it this way.
22 Let's assume you and I are members of a group on a koppie
23 and we have weapons and we are concerned that the Police
24 might try to take them off us. Night time arrives, most of
25 the people go home through the streets. Some of us stay on

Page 3075

1 the koppie overnight. It would be more sensible for us to
2 keep those weapons with us on the koppie than to put them
3 at risk by letting them be walked through the streets by
4 people who are going home.

5 BRIG MKHWANAZI: Counsellor, if maybe the
6 weapons being in possession of the participants are for the
7 purpose of protection, my experience tells me that it's
8 possible that they can keep with them in that position in
9 the koppie for the purpose of protection, but for the sake
10 of keeping them safe, I have a problem on that, Sir. I
11 won't agree. MR BUDLENDER SC: Alright, let me
12 move on. Common sense tells us that if you could search
13 and if necessary arrest that small group of 50 on the
14 koppie at night, you would achieve a number of things.
15 Firstly, you would have a good chance of arresting some of
16 the leaders. You agree with that?

17 BRIG MKHWANAZI: It is a common thing,
18 Counsellor, that as long as the information is there
19 through intelligence, everything is in place, I don't think
20 police officials must hesitate to plan an operation to deal
21 with that type of a situation. However, it will depend to
22 those involved on the day.

23 MR BUDLENDER SC: If you arrested the
24 core group on the koppie at night, you would stand a good
25 chance of weakening the resolve of the other participants

Page 3076

1 in the gathering during the day.

2 BRIG MKHWANAZI: Counsellor, I will say

3 yes, arresting the group leaders will actually calm the

4 situation, but sometimes it doesn't work that way. The

5 constituencies will always definitely try and fight very

6 harder after their leaders have been arrested. That's

7 always, it does happen.

8 MR BUDLENDER SC: And if you moved at

9 night on the core group on the koppie, you would stand a

10 good chance, or at least a reasonable chance of

11 confiscating some or all of the firearms.

12 BRIG MKHWANAZI: With the proper plan,

13 proper information, Counsellor, yes it's possible.

14 MR BUDLENDER SC: So this option of

15 moving at night on the small group who remained there, is

16 an alternative which should've been considered.

17 BRIG MKHWANAZI: If it's true really that

18 they were there and the information is there, Counsellor,

19 that will work very well.

20 MR BUDLENDER SC: Chair, would this be a

21 convenient time for the tea adjournment?

22 CHAIRPERSON: We'll take the tea

23 adjournment. I just want to remind everyone that the lunch

24 adjournment will be shorter today than usual because it's

25 Friday. We will resume at about 13:30 and we will then

Page 3077

1 adjourn at 3 o'clock to enable those who have to travel.

2 We'll take the adjournment now.

3 [INQUIRY ADJOURNS INQUIRY RESUMES]

4 [11:21] CHAIRPERSON: The commission resumes.

5 Brigadier, it's my duty remind you that you're still under

6 oath. I don't have to remind you, Mr Budlender, that

7 you're still cross-examining.

8 MR BUDLENDER SC: My memory is not great,

9 but that much I can remember, Chairperson. Brigadier,

10 before the tea adjournment we were talking about the option

11 of moving at night on the small group of 50 on the koppie,

12 you remember that?

13 BRIG MKHWANAZI: Yes, I remember.

14 MR BUDLENDER SC: And you agree that that

15 was an alternative which should be considered on that

16 scenario?

17 BRIG MKHWANAZI: Depending to the

18 information received, as I have said, Counsellor, yes it

19 can be an option as well to deal with the situation.

20 MR BUDLENDER SC: And common sense tells

21 us that it's relatively easy to deal with a group of about

22 50 people because you can muster overwhelming force of

23 numbers.

24 BRIG MKHWANAZI: That's correct.

25 MR BUDLENDER SC: And the public order

Page 3078

1 police training manual which we've been given, actually

2 deals with how to carry out operations at night.

3 BRIG MKHWANAZI: That's correct.

4 MR BUDLENDER SC: Now in fact, General,

5 Brigadier, sorry, I'm promoting you prematurely. In fact

6 this option was apparently considered. Would you go to

7 L63. Let's just – sorry, have you got that?

8 BRIG MKHWANAZI: Not yet.

9 MR BUDLENDER SC: It say –

10 BRIG MKHWANAZI: I'm getting there now.

11 MR BUDLENDER SC: The page is headed JOC

12 briefing and then there's a box headed with a sub-heading

13 report in it. Do you have it?

14 BRIG MKHWANAZI: Yes, I've got it.

15 MR BUDLENDER SC: Right, now if we can

16 identify at first, you will see on the right hand side at

17 the top, there is the calendar for August which shows that

18 this relates to the 14th of August 2012. Can you see that?

19 BRIG MKHWANAZI: That is correct.

20 MR BUDLENDER SC: Now there's an item

21 report and then let's come to operational deployments, do

22 you see that? The second sub-heading in the first box.

23 BRIG MKHWANAZI: Yes, I see that

24 operational deployment, the one on top.

25 MR BUDLENDER SC: Alright and what says

Page 3079

1 the following, at 6 o'clock – that's 6 in the morning,

2 06h00 the initial interim operational strategy considered

3 was to prevent the protestors from coming to the koppie

4 armed by deploying a filtering police line to search those

5 approaching or moving along approach routes and then the

6 other element of the strategy considered is the following,

7 quote, "encircle the few protestors at the koppie,

8 estimated at less than 50, disarm, arrest and transport for

9 processing to Marikana police station." Do you see that?

10 BRIG MKHWANAZI: I do.

11 MR BUDLENDER SC: So we know that it was

12 considered and then the next paragraph tells us why it was

13 not deemed feasible. I'll read it to you. "This was

14 deemed not feasible due to the forces called up from

15 distant locations not having arrived yet and those who were

16 there had not yet been orientated to the mission are or

17 briefed sufficiently." You see that?

18 BRIG MKHWANAZI: I see it, Sir.

19 MR BUDLENDER SC: And that was at 6

20 o'clock on the morning of the 14th of August, that that

21 view was taken.

22 BRIG MKHWANAZI: Yes.

23 MR BUDLENDER SC: Is that correct?

24 BRIG MKHWANAZI: I see that.

25 MR BUDLENDER SC: Of course two days

Page 3080

1 later by the 16th of August these reasons which were given
 2 for not following this strategy had fallen away. Forces
 3 called up from distance locations had arrived by then.
 4 Those who were there had been oriented to the mission area,
 5 correct?
 6 BRIG MKHWANAZI: That's correct.
 7 MR BUDLENDER SC: So the reason for not
 8 doing this on the 14th no longer existed on the 16th.
 9 BRIG MKHWANAZI: That's correct.
 10 However, I'm not sure, Counsellor, why after they took a
 11 decision they never go back and revisit and see what they
 12 can do. I'm not sure in that position.
 13 MR BUDLENDER SC: That's a very good
 14 question. Yes, now, Brigadier, on the face of it, if you
 15 wanted to – on the face of it, it would be a lower risk
 16 strategy to confront 50 people by surprise at night than 3
 17 500 people in daylight who can see it coming.
 18 BRIG MKHWANAZI: You're correct,
 19 Counsellor, however maybe can I point something, especially
 20 if you deal with the spectators or – sorry with the
 21 participants during the day at that type of a – at that
 22 figure, the only way is to follow the procedures, giving
 23 warning, let the people move first on their own. There are
 24 those who will voluntarily disperse and go back home which
 25 will actually maybe allow you to have a better number to

Page 3081

1 contain. That's the only part maybe you can sometime
 2 utilise as well, depending to the situation on a day as
 3 well.
 4 MR BUDLENDER SC: Yes and while you're on
 5 that point, we know that in fact no such warning was ever
 6 given on the 16th of August. The intention was to give the
 7 warning after the barbed wire had been deployed but the
 8 barbed wire triggered the events which resulted in the
 9 killings.
 10 BRIG MKHWANAZI: I know very well that
 11 the plan was to deploy the barbed wire after the barbed
 12 wire has been deployed then the warning be given, following
 13 the procedures. However with the situation whereby people
 14 started to breach the line as quick as possible, they
 15 couldn't give the warning.
 16 MR BUDLENDER SC: If the warning had been
 17 given before the barbed wire was deployed, that may well be
 18 that some part of the crowd would've left and gone home.
 19 BRIG MKHWANAZI: I'm not sure,
 20 Counsellor. It can be both ways, however, I'm not sure
 21 with the operational commander on that day, what was his
 22 assessment regarding the giving of the warning.
 23 MR BUDLENDER SC: I'm just repeating what
 24 you said in your evidence a short moment ago that if you
 25 give a warning some people are likely to leave and the

Page 3082

1 result is that the crowd becomes smaller and easier to
 2 manage.
 3 BRIG MKHWANAZI: That's correct, the main
 4 purpose is to have people voluntarily leaving that
 5 position. At the same time you can be able to actually
 6 deal with the situation that is before you if it come to
 7 that need.
 8 MR BUDLENDER SC: Now we've been talking
 9 about alternatives to the – which could've and should've
 10 been considered. Now if you thought the weapons were being
 11 kept by the people who slept in the hostel, one way of
 12 confiscating the weapons would be to cordon the hostels and
 13 not let people out until they had been searched for
 14 weapons. That would be a possibility.
 15 BRIG MKHWANAZI: Normally, Counsellor, if
 16 you work with hostels you need to have a proper information
 17 intelligence wise that must come through. At the same time
 18 we need to take the – look to the situation especially with
 19 the terrain, the number of rooms that are available as well
 20 to plan properly so that if you cordon, you can be able to
 21 deal with the situation. If it's well planned and you got
 22 information properly because what is important is to know
 23 exactly where the firearms are kept then you can be in a
 24 position to deal with the situation property but if it's
 25 not that position, always this challenging because if you

Page 3083

1 talk about the hostel, it can be having a lot of rooms and
 2 it can be really an operation that will give a lot of
 3 challenge if you don't have information.
 4 MR BUDLENDER SC: Yes, I can understand
 5 that searching a hostel can be a big job, but if your aim
 6 is to prevent people coming to the koppie armed, then you
 7 don't need to search the hostel, you can just stop them
 8 leaving the hostel until they've been searched.
 9 BRIG MKHWANAZI: It can be an
 10 alternative, Counsellor, yes as well the information must
 11 be in place. Are they all residing in the hostel and to
 12 make sure as well the danger part of putting members in
 13 danger at that situation, hence they are armed with sharp
 14 objects. Our history tells us, we have lost a few police
 15 official in a situation whereby an assegai can be used to a
 16 police official and the police official can be killed. So
 17 we need to be very careful and maybe my option, if you ask
 18 what option can I use, it's better rather than to do it
 19 during the day than to do it at night when people are
 20 sleeping. You know very well you plan, you get
 21 information, you go in, you can actually deal with the
 22 situation.
 23 MR BUDLENDER SC: Brigadier, one of the
 24 options you can consider is to cordon and search the
 25 hostels to remove any dangerous weapons in order to

Page 3084

1 stabilise the area, is that correct?
 2 BRIG MKHWANAZI: That's correct, Sir.
 3 MR BUDLENDER SC: That would be a good
 4 thing to do.
 5 BRIG MKHWANAZI: That's correct.
 6 MR BUDLENDER SC: And in fact the police
 7 planned to do that. Are you aware of that?
 8 BRIG MKHWANAZI: Definitely it is one of
 9 the stages.
 10 MR BUDLENDER SC: Wouldn't it – well
 11 let's go to slide L82. This is also part of Colonel
 12 Scott's plan of the 14th of August, is that correct?
 13 BRIG MKHWANAZI: Correct.
 14 MR BUDLENDER SC: And you'll see that
 15 under stage 6 he says this is now going to come at the end
 16 of his process. In order to complete the disarming process
 17 in the Marikana area, the Karee and Wonderkop hostels will
 18 have cordon and search operations executed to remove any
 19 further dangerous weapons in order to stabilise the area.
 20 So that was part of the plan.
 21 BRIG MKHWANAZI: I do agree.
 22 MR BUDLENDER SC: Can you think of any
 23 good reason why that shouldn't have been done before the
 24 crowd of 3 500 were confronted on the koppie?
 25 BRIG MKHWANAZI: As I have indicated,

Page 3085

1 Counsellor, from the beginning, I'm not sure how actually
 2 they never revisited the strategy. Remember the strategy
 3 was to engage on it, but with the shortage and those
 4 members who are present as well not yet orientated, they
 5 never done it, but my point is I'm not sure. I will not be
 6 able to have an answer on that.
 7 MR BUDLENDER SC: All of these – I'm
 8 sorry, and one other thing which you could do is you could
 9 deploy a filtering police line to search those coming to
 10 the koppie to disarm them before they reached the koppie.
 11 BRIG MKHWANAZI: Maybe, Counsellor, what
 12 I can say to answer your question is that normally in these
 13 types of gathering it's whereby you have a convener or the
 14 organiser and where you've got proper meetings in place
 15 where conditions are placed properly and where you will be
 16 in a clear position to say if 1, 2, 3 is not followed this
 17 is what we are going to do is such a way people will be in
 18 a position to manage themselves. The only thing what
 19 police will do will to assist where people are failing to
 20 handle the issues. Especially the appointing of the
 21 marshals who can assist to disarm the people themselves and
 22 at the same time if they fail, police can assist as well.
 23 And I do understand if you say if they were moving to the
 24 koppie, police could have actually embarked on the process
 25 of trying to search people before they reached there, but

Page 3086

1 my point in making is I'm actually dealing with the
 2 position whereby we talk of gathering procedures that we
 3 need to follow. If everything was followed properly, I
 4 don't think it was going to be a problem even to go to that
 5 position to say let's search them before they reach the
 6 koppie because obviously the marshals will do that type of
 7 a job and police will only have to assist that's all, to
 8 make sure such things doesn't happen.
 9 MR BUDLENDER SC: Brigadier, we know that
 10 this was a gathering which was not – which did not follow
 11 the procedures and the Regulation of Gatherings Act. So
 12 that doesn't help us very much, does it?
 13 [11:41] BRIG MKHWANAZI: I do agree.
 14 MR BUDLENDER SC: So all I'm putting to
 15 you is that one of the alternative strategies if you wanted
 16 to stop people coming to the koppie armed, was to deploy a
 17 filtering police line to search those who were approaching
 18 or who were moving along approach routes.
 19 BRIG MKHWANAZI: Counsellor, I do agree.
 20 Not to make a problem to your question, if we check back on
 21 the 13th, that was tried already by General Mpembe and
 22 definitely it had a difficult of a result.
 23 MR BUDLENDER SC: No, Brigadier, I don't
 24 think that's at all what General Mpembe attempted. General
 25 Mpembe didn't have a pre-planned and pre-organised

Page 3087

1 filtering police line. He came across a group of people
 2 who were marching and he dealt with the situation ad hoc as
 3 it arose.
 4 BRIG MKHWANAZI: That's correct,
 5 Counsellor, but if we check the Regulation of Gatherings
 6 Act it provides for a spontaneous event. This was the same
 7 situation and it must be handled as the same as others as
 8 well. As the members intervened at that time, it's the
 9 same situation. In that type of a situation they were
 10 supposed to follow those procedures in the same way. I do
 11 agree, there was notice given, there was no notice given by
 12 the participants gathering in the koppie. However, the
 13 procedures, hence it was spontaneous, it has to be followed
 14 the same way. It provided, it is provided under Regulation
 15 of Gatherings Act.
 16 MR BUDLENDER SC: Brigadier, to sum up,
 17 we've identified several alternative choices which could
 18 have been made. We've identified a night operation at the
 19 koppie to deal with 50 people, and we've agreed that
 20 there's no apparent reason in the document L as to why that
 21 wasn't done on the 16th.
 22 BRIG MKHWANAZI: That's correct.
 23 MR BUDLENDER SC: We've also agreed that
 24 an alternative option would be to search people when they
 25 came out of the hostels.

Page 3088

1 BRIG MKHWANAZI: My point in checking
 2 there was that we need to check when do we do it, because
 3 if we do it during the day it may sometimes cause problem,
 4 hence they are already armed.
 5 MR BUDLENDER SC: Yes, the sensible time
 6 to do it would be when they came out in the morning.
 7 BRIG MKHWANAZI: If the information is
 8 well, given plan is in place properly, I will agree with
 9 you, Counsellor.
 10 MR BUDLENDER SC: We've agreed that the
 11 further option was a cordon and search of the hostels
 12 before confronting the people on the koppie.
 13 BRIG MKHWANAZI: Yes, Counsellor, I'm in
 14 agreement. The only thing I'm saying is that proper
 15 information must be, actually be obtained. Hence the
 16 hostel got lots of rooms, know exactly where the weapons
 17 are, then you have a proper plan and you'd be able to
 18 search without any problem and be able to disarm whoever is
 19 having anything in his possession at that stage.
 20 MR BUDLENDER SC: And we've agreed that a
 21 further option would be to deploy a filtering police line
 22 to stop people reaching the koppie with weapons.
 23 BRIG MKHWANAZI: My point, Counsellor,
 24 was that if this was done in a proper way, notice given,
 25 condition put in place, as well as marshals in place as the

Page 3089

1 people are moving to the koppie, the job for the Police was
 2 going to be too little because they were going to manage
 3 themselves and Police were going to assist where it is
 4 necessary. I do agree where you said there wasn't any
 5 notice given and my point in making is any spontaneous
 6 event, whatever event that comes, we need to try and follow
 7 the procedures properly.
 8 MR BUDLENDER SC: And on the face of it,
 9 Brigadier, all of these would be lower risk options than
 10 confronting 3 500 people on the koppie.
 11 BRIG MKHWANAZI: Correct.
 12 MR BUDLENDER SC: Thank you, Brigadier.
 13 Can we then move on to another subject, which is the
 14 decision making process. Now we know that as at the 16th
 15 the strikers had been on the koppie for three or four days,
 16 depending on when you count the starting point.
 17 BRIG MKHWANAZI: I got that information.
 18 MR BUDLENDER SC: The decision whether to
 19 implement stage 3, that is the rollout of the barbed wire,
 20 had to be taken by the people on the ground, in particular
 21 by the overall commander.
 22 BRIG MKHWANAZI: Normally in operations
 23 of this nature decisions are actually taken between the
 24 operational commander and an overall commander, because
 25 this is about a decision that needs to be taken.

Page 3090

1 MR BUDLENDER SC: I understand that.
 2 They are the people on the ground; they know what is going
 3 on, and they are best placed to make the decision.
 4 BRIG MKHWANAZI: It depends, Counsellor,
 5 where the overall commander is at that stage. He may
 6 sometimes be in a JOC, or maybe he can be somewhere, but
 7 these are two people who must make decisions.
 8 MR BUDLENDER SC: And it's a decision
 9 which must be taken at the time in question just before you
 10 implement, in the light of all the circumstances which then
 11 prevail.
 12 BRIG MKHWANAZI: It will depend, because
 13 all decision must be made based on the operational plan
 14 that is in place, unless if it is a new information that
 15 comes up, then that decision will be taken right at that
 16 point and say what has to be done to deal with that
 17 situation. But if it is on the plan, the only thing is to
 18 say when are we activating, or should we activate paragraph
 19 so-and-so and do what we're supposed to do.
 20 MR BUDLENDER SC: It would be wrong – let
 21 me put it differently. It would be wrong to make the
 22 decision the day before to say we're going to implement
 23 this strategy, regardless of what the circumstances are
 24 tomorrow?
 25 BRIG MKHWANAZI: Counsellor, right from

Page 3091

1 the beginning I said always there will be influencing
 2 factors that come during the operation. You have the plan,
 3 but it's not Alpha and Omega. There will be some changes
 4 every time that will give some sort of changes to say how
 5 we deal with the situation. Obviously if you draft an
 6 operational plan or you compile it, it will be done in time
 7 and it must be done in time so that we get all the
 8 necessary information in place. Come the operation, we
 9 know exactly who to contact, what to do, especially if we
 10 deal with issues of crowd management where people are going
 11 to march, where people are going to have gatherings. There
 12 you need a lot of information, who to talk to if you need
 13 to talk with somebody amongst them. You need this
 14 information prior. You can't have it on the day. If you
 15 have it on the day you can't do anything properly. So that
 16 is very, very important that you need to prepare yourself
 17 in time so that you can be able to do everything properly.
 18 MR BUDLENDER SC: Brigadier, let me cut
 19 to the chase. It arises really from a question which
 20 Commissioner Hemraj put to you. The decision to move and
 21 implement a particular stage is an operational decision
 22 which must be taken in the light of the circumstances at
 23 that time by the people who are best able to judge them.
 24 BRIG MKHWANAZI: Counsellor, my point of
 25 departure was we got a plan in place that addresses the

Page 3092

1 anticipated situation. However, during the day of the
 2 situation something happened; decision need to be taken
 3 now, and definitely the operational commander together with
 4 an overall commander, they will take a decision to say
 5 let's activate this type of a plan and address the
 6 situation. I agree with you.
 7 MR BUDLENDER SC: Yes, I understand that.
 8 You have an operational plan, but of course you don't
 9 implement it blindly. You look at the situation on the
 10 ground at the time before you decide to implement.
 11 BRIG MKHWANAZI: That's correct,
 12 depending to what issues that are transpiring during the
 13 course of the event.
 14 MR BUDLENDER SC: Yes, exactly. Now
 15 these are difficult decisions which the operational
 16 commander and the overall commander have to make.
 17 BRIG MKHWANAZI: I will agree and say
 18 again that it depends what type of a situation actually
 19 that they are coming across then, but yes, decision needs
 20 to be taken.
 21 MR BUDLENDER SC: My point is that these
 22 are difficult decisions and they should be taken by
 23 somebody with good operational experience.
 24 BRIG MKHWANAZI: Correct.
 25 MR BUDLENDER SC: And if someone other

Page 3093

1 than the operational commander and the overall commander
 2 decided to remove the people from the koppie, that would be
 3 an error. It's a decision they should make.
 4 BRIG MKHWANAZI: Counsellor, normally
 5 what we have, we have the overall commander, we have the
 6 operational commander in the province, but we have the
 7 provincial commissioner that is in charge of the province.
 8 These are the people most of the time that will come
 9 onboard because the provincial commissioner is answerable
 10 for the province. But the people operationally who will
 11 actually interact in most cases in decision making in the
 12 intervention to the problem will be the overall commander
 13 as well as the operational commander.
 14 MR BUDLENDER SC: Brigadier, I want to
 15 ask you a question and I want to ask it carefully because I
 16 don't want to put as a fact what hasn't been shown. But if
 17 there was political pressure on the Police to remove the
 18 people from the koppie, that would have the risk of leading
 19 to the wrong decision because it's not a political decision
 20 that should be made, it's an operational decision that
 21 should be made.
 22 BRIG MKHWANAZI: Ja, Counsellor, this one
 23 will be a challenge to me to respond on it because on my
 24 experience working as a police official, I never receive
 25 instruction from political side. Each time we get

Page 3094

1 information it's through from the side of the Police with
 2 our own chain of command, how we have to do the job. But
 3 on political side to say now do the following, it has never
 4 happened to my side.
 5 MR BUDLENDER SC: Yes, and if it were to
 6 happen it would be a bad thing?
 7 BRIG MKHWANAZI: Ja, for me it would be
 8 for the first time, Sir.
 9 MR BUDLENDER SC: And you would consider
 10 it to be a bad thing? That's why it's never happened
 11 before.
 12 CHAIRPERSON: In the witness's
 13 experience?
 14 MR BUDLENDER SC: In the witness's
 15 experience, yes.
 16 BRIG MKHWANAZI: Ja, on my opinion really
 17 it would be a first time to have political role players
 18 coming in and give instructions to Police how to police a
 19 situation. That would be a new thing. The only thing,
 20 Counsellor, that can be done if we talk about the situation
 21 of Marikana, we can look of the influential figures in
 22 politic who can come in and talk to the people maybe to
 23 assist, to make sure things can be actually peacefully
 24 resolved. That can be done, but not to say how the Police
 25 or the police functions must be executed on that particular

Page 3095

1 day.
 2 [12:01] MR BUDLENDER SC: Brigadier, I want to be
 3 careful again to make it clear that I'm not saying that it
 4 did happen, but if it did happen that there was political
 5 pressure on the Police to act in a particular way in this
 6 situation, that would be a new thing in your experience and
 7 it would be a bad thing?
 8 BRIG MKHWANAZI: That's correct, Sir.
 9 MR BUDLENDER SC: Thank you. Then can we
 10 move on to a new topic?
 11 CHAIRPERSON: - move on to the new topic,
 12 I'd like to ask a question dealing with this topic. At one
 13 point in your evidence I understood you to use the word
 14 "now" in the context of the plan having to be put into
 15 operation now, which means in this particular context the
 16 16th of August. Did you say something along those lines?
 17 BRIG MKHWANAZI: If I remember,
 18 Chairperson, the question was about the decision making, if
 19 I'm correct. My point was that the plan has to be done in
 20 time and decision taken on the day will be between the
 21 overall commander, the operational commander, to say should
 22 we activate the plan and do 1, 2, 3, as it is actually
 23 written on the plan, and again the point I made was it will
 24 depend during the operation itself if there's something
 25 that comes at that situation to say how to deal with that

<p style="text-align: right;">Page 3096</p> <p>1 because nobody maybe was aware that it will happen and what 2 decision, what steps to be followed to deal with that 3 particular problem. 4 CHAIRPERSON: The reason I ask the 5 question is, what interests me is was it considered 6 necessary for the operational plan to be put into operation 7 on that Thursday. In other words was it also possible that 8 the matter could be held over till the next day, till the 9 Friday when something could have happened overnight, as Mr 10 Budlender has suggested. Now you've agreed, if I 11 understood you. In other words, as you see it on the facts 12 that have been put before you, was there any compelling 13 operational necessity for the plan to be put into operation 14 on Thursday the 16th? 15 BRIG MKHWANAZI: The only information, 16 Chairperson, I received was that for the plan to be delayed 17 was due to the fact that there was an agreement that the 18 arms will be laid down, and that's the information I got. 19 If you look to that position, if the arms were laid down, 20 it means everything is peacefully, wasn't going to be any 21 problem that comes out. That's the only information I got. 22 I don't have another reason around that. 23 CHAIRPERSON: Apparently it must have 24 become clear in the course of the morning that if there was 25 such an agreement, as you will have heard there's debate</p>	<p style="text-align: right;">Page 3098</p> <p>1 you, Chair. Now, Brigadier, to move to a new point, you 2 made reference in your evidence-in-chief to the Goldstone 3 Commission. Do you remember that? 4 CHAIRPERSON: Correct, Sir. 5 MR BUDLENDER SC: That was the commission 6 of inquiry regarding the prevention of public violence and 7 intimidation. 8 BRIG MKHWANAZI: Correct, Sir. 9 MR BUDLENDER SC: And are you aware that 10 the commission put together a panel of experts to give it 11 advice regarding a new system of legal control of 12 demonstrations in South Africa? 13 BRIG MKHWANAZI: That's correct, Sir. 14 However, I never have an opportunity to read the report, 15 Sir. 16 CHAIRPERSON: You might find it helpful 17 in your work if you do so. It's a comprehensive report, 18 compiled by an international panel, who actuallyrafted the 19 Regulation of Gatherings Bill – 20 BRIG MKHWANAZI: Yes. 21 CHAIRPERSON: - which was adopted by 22 parliament. 23 BRIG MKHWANAZI: That's correct, Sir. 24 CHAIRPERSON: It was chaired, I met the 25 people concerned at the time in 1993, but the chairman was</p>
<p style="text-align: right;">Page 3097</p> <p>1 about that, but if there was such an agreement it wasn't 2 being adhered to. The weapons were not being laid down and 3 the strikers were not prepared, despite pleas to them from 4 Mr Mathunjwa, to leave the koppie. That must have been 5 apparent at least by the middle of the day, between say 6 noon and 2 o'clock. So the question that arises then is 7 was there any compelling necessity, given that situation, 8 for the plan to be put into operation on that day? 9 BRIG MKHWANAZI: I do understand, 10 Chairperson, your question very well. However, I won't be 11 able to have a proper answer to say why they decided to 12 proceed with the plan after they have learned that people 13 are not prepared to lay down their arms. There maybe can 14 be lot of reasons around, of which maybe the people who 15 were involved on the operation said they will be in a 16 position to indicate, really, I couldn't manage to get that 17 information exactly to say why immediately after they pick 18 it up that people are not going to lay down the arms, why 19 they decided to go and activate level 3. I'm not having 20 that information. 21 CHAIRPERSON: Thank you, Brigadier. 22 Sorry, Mr Budlender. You wanted to move on to another 23 point now. I thought that point's physically in the 24 context of the subject which you'd just been dealing with. 25 MR BUDLENDER SC: Very much so. Thank</p>	<p style="text-align: right;">Page 3099</p> <p>1 an eminent Professor of Law from Harvard, who was very 2 largely responsible for a good deal of the thinking that 3 went into the bill and now the act, and it's all explained 4 in the book which counsel has referred to. 5 BRIG MKHWANAZI: Okay, thanks. 6 CHAIRPERSON: I think we still don't have 7 an exhibit number, so we will ask Ms Pillay once again to 8 assist us. 9 MS PILLAY: Chair, it would be TT1. 10 CHAIRPERSON: Thank you. 11 MR BUDLENDER SC: Brigadier, you have in 12 front of you a part of the, an extract from the report 13 which was produced by that panel. 14 BRIG MKHWANAZI: Thank you. 15 MR BUDLENDER SC: Perhaps we can start by 16 identifying who the members of the panel were to whom the 17 Chair referred. If you'll go to the last page but two, 18 it's called page 69, you'll see appendix A, you see that? 19 BRIG MKHWANAZI: I see it, Sir. 20 MR BUDLENDER SC: And we see who the 21 people were. There was Lee Brown, who was the Commissioner 22 of Police of the City of New York, correct? 23 BRIG MKHWANAZI: Correct. 24 MR BUDLENDER SC: And there was Prof Dr 25 Fijnaut, F-I-J-N-A-U-T, who was a Professor of Criminology</p>

<p style="text-align: right;">Page 3100</p> <p>1 and Criminal Law from Holland, and the book tells us that 2 he has written a great number of books, reports and 3 articles in the field of policing, organised crime, general 4 criminology and comparative and international criminal law. 5 You see that? 6 BRIG MKHWANAZI: I see that, yes. 7 MR BUDLENDER SC: Perhaps to go back to 8 Mr Brown, we see that Mr Brown was the president of the 9 International Association of Police Chiefs. Then we have 10 Prof Don Foster. You see that? 11 BRIG MKHWANAZI: I see that, yes. 12 MR BUDLENDER SC: He was a Professor of 13 Psychology at the University of Cape Town and he – 14 CHAIRPERSON: He still is. 15 MR BUDLENDER SC: - still is, and he has 16 published, or had published and has published in the area 17 of the psychology of crowds and crowd violence, and he had 18 acted as expert witness or consultant in 10 trials 19 involving collective violence. You see that? 20 BRIG MKHWANAZI: I see that. 21 MR BUDLENDER SC: Then we have Prof 22 Tertius Geldenhuys, who I think is now a general in the 23 South African Police Services. 24 BRIG MKHWANAZI: I know him, Sir. 25 MR BUDLENDER SC: Yes. Then we have Prof</p>	<p style="text-align: right;">Page 3102</p> <p>1 operation, and it's said that he frequently lectures at the 2 National Police Staff College in the United Kingdom. 3 BRIG MKHWANAZI: I see that. 4 MR BUDLENDER SC: I'm sure you'll agree, 5 Brigadier, that that's a group of very eminent people with 6 very great knowledge of policing, including public order 7 policing, both in theory and in practice. Would you agree 8 with that? 9 BRIG MKHWANAZI: I do. 10 MR BUDLENDER SC: Incidentally, have you 11 heard before of Prof PAJ Waddington? Have you heard 12 anything about him? 13 BRIG MKHWANAZI: No, it's first time to 14 hear, Sir. 15 MR BUDLENDER SC: I'm told he's a former 16 policeman; he's known as Tank Waddington. It may tell us 17 something about him. Tank. 18 BRIG MKHWANAZI: No, I haven't met him, 19 Sir. 20 MR BUDLENDER SC: Now would you go to the 21 page which is printed page 37? Do you see the sub-heading 22 at the foot of page 37, "Command and control of police?" 23 BRIG MKHWANAZI: Correct. 24 MR BUDLENDER SC: Now I would like to 25 read a passage to you from there, and you can follow it as</p>
<p style="text-align: right;">Page 3101</p> <p>1 Philip Heymann, H-E-Y-M-A-N-N, who was an eminent professor 2 at Harvard, director at the Centre for Criminal Justice, 3 and has held very many senior positions in the United 4 States government. See that? Then we have the late Adv 5 Louw, who was an advocate of the Supreme Court of South 6 Africa. Then we have Dr Olivier, who was the head of 7 Conflict Analysis at the Human Sciences Research Council. 8 BRIG MKHWANAZI: Yes, Sir. 9 MR BUDLENDER SC: It tells us that he was 10 engaged in extensive research on civil unrest and political 11 violence in South Africa. Then we have Prof Clifford 12 Shearing, S-H-E-A-R-I-N-G, who was Professor of Criminology 13 and Sociology at the University of Toronto and at the 14 University of the Western Cape, and a member of the Police 15 Board established under the provisions of the South African 16 Peace Accord. Then we have Mr CJ Van Der Merwe, who was 17 the president of the Natal Municipal Association and a man 18 clearly with a great deal of experience in local 19 government. Then we have Dr PAJ Waddington, W-A-D-D-I-N-G- 20 T-O-N, who had written a book called "The Strong Arm of the 21 Law," which was a detailed examination of police strategy 22 and tactics in public order situations. He had been 23 observing the policing of demonstrations on London, 24 including negotiations between police and demonstrators, 25 the planning, preparations and briefing for the police</p>	<p style="text-align: right;">Page 3103</p> <p>1 I go. Quote, "Each of the preceding scenarios presumes the 2 effective deployment of tactics within some clearly 3 formulated strategy. It is of the utmost importance that 4 the policing of public order operations is characterised by 5 thorough planning and preparation. Senior officers must 6 consider and make contingency plans for various scenarios, 7 from those thought to be highly probable, through to those 8 considered possible, however unlikely. Through these means 9 the police will avoid being surprised by unexpected events 10 and thus retain maximum control over their own officers and 11 the events themselves." You see that? 12 BRIG MKHWANAZI: I see that. 13 MR BUDLENDER SC: Do you agree with that? 14 BRIG MKHWANAZI: I do agree, Sir. 15 MR BUDLENDER SC: Good, because one of 16 the key elements of good planning is that you provide for 17 contingencies, in other words for what you are going to do 18 if things don't go as planned. 19 BRIG MKHWANAZI: Correct, Sir. 20 Contingency plan is always "what if," yes. 21 MR BUDLENDER SC: You must anticipate the 22 ways in which things might not go according to plan and 23 make a plan for each of them. 24 BRIG MKHWANAZI: That's correct. 25 MR BUDLENDER SC: If you don't do that,</p>

Page 3104

1 you don't have an adequate plan.
 2 BRIG MKHWANAZI: Correct.
 3 [12:21] MR BUDLENDER SC: Now let's look at the
 4 plan in this case. Would you go to L177? Do you have it?
 5 And we see there, that the plan was first to – we are now
 6 talking about plan of stage 3, that's correct?
 7 BRIG MKHWANAZI: That is correct, yes.
 8 MR BUDLENDER SC: And the plan was to
 9 enclose the neutral area with barbed wire.
 10 CHAIRPERSON: There's an attempt being
 11 made to show us slide 177, but we are in fact seeing slide
 12 176.
 13 MR BUDLENDER SC: Thank you, Chair. So
 14 the phase 1 was going to be enclose the neutral area with
 15 barbed wire, that is correct?
 16 BRIG MKHWANAZI: Yes.
 17 MR BUDLENDER SC: Phase was going to be
 18 to form lines, I beg your pardon, form two lines of Public
 19 Order Police with Nyalas and water canons, and then the –
 20 and with the TRT and the NIU and the SDFs behind them,
 21 correct?
 22 BRIG MKHWANAZI: Correct.
 23 MR BUDLENDER SC: And then there was to
 24 be the use of force in a continuum, firstly the instruction
 25 to disperse, to which you have already referred us. That

Page 3105

1 is correct?
 2 BRIG MKHWANAZI: Correct, Sir.
 3 MR BUDLENDER SC: And then the move to
 4 water canons, stun grenade and teargas, and rubber bullets.
 5 The plan was that this would lead to dispersion of the
 6 people on the koppie and thereafter they would be circled
 7 and isolated, searched for dangerous weapons and arrests
 8 made. That's what the plan was, correct?
 9 BRIG MKHWANAZI: Correct, yes.
 10 MR BUDLENDER SC: What was the plan, if
 11 things didn't go according to plan?
 12 BRIG MKHWANAZI: In my understanding,
 13 Counsellor –
 14 MR BUDLENDER SC: Sorry to interrupt you,
 15 Brigadier, but first let's take it step by step, is there
 16 anything in this plan in annexure L which says what the
 17 contingency plan was if things didn't go according to plan?
 18 BRIG MKHWANAZI: I will go back to,
 19 straight to my answer, the way I wanted to place it,
 20 Counsellor, that from what I have picked up and yesterday,
 21 and what was I was shown, there was a place where there
 22 were reserves put in place, in case if something goes
 23 wrong. Those reserves will be activated and be able to
 24 assist. That's what I picked up yesterday what was placed
 25 there. I think it's about two places on a holding area, as

Page 3106

1 a contingency to if something happens, goes wrong.
 2 MR BUDLENDER SC: Yes, the plan was, the
 3 contingency was that if things went wrong, the TRT, the
 4 NIU, and the SDF would come into play either from those
 5 already on the site, or from those at the forward holding
 6 areas. Is that correct?
 7 BRIG MKHWANAZI: Yes, that's my
 8 understanding, they will be moving from the reserve
 9 position in the holding area, and assist where there is a
 10 problem, if something goes wrong.
 11 MR BUDLENDER SC: Now these are people
 12 who use equipment which is not designed to be used for
 13 public order policing or crowd control, they carry sharp
 14 weaponry.
 15 BRIG MKHWANAZI: It is correct.
 16 MR BUDLENDER SC: And give the nature of
 17 the weaponry which they carry, we know that if they use it,
 18 there is a probability that people will be killed.
 19 BRIG MKHWANAZI: Correct.
 20 MR BUDLENDER SC: So what we have arrived
 21 at, is the following, the only contingency plan in this
 22 plan, was that if things didn't work out as intended, the
 23 people with sharp ammunition would be brought into play and
 24 it was then likely that people would be killed.
 25 BRIG MKHWANAZI: On my understanding,

Page 3107

1 Counsellor, from the reserve group which were placed on the
 2 holding areas, there was Public Order Policing members as
 3 well with them.
 4 MR BUDLENDER SC: That may be so but the
 5 contingency plan involved bringing in to play the TRT, the
 6 NIU, and the SDF, if things went wrong.
 7 BRIG MKHWANAZI: I see that, Sir, but
 8 yes, Public Order was part of it, that's what I've been
 9 informed, Sir.
 10 MR BUDLENDER SC: There's nothing in the
 11 plan that you are seeing which shows how the additional
 12 Public Order Police were going to resolve a problem which
 13 their colleagues in the Public Order Police had not been
 14 able to resolve.
 15 BRIG MKHWANAZI: That is correct.
 16 MR BUDLENDER SC: And that is the full
 17 extent of the contingency planning which we see from the
 18 plan.
 19 BRIG MKHWANAZI: I do agree.
 20 MR BUDLENDER SC: Of course, it doesn't
 21 help to have a contingency plan in your head, if you
 22 haven't told those who are implementing the plan, the
 23 members on the ground, what it is. They must know what
 24 they are going to do, if things don't go according to plan.
 25 BRIG MKHWANAZI: It is correct,

Page 3108

1 Counsellor, normally briefing must be given thoroughly.
 2 MR BUDLENDER SC: Thank you, Brigadier, I
 3 now want to move onto the looking at the plan itself to ask
 4 you some questions about the plan itself. I'll take you to
 5 specific pages, if I – where I get there, I won't have to
 6 do much of that, I don't think, but I think we know, I am
 7 sure we have agreed, that the basic premise of the plan was
 8 that while the razor wire was being rolled out, the
 9 strikers would remain on the koppie.
 10 BRIG MKHWANAZI: Information that I
 11 received, Counsellor, was that after the deployment, the
 12 participants will be dispersed from the koppie.
 13 MR BUDLENDER SC: In other words, it was
 14 anticipated that all or most of them would remain on the
 15 koppie, until after the deployment of the barbed wire when
 16 the dispersal would take place.
 17 BRIG MKHWANAZI: That's information I
 18 got, I think so, Sir.
 19 MR BUDLENDER SC: Now, we also know from
 20 what happened, that that's not what transpired, in fact
 21 many people moved off the koppie once the police started
 22 deploying the barbed wire.
 23 BRIG MKHWANAZI: Information received
 24 from my side, Counsellor, is that when the barbed wire was
 25 deployed, and it was breached by some of the group of the

Page 3109

1 people, and there were some people who were actually moving
 2 away as well, and they were not confronted by anybody.
 3 They were able just to move in the meantime.
 4 MR BUDLENDER SC: I think you'll agree
 5 also that it's not really surprising that people
 6 experienced barbed wire or razor wire as threatening, and
 7 some of them would have been afraid that they were going to
 8 be surrounded and encircled.
 9 BRIG MKHWANAZI: It is possible, but on
 10 that day, I am not sure the purpose of the barbed wire was
 11 to encircle the people. I don't think so it was that
 12 purpose, Sir.
 13 MR BUDLENDER SC: I understand it,
 14 Brigadier, but of course the people on the koppie didn't
 15 know why the barbed wire was being put in place.
 16 BRIG MKHWANAZI: Possible.
 17 MR BUDLENDER SC: We have seen from the
 18 statements produced by the – according to the statements
 19 produced of – by IPID, of people who were there, people
 20 refer to being encircled or surrounded.
 21 BRIG MKHWANAZI: I hear that, Sir.
 22 MR BUDLENDER SC: Now, it's, I suggest,
 23 completely foreseeable that when the – as the barbed wire
 24 was deployed some of the people on the koppie would want to
 25 head in the direction of the settlement in which they live.

Page 3110

1 BRIG MKHWANAZI: It can be possible, Sir.
 2 MR BUDLENDER SC: Well, you wouldn't be
 3 surprised if that happened, would you? You wouldn't be
 4 surprised if some people said to themselves, hang on,
 5 things are getting rough here now, the barbed wire is
 6 coming out, I am going home.
 7 BRIG MKHWANAZI: As, Counsellor, you have
 8 said that some of them may happen that they never knew what
 9 was happening, it's normal, it can be possible.
 10 MR BUDLENDER SC: You wouldn't be
 11 surprised by that and in fact that was part of the plan
 12 that people should leave without any force being used.
 13 BRIG MKHWANAZI: It's part of the plan,
 14 of course.
 15 MR BUDLENDER SC: Now, the direction of
 16 the settlement, the informal settlement, where some of the
 17 people lived, is north west of the koppie.
 18 CHAIRPERSON: I take it Mr Budlender, if
 19 you look at slide 81, you will see the koppie, you will see
 20 the various police forces arraigned and then behind them,
 21 is the informal settlement.
 22 MR MAHLANGU: Sir, it's 181? 81.
 23 CHAIRPERSON: Well it's various places
 24 but I think the slide 81 is a convenient one.
 25 BRIG MKHWANAZI: Yes, I got it, north

Page 3111

1 west.
 2 MR BUDLENDER SC: Now if you'll look at
 3 that slide, Brigadier, you will see –
 4 CHAIRPERSON: Mr Semenya wishes to say
 5 something.
 6 MR SEMENYA SC: Chair, I don't mean to be
 7 difficult, but is the proposition that the ones who were in
 8 the group, passed the kraal, some of them lived in that
 9 area? Are they posting that a fact?
 10 CHAIRPERSON: Mr Budlender, you heard the
 11 question, I am not sure it's an objection, but it's a
 12 question which might lead to an objection if you don't
 13 answer properly.
 14 MR BUDLENDER SC: Well, according to the
 15 IPID statements which we have some of the strikers lived in
 16 the informal settlement. Can I just finish, Chair? I put
 17 it to the witness on this basis, I don't want to give
 18 evidence, but if some of – let me put it to you this way,
 19 Brigadier –
 20 CHAIRPERSON: Earlier on in your cross-
 21 examination, you put certain propositions to the witness,
 22 and asked him to assume that they are correct. So that
 23 might be the way forward, to deal with this matter.
 24 MR BUDLENDER SC: Brigadier, if we assume
 25 that some of the strikers on the koppie lived in the

Page 3112

1 informal settlement, can you make that assumption for the
 2 moment. If I am wrong in that, and none of the strikers
 3 came from the informal settlement, then of course what will
 4 follow will be irrelevant, but can you make that assumption
 5 for the moment? Right, okay, now Brigadier, can you locate
 6 the koppie where the strikers were on that diagram, if I
 7 have it correctly, it's K1. Can you see that?
 8 BRIG MKHWANAZI: I saw it yesterday, oh,
 9 ja. That's it.
 10 MR BUDLENDER SC: Alright.
 11 BRIG MKHWANAZI: I see it.
 12 MR BUDLENDER SC: Now, you can see in the
 13 top right-hand corner of that, to orientate ourselves on
 14 the top right-hand corner of that diagram is the north
 15 sign, do you see that? It's very small.
 16 BRIG MKHWANAZI: I see that.
 17 MR BUDLENDER SC: Sir, if we now relate
 18 K1 to the informal settlement, in fact the statement is due
 19 north of the koppie, can you see that?
 20 BRIG MKHWANAZI: Yes.
 21 MR BUDLENDER SC: Now we know that the
 22 razor wire was extended on that yellow line, or more or
 23 less on that yellow line which is shown there, can you see
 24 that?
 25 BRIG MKHWANAZI: I see that.

Page 3113

1 MR BUDLENDER SC: It blocks mainly the
 2 easterly direction, easterly and some of the northerly. Do
 3 you see that?
 4 BRIG MKHWANAZI: I see that.
 5 MR BUDLENDER SC: I think the line didn't
 6 go as far in the event, as it is shown on that plan. Do
 7 you see that?
 8 BRIG MKHWANAZI: I see that.
 9 MR BUDLENDER SC: Now that razor wire was
 10 being put in place as the events unfolded, correct? It was
 11 being deployed
 12 [12:41] MR MKHWANAZI: Yes.
 13 MR BUDLENDER SC: You're aware, I think,
 14 that those – the blue and orange and red lines are
 15 vehicles, marked STSNIUTRT P2, P4 and so on, those were not
 16 yet in place? Do you understand that? They were still to
 17 come.
 18 MR MKHWANAZI: Yes.
 19 MR BUDLENDER SC: The plan was to deploy
 20 the barbed wire and then to put those units in place in
 21 order to disperse the people?
 22 MR MKHWANAZI: Yes.
 23 MR BUDLENDER SC: You see that? And
 24 that's in fact, it's quite clear from the operational plan
 25 that that was the intention. First we put the barbed wire

Page 3114

1 in place and then we roll out these vehicles and people in
 2 order to carrying out the dispersal action?
 3 MR MKHWANAZI: I see that.
 4 MR BUDLENDER SC: Now if there were
 5 people on the Koppie who lived in the settlement and wanted
 6 to go there, the logical thing would have been for them to
 7 head in a north-westerly direction, really through that
 8 area where the barbed wire and the – had not reached and
 9 where these other troops were going to be deployed, but
 10 hadn't yet arrived? Can you see that?
 11 MR MKHWANAZI: Yes.
 12 MR BUDLENDER SC: That would be the
 13 obvious way to go home if you wanted to go home to the
 14 informal settlement?
 15 MR MKHWANAZI: That's correct.
 16 MR BUDLENDER SC: And now if you were
 17 going in that direction, you couldn't go too far West,
 18 because there is a negative attraction point. There was
 19 IRA2, which was the TRT and other people, you see that
 20 green one? So if you were sensible in wanting to avoid
 21 trouble, you wouldn't hit straight towards them. That
 22 would be trouble. You would bend around to the right
 23 towards the informal settlement.
 24 MR MKHWANAZI: I see that, but I wonder
 25 if I can explain my understanding in disperse? From the

Page 3115

1 situation explained to me, I would like to say I was going
 2 to be happy if I will hear that the police official after
 3 the deployment of the barbed wire did manage to deploy,
 4 because if you do disperse, it's not that barbed wire will
 5 deploy persons on the Koppie, but police official must
 6 execute dispersal. And in this position, I don't hear how
 7 police official move to the Koppie and disperse the persons
 8 there. The only thing I'm seeing is the barbed wire that
 9 is deployed, of which counsellor's point is that it may
 10 have aggravated the thinking of the people to say, what is
 11 going to happen? Let me run away from this position. That
 12 is what I think what you are saying. But at this moment I
 13 don't see what is the position of the police official if
 14 they've got a chance to deploy, form up and disperse the
 15 people, because they must be dispersed by the police
 16 officials themselves, I don't see that position. Then it
 17 gives me a position to say, it's going to be a problem to
 18 keep on saying, yes, yes, you know, as I'm doing now. I
 19 would like really, with due respect, to say, can I have
 20 that position to say, where is the police official in this
 21 position? Did they manage to deploy or they never managed
 22 to deploy, then maybe I can be able to talk. That is,
 23 counsellor, with due respect, excluding the police
 24 officials that are on reserve, the TRT. I would like to
 25 hear on the part of the public order policing where they

Page 3116

1 are now and what is the position, please.

2 MR BUDLENDER SC: Let me try to show you,

3 Brigadier. If you look at – let's look at slide L200.

4 MR MKHWANAZI: I've got it.

5 MR BUDLENDER SC: Right. Now what that

6 shows us firstly, the dotted yellow line shows us how far

7 the deployed barbed wire actually reached. It was not as

8 far as had been planned on L81, which you've been shown.

9 Can you see that? For the sake of fairness, I should – and

10 completeness, I should say that there was an attempt to

11 close that gap between the front Nyala and that first

12 kraal, but that's as far as that barbed got on the most

13 generous reading. You see that?

14 MR MKHWANAZI: I see it.

15 MR BUDLENDER SC: And this is a

16 photograph taken at about the time shortly before the

17 deployment of the barbed wire came to an end, because you

18 can see how far it's already got.

19 MR MKHWANAZI: I see that.

20 MR BUDLENDER SC: Now if you look on the

21 right of that photograph, you will see the area where the,

22 if I can call them the dispersal team were going to be.

23 The water canon, the POP units, the TRT behind them, the

24 NIU and the STF behind them, they were all going to be on

25 the right and they were going to give effect to the

Page 3117

1 dispersal, you see that?

2 MR MKHWANAZI: I see that.

3 CHAIRPERSON: Mr Semenya wants to say

4 something?

5 MR SEMENYA SC: Chair, I do not follow

6 this line. As far as I understand, what we have as slide

7 81 and what we have on slide 200, firstly as I understand,

8 on slide 81 that TRP in the green on top and that one below

9 were not on site when the crowd was moving. That's not

10 where they were.

11 MR BUDLENDER SC: I think we're then not

12 at cross-purposes, Chair. If the TRT in the green block

13 hadn't arrived yet, I accept that. That actually

14 simplifies matters, Brigadier, and I'm sure Mr Semenya will

15 correct me if I'm wrong, but I put it to you that at the

16 time when the deployment of the barbed wire came to an end,

17 the people to the – police officers and members to the

18 Western side, North-Western, Western side, in other words,

19 IRA2 and the STF and the NIU and the TRT, all those people

20 we see there, they hadn't arrived yet? Right. Now let me

21 put to you where what – the conclusions I want to draw from

22 all of this. It was inevitable and predictable that some

23 of the people on the Koppie would head in a North-Westerly

24 direction towards their homes.

25 MR MKHWANAZI: Counsellor, I will agree

Page 3118

1 if they were all from the side of the settlement.

2 MR BUDLENDER SC: Well, those who were

3 from the settlement?

4 MR MKHWANAZI: Definitely. They will

5 have definitely want to go home.

6 MR BUDLENDER SC: Yes.

7 MR MKHWANAZI: It's a fact.

8 MR BUDLENDER SC: That's a positive

9 attraction point as you call it?

10 MR MKHWANAZI: Yes.

11 MR BUDLENDER SC: And there was nothing

12 to stop them doing that at that time?

13 MR MKHWANAZI: Counsellor, that's

14 information I got that during the deployment of the barbed

15 wire, some of the people they were as well moving, nobody

16 stopped there.

17 MR BUDLENDER SC: And even if they were

18 armed, they could go home with their arms?

19 MR MKHWANAZI: I haven't checked on that

20 position, Sir, I would be lying, I'm not sure.

21 MR BUDLENDER SC: Well, we've see there

22 was nothing to stop them doing that. There was no-one in

23 place to stop them?

24 MR MKHWANAZI: I'm not sure. I'm not

25 certain how to answer that question really.

Page 3119

1 MR BUDLENDER SC: Why don't you just say

2 yes?

3 MR MKHWANAZI: I need first, I rather

4 consult and see, and hear what's happening really. I

5 couldn't pick up whether everyone with arms, everybody, but

6 I was informed that the moment the barbed wire was

7 deployed, some people were moving from the Koppie as well,

8 nobody interfered with -

9 MR BUDLENDER SC: Well, you've seen –

10 you've heard what Adv Semenya said, that at that time the

11 TRT to the North West and the – those lines of the

12 dispersal team were not yet in place?

13 MR MKHWANAZI: During the deployment of

14 the barbed wire?

15 MR BUDLENDER SC: At the time, yes,

16 during and at the time when the deployment of the barbed

17 wire came to an end?

18 MR MKHWANAZI: Yes.

19 MR BUDLENDER SC: So at that time there

20 was nothing to stop people walking through to the informal

21 settlement with their arms, if they were armed?

22 MR MKHWANAZI: Well, I'm not sure in that

23 position, but only what I know is that they were allowed to

24 go. I'm not sure whether it was the time TRT has arrived

25 or maybe not yet arrived. I'm not sure as I was not there.

Page 3120

1 MR BUDLENDER SC: I understand,
 2 Brigadier, you weren't there and I don't want to ask, I
 3 really don't want to ask you questions about the detail of
 4 the operation. All I want to put to you is this. That
 5 once the barbed wire was rolled out or was being rolled
 6 out, it was natural that some of the people on the Koppie
 7 would head in a North Westerly direction and try to
 8 outflank the barbed wire which was being put in place.
 9 MR MKHWANAZI: It's possible, Sir.
 10 MR BUDLENDER SC: And there was no
 11 contingency plan to deal with that?
 12 MR MKHWANAZI: I won't say it wasn't
 13 there or it was there, but the main thing is, it's obvious
 14 if people see that particular situation happen, definitely
 15 would like to go out and move back to their homes. I think
 16 the objective as well from SAPS on the day, was to have
 17 people moving out from that position. I don't see any
 18 problem around that position, that definitely you would
 19 need a contingency plan to stop them, because I don't see
 20 anything that says, stop them. What I see, is to split
 21 them into smaller manageable groups, disarm the
 22 participants, that's all what I'm seeing. So I don't see a
 23 problem on that.
 24 MR BUDLENDER SC: What I put to you,
 25 Brigadier, if that happened, the operation would succeed in

Page 3121

1 part of its goal, but fail in another and important part of
 2 its goal. It could – it would succeed to that extent that
 3 it would result in some dispersal of people and people
 4 leaving the Koppie, that's correct, that's what you've just
 5 said, I think?
 6 MR MKHWANAZI: The end result –
 7 MR BUDLENDER SC: Yes.
 8 MR MKHWANAZI: - was to ensure that
 9 people are dispersed and disarmed. Then yes, if you say,
 10 if some can on their own walk out without weapon in their
 11 possession, yes, there will be a gap on that to say, we
 12 still have people with arms in their possession. However,
 13 at this stage I never received information to say, those
 14 who left were still having their weapons, or they were not
 15 having their weapons.
 16 MR BUDLENDER SC: You put your finger on
 17 the point, Brigadier, that it would achieve the dispersal,
 18 but it would not achieve disarming. So if any of the
 19 people with arms chose to go in that direction, that part
 20 of the operation would not have succeeded?
 21 MR MKHWANAZI: Counsellor, my point is,
 22 if they left the koppie with weapon and at this position I
 23 haven't heard information that says they left with weapon
 24 or without weapon, counsellor, you can inform me if they
 25 left with weapon.

Page 3122

1 MR BUDLENDER SC: Brigadier, I'm just as
 2 ignorant as you are. All I'm saying to you is, that this
 3 plan had the result that as far as people leaving to go to
 4 the North West after the settlement is concerned, it would
 5 achieve the goal of dispersal, but if some of them had
 6 weapons with them, it would not achieve the goal of
 7 disarming them. Is that a fair proposition?
 8 MR MKHWANAZI: In that position, yes.
 9 MR BUDLENDER SC: In our position of
 10 mutual ignorance, we can reach the same conclusion?
 11 CHAIRPERSON: Is it appropriate for us to
 12 take the adjournment on that note? The Commission will
 13 adjourn till half past one.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [13:29] CHAIRPERSON: The commission resumes.
 16 Brigadier, you are still under oath. Mr Budlender.
 17 MR BUDLENDER SC: Brigadier, just to tidy
 18 up one small point before I move onto the next part of this
 19 subject. The purpose of the barbed wire was to prevent the
 20 strikers moving in an easterly direction, is that correct?
 21 MR MKHWANAZI: I think it will be
 22 incorrect, counsellor, with the information I have received
 23 from the people who brief me that the purpose of the barbed
 24 wire was to protect members of the SAPS as well as to
 25 protect media people, as well as other VIP, if possible

Page 3123

1 they come in.
 2 MR BUDLENDER SC: I am sorry, I ran two
 3 questions really, into one, let me deal with it separately.
 4 The police safe area and the place where the media were was
 5 to the east of the koppie. I get my directions wrong, but
 6 I think this one is right.
 7 MR MKHWANAZI: I am doubting, I am not
 8 clear with the position of the safety because yes, I
 9 remember yesterday we spoke about the neutral zone where
 10 the police should be to be able to actually make
 11 arrangement of anything they want to do.
 12 MR BUDLENDER SC: Look at slide L81,
 13 MR MKHWANAZI: Got it.
 14 MR BUDLENDER SC: Do you have that?
 15 MR MKHWANAZI: Yes.
 16 MR BUDLENDER SC: Let's orientate
 17 ourselves again, we see the north sign in the top right
 18 hand corner, do you have that?
 19 MR MKHWANAZI: Yes, I see that.
 20 MR BUDLENDER SC: Then if you look at the
 21 lower part of the cordon in yellow, yes, the cordon, the
 22 barbed wire cordon. Do you see that?
 23 MR MKHWANAZI: I see the barbed wire.
 24 MR BUDLENDER SC: Is it east?
 25 MR MKHWANAZI: This is east.

Page 3124

1 MR BUDLENDER SC: And that is to the, and
 2 we see K3 which is where the koppie is, I am sorry not K3,
 3 K1, I beg your pardon. You see K1?
 4 MR MKHWANAZI: Yes.
 5 MR BUDLENDER SC: The koppie. And then
 6 if we move to the right behind that cordon, that was the
 7 police and media safe area, do you see that?
 8 MR MKHWANAZI: Okay, I see that.
 9 MR BUDLENDER SC: Behind the cordon is
 10 the police and media safe area, do you see that?
 11 MR MKHWANAZI: I see that.
 12 MR BUDLENDER SC: And that's to the east
 13 of koppie 1.
 14 MR MKHWANAZI: Right, I see that.
 15 MR BUDLENDER SC: So this time I got it
 16 right. The cordon was to prevent the people from the
 17 koppie moving in an eastwards direction. Towards where the
 18 police and media safe area was.
 19 MR MKHWANAZI: The information I got is
 20 that the cordon with the barbed wire was to protect media
 21 and as well members of SAPS. And at the same time
 22 participants were allowed to move if they move, at that
 23 stage there wasn't any problem. That's what I have got.
 24 MR BUDLENDER SC: The only point is this,
 25 that the area, the direction which they were prevented in

Page 3125

1 moving was an easterly direction. The cordon prevented the
 2 moving in an easterly direction. Is that correct?
 3 MR MKHWANAZI: Looking to the position
 4 where the barbed wire ends, it is correct.
 5 MR BUDLENDER SC: So the barbed wire,
 6 that barbed wire cordon was erected because it was
 7 anticipated that otherwise some of the strikers might move
 8 in an easterly direction and the aim was to prevent that.
 9 MR MKHWANAZI: The information I got is
 10 that the barbed wire's purpose was only to protect media
 11 and police officials. I haven't received information that
 12 says it was stopping the participants to go to a certain
 13 direction. However, counsellor, I do agree with the
 14 position, where it ends it may definitely cause a problem
 15 for them to go through if they have to go through. But the
 16 information I got is that they were still allowed to move
 17 whatever direction they want to move.
 18 MR BUDLENDER SC: Let's move on. When
 19 the plan did not go as intended, things didn't proceed as
 20 intended, that left the TRT and the NIU and the STF as the
 21 back up to deal with the situation which had arisen.
 22 MR MKHWANAZI: Counsellor, maybe if I can
 23 understand at what stage maybe we are actually referring
 24 to, where the plan actually came to a position to say now
 25 is not actually achievable.

Page 3126

1 MR BUDLENDER SC: As we have previously
 2 agreed the plan was that the people or most of them would
 3 remain on the koppie while the barbed wire was deployed.
 4 The other police officers will be brought around with
 5 teargas, water cannons, stun grenades and so on and they
 6 would disperse the people who had remained on the koppie?
 7 MR MKHWANAZI: That is correct.
 8 MR BUDLENDER SC: Instead of that a
 9 substantial number of people left the koppie going in a
 10 north westerly direction, I think, but going towards, going
 11 in the direction of the cordon, of the barbed wire. Or
 12 trying to go around the barbed wire. And there was never
 13 an opportunity to do the deployment of the dispersal group
 14 which had been planned.
 15 MR MKHWANAZI: What I understand,
 16 counsellor, is that the moment the barbed wire is deployed
 17 there was a breach by some of the participants. If you
 18 mean that that is correct, there was a breach.
 19 MR BUDLENDER SC: Well, Brigadier, there
 20 are two different views as to what happened when the barbed
 21 wire was deployed. One view is the one which you have put
 22 forward, that there was an attempt to breach the cordon.
 23 The other view was that there was an attempt to outflank,
 24 or to go around the cordon. You and I don't have to debate
 25 that, that will be dealt with by the people who were there.

Page 3127

1 But all I am putting to you, is that, that movement had the
 2 result that the next phase or the next stage, namely
 3 bringing up the people who were going to carry out the
 4 dispersal action, couldn't proceed as planned because, well
 5 we know it ended up in a shooting.
 6 MR MKHWANAZI: That's correct,
 7 counsellor, it actually disrupted the next stage of giving
 8 warning, disperse the people.
 9 MR BUDLENDER SC: And if the TRT and NIU,
 10 and STF had to be brought into play there was a real risk
 11 of fatalities, because they are people who carry sharp
 12 weapons.
 13 MR MKHWANAZI: It is a fact, counsellor,
 14 that if you bring TRT, national intervention, as well as
 15 special task force they carry live ammunition. And to take
 16 that decision you must know exactly when and why they must
 17 intervene.
 18 MR BUDLENDER SC: Yes, because if they do
 19 intervene, given the nature of the weapons that they carry
 20 and the nature of their functions, it's likely that some
 21 people will be killed?
 22 MR MKHWANAZI: It is normal, it is
 23 possible. That's why I am saying your assessment must be
 24 preferred, when do you bring them in the position.
 25 MR BUDLENDER SC: Those sharp weapons are

Page 3128

1 really the only means that those groups have of dealing
2 with the situation when they are called in.
3 MR MKHWANAZI: Come again, counsellor,
4 you are saying, those?
5 MR BUDLENDER SC: Those sharp weapons are
6 really the only means that those units have of dealing with
7 the situation when they are called in. They don't carry
8 non lethal weaponry.
9 MR MKHWANAZI: That is correct.
10 MR BUDLENDER SC: And they are also not
11 trained in crowd management, that's what the public order
12 police are for.
13 MR MKHWANAZI: That is correct, although
14 the national intervention members, the old ones are coming
15 from that background.
16 MR BUDLENDER SC: That was explained to
17 us by a senior police official, that the STF don't have the
18 training, the TRT don't have the training in it, but the
19 NIU had some training in their previous life and so some of
20 them know something about it.
21 MR MKHWANAZI: That is correct.
22 MR BUDLENDER SC: I want to look at the
23 situation in which the plan was designed and implemented
24 and I want to put the following to you. Firstly, the
25 police knew that there were some violent people amongst the

Page 3129

1 strikers because they had already killed some mine
2 officials and police members.
3 MR MKHWANAZI: That is correct.
4 MR BUDLENDER SC: The police knew from
5 the events of the 13th August that teargas and stun
6 grenades did not deter those people. Correct, because we
7 know that on that day when they were attacked with teargas
8 and stun grenades they became violent, turned on the police
9 and killed two of them.
10 MR MKHWANAZI: With the outcome of the
11 situation I do agree.
12 MR BUDLENDER SC: The police knew that
13 this was what happened when they attacked certain of these
14 people with teargas and stun grenades.
15 MR MKHWANAZI: I do agree.
16 MR BUDLENDER SC: Police also knew from
17 the events of the 13th August that rubber was ineffective
18 against a group of this kind, probably because of what the
19 people were wearing or carrying.
20 MR MKHWANAZI: I got that information,
21 Sir.
22 MR BUDLENDER SC: The police knew from
23 the events of the 13th of August that they were dealing
24 with determined people who would not simply do what they
25 were told by the police.

Page 3130

1 MR MKHWANAZI: It's one of the, I would
2 say one of the lessons learned out of that, that those
3 people were really coming forward, not doing what normally
4 is happening with the normal crowd situation we meet every
5 time.
6 MR BUDLENDER SC: Just to make clear that
7 when I talk about the people I have been referring to, I am
8 not referring to all of the 3 500 strikers. There was
9 clearly a very diverse group, I am referring to some of the
10 people in the group. I am sure you will agree with that?
11 MR MKHWANAZI: Yes, maybe if I can have
12 clarity, which is this group, are we talking about?
13 MR BUDLENDER SC: I don't want to attempt
14 to define the group, I am just saying there were such
15 people amongst the bigger crowd.
16 MR MKHWANAZI: Okay –
17 CHAIRPERSON: You can assume that the
18 people who were involved in the engagement, if one can call
19 it that, on the 13th where the two policemen were killed
20 were part of the group who were on the koppie –
21 MR MKHWANAZI: The bigger group.
22 CHAIRPERSON: The bigger group on the
23 16th.
24 MR MKHWANAZI: Okay.
25 MR BUDLENDER SC: And I have listed all

Page 3131

1 the things, all the characteristics that, or some of the
2 characteristics that the police knew about of some of the
3 people in the crowds. I won't repeat all of that. Now,
4 and I put one more thing to you, the police believed that
5 certain members of the group had taken muti, and that those
6 members thought that they were invincible as a result.
7 MR MKHWANAZI: I am not sure from the
8 side of the police but maybe I will think on the side of
9 the participants themselves that maybe if definitely they
10 actually engaged themselves in using of muti kind of a
11 situation, maybe they have that belief, I am not sure about
12 that one really.
13 CHAIRPERSON: That seemed to have been
14 the police information, I don't know whether this is your
15 point, Mr Budlender, if not, forgive me. But if you look
16 at slide 85, 86, 87 and 90, it appears that the police were
17 aware of rituals having being performed, appear to have had
18 information which is reported in slide 85 about what the
19 purpose of the muti was. It was suggested that an Nyanga
20 had been imported to perform certain rituals.
21 MR MKHWANAZI: That is correct.
22 MR BUDLENDER SC: The police must have
23 believed from observing these rituals that these rituals
24 would make certain of the strikers less likely to back down
25 or to concede.

<p style="text-align: right;">Page 3132</p> <p>1 MR MKHWANAZI: I am not sure, counsellor, 2 what was their belief from the side of the police after 3 actually noticing the rituals being practised, it may 4 happen they have that belief or it may happen they never 5 have it but from our position I never received that 6 information that tells me clearly that it actually, it came 7 as a belief to them that really it will make participants 8 to actually, to conduct themselves the way the counsellor 9 is mentioning.</p> <p>10 MR BUDLENDER SC: Think for a moment 11 about what the police probably believed. They didn't, they 12 took great care to observe and photograph these ritual 13 practices, you can see some of the photographs.</p> <p>14 MR MKHWANAZI: I saw those.</p> <p>15 MR BUDLENDER SC: The police didn't think 16 these were wedding ceremonies that were being carried out.</p> <p>17 MR MKHWANAZI: That is correct, they 18 never thought that.</p> <p>19 MR BUDLENDER SC: The police thought that 20 these were rituals carried out to make people confident and 21 to give them confidence and to make them feel strong.</p> <p>22 MR MKHWANAZI: Counsellor, as I have 23 indicated I am not sure what was their belief after seeing 24 this practice of rituals, I have said already that it may 25 happen that they have some sort of belief that maybe</p>	<p style="text-align: right;">Page 3134</p> <p>1 believed.</p> <p>2 MR MADLANGA SC: Maybe what was reported 3 to them, not what the police believed.</p> <p>4 MR MKHWANAZI: It was reported.</p> <p>5 CHAIRPERSON: Yes, I think that is a 6 valid objection, isn't it. The next point of course, the 7 first part is, the information was that the Nyanga had been 8 imported for this particular reason, and that in order that 9 a ritual should be performed, on the second paragraph it 10 indicates the police knew that a ritual of some kind had 11 been performed because that is seen – that's referred to in 12 the second paragraph of 85 and is seen in the slide 86.</p> <p>13 MR BUDLENDER SC: Brigadier, this is a 14 report or reports which reached the police and it is what 15 the police themselves observed.</p> <p>16 MR MKHWANAZI: It definitely looks like 17 it is a report, of which I am struggling to understand 18 where it was from, but it was reported, yes.</p> <p>19 MR BUDLENDER SC: And the next paragraph 20 tells us that the police actually observed protestors 21 undergoing a ritual.</p> <p>22 MR MKHWANAZI: That is correct.</p> <p>23 MR BUDLENDER SC: Do you see that?</p> <p>24 MR MKHWANAZI: I see that, Sir.</p> <p>25 MR BUDLENDER SC: Can I read you what was</p>
<p style="text-align: right;">Page 3133</p> <p>1 definitely they will do as the counsellor is indicating, or 2 maybe not. I am not sure but definitely they saw this, 3 they took photos of that.</p> <p>4 MR BUDLENDER SC: Just look at slide 85 5 to which the chairperson referred you.</p> <p>6 MR MKHWANAZI: Got it.</p> <p>7 MR BUDLENDER SC: This is the information 8 which the police had on the 14th of August, do you see 9 that?</p> <p>10 MR MKHWANAZI: Yes, I see.</p> <p>11 MR BUDLENDER SC: It says, "it was 12 reported that the protestors had imported an Nyanga to 13 perform certain rituals and manufacture muti which would 14 ensure them victory in confrontations with their opponents. 15 The men who gathered at the koppie, armed with knobkieries 16 iron rods, spears and pangas, believed the Nyanga could 17 perform a ritual at the koppies and sprinkle them with muti 18 to, 'make them brave.' That's what the police believed.</p> <p>19 MR MKHWANAZI: I don't have it.</p> <p>20 MR BUDLENDER SC: Do you know have 85?</p> <p>21 MR MKHWANAZI: I noticed that is actually 22 starting at page 42 which is slide 84, then comes on the 23 other side, but I got it now, Sir.</p> <p>24 MR BUDLENDER SC: So, what - the first 25 paragraph on the top of slide 85 tells us what the police</p>	<p style="text-align: right;">Page 3135</p> <p>1 said by my learned friend, Mr Semanya in his opening 2 statement on behalf of the police, paragraph 55. I will 3 quote to you, if you can just listen to it carefully. This 4 is what was said on behalf of the police to the commission. 5 "You will hear in evidence about the dogged refusal by the 6 protestors to disarm. You will hear about a ritual that 7 some of them underwent in the belief that they would be 8 invincible, invisible and invulnerable. This explains 9 their inexplicable conduct of charging at the police with 10 spears despite the force displayed by the police." That is 11 the police view of what happened.</p> <p>12 MR MKHWANAZI: I hear that, Sir.</p> <p>13 MR BUDLENDER SC: Perhaps I can just, for 14 the sake of completeness. Could you look at L107 and L108. 15 I am not going to take you through that, but that is 16 further information provided by the police to the 17 commission in its, in the police presentation in relation 18 to the role of the sangoma. Do you see that?</p> <p>19 MR MKHWANAZI: I see that.</p> <p>20 MR BUDLENDER SC: Right, let me come back 21 to where I was, we know that the police knew that there 22 were violent people amongst the strikers, correct?</p> <p>23 MR MKHWANAZI: That is correct.</p> <p>24 MR BUDLENDER SC: You have also agreed 25 that the police knew from the events of the 13th August</p>

Page 3136

1 that teargas and stun grenades did not deter the people
2 concerned.

3 MR MKHWANAZI: Are you referring,
4 counsellor, before the 16th?

5 MR BUDLENDER SC: Before the 16th, yes.

6 MR MKHWANAZI: I will say I am not sure
7 about the answer there to say yes or no, because I
8 understand the teargas was utilised on the 13th where
9 actually police officials lost their lives and some of the
10 committee members as well, lost their lives and one injured
11 from the police side. So, I am not sure, maybe, I don't
12 know if I haven't share it enough, to say really by that
13 time police were at the position to say teargas is not more
14 working at all. I haven't received that information before
15 me, Sir.

16 MR BUDLENDER SC: I don't want to go back
17 to that, Brigadier, it's on the record and we'll deal with
18 that in due course. The police knew on the 16th of August
19 from the events of the 13th of August that rubber was
20 largely ineffective against this group.

21 [13:58] BRIG MKHWANAZI: I hear that, Counsellor.

22 MR BUDLENDER SC: The police knew that
23 they were dealing with determined people who wouldn't
24 simply do what the police told them to do. They knew that
25 from what happened on the 13th of August.

Page 3137

1 BRIG MKHWANAZI: I then received the
2 information but it is possible looking to what happened on
3 the 13th.

4 MR BUDLENDER SC: And we've been in
5 detail through the reports which the police received and
6 the observations which they made about the rituals and the
7 use of muti.

8 BRIG MKHWANAZI: I heard about it.

9 MR BUDLENDER SC: And I want to put it to
10 you that having regard to all of those circumstances it was
11 entirely foreseeable that when the razor wire was deployed
12 these strikers would not simply stand in docile fashion on
13 the koppie waiting to be dispersed or arrested.

14 BRIG MKHWANAZI: I am not sure about that
15 point, it can be possible but normally it doesn't happen
16 that way, but yes.

17 MR BUDLENDER SC: I want to put it to you
18 that under those circumstances about the least likely thing
19 that could happen would be that these people would stand on
20 the koppie and wait to be dispersed and arrested.

21 BRIG MKHWANAZI: It is definitely
22 possible that once people see that something is happening
23 some of them really will think of moving away to avoid
24 trouble.

25 MR BUDLENDER SC: Well, some people would

Page 3138

1 move away to avoid trouble because they were not people who
2 wanted to have trouble, but if there were some who wanted
3 to make trouble they also wouldn't stand waiting to be
4 dispersed and arrested.

5 BRIG MKHWANAZI: It is possible that some
6 people will do that.

7 MR BUDLENDER SC: Come on, Brigadier, it
8 is more than possible, it is the likely result, let's be
9 frank with each other.

10 BRIG MKHWANAZI: That's correct.

11 MR BUDLENDER SC: And so it was entirely
12 foreseeable that they disperse and search and arrest plan
13 would not proceed in the manner which was provided for in
14 the plan.

15 BRIG MKHWANAZI: That part, Counsellor, I
16 won't be able to comment except to say it will definitely
17 depend to the operational commander and overall commander
18 to say how they were seeing the situation at that moment.

19 MR BUDLENDER SC: And the only
20 contingency plan provided for this situation was police
21 members with sharp ammunition.

22 BRIG MKHWANAZI: Counsellor, I indicated
23 from the beginning that from the reserve team or reserve
24 group there was public order policing that is armed with
25 shotguns and rubber bullets.

Page 3139

1 MR BUDLENDER SC: Brigadier, but if the
2 police, if the POPS police on the scene could not achieve
3 what they wanted with rubber bullets and teargas, it was
4 hardly likely that the reserved POPS members would achieve
5 it by the same method.

6 BRIG MKHWANAZI: Counsellor, I believe
7 the planning place was not only to address shooting rubber
8 or shooting teargas, it was to address dispersing,
9 arresting, meaning if one has to call public order policing
10 they were not only to be called to come in and do shooting,
11 but as well to perform other tasks to reinforce those
12 members who need some help.

13 MR BUDLENDER SC: Well, Brigadier,
14 perhaps you can help the commission, what you suggested,
15 that the POP members who were in the reserve areas would be
16 able to achieve that the POP members on the scene couldn't
17 achieve?

18 BRIG MKHWANAZI: Counsellor, we indicated
19 right from the beginning from your side that the POP that
20 appeared to be in a reserve were not actually indicated on
21 the plan, however what normally do happen is that if you've
22 got a reserve of a public order policing members, it is
23 only three mission to take care of. Number one, is to
24 arrest, number two will be to release members in line,
25 number three will be to reinforce, meaning if it happened

<p style="text-align: right;">Page 3140</p> <p>1 that we see that the problem gets bigger we can bring them 2 to reinforce or if any member need to be taken out in the 3 line, the other member can come in and assist on that. 4 MR BUDLENDER SC: Well, let's get to the 5 point, Brigadier, the additional POP members were not in 6 fact able to resolve the matter without the lost of life, 7 correct? 8 BRIG MKHWANAZI: Counsellor, I am not 9 clear with your statement please? 10 MR BUDLENDER SC: The situation was not 11 resolved without the loss of life, correct? 12 BRIG MKHWANAZI: I will agree, 13 Counsellor, looking to the outcome of the operation on that 14 day. 15 MR BUDLENDER SC: So we know that the 16 additional POP members from the reserve area were not able 17 to resolve the matter without the loss of life. 18 BRIG MKHWANAZI: It is true, Sir. 19 MR BUDLENDER SC: Now, Brigadier, you 20 know that there is a lot of literature internationally 21 about public order policing. 22 BRIG MKHWANAZI: Yes, that's true. 23 MR BUDLENDER SC: It is a subject which 24 is intensively studied and written about in serious books 25 and journals.</p>	<p style="text-align: right;">Page 3142</p> <p>1 Waddington. 2 BRIG MKHWANAZI: No – 3 MR BUDLENDER SC: Do you know that book? 4 BRIG MKHWANAZI: No. 5 MR BUDLENDER SC: Can you tell us the 6 names of any books dealing with public order policing? 7 BRIG MKHWANAZI: Ja, it will be a 8 challenge to me, I forgot the names, I could have maybe 9 brought something with me, at this stage I don't have 10 anything. 11 MR BUDLENDER SC: Have you ever heard of 12 Professor David Waddington? 13 BRIG MKHWANAZI: No. 14 MR BUDLENDER SC: Well, - so you're not 15 in a position to confirm or deny that he is an 16 international expert in public order policing? 17 BRIG MKHWANAZI: No. 18 MR BUDLENDER SC: Now I am going to give 19 you an extract from this last book to which I've referred 20 now and I want to ask you some questions about that. 21 CHAIRPERSON: Before you do that, in 22 fairness to the witness you might tell us, you say he is a 23 professor, you might tell us at what university he is a 24 professor, you might tell us who the publisher is of the 25 book, so that we can form some assessment as to whether it</p>
<p style="text-align: right;">Page 3141</p> <p>1 BRIG MKHWANAZI: That's correct. 2 MR BUDLENDER SC: I've got some of those 3 books here with me. I've got a book called Public order 4 policing, Contemporary Perspectives on strategy and tactics 5 by Mike King and Nigel Brearley, do you know that book? Do 6 you know that book? 7 BRIG MKHWANAZI: No, Sir. 8 MR BUDLENDER SC: I've got a book called 9 Policing public order, theoretical and practical issues 10 edited by C Kritcher and David Waddington, do you know that 11 book? 12 BRIG MKHWANAZI: No. 13 MR BUDLENDER SC: I've got a book called 14 Preventing crowd violence edited by Tamara Madensen, M-A-D- 15 E-N-S-E-N, and Johannes Knutsson, K-N-U-T-S-S-O-N. Have 16 you heard of that book? Have you heard of that book? 17 BRIG MKHWANAZI: No, Sir. 18 MR BUDLENDER SC: I've got a book called 19 The strong arm of the law, which is by Professor Peter 20 Waddington or PAJ Waddington, Tank Waddington who was a 21 member of the committee which advised the Goldstein 22 Commission, do you know that book? 23 BRIG MKHWANAZI: No. 24 MR BUDLENDER SC: I've got a book called 25 Policing public disorder, theory and practice by David</p>	<p style="text-align: right;">Page 3143</p> <p>1 is something to be taken seriously. 2 MR BUDLENDER SC: Chair, can I say that I 3 understand there will be a witness in due course who will 4 say that David Waddington is a recognised expert in public 5 order policing, but it is a witness whom I have met, but it 6 is not a witness called by the evidence leaders and so I 7 don't want to put that in, but there will be such evidence 8 I understand. 9 CHAIRPERSON: I see the book is published 10 by Rutledge which are a well known firm of – 11 MR BUDLENDER SC: Yes, yes – 12 CHAIRPERSON: - of academic publishers. 13 MR BUDLENDER SC: Yes. 14 CHAIRPERSON: So reference books, we can 15 very often regard it as being of authority. 16 MR BUDLENDER SC: Yes, Chair. I take it 17 that Ms Pillay will confirm that this is TT2? 18 MS PILLAY: That's correct, Chair. 19 MR BUDLENDER SC: And it is published by 20 Rutledge, it is the second edition of the book being 21 considered sufficiently worthwhile to go into a second 22 edition, it is the second edition of 2012. Professor 23 Waddington is a professor at Sheffield Hallam, H-A-L-L-A-M 24 University and his main research interests are described as 25 the policing of public disorder, research methods and</p>

<p style="text-align: right;">Page 3144</p> <p>1 interestingly the sociology of mining communities. Then, 2 Brigadier, if you'll go to that TT2, could you just go to 3 the table of contents of the book? 4 BRIG MKHWANAZI: I am there already. 5 MR BUDLENDER SC: You will see that 6 Chapter 1 deals with public order policing, theoretical 7 approaches. 8 BRIG MKHWANAZI: I see that. 9 MR BUDLENDER SC: Chapter 2 deals with 10 theories of public disorder. 11 BRIG MKHWANAZI: Correct. 12 MR BUDLENDER SC: Chapter 3 deals with 13 the American Urban Riots from 1991 to 2001. 14 BRIG MKHWANAZI: Ja, I see it. 15 MR BUDLENDER SC: Chapter 4 deals with 16 the British Urban Riots from 1991 to 2001. 17 BRIG MKHWANAZI: Correct, I see it. 18 MR BUDLENDER SC: Chapter 5 deals with 19 worldwide anti globalisation protests post Seattle. 20 BRIG MKHWANAZI: I see that. 21 MR BUDLENDER SC: Chapter 6 deals with 22 the GA to Justice and Home Affairs Ministers' meeting in 23 Sheffield in June 2005. 24 BRIG MKHWANAZI: That's correct. 25 MR BUDLENDER SC: Chapter 7 deals with</p>	<p style="text-align: right;">Page 3146</p> <p>1 that would be conducive to violent confrontation? You 2 understand the exercise we're doing? 3 BRIG MKHWANAZI: Yes. 4 MR BUDLENDER SC: Now the first one is a 5 hard line government willing to sanction police repression, 6 do you agree that that would be conducive to violent 7 confrontation? 8 BRIG MKHWANAZI: I do agree. 9 MR BUDLENDER SC: Number 2 is explicit 10 pressure on the police from government and the other 11 politicians, interest groups, general public, the media, 12 police personnel to apply uncompromising tactics and 13 strategies. Do you agree that that would be conducive to 14 violent confrontation? Do you agree with - 15 [14:18] BRIG MKHWANAZI: I do agree. 16 MR BUDLENDER SC: Then the next one I 17 want to refer to is under the sub-heading institutional, 18 the first one, centralised rather than local control over 19 police operations. Do you agree that that would be 20 conducive to violent confrontation? 21 BRIG MKHWANAZI: Which is one is – you 22 are at number 3? 23 MR BUDLENDER SC: Number 1, under 24 institutional. 25 BRIG MKHWANAZI: Under institution, you</p>
<p style="text-align: right;">Page 3145</p> <p>1 English football fans abroad from 1990 to 2006. 2 BRIG MKHWANAZI: I see that. 3 MR BUDLENDER SC: And Chapter 8 is the 4 conclusions of the study. It includes theoretical 5 foundations, the case studies and the policy implications. 6 BRIG MKHWANAZI: Yes. 7 MR BUDLENDER SC: Then I want you, I 8 would ask you to go to the last two pages of TT2. You'll 9 see and do you have them, it is a page headed table 8.1, do 10 you have that? 11 BRIG MKHWANAZI: Yes, I see that. 12 MR BUDLENDER SC: And that is a list of 13 factors which in Professor Waddington's opinion are likely 14 to, - are conducive to violent confrontation in policing 15 public order, do you see that? 16 BRIG MKHWANAZI: Yes. 17 MR BUDLENDER SC: He says on the basis of 18 his research that these are factors which are likely to 19 increase the risk of violence and I am going to identify 20 some of them and ask you about them. Let me be clear that 21 I am not asking you whether those conditions existed at 22 Marikana in August 2012. Many of them fall outside your 23 personal knowledge, I believe, but what I am going to put 24 to you, to ask you is, do you agree with Professor's 25 Waddington's opinion that if these conditions existed that</p>	<p style="text-align: right;">Page 3147</p> <p>1 know, I'm lost. Centralised rather than local control over 2 police operation. 3 MR BUDLENDER SC: Do you agree with 4 Professor Waddington that that is a factor which is 5 conducive to violent confrontation? Do you agree? 6 BRIG MKHWANAZI: Yes. 7 MR BUDLENDER SC: And number 4 under that 8 heading, an absence or lack of knowledge of forceful plans 9 of action for dealing with public order. Do you agree that 10 that is a factor which would be conducive to violent 11 confrontation? 12 BRIG MKHWANAZI: It's correct. 13 MR BUDLENDER SC: Paragraph 7 under that 14 heading, a lack of up-to-date training in tolerance crowd 15 control methods. Do you agree that that is a factor which 16 would be conducive to violent confrontation? 17 BRIG MKHWANAZI: It's correct. 18 MR MADLANGA SC: Mr Chairman, 19 Commissioners, may I just ask to assist with the 20 interpretation. The interpreter, but he can correct me if 21 I'm wrong, he's not capturing the part that says conducive 22 to violent confrontation and my attempt would be that 23 [African language]. 24 MR HANABE: If I may ask where is that 25 one?</p>

<p style="text-align: right;">Page 3148</p> <p>1 MR MADLANGA SC: Where is what? 2 MR HANABE: The paragraph. 3 MR BUDLENDER SC: Top of the page. 4 MR MADLANGA SC: Top of the page, yes. 5 Counsel if you had noticed when Hennie refers to each one 6 of these, at the end he says it would be conducive to 7 violent confrontation. With each one of those, so your 8 interpretation should also convey the same meaning and - 9 MR HANABE: Thank you very much, 10 Advocate. 11 MR MADLANGA SC: - but it depends on 12 whether you accept that I'm correct in what I'm saying. 13 MR HANABE: I will accept it, thank you. 14 MR BUDLENDER SC: Then Brigadier, the 15 next one I want to refer to is under cultural. Do you have 16 the sub-heading cultural? 17 BRIG MKHWANAZI: Yes, I've got it. 18 MR BUDLENDER SC: This one – officers 19 from outside the locality who are unfamiliar with local 20 customs and sensibilities and do not have a full commitment 21 to maintaining good long term relationships or relations 22 with the public. Do you agree that that would be a factor 23 conducive to violent confrontation? 24 BRIG MKHWANAZI: It's correct. 25 MR BUDLENDER SC: Paragraph 2, under</p>	<p style="text-align: right;">Page 3150</p> <p>1 BRIG MKHWANAZI: It's correct. 2 MR BUDLENDER SC: And then under the sub- 3 heading contextual, number 1, "a history of previous 4 incidents or negative encounters with possible scores to 5 settle. Professor Waddington says that's a factor which is 6 conducive to violent confrontation," do you agree? 7 BRIG MKHWANAZI: That's giving me a 8 little bit of a problem this one, Counsellor, because what 9 we are normally doing is that we are helped by the 10 historical background to be able to plan properly. But if 11 doing that will actually contribute to a violent 12 confrontation then I have a problem on that because on my 13 experience I never have that situation. Always it used to 14 assist me. 15 MR BUDLENDER SC: I understand your 16 point, Brigadier. You say and I'm sure that's right, that 17 you need to know that history in order to be able to deal 18 with the situation in a non-confrontational manner. That I 19 think is the point you're making. But of course, I accept 20 that. 21 BRIG MKHWANAZI: Thank you. 22 MR BUDLENDER SC: But you will accept, 23 I'm sure, that if there is in fact a background of previous 24 incidents or negative encounters with some people possibly 25 wanting to settle scores, that is a factor conducive to</p>
<p style="text-align: right;">Page 3149</p> <p>1 cultural, special units subscribing to norms of 2 confrontation. Did you agree that with Professor 3 Waddington that that is a factor conducive to violent 4 confrontation? 5 BRIG MKHWANAZI: Ja – 6 MR BUDLENDER SC: You agree? 7 BRIG MKHWANAZI: - I don't get it right. 8 Special unit subscribing to norms of confrontation that's 9 still conducive to violent confrontation, special units. 10 MR BUDLENDER SC: I think the point the 11 professor is making is that where you have in operation 12 special units which subscribe to norms of confrontation, 13 violent – that is conducive to violent confrontation. It 14 seems to be quite logical, speaking as a – 15 BRIG MKHWANAZI: Ja, okay. 16 MR BUDLENDER SC: Paragraph 5 under 17 cultural. "Mistrust and stereotyping of sections of the 18 public due to their age, class, transgressiveness and 19 organisation e.g. heterogeneous non-hierarchical 20 leaderless, non-institutionalised, having a violent or 21 unpredictable repertoires of action." It's rather a long 22 statement but what it says is when the police mistrust and 23 stereotype sections of the public for one of these reasons, 24 that is conducive to violent confrontation, would you agree 25 with that?</p>	<p style="text-align: right;">Page 3151</p> <p>1 violence. 2 BRIG MKHWANAZI: Some people want to 3 settle scores. 4 MR BUDLENDER SC: Yes. 5 BRIG MKHWANAZI: No, I do. 6 MR BUDLENDER SC: Can you go to the next 7 page, Brigadier. I'm going to try and not to go through 8 too many of these – 9 MS HEMRAJ: While you're at it, Mr 10 Budlender, what about number 5 on that page? 11 MR BUDLENDER SC: Brigadier, you see 12 number 5 under contextual, "the absence of or lack of faith 13 in any prior agreements or contingency plans formulated 14 with public representatives." Is that a factor conducive 15 to violence? 16 BRIG MKHWANAZI: I do agree. 17 MR BUDLENDER SC: Then on the next page 18 under situational, I'm trying to avoid too many, we can be 19 here for a week, but situational, paragraph 2. "Officers 20 deployed in high profile and provocative formations with 21 reinforcements, weaponry, dogs, horse etcetera all on 22 public display." That is a factor conducive to violent 23 confrontation. Do you agree that - 24 BRIG MKHWANAZI: Ja, you – my answer 25 should be do I agree or not, but I want just to indicate</p>

<p style="text-align: right;">Page 3152</p> <p>1 that especially on crowd management environment, it 2 definitely, we need to ensure that some of these type of 3 units are placed in a position whereby they cannot actually 4 be in a position to aggravate the situation as long as they 5 are kept in – we have like the reserves where it was they 6 away from that position. They can only be called up if 7 there's a situation. So I have a problem but I'm not sure 8 how they deploy because my question was to say as well the 9 writer is from South Africa or is not from South Africa. 10 Yes, we have to learn from other people, I do agree, but at 11 the same time is to say which situation are we talking 12 about because the crowd in Belgium is not the same as crowd 13 behaviour in South Africa as well. So I'm looking at that 14 to say how are we deploying. But in this essence I'm a 15 little bit – in this position I'm having a little bit of a 16 problem. 17 MR BUDLENDER SC: I'll move on, paragraph 18 3 under situational. "Deployment of officers from a 19 variety of different forces leading to poor coordination 20 and blurred lines of command." Do you agree that if that 21 happens, that increases the risk of violent confrontation? 22 BRIG MKHWANAZI: I do agree. 23 MR BUDLENDER SC: The next one, 6 under 24 situational. "Police definitions of public behaviour as 25 sinister, illegitimate or ill-intentions." Do you agree</p>	<p style="text-align: right;">Page 3154</p> <p>1 conducive to violent confrontation? 2 BRIG MKHWANAZI: I do agree. 3 MR BUDLENDER SC: I'm nearly finished, 4 Brigadier, I promise. Paragraph 9 under situational, "a 5 symbolically significant location e.g. a frontline to be 6 defended by a community or subculture or no-go-area to be 7 retaken by the police." Do you agree that that is a factor 8 which is conducive to violent confrontation? 9 BRIG MKHWANAZI: It's correct. 10 MR BUDLENDER SC: Brigadier, only 3 more, 11 I promise. Under interactional, "sudden or overdramatic 12 police interventions which suggest overkill." Do you agree 13 that that is a factor which is conducive to violent 14 confrontation? 15 BRIG MKHWANAZI: I do agree. 16 MR BUDLENDER SC: Now, Brigadier, 17 paragraph 6 under interactional, "dispersal tactics by the 18 police that serve only to spread the crowd geographically 19 and make its activities more unpredictable and less easy to 20 control." Do you agree that that's a factor which is 21 conducive to violent confrontation? 22 BRIG MKHWANAZI: It's correct. 23 MR BUDLENDER SC: And the last one to 24 which I want to refer you, paragraph 8 under interactional, 25 "a failure to engage in or a rejection of opportunities to</p>
<p style="text-align: right;">Page 3153</p> <p>1 that, 6 under situational. Do you agree that if the police 2 have this definition of the behaviour of the protestors as 3 sinister, illegitimate or ill-intentioned, that increases 4 the risk of violent confrontation? You agree? 5 BRIG MKHWANAZI: Yes, I do. 6 MR BUDLENDER SC: Thank you. Then item 8 7 under situational, a strategic intention by the police to 8 engage in confrontation e.g. to clear an area or win by 9 appearing to lose. Do you agree with the professor that 10 that is conducive to violent confrontation? 11 BRIG MKHWANAZI: Ja, that part I'm not 12 clear with, counsellor you can maybe indicate where it say 13 or win by appearing to lose. 14 MR BUDLENDER SC: Brigadier, we're again 15 equally ignorant as far as that is concerned. Let's leave 16 out that phrase. 17 BRIG MKHWANAZI: - you say agree or not. 18 MR BUDLENDER SC: Let's – no, fair 19 enough. Shall we say a – I think it's described – 20 discussed in fact in his book, but I don't want to go 21 there. 22 BRIG MKHWANAZI: Okay. 23 MR BUDLENDER SC: "A strategic intention 24 by the police to engage in confrontation, e.g. to clear an 25 area." Do you agree that that is a factor which is</p>	<p style="text-align: right;">Page 3155</p> <p>1 arbitrate or negotiate a reduction of hostilities 2 especially when credible representatives are present and 3 issues do not seem intractable." Do you agree that that's 4 a factor which is conducive to violent confrontation? 5 BRIG MKHWANAZI: I agree. 6 MR BUDLENDER SC: Right. Thank you and 7 just one point which is related, I'm not sure that I 8 understood your evidence yesterday correctly. Did you say 9 that when there is the show of force with the vehicles, the 10 police members should or should not display their arms? 11 BRIG MKHWANAZI: They actually conduct or 12 do the show of force without being having all the firearm, 13 like shotguns and all that, it can be a side firearm of 14 course, but shotgun no, if they do that. 15 MR BUDLENDER SC: Thank you, that's what 16 I thought you had said. Then I'm moving, you'll be pleased 17 to hear, to a new topic which is negotiations. Now you 18 train members of the South African Police Service in 19 negotiation. 20 BRIG MKHWANAZI: Maybe I should maybe 21 explain this way, Counsellor, that if we talk about 22 negotiation it's not negotiation as a course on its own, 23 but it's being presented together with a lecture regulation 24 of Gatherings Act when we are busy giving information to 25 the members. So we theme that and negotiation is being</p>

<p style="text-align: right;">Page 3156</p> <p>1 explained as well, how it has to be handled but there is a 2 course where we have a course for hostage negotiator, those 3 are the specific course where a person has a person has 4 attend to that but this one is included during the time of 5 the presentation of regulation of Gathering Act. 6 [14:38] MR BUDLENDER SC: I understand. You 7 yourself, have been trained in negotiation. 8 BRIG MKHWANAZI: A course, hostage 9 negotiation, no, I never done it, but under regulation of 10 Gathering Act, of course I've gone through a lot of time 11 whereby we get lectured how we have to conduct ourselves, 12 if we deal with discussions with the organisers or the 13 leaders of the organisation that is going to march on the 14 day. So actually work under regulation of Gathering Act, 15 I've done that. 16 MR BUDLENDER SC: We know, I think you'll 17 agree that the first thing in negotiation is to gain the 18 confidence of the party with whom you are negotiating. And 19 I think you will agree that the essence of successful 20 negotiation is give and take. Each party gives up 21 something, in return for getting something it couldn't 22 otherwise have. 23 BRIG MKHWANAZI: It is correct, Sir. 24 MR BUDLENDER SC: Just one further 25 background question, we know that from the point of view of</p>	<p style="text-align: right;">Page 3158</p> <p>1 MR BUDLENDER SC: It's at page 2967 of 2 the record, where Mr Semanya put to you, "there will be 3 evidence of Fanagalo interpreters used, giving the audience 4 that was going to be addressed," and your answer was, "It 5 is correct, as long as there was somebody really from SAPS 6 who can interact with that, if you never had a problem with 7 that. I think it was correct as well, because dialogue 8 must be in the language people can understand." 9 BRIG MKHWANAZI: What really I meant is 10 that really from the SAPS side, we've got a person who can 11 manage to understand and be able to communicate with the 12 people who are going to march, for instance, if I speak 13 Tswana and somebody from the crowd, as a leader, speaks 14 Tswana, obviously we will be able to communicate and solve 15 the problem. Then in that position I don't see there's any 16 problem, because what is the main objective here, is to 17 say, let's solve the problem, let them actually manage to 18 reach their objective. The only thing is that it has to be 19 done and it has to be done within the legal framework of 20 the law, and if we manage each other to communicate in 21 Tswana and definitely we manage to get things done 22 properly, I don't see a problem into that position, Sir. 23 MR BUDLENDER SC: Let me put it this way, 24 Brigadier, the first prize is that the negotiator can speak 25 the language of the people he or she is negotiating with.</p>
<p style="text-align: right;">Page 3157</p> <p>1 the strikers, Lonmin, their employer was their opponent. 2 BRIG MKHWANAZI: That is correct. 3 MR BUDLENDER SC: They were striking 4 because they had a complaint about Lonmin. 5 BRIG MKHWANAZI: It is correct, I got 6 that information. 7 MR BUDLENDER SC: And they said they 8 wouldn't leave the koppie until Lonmin came to speak to 9 them. 10 BRIG MKHWANAZI: Correct information I 11 got. 12 MR BUDLENDER SC: Now, Brigadier, a good 13 way to gain the confidence of the people with whom you are 14 negotiating is to speak their language. 15 BRIG MKHWANAZI: It is correct, it's 16 very, very important. 17 MR BUDLENDER SC: We know that the SAPS 18 negotiators are not able to do that, that they had to use 19 an interpreter. 20 BRIG MKHWANAZI: I got that information. 21 MR BUDLENDER SC: You said yesterday that 22 it is acceptable to use an interpreter from the South 23 African Police Service. 24 BRIG MKHWANAZI: I am not sure, 25 Counsellor, maybe if you can remind me at what situation?</p>	<p style="text-align: right;">Page 3159</p> <p>1 BRIG MKHWANAZI: It is correct, but we 2 must understand as well, that within the crowd, the people 3 who are actually demonstrating or marching, is not all of 4 them who will speak one language. Others speak Xhosa, 5 other speaks Zulu, other speaks Tswana, but normally there 6 will be a common language all of us will have to agree to 7 say, let's actually talk and be able to understand each 8 other, and be able to solve the problem that is actually 9 before us, so that at the same time, we can actually reach 10 the objective. Counsellor, I don't see it should be like a 11 fast rule to say, this must be this way, it's turning to 12 that way, because what is needed here is to make sure that 13 people manage to do what they are supposed to do and do it 14 in a proper way, and police has to make sure that they 15 actually protect and make sure people are not injured and 16 everything. That's what we need to do on the day, and 17 successfully. 18 MR BUDLENDER SC: Let me try and sum it 19 up, Brigadier. It's best if a negotiator can speak the 20 language of the person he or she is negotiating with. 21 BRIG MKHWANAZI: Correct. 22 MR BUDLENDER SC: But it's also 23 acceptable if the negotiator has somebody else from the 24 SAPS, who can interpret and communicate on his or her 25 behalf.</p>

Page 3160

1 BRIG MKHWANAZI: Counsellor if I listen
 2 properly, what is written there is that I said an
 3 interpreter has to come from the side of the police. I am
 4 not sure if I put it that way, but I don't dispute it if I
 5 did, but as I am saying it cannot be a fast rule where the
 6 interpreter comes from. Can an interpreter come from the
 7 side of the people who are actually marching as well. The
 8 main thing here, the objective let's understand each other,
 9 let's solve the problem, nobody must be injured, lets have
 10 an objective being reached at the end of the day as police
 11 officials.

12 MR BUDLENDER SC: I understand that. It
 13 would be fine to have – it would be acceptable to have an
 14 interpreter who came from the side of the people you are
 15 negotiating with.

16 BRIG MKHWANAZI: From my experience,
 17 Counsellor, working in Johannesburg with different marches,
 18 COSATU, SATAWU, you name it, I never have a problem from
 19 which side a person can come from. The main thing's the
 20 objective on the day, is to deal with the task before us
 21 and make sure that it is successful. Counsellor, maybe if
 22 I may say, Sir, that I've never been challenged in most of
 23 my marches I've actually managed before with the language,
 24 because always there will be a way how to communicate and
 25 how to move forward. So I don't think it is a problem at

Page 3161

1 all every time.

2 MR BUDLENDER SC: Brigadier, I am not
 3 arguing with you at all, I am agreeing with you, that the
 4 best thing is, if a negotiator can speak the language –

5 BRIG MKHWANAZI: Yes.

6 MR BUDLENDER SC: - but it's acceptable
 7 if either side produces an interpreter, if either the
 8 police produce an interpreter or if the people they are
 9 negotiating with produce an interpreter. That would also
 10 be fine.

11 BRIG MKHWANAZI: I do agree in that
 12 position, but as I said, it won't be a problem, the only
 13 thing is, will it be a problem? If there is a problem
 14 there must be a solution.

15 MR BUDLENDER SC: Now, when you are
 16 negotiating with a party, is it acceptable to use an
 17 interpreter who is an employee of their opponents? Do you
 18 think that would build up confidence and trust?

19 BRIG MKHWANAZI: In my experience, I will
 20 talk on my experience really, Counsellor, is that I never
 21 have a situation whereby I will have to take a person from
 22 that position. As you have said from the beginning, the
 23 trust must be there, you must build the trust. So if the
 24 trust is not there, will be a problem. Immediately, maybe
 25 if I bring somebody now from that position, obviously there

Page 3162

1 will be a problem. Some people won't trust, whether we are
 2 discussing in a good faith or not.

3 MR BUDLENDER SC: Can I come to the last
 4 aspect on negotiation. From your attendance at
 5 Potchefstroom and your reading of the papers, you know that
 6 what the police asked the strikers to do was to surrender
 7 their weapons and leave the koppie.

8 BRIG MKHWANAZI: The core point I
 9 received was that the main request was that they must lay
 10 down their arms, that was the main part.

11 MR BUDLENDER SC: What did the police
 12 offer the strikers in return, if they did that?

13 BRIG MKHWANAZI: Truly speaking,
 14 Counsellor, I never have that information. What maybe, as
 15 you said, if we negotiate, give and take but I never have
 16 any information to say what was there between the people,
 17 because what I know normally is to look to say, what is the
 18 problem that need to be actually discussed or be
 19 negotiated, but in issue of what was the give and take
 20 between the two parties negotiating, in most cases, I am
 21 not sure what was discussed, because I believe, Counsellor,
 22 is that as we talk about negotiating, we are talking
 23 negotiation that is taking place before the koppie.

24 MR BUDLENDER SC: Brigadier, in the
 25 papers which you read, and the meetings you've had, have

Page 3163

1 you seen any evidence of something which the police offered
 2 the strikers in return for surrendering their weapons? Any
 3 inducement of any kind.

4 COMMISSIONER TOKOTA: Sorry, before you
 5 answer, when did you consider General Mzembe's offer that,
 6 we don't have a problem with you, give us your arms, then
 7 we will let you go.

8 MR BUDLENDER SC: Thank you, Commissioner
 9 Tokota, that's, with respect, very helpful. On the 13th,
 10 General Mzembe said, look, you lay down your arms, and in
 11 return we allow you to march to the koppie and we will even
 12 escort you and make you safe there. That was an offer in
 13 return, you lay down your arms and we will help you in this
 14 way, a negotiation. Do you understand that?

15 BRIG MKHWANAZI: Correct, yes.

16 MR BUDLENDER SC: Now let's talk about
 17 the people once they were on the koppie. The police said –

18 CHAIRPERSON: Mr Budlender, is this topic
 19 that's going to take some time? Because I did say we were
 20 going to adjourn at three. And it's three minutes to three
 21 now.

22 MR BUDLENDER SC: I hope to be done by
 23 three.

24 CHAIRPERSON: Alright.

25 MR BUDLENDER SC: Depending on the

Page 3164

1 cooperativeness of the Brigadier of course. Brigadier,
 2 when you are dealing with the people who are now on the
 3 koppie, they have their traditional weapons with them, and
 4 they are, have some number of firearms with them. The
 5 police have stated that people on the koppie, please hand
 6 down – surrender your weapons. Have you seen any evidence
 7 anywhere in the papers, or anything you've heard that they
 8 were offered any reward or return or inducement if they did
 9 that?

10 BRIG MKHWANAZI: Ja, as an offer in
 11 return, I would say I couldn't pick it up anything except
 12 that there were times whereby during the negotiations, was
 13 if anybody got those rifles that were taken, they can just
 14 leave them right there where they are at the koppie.
 15 Police will pick them after, that's the only thing which,
 16 to me is a sign to say no matter what had happened, leave
 17 it there we can't hunt off somebody who was having the
 18 firearm and arrest and all those things.

19 MR BUDLENDER SC: Last question,
 20 Brigadier, if the police had been able to say to the
 21 strikes, you hand over your weapons, and we will bring your
 22 employer to the koppie to speak to you, that would have
 23 been a real inducement which might have resulted in a
 24 successful negotiation.

25 BRIG MKHWANAZI: Normally it help a lot.

Page 3165

1 MR BUDLENDER SC: Thank you, Chair, that
 2 is all I have for the moment.
 3 [14:58] CHAIRPERSON: Mr Semanya, you did
 4 indicate that we were going to get some documents which you
 5 didn't have last time. Now you may well have them now but
 6 all I am saying to you is, perhaps you can give them to us
 7 on Tuesday morning?

8 MR SEMENYA SC: Thank you, Chair.

9 CHAIRPERSON: If they're ready by then, I
 10 take it they are ready now, you don't have to give them to
 11 us now.

12 MR SEMENYA SC: I'll do my best, Chair.

13 CHAIRPERSON: The commission will then
 14 adjourn until ten o'clock on Tuesday morning.

15 [COMMISSION ADJOURNED]

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able 3046:9 3047:24 3048:16,17 3049:7 3053:23 3054:13 3057:6,13 3082:5,20 3085:6 3088:17,18 3091:17,23 3097:11 3105:23 3107:14 3109:3 3115:22 3123:10 3138:16 3139:16 3140:6,16 3150:10,17 3157:18 3158:11,14 3159:7,8 3164:20	3104:1 adhered 3097:2 adjourn 3077:1 3122:13 3163:20 3165:14 adjourned 3044:8 3048:5 3165:15 adjournment 3076:21 3076:23,24 3077:2,10 3122:12 ADJOURNS 3077:3 3122:14 administering 3066:2 admitted 3054:20 adopted 3098:21 Adv 3101:4 3119:10 advice 3098:11 advised 3141:21 advocate 3101:5 3148:10 Affairs 3144:22 afraid 3048:10 3109:7 Africa 3047:16,22 3098:12 3101:6,11 3152:9,9,13 African 3054:9 3073:10,13 3100:23 3101:15 3147:23 3155:18 3157:23 afternoon 3071:7 age 3149:18 agencies 3047:15 aggravate 3069:20 3152:4 aggravated 3115:10 ago 3081:24 agree 3054:22,23 3055:7 3059:13,21 3060:21 3062:6 3072:11 3073:2 3075:11,16 3077:14 3084:21 3086:13,19 3087:11 3088:8 3089:4 3092:6,17 3102:4,7 3103:13,14 3107:19 3109:4 3117:25 3125:13 3129:11,15 3130:10 3140:12 3145:24 3146:6,8,13,14,15,19 3147:3,5,9,15 3148:22 3149:2,6,24 3150:6 3151:16,23,25 3152:10,20,22,25 3153:1,4,9,17,25 3154:2,7,12,15,20 3155:3,5 3156:17,19 3159:6 3161:11 agreed 3087:19,23 3088:10,20 3096:10 3108:7 3126:2 3135:24 agreeing 3161:3 agreement 3062:16 3088:14 3096:17,25 3097:1	agreements 3151:13 ahead 3066:24 aim 3048:24 3083:5 3125:8 aimed 3052:7,8 alleged 3058:25 3061:19 3062:3 allow 3080:25 3163:11 allowed 3119:23 3124:22 3125:16 Alpha 3091:3 Alright 3075:11 3078:25 3112:10 3163:24 alternative 3076:16 3077:15 3083:10 3086:15 3087:17,24 alternatives 3082:9 amended 3063:19 amendment 3063:1 American 3144:13 amicably 3046:15 ammunition 3106:23 3127:15 3138:21 analysed 3049:3 analysing 3052:7 analysis 3057:22,23,23 3058:3,5 3060:16,24 3061:7,7,13 3062:2 3101:7 annexure 3062:13,19 3064:9,14 3105:16 answer 3044:12,14 3048:8 3053:24 3057:16 3058:18,20 3058:22 3061:3 3063:15 3085:6,12 3097:11 3105:19 3111:13 3118:25 3136:7 3151:24 3158:4 3163:5 answerable 3093:9 anti 3144:19 anticipate 3103:21 anticipated 3068:11 3092:1 3108:14 3125:7 anticipating 3058:9 anybody 3059:19 3109:2 3164:13 anyway 3053:15 apparent 3087:20 3097:5 apparently 3065:3 3078:6 3096:23 appear 3066:15 3131:17 appeared 3063:2 3139:20 appearing 3153:9,13 appears 3066:17 3131:16 appendix 3099:18 apply 3146:12 appointed 3053:1 appointing 3085:20	approach 3046:1 3079:5 3086:18 approaches 3144:7 approaching 3079:5 3086:17 appropriate 3072:10 3122:11 appropriateness 3069:6,8 approximately 3051:7 3051:22 arbitrate 3155:1 area 3045:8 3046:9 3056:8 3080:4 3084:1 3084:17,19 3100:16 3104:9,14 3105:25 3106:9 3111:9 3114:8 3116:21 3123:4 3124:7,10,18,25 3140:16 3153:8,25 areas 3045:13 3048:17 3106:6 3107:2 3139:15 arguing 3161:3 arisen 3125:21 arises 3091:19 3097:6 arm 3101:20 3141:19 armed 3066:7,14 3079:4 3083:6,13 3086:16 3088:4 3118:18 3119:21 3133:15 3138:24 arms 3096:18,19 3097:13,18 3118:18 3119:5,21 3121:12,19 3155:10 3162:10 3163:6,10,13 arose 3087:3 arraigned 3110:20 arrangement 3123:11 arrest 3075:13 3079:8 3138:12 3139:24 3164:18 arrested 3074:16 3075:23 3076:6 3137:13,20 3138:4 arresting 3075:15 3076:3 3139:9 arrests 3105:7 arrival 3052:16 3053:4 arrived 3079:15 3080:3 3106:20 3114:10 3117:13,20 3119:24 3119:25 arrives 3074:24 articles 3100:3 asked 3044:7 3051:14 3111:22 3162:6 asking 3051:15 3145:21 aspect 3066:16 3067:5 3162:4 assegai 3083:15 assessment 3057:19 3064:23 3067:12,17 3081:22 3127:23	3142:25 assist 3045:17,17 3049:7 3085:19,21,22 3086:7 3089:3 3094:23 3099:8 3105:24 3106:9 3140:3 3147:19 3150:14 assistant 3050:23 Association 3100:9 3101:17 assume 3074:22 3111:22,24 3130:17 assumption 3112:1,4 assumptions 3062:24 attack 3057:19 3058:2 3059:23 3060:19,25 3061:16 3062:2 3064:24 3065:10,16 3066:6 attacked 3066:13 3129:7,13 attempt 3104:10 3116:10 3126:22,23 3130:13 3147:22 attempted 3086:24 attend 3156:4 attendance 3162:4 attended 3053:20 attraction 3114:18 3118:9 audience 3158:3 Audit 3058:11,25 3059:1 3060:11,25 3064:23 3065:3,8 3069:23,24 3078:17 3078:18 3079:20 3080:1 3081:6 3084:12 3095:16 3129:5,17,23 3133:8 3135:25 3136:18,19 3136:25 3145:22 authority 3143:15 available 3046:19 3047:4 3053:25 3062:13 3082:19 avoid 3046:20 3103:9 3114:20 3137:23 3138:1 3151:18 aware 3065:4 3084:7 3096:1 3098:9 3113:13 3131:17
				B
				back 3046:24 3052:17 3062:20 3080:11,24 3086:20 3100:7 3105:18 3120:15 3125:21 3131:24 3135:20 3136:16 backed 3066:8 background 3128:15 3150:10,23 3156:25 bad 3046:18 3094:6,10 3095:7 badly 3054:19

<p>barbed 3070:16,21 3071:17,20 3081:7,8 3081:11,11,17 3089:19 3104:9,15 3108:15,22,24 3109:6 3109:10,15,23 3110:5 3113:20,25 3114:8 3115:3,4,8 3116:7,12 3116:17 3117:16 3118:14 3119:6,14,16 3120:5,8 3122:19,23 3123:22,23 3124:20 3125:4,5,6,10 3126:3 3126:11,12,16,20 based 3052:15 3062:2 3062:22,25 3090:13 basic 3108:7 basis 3048:1 3061:14 3071:14 3111:17 3145:17 beg 3104:18 3124:3 beginning 3047:17 3059:15 3063:4,13 3085:1 3091:1 3138:23 3139:19 3161:22 behalf 3135:2,4 3159:25 behaviour 3152:13,24 3153:2 Belgium 3047:18 3152:12 belief 3131:11 3132:2,4 3132:7,23,25 3135:7 believe 3139:6 3145:23 3162:21 believed 3131:4,23 3132:11 3133:16,18 3134:1,3 bend 3114:22 best 3046:6 3090:3 3091:23 3159:19 3161:4 3165:12 better 3070:23 3080:25 3083:18 big 3045:8 3051:3 3083:5 bigger 3069:16 3130:15 3130:21,22 3140:1 bill 3098:19 3099:3 bit 3046:17 3048:12 3060:23 3064:6,11 3150:8 3152:15,15 blindly 3092:9 block 3117:12 blocks 3113:1 blue 3113:14 blurred 3152:20 Board 3101:15 body 3071:6 book 3099:4 3100:1 3101:20 3141:3,5,6,8 3141:11,13,16,16,18 3141:22,24 3142:3,19 3142:25 3143:9,20 3144:3 3153:20</p>	<p>books 3100:2 3140:24 3141:3 3142:6 3143:14 box 3078:12,22 brave 3133:18 breach 3081:14 3126:17,18,22 breached 3108:25 breaching 3058:2 break 3045:12 Brearily 3141:5 brief 3122:23 briefed 3079:17 briefing 3078:12 3101:25 3108:1 Brigadier 3044:3,7 3048:4,12 3052:6 3053:7 3054:8 3058:20 3061:3 3063:16 3064:20 3065:21 3067:8 3071:16 3072:14 3074:21 3077:5,9 3078:5 3080:14 3083:23 3086:9,23 3087:16 3089:9,12 3091:18 3093:14 3095:2 3097:21 3098:1 3099:11 3102:5 3105:15 3108:2 3109:14 3111:3,19,24 3112:5 3116:3 3117:14 3120:2,25 3121:17 3122:1,16,17 3126:19 3134:13 3136:17 3138:7 3139:1,13 3140:5,19 3144:2 3148:14 3150:16 3151:7,11 3153:14 3154:4,10,16 3157:12 3158:24 3159:19 3161:2 3162:24 3164:1,1,20 bring 3127:14,24 3140:1 3161:25 3164:21 bringing 3107:5 3127:3 British 3144:16 brought 3047:8 3053:14 3056:5 3106:23 3126:4 3127:10 3142:9 Brown 3099:21 3100:8 3100:8 Budlender's 3071:10 build 3161:18,23 bullets 3105:4 3138:25 3139:3 bundle 3060:7 busy 3155:24</p> <hr/> <p style="text-align: center;">C</p> <p>C 3141:10 calendar 3078:17 call 3116:22 3118:9</p>	<p>3130:18 3139:9 called 3079:14 3080:3 3099:18 3101:20 3128:2,7 3139:10 3141:3,8,13,18,24 3143:6 3152:6 calm 3076:3 cannons 3126:5 canon 3046:3 3066:2 3066:11 3116:23 canons 3104:19 3105:4 can't 3051:14 3058:21 3058:21,22 3059:2,5 3091:14,15 3164:17 Cape 3100:13 3101:14 capturing 3147:21 care 3132:12 3139:23 careful 3083:17 3095:3 carefully 3093:15 3135:3 carried 3132:16,20 carry 3074:5 3078:2 3106:13,17 3127:3,11 3127:15,19 3128:7 carrying 3114:2 3129:19 case 3104:4 3105:22 3145:5 cases 3093:11 3162:20 cater 3063:1 cause 3072:22 3088:3 3125:14 centralised 3146:18 3147:1 Centre 3101:2 ceremonies 3132:16 certain 3065:3,3,16 3067:3 3070:21 3111:21 3118:25 3125:12 3129:13 3131:5,20,24 3133:13 certainly 3067:7 chain 3045:4 3094:2 Chair 3044:5 3066:19 3066:25 3067:8 3071:15 3076:20 3098:1 3099:9,17 3104:13 3111:6,16 3117:5,12 3143:2,16 3143:18 3165:1,8,12 chaired 3098:24 chairman 3061:8 3098:25 3147:18 chairperson 3044:2,6,9 3044:11,13,15,16 3046:17 3047:10 3048:3,7,11,16 3050:17 3051:9 3053:21 3061:6,9 3062:8,15,21 3063:3 3063:14,20 3065:11 3065:21 3066:1,23 3067:1 3070:24,25 3071:4,9 3076:22 3077:4,9 3094:12 3095:11,18 3096:4,16</p>	<p>3096:23 3097:10,21 3098:4,16,21,24 3099:6,10 3100:14 3104:10 3110:18,23 3111:4,10,20 3117:3 3122:11,15 3130:17 3130:22 3131:13 3133:5 3134:5 3142:21 3143:9,12,14 3163:18,24 3165:3,9 3165:13 challenge 3056:4 3083:3 3093:23 3142:8 challenged 3160:22 challenging 3082:25 chance 3057:11 3075:15,25 3076:10 3076:10 3115:14 change 3064:18 changed 3054:4 changes 3047:18 3050:15 3063:9 3091:3,4 Chapter 3144:6,9,12 3144:15,18,21,25 3145:3 characterised 3103:4 characteristics 3131:1 3131:2 charge 3067:22 3093:7 charging 3135:9 chase 3091:19 check 3058:4 3086:20 3087:5 3088:2 checked 3118:19 checking 3046:23 3047:14 3088:1 chest 3071:2 Chiefs 3100:9 choices 3087:17 chose 3121:19 circled 3105:6 circumstances 3090:10 3090:23 3091:22 3137:10,18 City 3099:22 civil 3101:10 CJ 3101:16 clarification 3065:7 clarify 3044:22 3064:21 3070:23 clarity 3130:12 class 3149:18 clear 3062:23 3085:16 3095:3 3096:24 3113:24 3123:8 3130:6 3140:9 3145:20 3153:8,12,24 clearly 3074:21 3101:18 3103:2 3130:9 3132:6 Clifford 3101:11 close 3046:12 3047:24 3053:5 3116:11 clue 3067:2</p>	<p>colleagues 3107:13 collected 3068:3 collective 3100:19 College 3102:2 Colonel 3058:24 3060:1 3061:1,13,18 3084:11 come 3046:14 3047:6 3054:2 3056:6 3057:10,13 3062:18 3063:7 3064:9 3072:7 3078:21 3082:6,17 3084:15 3091:2,8 3093:8 3094:22 3106:4 3113:17 3123:1 3128:3 3135:20 3138:7 3139:10 3140:3 3160:3,6,19 3162:3 comes 3063:6,6,17,24 3064:2,8,16,19 3071:5 3089:6 3090:15 3095:25 3096:21 3133:22 3160:6 coming 3052:17 3064:3 3079:3 3080:17 3083:6 3085:9 3086:16 3092:19 3094:18 3110:6 3128:14 3130:3 command 3044:20,21 3044:21,25 3045:5,6 3045:18 3055:24 3056:7 3067:18 3094:2 3102:22 3152:20 commander 3045:9,10 3045:11,19,20 3081:21 3089:21,24 3089:24 3090:5 3092:3,4,16,16 3093:1,1,5,6,12,13 3095:21,21 3138:17 3138:17 commanders 3045:21 3051:10,11 3053:3 commenced 3069:23 comment 3065:1,18 3070:21 3138:16 comments 3050:20,21 commission 3044:2 3049:8 3052:9 3053:1 3053:14 3077:4 3098:3,5,10 3122:12 3122:14,14,15 3135:4 3135:17 3139:14 3141:22 3165:13,15 commissioner 3091:20 3093:7,9 3099:21 3163:4,8 Commissioners 3147:19 commitment 3148:20 committed 3072:6,15 3072:25</p>
---	---	--	--	--

<p>committee 3136:10 3141:21</p> <p>common 3073:18,24 3074:3 3075:12,17 3077:20 3159:6</p> <p>communicate 3045:10 3158:11,14,20 3159:24 3160:24</p> <p>communication 3045:12,16</p> <p>communities 3144:1</p> <p>community 3054:17 3055:2 3068:24 3154:6</p> <p>comparative 3100:4</p> <p>compelling 3096:12 3097:7</p> <p>compilation 3049:8</p> <p>compile 3059:16 3091:6</p> <p>compiled 3060:11,13 3061:19 3063:21 3064:5,7 3098:18</p> <p>complaint 3157:4</p> <p>complete 3084:16</p> <p>completely 3058:16 3109:23</p> <p>completeness 3116:10 3135:14</p> <p>comprehensive 3098:17</p> <p>concede 3131:25</p> <p>concept 3057:24</p> <p>concerned 3074:23 3098:25 3122:4 3136:2 3153:15</p> <p>conclude 3068:17</p> <p>conclusion 3122:10</p> <p>conclusions 3061:2 3117:21 3145:4</p> <p>condition 3088:25</p> <p>conditions 3064:1 3085:15 3145:21,25</p> <p>conductive 3145:14 3146:1,6,13,20 3147:5,10,16,21 3148:6,23 3149:3,9 3149:13,24 3150:6,25 3151:14,22 3153:10 3154:1,8,13,21 3155:4</p> <p>conduct 3047:12 3056:12 3132:8 3135:9 3155:11 3156:11</p> <p>confidence 3132:21 3156:18 3157:13 3161:18</p> <p>confident 3132:20</p> <p>confirm 3142:15 3143:17</p> <p>confiscated 3074:12</p> <p>confiscating 3076:11 3082:12</p> <p>Conflict 3101:7</p> <p>confront 3080:16</p>	<p>confrontation 3145:14 3146:1,7,14,20 3147:5,11,16,22 3148:7,23 3149:2,4,8 3149:9,12,13,24 3150:6,12 3151:23 3152:21 3153:4,8,10 3153:24 3154:1,8,14 3154:21 3155:4</p> <p>confrontations 3133:14</p> <p>confronted 3084:24 3109:2</p> <p>confronting 3088:12 3089:10</p> <p>consider 3050:9 3083:24 3094:9 3103:6 3163:5</p> <p>considered 3066:16 3076:16 3077:15 3078:6 3079:2,6,12 3082:10 3096:5 3103:8 3143:21</p> <p>consistent 3070:4</p> <p>consolidated 3050:12</p> <p>constable 3074:15</p> <p>constituencies 3076:5</p> <p>consult 3119:4</p> <p>consultant 3100:18</p> <p>contact 3091:9</p> <p>contain 3081:1</p> <p>contaminated 3056:21</p> <p>contamination 3046:20</p> <p>Contemporary 3141:4</p> <p>contents 3144:3</p> <p>context 3095:14,15 3097:24</p> <p>contextual 3150:3 3151:12</p> <p>contingencies 3103:17</p> <p>contingency 3064:22 3103:6,20 3105:17 3106:1,3,21 3107:5 3107:17,21 3120:11 3120:19 3138:20 3151:13</p> <p>continuous 3048:1</p> <p>continuously 3063:7 3064:17</p> <p>continuum 3104:24</p> <p>contribute 3052:12,13 3150:11</p> <p>contributed 3050:25 3051:1</p> <p>contribution 3048:2</p> <p>control 3044:21,21,22 3044:25 3045:4,7,18 3055:24 3056:8 3068:18 3098:11 3102:22 3103:10 3106:13 3146:18 3147:1,15 3154:20</p> <p>controlled 3068:11</p> <p>convener 3085:13</p> <p>convenient 3076:21 3110:24</p> <p>convey 3148:8</p>	<p>cooperativeness 3164:1</p> <p>coordinated 3056:9</p> <p>coordination 3152:19</p> <p>cordon 3082:12,20 3083:24 3084:18 3088:11 3123:21,21 3123:22 3124:6,9,16 3124:20 3125:1,6 3126:11,22,24</p> <p>core 3072:15,24 3073:11,25,25 3075:24 3076:9 3162:8</p> <p>corner 3112:13,14 3123:18</p> <p>correctly 3048:14 3050:9 3112:7 3155:8</p> <p>correctness 3053:9</p> <p>COSATU 3160:18</p> <p>couldn't 3053:9 3081:15 3097:16 3114:17 3119:5 3127:4 3139:16 3156:21 3164:11</p> <p>could've 3082:9</p> <p>Council 3101:7</p> <p>counsel 3099:4 3148:5</p> <p>counsellor's 3115:9</p> <p>count 3051:14 3089:16</p> <p>countries 3047:20</p> <p>course 3061:4 3079:25 3092:8,13 3096:24 3107:20 3109:14 3110:14 3112:3 3134:6 3136:18 3143:3 3150:19 3155:14,22 3156:2,2 3156:3,8,10 3164:1</p> <p>Court 3101:5</p> <p>create 3069:16</p> <p>created 3061:1 3065:9</p> <p>creates 3046:17</p> <p>credible 3155:2</p> <p>crime 3100:3</p> <p>criminal 3074:18 3100:1,4 3101:2</p> <p>criminology 3099:25 3100:4 3101:12</p> <p>cross 3111:20</p> <p>cross-examination 3067:6</p> <p>cross-examining 3044:4 3077:7</p> <p>cross-purposes 3117:12</p> <p>crowd 3072:18,20,21 3081:18 3082:1 3084:24 3091:10 3100:17 3106:13 3117:9 3128:11 3130:4,15 3141:14 3147:14 3152:1,12,12 3154:18 3158:13 3159:2</p> <p>crowds 3100:17 3131:3</p> <p>cultural 3148:15,16 3149:1,17</p>	<p>currently 3047:14</p> <p>customs 3148:20</p> <p>cut 3091:18</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>danger 3068:22 3083:12,13</p> <p>dangerous 3083:25 3084:19 3105:7</p> <p>date 3060:8,13</p> <p>David 3141:10,25 3142:12 3143:4</p> <p>day 3048:1,14 3049:15 3049:23 3052:8,21 3056:9,16 3057:3,5,8 3058:15,17 3063:12 3069:4 3075:22 3076:1 3080:21 3081:2,21 3083:19 3088:3 3090:22 3091:14,15 3092:1 3095:1,20 3096:8 3097:5,8 3109:10 3120:16 3129:7 3140:14 3156:14 3159:16 3160:10,20</p> <p>daylight 3080:17</p> <p>days 3049:10,13,14 3051:21,25 3079:25 3089:15</p> <p>deal 3046:14 3047:9,25 3056:7 3057:25 3063:10,12 3064:10 3064:15,19 3075:20 3077:19,21 3080:20 3082:6,21,24 3083:21 3087:19 3090:16 3091:5,10 3095:25 3096:2 3099:2 3101:18 3111:23 3120:11 3123:3 3125:21 3136:17 3150:17 3156:12 3160:20</p> <p>dealing 3053:2 3056:13 3086:1 3095:12 3097:24 3128:1,6 3129:23 3136:23 3142:6 3147:9 3164:2</p> <p>deals 3067:5,11,16,25 3078:2 3144:6,9,12 3144:15,18,21,25</p> <p>dealt 3063:2 3087:2 3126:25</p> <p>debate 3096:25 3126:24</p> <p>DECEMBER 3044:1</p> <p>decide 3092:10</p> <p>decided 3093:2 3097:11,19</p> <p>decision 3080:11 3089:14,18,25 3090:3 3090:8,13,15,22 3091:20,21 3092:2,4 3092:19 3093:3,11,19</p>	<p>3093:19,20 3095:18 3095:20 3096:2 3127:16</p> <p>decisions 3089:23 3090:7 3092:15,22</p> <p>deemed 3079:13,14</p> <p>deeply 3072:5,15,24</p> <p>defended 3154:6</p> <p>define 3130:14</p> <p>definitely 3051:9,12,19 3054:5,25 3056:4 3059:20 3064:18 3076:5 3084:8 3086:22 3092:3 3118:4,5 3120:14,18 3125:14 3131:9 3133:1,2 3134:16 3137:21 3138:16 3152:2 3158:21</p> <p>definition 3153:2</p> <p>definitions 3152:24</p> <p>delayed 3096:16</p> <p>demonstrating 3159:3</p> <p>demonstration 3072:4 3072:14,25 3073:4</p> <p>demonstrations 3098:12 3101:23</p> <p>demonstrators 3101:24</p> <p>deny 3142:15</p> <p>departure 3091:25</p> <p>depend 3075:21 3090:12 3095:24 3138:17</p> <p>depending 3077:17 3081:2 3089:16 3092:12 3163:25</p> <p>depends 3090:4 3092:18 3148:11</p> <p>deploy 3081:11 3085:9 3086:16 3088:21 3113:19 3115:3,5,14 3115:21,22 3152:8</p> <p>deployed 3056:2 3070:22 3071:21,21 3081:7,12,17 3108:25 3109:24 3113:11 3114:9 3115:9 3116:7 3119:7 3126:3,16,21 3137:11 3151:20</p> <p>deploying 3079:4 3108:22 3152:14</p> <p>deployment 3078:24 3103:2 3108:11,15 3115:3 3116:17 3117:16 3118:14 3119:13,16 3126:13 3152:18</p> <p>deployments 3078:21</p> <p>Der 3101:16</p> <p>described 3143:24 3153:19</p> <p>designed 3106:12 3128:23</p> <p>despite 3097:3 3135:10</p> <p>detail 3120:3 3137:5</p> <p>detailed 3101:21</p>
---	--	---	---	--

<p>deter 3129:6 3136:1 determined 3129:24 3136:23 diagram 3112:6,14 dialogue 3158:7 didn't 3050:1 3053:4 3066:12 3086:25 3105:11,17 3106:22 3109:14 3113:5 3125:19 3132:11,15 3165:5 different 3062:22 3063:8,15 3066:22 3126:20 3152:19 3160:17 differently 3051:23 3052:2,20 3059:4 3090:21 difficult 3054:10 3059:20,24 3064:6,11 3065:19 3086:22 3092:15,22 3111:7 difficulty 3065:22 directed 3061:17 direction 3044:19 3109:25 3110:15 3113:2 3114:7,17 3117:24 3120:7 3121:19 3122:20 3124:17,25 3125:1,2 3125:8,13,17 3126:10 3126:11 directions 3123:5 director 3101:2 disarm 3079:8 3085:10 3085:21 3088:18 3120:21 3135:6 disarmed 3121:9 disarming 3084:16 3121:18 3122:7 discipline 3047:8 3056:5 disciplined 3056:2 discussed 3049:3 3153:20 3162:18,21 discussing 3162:2 discussions 3156:12 disorder 3141:25 3143:25 3144:10 dispersal 3108:16 3114:2 3115:6 3116:22 3117:1 3119:12 3121:3,17 3122:5 3126:13 3127:4 3154:17 disperse 3046:10 3066:12 3080:24 3104:25 3113:21 3114:25 3115:4,7,14 3126:6 3127:8 3138:12 dispersed 3066:13 3108:12 3115:15 3121:9 3137:13,20 3138:4 dispersing 3139:8</p>	<p>dispersion 3066:6 3105:5 display 3151:22 3155:10 displayed 3135:10 dispute 3160:4 disrupted 3127:7 dissipate 3073:5 distance 3080:3 distant 3079:15 diverse 3130:9 divided 3049:18,19 3052:17 docile 3137:12 doctrine 3045:2 document 3062:13 3087:20 documented 3062:12 documents 3165:4 doesn't 3054:21 3061:18 3062:25 3064:17 3072:1 3076:4 3086:12 3107:20 3137:15 dogged 3135:5 doggedly 3055:5 dogs 3151:21 doing 3052:17 3080:8 3115:18 3118:12,22 3130:3 3146:2 3150:9 3150:11 Don 3100:10 don't 3045:15 3056:23 3064:25 3070:25 3075:19 3077:6 3083:3,7 3086:4,23 3092:8 3093:16 3096:22 3099:6 3103:18,25 3104:1 3107:24 3108:6 3109:11 3111:6,12,17 3115:6,13,16 3119:1 3120:2,3,17,19,22 3126:24 3128:7,17,18 3130:13 3131:14 3133:19 3136:11,16 3142:9 3143:7 3149:7 3153:20 3158:15,22 3159:10 3160:4,25 3163:6 3165:10 dotted 3116:6 doubting 3123:7 Dr 3099:24 3101:6,19 draft 3050:14 3091:5 draw 3059:16 3117:21 drawn 3058:25 due 3061:4 3079:14 3096:17 3112:18 3115:19,23 3136:18 3143:3 3149:18 duration 3059:7 duty 3077:5 dynamics 3072:18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>Earlier 3111:20</p>	<p>early 3071:9 easier 3082:1 east 3123:5,24,25 3124:12 displayed 3113:2,2 3122:20 3125:1,2,8 eastwards 3124:17 easy 3077:21 3154:19 edited 3063:19 3141:10 3141:14 edition 3143:20,22,22 effect 3060:11 3116:25 effective 3063:18 3103:2 effectively 3054:14 either 3106:4 3161:7,7 element 3079:6 elements 3103:16 embark 3047:12 3054:4 3064:3 embarked 3085:24 eminent 3099:1 3101:1 3102:5 employee 3161:17 employer 3157:1 3164:22 enable 3077:1 encircle 3079:7 3109:11 encircled 3109:8,20 enclose 3104:9,14 encounters 3150:4,24 ended 3127:5 ends 3125:4,14 energy 3073:5 engage 3085:3 3153:8 3153:24 3154:25 engaged 3101:10 3131:10 engagement 3130:18 England 3047:22 English 3145:1 ensure 3063:9 3068:21 3121:8 3133:14 3152:2 entirely 3137:11 3138:11 entrenched 3045:2 environment 3152:1 equally 3153:15 equipment 3047:3,4,25 3106:12 ere 3157:18 erected 3125:6 error 3057:1,7 3093:3 escort 3163:12 especially 3045:6 3050:22 3051:3 3056:3,19,20 3063:22 3072:18 3080:19 3082:18 3085:20 3091:9 3152:1 3155:2 essence 3152:14 3156:19 established 3101:15 estimate 3051:15</p>	<p>estimated 3079:8 etcetera 3151:21 event 3052:1 3056:3 3087:6 3089:6,6 3092:13 3113:6 events 3049:2 3053:10 3081:8 3103:9,11 3113:10 3129:5,17,23 3135:25 3136:19 everybody 3119:5 evidence 3048:12 3053:9 3071:1 3073:9 3073:13 3081:24 3095:13 3111:18 3135:5 3143:6,7 3155:8 3158:3 3163:1 3164:6 evidence-in-chief 3098:2 exactly 3058:18 3082:23 3088:16 3091:9 3092:14 3097:17 3127:16 examination 3101:21 3111:21 excluding 3115:23 execute 3115:6 executed 3084:18 3094:25 execution 3057:25 3063:17 exercise 3146:2 exhibit 3049:25 3050:2 3050:6 3053:11,14,23 3060:4 3066:1 3099:7 existed 3080:8 3145:21 3145:25 expectation 3059:4 experience 3074:15 3075:7 3092:23 3093:24 3094:13,15 3095:6 3101:18 3150:13 3160:16 3161:19,20 experienced 3072:3 3109:6 expert 3048:13,13,20 3100:18 3142:16 3143:4 experts 3098:10 explain 3114:25 3155:21 explained 3053:16 3061:13 3099:3 3115:1 3128:16 3156:1 explains 3135:8 explanation 3052:15 3058:8,23 explicit 3146:9 explore 3047:19 express 3048:13 3051:22 extended 3112:22 extensive 3101:10 extent 3066:16 3072:7</p>	<p>3107:17 3121:2 extract 3099:12 3142:19 E-N-S-E-N 3141:15 e.g 3149:19 3153:8,24 3154:5</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 3056:3 3080:14,15 3089:8 faced 3045:22 fact 3062:5 3064:23 3065:2 3071:11 3078:4,5 3081:5 3084:6 3093:16 3096:17 3104:11 3108:20 3110:11 3111:9 3112:18 3113:24 3118:7 3127:13 3140:6 3150:23 3153:20 factor 3147:4,10,15 3148:22 3149:3 3150:5,25 3151:14,22 3153:25 3154:7,13,20 3155:4 factors 3059:16 3063:5 3091:2 3145:13,18 facts 3096:11 fail 3046:11 3085:22 3121:1 failing 3085:19 fails 3046:14 3047:25 failure 3056:25 3059:2 3061:24,25,25 3154:25 fair 3061:3 3122:7 3153:18 fairness 3116:9 3142:22 faith 3151:12 3162:2 fall 3072:20 3145:22 fallen 3080:2 Fanagalo 3158:3 fans 3145:1 far 3057:10,13 3070:15 3113:6 3114:17 3116:6,8,12,18 3117:6 3122:3 3153:15 fashion 3137:12 fast 3159:11 3160:5 fatalities 3127:11 fear 3074:11 feasible 3079:13,14 feel 3132:21 feeling 3045:12 3056:21 field 3100:3 fight 3076:5 figure 3080:22 figures 3051:12 3094:21 Fijnaut 3099:25 filtering 3079:4 3085:9 3086:17 3087:1</p>
--	--	---	--	---

3088:21 final 3049:20 3050:6,11 3053:13 find 3056:12 3098:16 fine 3160:13 3161:10 finger 3121:16 finish 3111:16 finished 3154:3 firearm 3065:13 3068:21 3074:17 3155:12,13 3164:18 firearms 3068:13,19 3074:3 3076:11 3082:23 3164:4 firm 3143:10 first 3050:2 3053:10 3058:24 3078:16,22 3080:23 3094:8,17 3102:13 3104:5 3105:15 3113:25 3116:11 3119:3 3133:24 3134:7 3146:4,18 3156:17 3158:24 firstly 3044:20 3075:15 3104:24 3116:6 3117:7 3128:24 first-hand 3072:9 flexible 3064:19 floor 3050:20 flowing 3062:5 follow 3080:22 3086:3 3086:10 3087:10 3089:6 3102:25 3112:4 3117:5 followed 3085:16 3086:3 3087:13 3096:2 following 3045:25 3058:15 3066:3,8,17 3079:1,6 3080:2 3081:12 3094:3 3106:21 3128:24 foot 3102:22 football 3145:1 force 3077:22 3104:24 3110:12 3127:15 3135:10 3155:9,12 forceful 3147:8 forces 3079:14 3080:2 3110:20 3152:19 foreseeable 3109:23 3137:11 3138:12 forgive 3131:15 forgot 3142:8 form 3104:18,18 3115:14 3142:25 formations 3151:20 former 3102:15 formulated 3103:3 3151:13 forward 3106:5 3111:23 3126:22 3130:3 3160:25 Foster 3100:10 found 3071:6	foundations 3145:5 four 3089:15 framework 3158:19 frank 3138:9 frankly 3054:20 frequently 3102:1 Friday 3076:25 3096:9 friend 3135:1 front 3050:21 3099:12 3116:11 frontline 3154:5 full 3061:25 3107:16 3148:20 functions 3094:25 3127:20 further 3057:11 3061:21 3084:19 3088:11,21 3135:16 3156:24 furthermore 3066:4 future 3044:20,24 3045:15 3047:3 F-I-J-N-A-U-T 3099:25	3080:1 3081:6,12,17 3087:11,11 3088:8,24 3089:5 3097:7 3108:1 3127:19 gives 3048:20 3115:17 3156:20 giving 3048:12 3052:18 3067:2 3080:22 3081:22 3127:7 3150:7 3155:24 3158:3 globalisation 3144:19 go 3047:22 3050:11 3053:15,24 3057:11 3060:6,14 3062:19 3067:8 3069:22 3072:1 3074:25 3078:6 3080:11,24 3083:21 3084:11 3086:4 3097:19 3099:17 3100:7 3102:20 3103:1,18,22 3104:4 3105:11,17,18 3107:24 3113:6 3114:6,13,13,17 3118:5,18 3119:24 3120:15 3121:19 3122:3 3125:12,15,15 3125:19 3126:12,24 3136:16 3143:21 3144:2,2 3145:8 3151:6,7 3153:20 3163:7 goal 3121:1,2 3122:5,6 goals 3052:21 goes 3054:19 3105:22 3106:1,10 going 3046:16 3052:24 3056:7 3057:12,25 3059:24 3060:23 3061:24 3064:15 3068:25 3075:4 3084:15 3085:17 3086:4 3089:2,2,3 3090:2,22 3091:10,11 3096:20 3097:18 3103:17 3104:14,17 3107:12,24 3109:7 3110:6 3114:9,17 3115:1,11,17 3116:22 3116:24,25 3126:9,10 3126:10 3127:3 3135:15 3142:18 3145:19,23 3151:7 3156:13 3158:4,12 3163:19,20 3165:4 Goldstein 3141:21 Goldstone 3098:2 good 3075:15,24 3076:10 3080:13 3084:3,23 3092:23 3099:2 3103:15,16 3148:21 3157:12 3162:2 government 3101:4,19 3146:5,10	gradual 3046:4 great 3077:8 3100:2 3101:18 3102:6 3132:12 green 3114:20 3117:8 3117:12 grenade 3105:4 grenades 3065:17 3066:3,11 3126:5 3129:6,8,14 3136:1 ground 3089:20 3090:2 3092:10 3107:23 group 3049:12 3072:6 3073:11,14 3074:22 3075:13,24 3076:3,9 3076:15 3077:11,21 3087:1 3102:5 3107:1 3108:25 3111:8 3126:13 3129:18 3130:9,10,12,14,20 3130:21,22 3131:5 3136:20 3138:24 groups 3049:18,19,19 3052:17 3120:21 3128:1 3146:11	happy 3115:2 hard 3146:5 harder 3076:6 Harvard 3099:1 3101:2 hasn't 3093:16 haven't 3102:18 3107:22 head 3101:6 3107:21 3109:25 3114:7 3117:23 3120:7 headed 3078:11,12 3145:9 heading 3065:23 3147:8,14 3150:3 hear 3073:21 3074:9 3102:14 3109:21 3115:2,6,25 3119:4 3135:5,6,12 3136:21 3155:17 heard 3096:25 3102:11 3102:11 3111:10 3119:10 3121:23 3137:8 3141:16,16 3142:11 3164:7 held 3063:25,25 3068:13 3096:8 3101:3 help 3086:12 3107:21 3139:12,14 3163:13 3164:25 helped 3150:9 helpful 3098:16 3163:9 Hemraj 3063:16 3091:20 3151:9 Hennie 3148:5 hesitate 3075:20 heterogeneous 3149:19 Heymann 3101:1 he'd 3071:9 he's 3056:21 3102:15 3102:16 high 3151:20 highest 3067:17 highly 3103:7 historical 3150:10 history 3083:14 3150:3 3150:17 hit 3114:21 hoc 3087:2 holding 3105:25 3106:5 3106:9 3107:2 Holland 3100:1 home 3074:5,25 3075:4 3080:24 3081:18 3110:6 3114:13,13 3118:5,18 3144:22 homes 3117:24 3120:15 hope 3163:22 horse 3151:21 hostage 3156:2,8 hostel 3082:11 3083:1,5 3083:7,8,11 3088:16 hostels 3082:12,16 3083:25 3084:17 3087:25 3088:11 hostilities 3155:1
	G		H	

<p>hours 3069:25 3070:13 3071:5,10,11,12,13 house 3074:19 Human 3101:7 hunt 3164:17 H-A-L-L-A-M 3143:23 H-E-Y-M-A-N-N 3101:1</p> <hr/> <p style="text-align: center;">I</p> <p>identified 3055:12,19 3055:24 3057:2 3058:2,3,6 3060:16 3087:17,18 identifies 3052:25 3068:3 identify 3052:21 3057:7 3078:16 3145:19 identifying 3099:16 identity 3072:20 ignorance 3122:10 ignorant 3122:2 3153:15 illegitimate 3152:25 3153:3 ill-intentioned 3153:3 ill-intentions 3152:25 image 3046:18 immediately 3071:21 3097:17 3161:24 implement 3089:19 3090:10,22 3091:21 3092:9,10 implementation 3061:1 implemented 3128:23 implementing 3046:12 3107:22 implications 3145:5 importance 3103:3 important 3044:23 3047:11 3054:9 3069:5,15 3082:22 3091:16 3121:1 3157:16 imported 3131:20 3133:12 3134:8 improved 3055:25 improving 3045:14 incident 3069:25 Incidentally 3102:10 incidents 3074:16 3150:4,24 include 3060:19 3073:19 included 3062:15 3156:4 includes 3045:16 3047:15 3145:4 including 3101:24 3102:6 incorporate 3062:1,1 incorporated 3063:12 incorporation 3062:5 incorrect 3062:25 3122:22</p>	<p>increase 3145:19 increases 3152:21 3153:3 independent 3048:21 indicate 3047:10 3048:16,17 3056:20 3062:14 3097:16 3151:25 3153:12 3165:4 indicated 3056:2 3063:4,21 3084:25 3132:23 3138:22 3139:18,20 indicates 3134:10 indicating 3064:3 3133:1 individuals 3072:19 inducement 3163:3 3164:8,23 ineffective 3129:17 3136:20 inevitable 3117:22 inexplicable 3135:9 influence 3063:4 influencing 3059:16 3091:1 influential 3094:21 inform 3121:24 informal 3110:16,21 3111:16 3112:1,3,18 3114:14,23 3119:20 informed 3107:9 3119:6 informers 3059:18 initial 3079:2 initiated 3070:11 injured 3070:18 3136:10 3159:15 3160:9 inquiry 3077:3,3 3098:6 inside 3074:18 insist 3055:5 instance 3158:12 institution 3146:25 institutional 3146:17 3146:24 instruction 3065:12,16 3065:20 3093:25 3104:24 instructions 3049:6 3052:13 3065:9 3094:18 integrated 3046:1,18 3047:7 intelligence 3059:18 3062:10,17,23 3063:7 3063:17 3064:2 3075:19 3082:17 intended 3106:22 3125:19,20 intensively 3140:24 intention 3081:6 3113:25 3153:7,23 interact 3052:18 3093:11 3158:6</p>	<p>interactional 3154:11 3154:17,24 interest 3146:11 interestingly 3144:1 interests 3096:5 3143:24 interfered 3119:8 interim 3079:2 international 3098:18 3100:4,9 3142:16 internationally 3140:20 interpret 3159:24 interpretation 3147:20 3148:8 interpreter 3147:20 3157:19,22 3160:3,6 3160:6,14 3161:7,8,9 3161:17 interpreters 3158:3 interrupt 3105:14 intervene 3127:17,19 intervened 3087:8 intervention 3069:13 3069:15,20 3093:12 3127:14 3128:14 interventions 3154:12 intimidation 3098:7 intractable 3155:3 invincible 3131:6 3135:8 informed 3135:8 involved 3050:23 3053:3 3065:24 3066:2,10 3072:5 3075:22 3097:15 3107:5 3130:18 involving 3100:19 invulnerable 3135:8 IPID 3109:19 3111:15 IRA2 3114:19 3117:19 iron 3133:16 irrelevant 3112:4 isolated 3105:7 issue 3057:1 3162:19 issued 3056:16,22 issues 3044:17,18 3045:1 3053:6 3056:3 3056:7 3085:20 3091:10 3092:12 3141:9 3155:3 item 3078:20 3153:6 it's 3046:22 3048:11,16 3049:25 3055:21 3056:1 3057:4 3058:18 3059:9,13 3061:3 3062:15,18,18 3064:6,7,11 3068:6 3068:11 3071:13,19 3073:23,24 3074:1,3 3075:7 3076:13,17,24 3087:8 3090:8 3091:3 3093:3,19,20 3094:1 3094:10 3098:17 3099:3,18 3102:1,13 3105:25 3109:5,22</p>	<p>3110:9,13,22,23 3111:11,11 3112:7,15 3113:24 3115:4,17 3116:18 3118:7 3120:9,13 3127:20 3130:1 3136:17 3147:17 3157:15 3158:1 3159:11,19,22 3161:6 3163:20 I'd 3061:9 3095:12 I'll 3061:4 3074:9 3108:4 3165:12 I'm 3044:22 3045:24 3046:5,16 3047:3 3048:10 3049:11 3051:15 3058:19 3059:9 3060:23 3061:10 3064:8 3065:1,15,19 3070:20 3070:22 3071:7,20 3072:4,16 3073:22,23 3074:7,9,20 3086:14 3088:13,14 3095:3,19 3097:19 3102:4,15 I've 3044:13 3051:1 3057:11 3060:5 3061:20 3074:16 3107:8 3141:2,3,8,13 3141:18,24 3142:19 3156:10,15 3160:22 3160:23</p> <hr/> <p style="text-align: center;">J</p> <p>ja 3051:18 3068:8 3093:22 3094:7,16 3112:9 3142:7 3144:14 3149:5,15 3151:24 3153:11 3164:10 job 3083:5 3086:7 3089:1 3094:2 JOC 3078:11 3090:6 Johannes 3141:15 Johannesburg 3160:17 journals 3140:25 judge 3091:23 jumped 3066:23 June 3144:23 Justice 3101:2 3144:22</p> <hr/> <p style="text-align: center;">K</p> <p>Karee 3084:17 keep 3074:4 3075:2,8 3115:18 keeping 3075:10 kept 3082:11,23 3152:5 key 3073:20 3103:16 killed 3055:7 3065:2 3070:18,20,22 3071:10 3083:16 3106:18,24 3127:21 3129:1,9 3130:19 killings 3081:9 kind 3129:18 3131:10 3134:10 3163:3 King 3141:5</p>	<p>Kingdom 3102:2 knew 3110:8 3128:25 3129:4,12,16,22 3131:2 3134:10 3135:21,25 3136:18 3136:22,24 knopkieries 3133:15 know 3047:16 3065:2 3067:20 3070:25 3071:16 3079:11 3081:5,10 3082:22 3083:20 3086:9 3088:16 3089:14 3090:2 3091:9 3100:24 3106:17 3107:23 3108:6,19 3109:15 3112:21 3115:18 3119:23 3127:5,16 3128:20 3129:7 3131:14 3133:20 3135:21 3136:12 3140:15,20 3141:5,6,10,22 3142:3 3147:1 3150:17 3156:16,25 3157:17 3162:5,17 knowledge 3072:9,17 3102:6 3145:23 3147:8 known 3061:23 3102:16 3143:10 Knutsson 3141:15 koppie 3073:12,14 3074:4,22 3075:1,2,9 3075:14,24 3076:9 3077:11 3079:3,7 3083:6 3084:24 3085:10,10,24 3086:6 3086:16 3087:12,19 3088:12,22 3089:1,10 3089:15 3093:2,18 3097:4 3105:6 3108:9 3108:12,15,21 3109:14,24 3110:17 3110:19 3111:25 3112:6,19 3114:5 3115:5,7 3117:23 3119:7 3120:6 3121:4 3121:22 3123:5 3124:2,5,13,17 3126:3,6,9 3130:20 3133:15 3137:13,20 3157:8 3162:7,23 3163:11,17 3164:3,5 3164:14,22 koppies 3133:17 kraal 3111:8 3116:12 Kritcher 3141:10 K-N-U-T-S-S-O-N 3141:15 K1 3112:7,18 3124:3,3 K3 3124:2,2</p> <hr/> <p style="text-align: center;">L</p> <p>L 3049:25 3050:2,3,6 3050:14 3053:11,14</p>
---	--	---	---	---

3053:23 3066:1 3087:20 3105:16 lack 3061:7,13 3147:8 3147:14 3151:12 laid 3058:15,16 3062:11 3096:18,19 3097:2 language 3147:23 3157:14 3158:8,25 3159:4,6,20 3160:23 3161:4 large 3055:25 3072:4 largely 3099:2 3136:20 lasted 3049:9 late 3101:4 law 3099:1 3100:1,4 3101:21 3141:19 3158:20 lay 3061:15,20 3065:13 3097:13,18 3162:9 3163:10,13 lead 3073:8 3105:5 3111:12 leader 3158:13 leaderless 3149:20 leaders 3072:25 3073:3 3073:7,20,24 3075:16 3076:3,6 3143:6 3156:13 leadership 3045:1 leading 3050:6 3093:18 3152:19 learn 3047:18 3152:10 learned 3097:12 3130:2 3135:1 leave 3081:25 3097:4 3110:12 3153:15 3157:8 3162:7 3164:14,16 leaving 3082:4 3083:8 3121:4 3122:3 lecture 3155:23 lectured 3156:11 lectures 3102:1 Lee 3099:21 left 3081:18 3121:14,22 3121:23,25 3125:20 3126:9 legal 3098:11 3158:19 lesson 3044:19 lessons 3130:2 lethal 3045:24,24,25 3046:2,13 3047:13,13 3047:19,21 3056:13 3128:8 letter 3052:11,12,14 letting 3075:3 let's 3047:3,5 3050:24 3074:22 3092:5 3104:3 3105:15 3123:16 3125:18 3138:8 3140:4 3158:17 3159:7 3160:8,9 3163:16 let's 3078:7,21 3084:11 3086:5 3116:3	3153:15,18 level 3067:17,17 3097:19 Lieutenant-Colonel 3050:22 life 3128:19 3140:6,11 3140:17 light 3090:10 3091:22 line 3066:6,7,9,14 3079:4 3081:14 3085:9 3086:17 3087:1 3088:21 3112:22,23 3113:5 3116:6 3117:6 3139:24 3140:3 3146:5 lines 3095:16 3104:18 3104:18 3113:14 3119:11 3152:20 linking 3057:25 list 3145:12 listed 3130:25 listen 3050:8 3135:3 3160:1 listened 3050:25 literature 3140:20 little 3064:6,11 3089:2 3150:8 3152:15,15 live 3109:25 3127:15 lived 3110:17 3111:8 3111:15,25 3114:5 lives 3136:9,10 local 3101:18 3146:18 3147:1 3148:19 locality 3148:19 locate 3112:5 location 3154:5 locations 3079:15 3080:3 logical 3114:6 3149:14 London 3101:23 long 3075:18 3148:21 3149:21 3152:4 3158:5 longer 3080:8 Lonmin 3157:1,4,8 look 3045:5 3049:7 3056:5 3068:10 3069:1 3082:18 3092:9 3094:21 3096:19 3104:3 3110:19 3111:2 3116:3,3,20 3123:12 3123:20 3128:22 3131:15 3133:4 3135:14 3162:17 3163:10 looked 3044:17 3045:23 looking 3045:7,24 3046:3 3047:22,23 3066:21 3108:3 3125:3 3137:2 3140:13 3152:13 looks 3065:22 3134:16 lose 3073:4 3153:9,13	loss 3140:11,17 lost 3083:14 3136:9,10 3140:6 3147:1 lot 3056:5 3059:15 3061:2 3070:8 3083:1 3083:2 3091:12 3097:14 3140:20 3156:10 3164:25 lots 3088:16 Louw 3101:5 lower 3080:15 3089:9 3123:21 lunch 3076:23 lying 3118:20 L107 3135:14 L108 3135:14 L177 3104:4 L200 3116:3 L63 3078:7 L81 3116:8 3123:12 L82 3084:11 <hr/> M Madensen 3141:14 MADLANGA 3134:2 3147:18 3148:1,4,11 magnitude 3044:23 MAHLANGU 3055:16 3110:22 main 3046:8 3049:5 3054:1 3082:3 3120:13 3143:24 3158:16 3160:8,19 3162:9,10 maintain 3062:16 maintaining 3148:21 making 3051:9 3086:1 3089:5,14 3093:11 3095:18 3149:11 3150:19 man 3101:17 manage 3047:9 3082:2 3085:18 3089:2 3097:16 3115:3,21 3158:11,17,20,21 3159:13 manageable 3120:21 managed 3049:12 3057:10 3115:21 3160:23 management 3091:10 3128:11 3152:1 managing 3044:24 manner 3048:22 3138:13 3150:18 manual 3078:1 manufacture 3133:13 march 3063:22,25 3064:1,4 3091:11 3156:13 3158:12 3163:11 marches 3160:17,23 marching 3087:2 3159:3 3160:7 Marikana 3045:7 3049:3 3056:4 3079:9	3084:17 3094:21 3145:22 marked 3060:8 3113:15 marshals 3085:21 3086:6 3088:25 mask 3046:19,21 masks 3056:17,23 3057:1 Mathunjwa 3097:4 matter 3057:16 3096:8 3111:23 3140:6,17 3164:16 matters 3052:21 3117:14 maximum 3103:10 mean 3045:2 3046:20 3064:17 3111:6 3126:18 meaning 3061:25 3139:9,25 3148:8 means 3095:15 3096:20 3103:8 3128:1,6 meant 3158:9 media 3122:25 3123:4 3124:7,10,18,20 3125:10 3146:11 meet 3049:20 3130:4 meeting 3049:2,9 3051:6,11 3052:7,20 3052:25 3053:19 3063:8,23,23 3144:22 meetings 3085:14 3162:25 member 3056:20 3101:14 3140:2,3 3141:21 members 3046:20,22 3046:24 3047:1,2,8 3053:2 3056:16,22 3057:1 3066:6,7,13 3066:15 3068:23,23 3074:22 3083:12 3085:4 3087:8 3099:16 3107:2,23 3117:17 3122:24 3124:21 3128:14 3129:2 3131:5,6 3136:10 3138:21 3139:4,12,15,16,22 3139:24 3140:5,16 3155:10,18,25 memory 3077:8 men 3133:15 mention 3046:16 mentioned 3047:16 3056:19 3057:20 3059:3,6 3063:13,14 mentioning 3132:9 Merwe 3101:16 met 3098:24 3102:18 3143:5 method 3139:5 methods 3143:25 3147:15 middle 3072:6 3097:5	Mike 3141:5 mine 3129:1 mining 3144:1 Ministers 3144:22 minutes 3070:17 3163:20 missing 3057:18 mission 3079:16 3080:4 3139:23 mistake 3051:9 3057:2 3057:7 mistakes 3052:25 mistrust 3149:17,22 moment 3081:24 3112:2,5 3115:12 3119:6 3126:16 3132:10 3138:18 3165:2 morning 3055:12,19 3058:10 3079:1,20 3088:6 3096:24 3165:7,14 move 3046:10,24 3061:5 3075:12 3080:23 3089:13 3091:20 3095:10,11 3097:22 3098:1 3105:3 3108:3 3109:3 3115:7 3120:15 3122:18 3124:6,22,22 3125:7,16,17,18 3138:1 3152:17 3160:25 moved 3076:8 3108:21 movement 3127:1 moving 3061:6 3076:15 3077:11 3079:5 3085:23 3086:18 3089:1 3106:8 3109:1 3117:9 3118:15 3119:7 3120:17 3122:20 3124:17 3125:1,2 3137:23 3155:16 Mpembe 3065:9,13 3086:21,24,25 3163:10 Mpembe's 3163:5 Mpofu-like 3048:11 multi 3047:7 Municipal 3101:17 muster 3077:22 muti 3131:5,10,19 3133:13,17 3137:7 mutual 3122:10 M-A-D 3141:14 <hr/> N name 3160:18 names 3067:21 3142:6 3142:8 Natal 3101:17 national 3049:6 3052:13 3102:2 3127:14 3128:14 natural 3120:6
---	--	---	---	--

<p>nature 3063:22 3089:23 3106:16 3127:19,20 nearly 3154:3 necessary 3072:7 3075:13 3089:4 3091:8 3096:6 necessity 3096:13 3097:7 need 3045:5,13 3046:12 3047:11,12,19 3053:8 3054:14 3055:4,9 3056:5,8,12,21 3064:16 3068:21 3082:7,16,18 3083:7 3083:17 3086:3 3088:2 3089:6 3091:12,12,13,16 3092:2 3119:3 3120:19 3139:12 3140:2 3150:17 3152:2 3159:16 3162:18 needed 3053:10 3159:12 needs 3055:24 3089:25 3092:19 negative 3114:18 3150:4,24 negotiate 3155:1 3162:15 negotiated 3162:19 negotiating 3156:18 3157:14 3158:25 3159:20 3160:15 3161:9,16 3162:20,22 negotiation 3155:19,22 3155:22,25 3156:7,9 3156:17,20 3162:4,23 3163:14 3164:24 negotiations 3101:24 3155:17 3164:12 negotiator 3156:2 3158:24 3159:19,23 3161:4 negotiators 3157:18 neutral 3104:9,14 3123:9 never 3053:14,16 3058:17 3080:11 3085:2,5 3093:24 3094:3,10 3098:14 3110:8 3115:21 3121:13 3126:12 3132:4,5,18 3150:13 3156:9 3158:6 3160:18,22 3161:20 3162:14,15 new 3064:19 3090:14 3094:19 3095:6,10,11 3098:1,11 3099:22 3155:17 Nigel 3141:5 night 3044:8 3048:5 3073:12,15 3074:5,24 3075:14,24 3076:9,15</p>	<p>3077:11 3078:2 3080:16 3083:19 3087:18 NIU 3066:8 3104:20 3106:4 3107:6 3116:24 3117:19 3125:20 3127:9 3128:19 non 3128:8 non-confrontational 3150:18 non-hierarchical 3149:19 non-institutionalised 3149:20 noon 3097:6 normal 3110:9 3127:22 3130:4 normally 3062:8,11,12 3072:19 3082:15 3085:12 3089:22 3093:4 3108:1 3130:3 3137:15 3139:21 3150:9 3159:5 3162:17 3164:25 norms 3149:1,8,12 north 3110:17,25 3112:14,19 3119:11 3120:7 3122:4 3123:17 3126:10 northerly 3113:2 north-westerly 3114:7 3117:23 North-Western 3117:18 note 3122:12 notice 3087:11,11 3088:24 3089:5 noticed 3133:21 3148:5 noticing 3132:3 no-go-area 3154:6 no-one 3118:22 number 3044:20 3051:14 3067:13 3075:14 3080:25 3082:19 3099:7 3100:2 3126:9 3139:23,24,25 3146:9 3146:22,23 3147:7 3150:3 3151:10,12 3164:4 numbers 3077:23 Nyala 3116:11 Nyalas 3104:19 Nyanga 3131:19 3133:12,16 3134:7</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>oath 3044:3 3077:6 3122:16 objection 3111:11,12 3134:6 objective 3048:22 3120:16 3158:16,18 3159:10 3160:8,10,20 objects 3083:14</p>	<p>observations 3137:6 observe 3132:12 observed 3134:15,20 observing 3101:23 3131:23 obtained 3088:15 obtaining 3056:12 obvious 3114:13 3120:13 obviously 3063:9 3064:9 3086:6 3091:5 3158:14 3161:25 occasioned 3062:3 occur 3062:20 offer 3162:12 3163:5 3163:12 3164:10 offered 3163:1 3164:8 officers 3051:11 3103:5 3103:10 3117:17 3126:4 3148:18 3151:19 3152:18 official 3074:15 3083:15,16,16 3093:24 3115:2,5,7 3115:13,20 3128:17 officials 3071:22 3075:20 3115:16,24 3125:11 3129:2 3136:9 3160:11 oh 3112:8 okay 3055:15 3069:18 3071:21 3099:5 3112:5 3124:8 3130:16,24 3149:15 3153:22 old 3128:14 Olivier 3101:6 Omega 3091:3 onboard 3093:9 once 3099:7 3108:21 3120:5 3137:22 3163:17 ones 3111:7 3128:14 one's 3046:23 opening 3135:1 operation 3044:23,24 3045:19 3047:6,7 3053:3 3055:6 3061:22 3062:24 3063:5 3068:12,23 3070:11 3075:20 3083:2 3087:18 3091:2,8 3095:15,24 3096:6,13 3097:8,15 3102:1 3120:4,25 3121:20 3140:13 3147:2 3149:11 operational 3045:2,11 3045:19 3046:1 3054:5 3057:24 3059:17 3060:3,10 3065:23 3067:4,18 3068:17 3078:21,24 3079:2 3081:21 3089:24 3090:13 3091:6,21 3092:3,8</p>	<p>3092:15,23 3093:1,6 3093:13,20 3095:21 3096:6,13 3113:24 3138:17 operationalised 3064:7 operationally 3093:10 operations 3046:2,6 3055:25 3056:13 3067:25 3078:2 3084:18 3089:22 3103:4 3146:19 opinion 3048:13,20 3053:4 3058:13,19 3062:15 3063:14 3094:16 3145:13,25 opponent 3157:1 opponents 3133:14 3161:17 opportunities 3154:25 opportunity 3044:11 3053:15 3098:14 3126:13 option 3045:24 3076:14 3077:10,19 3078:6 3083:17,18 3087:24 3088:11,21 options 3045:24,25 3046:7 3056:13 3083:24 3089:9 orange 3113:14 order 3045:3 3046:2,19 3047:17 3048:13 3051:3 3054:13 3056:13,23 3061:5 3067:8,22,23 3068:25 3077:25 3083:25 3084:16,19 3101:22 3102:6 3103:4 3104:19 3106:13 3107:2,8,12,13 3113:21 3114:2 3115:25 3128:11 3134:8 3138:24 3139:9,22 3140:21 3141:3,9 3142:6,16 3143:5 3144:6 3145:15 3147:9 3150:17 orders 3049:7 3052:14 organisation 3149:19 3156:13 organised 3100:3 organiser 3085:14 organisers 3156:12 orientate 3112:13 3123:16 orientated 3079:16 3085:4 oriented 3080:4 originally 3062:3 outbreak 3068:12 outcome 3069:16 3129:10 3140:13 outflank 3120:8 3126:23 output 3050:15</p>	<p>outside 3047:15 3145:22 3148:19 overall 3045:20 3089:21,24 3090:5 3092:4,16 3093:1,5 3093:12 3095:21 3138:17 overdramatic 3154:11 overkill 3154:12 overnight 3055:13,20 3073:25 3075:1 3096:9 overwhelming 3077:22 o'clock 3061:15 3070:12 3071:12 3077:1 3097:6 3165:14 o'clock 3079:1,20</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>page 3060:7,15 3067:25 3068:2 3078:11 3099:17,18 3102:21 3102:21,22 3133:22 3145:9 3148:3,4 3151:7,10,17 3158:1 pages 3108:5 3145:8 PAJ 3101:19 3102:11 3141:20 panel 3098:10,18 3099:13,16 pangas 3133:16 paper 3062:18 papers 3162:5,25 3164:7 paragraph 3060:15 3067:11,13,14,15,24 3068:4,7 3079:12 3090:18 3133:25 3134:9,12,19 3135:2 3147:13 3148:2,25 3149:16 3151:19 3152:17 3154:4,17,24 pardon 3104:18 3124:3 parliament 3098:22 part 3057:10 3058:2 3060:3 3081:1,18 3083:12 3084:11,20 3099:12 3107:8 3110:11,13 3115:25 3121:1,1,19 3122:18 3123:21 3130:20 3134:7 3138:15 3147:21 3153:11 3162:10 participants 3062:11 3065:14 3068:14,18 3072:16 3075:6,25 3080:21 3087:12 3108:12 3120:22 3124:22 3125:12 3126:17 3131:9 3132:7 particular 3089:20 3091:21 3094:25 3095:5,15 3096:3</p>
---	--	--	--	--

<p>3120:14 3134:8 parties 3162:20 party 3156:18,20 3161:16 passage 3102:25 passed 3111:8 peace 3058:17 3101:16 peacefully 3094:23 3096:20 perform 3054:10,14 3131:20 3133:13,17 3139:11 performed 3131:17 3134:9,11 person 3156:3,3 3158:10 3159:20 3160:19 3161:21 personal 3145:23 personnel 3146:12 persons 3115:5,7 Perspectives 3141:4 Peter 3141:19 phase 3104:14,17 3127:2 Philip 3101:1 photograph 3116:16,21 3132:12 photographs 3132:13 photos 3133:3 phrase 3058:22 3153:16 physically 3097:23 pick 3053:4 3064:4 3097:17 3119:5 3164:11,15 picked 3057:5 3105:20 3105:24 Pillay 3099:7,9 3143:17 3143:18 place 3063:23 3064:5 3070:9 3071:16 3072:8 3075:19 3083:11 3085:14 3088:8,25,25 3090:14 3091:8,25 3105:19,21 3105:22 3108:16 3109:15 3113:10,16 3113:20 3114:1 3118:23 3119:12 3120:8 3123:4 3139:7 3162:23 placed 3085:15 3090:3 3105:24 3107:1 3152:3 places 3047:22 3105:25 3110:23 planned 3082:21 3084:7 3103:18 3116:8 3126:14 3127:4 planner 3059:24 planners 3058:14 planning 3101:25 3103:5,16 3107:17 3139:7 plans 3103:6 3147:8</p>	<p>3151:13 play 3106:4,23 3107:5 3127:10 played 3051:3 players 3094:17 pleas 3097:3 please 3044:15 3116:1 3140:9 3164:5 pleased 3155:16 point 3045:23 3046:16 3046:17 3047:10 3057:22 3062:16,21 3064:21 3080:19 3081:5 3085:5 3086:1 3088:1,23 3089:5,16 3090:16 3091:24 3092:21 3095:13,19 3095:23 3097:23 3098:1 3114:18 3115:9 3118:9 3121:17,21 3122:18 3124:24 3131:15 3134:6 3137:15 3140:5 3149:10 3150:16,19 3155:7 3156:25 3162:8 pointed 3055:9 3060:18 point's 3097:23 policeman 3102:16 policemen 3065:2 3130:19 policies 3049:6 3052:13 policing 3045:3 3046:19 3047:17 3051:4 3056:24 3067:22,23 3068:25 3100:3 3101:23 3102:6,7 3103:4 3106:13 3107:2 3115:25 3138:24 3139:9,22 3140:21 3141:4,9,25 3142:6 3142:16 3143:5,25 3144:6 3145:14 policy 3145:5 politic 3094:22 political 3093:17,19,25 3094:3,17 3095:4 3101:10 politicians 3146:11 poor 3152:19 POP 3066:6,8,13 3116:23 3139:15,16 3139:19 3140:5,16 POPs 3068:17 3139:2,4 pose 3044:6 poses 3068:22 position 3046:10 3048:18 3049:11 3050:23 3053:5 3056:6 3059:9,21,22 3059:24 3063:8,11,15 3064:2,11,11 3070:19 3075:8 3080:12 3082:5,24,25 3085:16 3085:18 3086:2,5</p>	<p>3096:19 3097:16 3106:9 3115:6,11,13 3115:16,17,20,21 3116:1 3118:20 3119:23 3120:17,18 3121:22 3122:8,9 3123:8 3125:3,14,24 3127:24 3132:5 3136:13 3142:15 3152:3,4,6,15 3158:15,22 3161:12 3161:22,25 positions 3101:3 positive 3118:8 possession 3047:2 3068:22 3074:17 3075:6 3088:19 3121:11,12 possibility 3082:14 possible 3059:8 3062:2 3062:14 3063:1 3074:1 3075:8 3076:13 3081:14 3096:7 3103:8 3109:9 3109:16 3110:1,9 3120:9 3122:25 3127:23 3137:2,15,22 3138:5,8 3150:4 possibly 3058:21,23 3067:5 3150:24 post 3144:19 posting 3111:9 Potchefstroom 3049:2 3049:5 3051:6 3053:19 3162:5 practical 3141:9 practice 3102:7 3132:24 3141:25 practices 3132:13 practised 3132:3 preceding 3103:1 predictable 3117:22 preferred 3127:24 prematurely 3078:5 premise 3108:7 preparation 3103:5 preparations 3101:25 prepare 3091:16 prepared 3054:2 3097:3,13 present 3050:2 3051:11 3056:16 3059:18 3085:4 3155:2 presentation 3050:14 3050:21 3135:17 3156:5 presented 3050:19 3155:23 president 3100:8 3101:17 pressure 3093:17 3095:5 3146:10 presumably 3068:14 presumes 3103:1 prevail 3090:11 prevent 3079:3 3083:6</p>	<p>3122:19 3124:16 3125:8 prevented 3124:25 3125:1 Preventing 3141:14 prevention 3098:6 previous 3067:21 3069:4 3128:19 3150:3,23 previously 3053:8 3126:1 pre-organised 3086:25 pre-planned 3086:25 pre-planning 3067:25 printed 3102:21 prior 3091:14 3151:13 prize 3158:24 probability 3106:18 probable 3103:7 probably 3129:18 3132:11 problem 3045:15 3046:12 3048:2 3061:21 3062:1 3066:23 3069:16 3075:10 3086:4,20 3088:3,18 3093:12 3096:3,21 3106:10 3107:12 3115:17 3120:18,23 3124:23 3125:14 3140:1 3150:8,12 3152:7,16 3158:6,15,16,17,22 3159:8 3160:9,18,25 3161:12,13,13,24 3162:1,18 3163:6 procedures 3080:22 3081:13 3086:2,11 3087:10,13 3089:7 proceed 3048:8 3097:12 3125:19 3127:4 3138:13 PROCEEDINGS 3044:1 process 3050:14 3084:16,16 3085:24 3089:14 processing 3079:9 produce 3161:8,9 produced 3099:13 3109:18,19 produces 3161:7 product 3049:21 3050:6 3052:18 3053:13 Prof 3099:24 3100:10 3100:21,25 3101:11 3102:11 professor 3099:1,25 3100:12 3101:1,12 3141:19 3142:12,23 3142:24 3143:22,23 3145:13 3147:4 3149:2,11 3150:5 3153:9 Professor's 3145:24</p>	<p>profile 3151:20 programme 3047:17 promise 3154:4,11 promote 3055:1 promoted 3054:20 promoting 3078:5 proper 3063:11 3076:12,13 3082:16 3085:14 3088:14,17 3088:24 3097:11 3159:14 properly 3045:14 3047:9 3053:24,25 3054:25 3056:9 3082:20,22 3085:15 3086:3 3088:8 3089:7 3091:15,17 3111:13 3150:10 3158:22 3160:2 property 3082:24 proportionately 3066:9 proposition 3111:7 3122:7 propositions 3071:24 3111:21 protect 3122:24,25 3124:20 3125:10 3159:15 protection 3075:7,9 protesters 3066:2,5,12 protestors 3079:3,7 3133:12 3134:20 3135:6 3153:2 protests 3144:19 provide 3103:16 provided 3044:23 3087:14,14 3135:16 3138:13,20 provides 3087:6 province 3052:12 3093:6,7,10 provincial 3093:7,9 provisions 3101:15 provocative 3151:20 psychology 3100:13,17 public 3045:3 3046:1 3046:18 3047:17 3051:3 3054:15 3056:13,23 3067:22 3067:23 3068:25 3077:25 3098:6 3101:22 3102:6 3103:4 3104:18 3106:13 3107:2,8,12 3107:13 3115:25 3128:11 3138:24 3139:9,22 3140:21 3141:3,9,25 3142:6 3142:16 3143:4,25 3144:6,10 3145:15 3146:11 3147:9 3148:22 3149:18,23 3151:14,22 3152:24 published 3100:16,16 3100:16 3143:9,19 publisher 3142:24</p>
--	---	---	---	---

<p>publishers 3143:12 purpose 3046:8 3054:1 3075:7,9 3082:4 3109:10,12 3122:19 3122:23 3125:10 3131:19 put 3050:3,18 3051:17 3052:5,8,19 3053:18 3058:22 3059:4 3060:2 3061:17,21,22 3062:23 3064:21,25 3065:2,7 3071:23 3073:12 3074:2,21 3075:2 3088:25 3090:21 3091:20 3093:16 3095:14 3096:6,12,13 3097:8 3098:10 3105:22 3109:15 3111:16,18 3111:21 3113:10,20 3113:25 3117:15,21 3120:4,8,24 3121:16 3126:21 3128:24 3131:4 3137:9,17 3143:7 3145:23 3158:2,23 3160:4 putting 3072:16 3073:23 3074:20 3083:12 3086:14 3127:1 P2 3113:15 P4 3113:15</p>	<p>reach 3086:5 3122:10 3158:18 3159:9 reached 3085:10,25 3114:8 3116:7 3134:14 3160:10 reaching 3088:22 read 3053:10 3079:13 3098:14 3102:25 3134:25 3162:25 reading 3116:13 3162:5 ready 3064:7 3165:9,10 real 3127:10 3164:23 really 3065:6 3072:6 3076:17 3083:2 3091:19 3094:16 3097:16 3109:5 3114:7 3115:19 3118:25 3119:4 3120:3 3123:3 3128:1 3128:6 3130:3 3131:12 3132:7 3136:12 3137:23 3158:5,9,10 3161:20 reason 3053:13,15 3058:24 3059:3,5,11 3059:13 3080:7 3084:23 3087:20 3096:4,22 3134:8 reasonable 3076:10 reasons 3080:1 3097:14 3149:23 recall 3052:3 receive 3064:14,16 3093:24 received 3052:15 3058:14 3062:9 3064:12 3072:2 3077:18 3096:16 3108:11,23 3121:13 3122:22 3125:11 3132:5 3136:14 3137:1,5 3162:9 receiving 3059:10 recognised 3143:4 recommendation 3054:25 reconsideration 3063:1 record 3136:17 3158:2 red 3113:14 reduction 3155:1 refer 3109:20 3146:17 3148:15 3154:24 reference 3098:2 3143:14 referred 3099:4,17 3104:25 3133:5 3134:11 3142:19 referring 3065:15 3125:23 3130:7,8,9 3136:3 refers 3148:5 reflection 3055:12,20 refusal 3135:5 regard 3137:10 3143:15</p>	<p>regarding 3081:22 3098:6,11 regardless 3090:23 regulation 3086:11 3087:5,14 3098:19 3155:23 3156:5,9,14 reinforce 3139:11,25 3140:2 reinforcements 3151:21 rejection 3154:25 relate 3112:17 related 3155:7 relates 3060:1 3078:18 relation 3135:17 relations 3148:21 relationships 3148:21 relatively 3072:15,24 3073:10 3077:21 release 3139:24 relied 3058:14 rely 3045:20 3046:7 3047:21 remain 3108:9,14 3126:3 remained 3073:12,14 3073:25 3076:15 3126:6 remember 3044:7 3057:17,20 3058:21 3064:25 3077:9,12,13 3085:2 3095:17 3098:3 3123:9 remind 3053:8,17 3076:23 3077:5,6 3157:25 reminding 3065:1 remove 3083:25 3084:18 3093:2,17 repeat 3131:3 repeated 3055:17 repeating 3081:23 repertoires 3149:21 report 3064:22 3078:13 3078:21 3098:14,17 3099:12 3134:14,17 reported 3049:15 3050:2,8 3131:18 3133:12 3134:2,4,18 reports 3049:22 3100:2 3134:14 3137:5 representatives 3151:14 3155:2 repression 3146:5 request 3065:13 3162:9 require 3062:25 required 3062:4 research 3047:12,12 3056:12 3101:7,10 3143:24,25 3145:18 reserve 3106:8 3107:1 3115:24 3138:23,23 3139:15,20,22 3140:16 reserved 3139:4 reserves 3105:22,23</p>	<p>3152:5 residing 3083:11 resolve 3075:25 3107:12,14 3140:6,17 resolved 3094:24 3140:11 resort 3046:5 respect 3115:19,23 3163:9 respond 3066:9 3093:23 response 3046:4 3066:7 3066:14,15 responsible 3099:2 rest 3057:12 result 3082:1 3086:22 3121:3,6 3122:3 3127:2 3131:6 3138:8 resulted 3055:6 3081:8 3164:23 resume 3076:25 resumes 3044:2 3077:3 3077:4 3122:14,15 retain 3103:10 retaken 3154:7 return 3156:21 3162:12 3163:2,11,13 3164:8,11 revised 3063:19 revision 3062:4 revisit 3045:6 3080:11 revisited 3067:6 3085:2 reward 3164:8 rifles 3164:13 right 3067:8 3072:4 3074:18 3078:15,16 3090:15,25 3112:5 3114:22 3116:5,21,25 3117:20 3123:6,17 3124:6,14,16 3135:20 3139:19 3149:7 3150:16 3155:6 3164:14 right-hand 3112:13,14 Riots 3144:13,16 risk 3057:19,19,22,23 3057:23 3058:3,5 3059:3,6 3060:15,19 3060:19,24,25 3061:1 3061:7,7,13,16 3062:1 3063:1 3064:24,24 3065:10 3074:11 3075:3 3080:15 3089:9 3093:18 3127:10 3145:19 3152:21 3153:4 risks 3060:16 3062:5 ritual 3132:12 3133:17 3134:9,10,21 3135:6 rituals 3131:17,20,23 3131:23 3132:3,20,24 3133:13 3137:6 rods 3133:16 role 3051:3 3094:17 3135:18</p>	<p>roll 3114:1 rolled 3070:17 3071:17 3073:1 3108:8 3120:5 3120:5 rollout 3089:19 rooms 3082:19 3083:1 3088:16 rough 3110:5 rounds 3066:4,11 routes 3079:5 3086:18 rubber 3046:4 3066:4 3066:11 3105:4 3129:17 3136:19 3138:25 3139:3,7 rule 3069:5,6,15 3159:11 3160:5 rules 3069:12 run 3115:11 runs 3071:10 Rutledge 3143:10,20</p>
S				
<p>question 3044:7,8 3048:14 3049:16,23 3052:6,6,19,22 3055:16,18 3058:1,4 3061:9 3071:14 3074:21 3080:14 3085:12 3086:20 3090:9 3091:19 3093:15 3095:12,18 3096:5 3097:6,10 3111:11,12 3118:25 3152:8 3156:25 3164:19 questions 3048:4,9,11 3053:24 3108:4 3120:3 3123:3 3142:20 quick 3081:14 quite 3061:11 3071:7 3073:4 3113:24 3149:14 quote 3079:7 3103:1 3135:3</p>	<p>Q</p>	<p>regarding 3081:22 3098:6,11 regardless 3090:23 regulation 3086:11 3087:5,14 3098:19 3155:23 3156:5,9,14 reinforce 3139:11,25 3140:2 reinforcements 3151:21 rejection 3154:25 relate 3112:17 related 3155:7 relates 3060:1 3078:18 relation 3135:17 relations 3148:21 relationships 3148:21 relatively 3072:15,24 3073:10 3077:21 release 3139:24 relied 3058:14 rely 3045:20 3046:7 3047:21 remain 3108:9,14 3126:3 remained 3073:12,14 3073:25 3076:15 3126:6 remember 3044:7 3057:17,20 3058:21 3064:25 3077:9,12,13 3085:2 3095:17 3098:3 3123:9 remind 3053:8,17 3076:23 3077:5,6 3157:25 reminding 3065:1 remove 3083:25 3084:18 3093:2,17 repeat 3131:3 repeated 3055:17 repeating 3081:23 repertoires 3149:21 report 3064:22 3078:13 3078:21 3098:14,17 3099:12 3134:14,17 reported 3049:15 3050:2,8 3131:18 3133:12 3134:2,4,18 reports 3049:22 3100:2 3134:14 3137:5 representatives 3151:14 3155:2 repression 3146:5 request 3065:13 3162:9 require 3062:25 required 3062:4 research 3047:12,12 3056:12 3101:7,10 3143:24,25 3145:18 reserve 3106:8 3107:1 3115:24 3138:23,23 3139:15,20,22 3140:16 reserved 3139:4 reserves 3105:22,23</p>	<p>safe 3074:5 3075:10 3123:4 3124:7,10,18 3163:12 safeness 3074:8 safety 3123:8 sake 3075:9 3116:9 3135:14 sanction 3146:5 sangoma 3135:18 SAPS 3045:4 3046:1,18 3046:24 3048:14 3049:2 3054:20 3068:23 3120:16 3122:24 3124:21 3157:17 3158:5,10 3159:24 sat 3054:3 SATAWU 3160:18 saturate 3046:8 saw 3112:8 3132:14 3133:2 saying 3044:22 3046:5 3047:3 3064:8 3066:18 3088:14 3095:3 3115:12,18 3122:2 3127:23 3128:4 3130:14 3148:12 3160:5 3165:6 says 3062:10 3067:17 3078:25 3084:15 3105:16 3120:20 3121:23 3125:12 3133:11 3145:17 3147:21 3148:6 3149:22 3150:5 scale 3055:25 scenario 3077:16 scenarios 3103:1,6 scene 3057:12 3139:2 3139:16 Sciences 3101:7 scores 3150:4,25 3151:3</p>	<p>roll 3114:1 rolled 3070:17 3071:17 3073:1 3108:8 3120:5 3120:5 rollout 3089:19 rooms 3082:19 3083:1 3088:16 rough 3110:5 rounds 3066:4,11 routes 3079:5 3086:18 rubber 3046:4 3066:4 3066:11 3105:4 3129:17 3136:19 3138:25 3139:3,7 rule 3069:5,6,15 3159:11 3160:5 rules 3069:12 run 3115:11 runs 3071:10 Rutledge 3143:10,20</p>

<p>Scott 3050:22 Scott's 3058:24 3060:2 3061:2,14,18 Scott's 3084:12 SDF 3106:4 3107:6 SDFs 3104:20 search 3075:12 3079:4 3083:7,24 3084:18 3085:9,25 3086:5,17 3087:24 3088:11,18 3138:12 searched 3082:13 3083:8 3105:7 searching 3083:5 Seattle 3144:19 second 3066:7,14 3078:22 3134:9,12 3143:20,21,22 Secondly 3056:11 3072:14 section 3045:9 sections 3149:17,23 seeing 3104:11 3107:11 3115:8 3120:22 3132:23 3138:18 seen 3109:17 3119:9 3134:11,12 3163:1 3164:6 sees 3065:23 Semenya 3070:24,25 3071:8 3111:4,6 3117:3,5,14 3119:10 3135:1 3158:2 3165:3 3165:8,12 senior 3051:11 3101:3 3103:5 3128:17 sense 3044:25 3045:8 3073:18,24 3074:3 3075:12 3077:20 sensibilities 3148:20 sensible 3075:1 3088:5 3114:20 sent 3052:11 separately 3123:3 serious 3052:6 3140:24 seriously 3143:1 serve 3154:18 Service 3054:9 3073:10 3073:13 3155:18 3157:23 Services 3100:23 set 3067:4 settle 3150:5,25 3151:3 settlement 3109:25 3110:16,16,21 3111:16 3112:1,3,18 3114:5,14,23 3118:1 3118:3 3119:21 3122:4 seven 3049:10 shape 3045:14 share 3136:12 sharp 3083:13 3106:13 3106:23 3127:11,25 3128:5 3138:21 Shearing 3101:12</p>	<p>Sheffield 3143:23 3144:23 shooting 3127:5 3139:7 3139:8,10 shootings 3071:16 3072:8,23 short 3081:24 shortage 3085:3 shortcoming 3044:18 3057:4,7 shorter 3076:24 shortly 3116:16 shotgun 3155:14 shotguns 3138:25 3155:13 shouldn't 3084:23 should've 3056:16 3076:16 should've 3082:9 show 3046:25 3060:23 3061:4 3104:11 3116:2 3155:9,12 shown 3093:16 3105:21 3112:23 3113:6 3116:8 shows 3058:16 3078:17 3107:11 3116:6,6 side 3047:1 3051:4 3054:4,5 3056:20 3073:21 3078:16 3093:25 3094:1,3,4 3108:24 3117:18,18 3118:1 3131:8,8 3132:2 3133:23 3136:11 3139:19 3155:13 3158:10 3160:3,7,14,19 3161:7 sign 3058:17 3112:15 3123:17 3164:16 significant 3154:5 simplifies 3117:14 simply 3058:21 3129:24 3136:24 3137:12 single 3069:25 sinister 3152:25 3153:3 Sir 3048:2,10,24 3055:14 3060:5,9,21 3065:20 3067:19 3068:15,20 3070:3,7 3070:15,20 3073:22 3075:10 3079:18 3084:2 3094:8 3095:8 3098:4,8,13,15,23 3099:19 3100:24 3101:8 3102:14,19 3103:14,19 3105:2 3107:7,9 3108:18 3109:12,21 3110:1,22 3112:17 3118:20 3120:9 3129:21 3133:23 3134:24 3135:12 3136:15 3140:18 3141:7,17 3156:23 3158:22</p>	<p>3160:22 sit 3050:24 site 3106:5 3117:9 situation 3045:7,18,21 3046:15 3047:9,25 3063:10 3064:4,19 3069:1,20 3075:21 3076:4 3077:19 3081:2,13 3082:6,18 3082:21,24 3083:13 3083:15,22 3087:2,7 3087:9,9 3090:17 3091:5 3092:1,2,6,9 3092:18 3094:19,20 3095:6,25 3097:7 3115:1 3120:14 3125:21 3128:2,7,23 3129:11 3130:4 3131:11 3138:18,20 3140:10 3150:13,18 3152:4,7,11 3157:25 3161:21 situational 3069:6,7 3151:18,19 3152:18 3152:24 3153:1,7 3154:4 situations 3101:22 skull 3071:2 sleeping 3083:20 slept 3082:11 slide 3065:22 3066:5 3067:4 3084:11 3104:11,11 3110:19 3110:24 3111:3 3116:3 3117:6,7,8 3123:12 3131:16,18 3133:4,22,25 3134:12 slides 3066:17 slightly 3062:21 small 3072:15 3073:11 3073:14 3075:13 3076:15 3077:11 3112:15 3122:18 smaller 3082:1 3120:21 sociology 3101:13 3144:1 sole 3054:1 solution 3161:14 solve 3158:14,17 3159:8 3160:9 somebody 3074:17 3091:13 3092:23 3158:5,13 3159:23 3161:25 3164:17 sorry 3059:3 3065:21 3071:13 3078:5,7 3080:20 3085:8 3097:22 3105:14 3123:2 3124:2 3163:4 sort 3045:12 3048:1 3063:10 3091:4 3132:25 South 3047:16,21 3054:8 3073:10,13 3098:12 3100:23 3101:5,11,15 3152:9</p>	<p>3152:9,13 3155:18 3157:22 so-and-so 3090:19 span 3044:25 3045:3 speak 3052:16 3157:8 3157:14 3158:12,24 3159:4,4,19 3161:4 3164:22 speaking 3149:14 3162:13 speaks 3158:13 3159:5 3159:5 spears 3133:16 3135:10 special 3127:15 3149:1 3149:8,9,12 specific 3108:5 3156:3 spectators 3046:9 3080:20 split 3120:20 spoke 3069:10,11 3123:9 spontaneous 3087:6,13 3089:5 spotting 3056:3 spread 3154:18 sprinkle 3133:17 SS3 3060:3,4 stabilise 3084:1,19 Staff 3102:2 stage 3045:22 3052:24 3069:23 3070:11 3084:15 3088:19 3089:19 3090:5 3091:21 3104:6 3121:13 3124:23 3125:23 3127:2,7 3142:9 stages 3084:9 stand 3059:22 3075:24 3076:9 3137:12,19 3138:3 standing 3049:6 3052:14 3061:5 3067:8 start 3045:13 3099:15 started 3071:22 3081:14 3108:21 starting 3089:16 3133:22 stated 3164:5 statement 3112:18 3135:2 3140:9 3149:22 statements 3109:18,18 3111:15 states 3069:15 3101:4 stating 3052:12 station 3079:9 stay 3074:25 step 3068:2,6 3105:15 3105:15 steps 3096:2 stereotype 3149:23 stereotyping 3149:17 STF 3066:8 3116:24 3117:19 3125:20</p>	<p>3127:10 3128:17 stop 3083:7 3086:16 3088:22 3118:12,22 3118:23 3119:20 3120:19,20 stopped 3118:16 stopping 3125:12 straight 3105:19 3114:21 strategic 3153:7,23 strategies 3086:15 3146:13 strategy 3079:2,6 3080:2,16 3085:2,2 3090:23 3101:21 3103:3 3141:4 street 3074:16,18 streets 3074:6,12,25 3075:3 strikers 3058:9 3060:20 3061:17 3065:4,16 3074:3 3089:15 3097:3 3108:9 3111:15,25 3112:2,6 3122:20 3125:7 3129:1 3130:8 3131:24 3135:22 3137:12 3157:1 3162:6,12 3163:2 strikes 3164:21 striking 3157:3 strong 3101:20 3132:21 3141:19 struggling 3134:17 STSNUTRT 3113:15 studied 3140:24 studies 3145:5 study 3145:4 stun 3065:17 3066:3,11 3105:4 3126:5 3129:5 3129:8,14 3136:1 sub 3068:7,12,13 3150:2 subculture 3154:6 subject 3063:19 3089:13 3097:24 3122:19 3140:23 submission 3049:8 subscribe 3149:12 subscribing 3149:1,8 substantial 3126:9 sub-heading 3078:12 3078:22 3102:21 3146:17 3148:16 succeed 3120:25 3121:2 succeeded 3121:20 successful 3056:10 3156:19 3160:21 3164:24 successfully 3159:17 sudden 3154:11 sufficient 3068:25 sufficiently 3079:17 3143:21 suggest 3054:18 3055:3</p>
---	---	---	---	---

3060:22 3071:5 3109:22 3154:12 suggested 3048:7 3050:15 3052:1 3096:10 3131:19 3139:14 suggestion 3061:19 3064:22 sum 3087:16 3159:18 support 3050:11 3054:15,20 3055:4 supposed 3053:5 3087:10 3090:19 3159:13 Supreme 3101:5 sure 3045:15 3046:9,22 3047:4 3051:12 3054:21 3061:11 3065:19 3070:22 3071:7,25 3073:22 3074:7,9 3080:10,12 3081:19,20 3083:12 3085:1,5 3086:8 3094:23 3102:4 3108:7 3109:10 3111:11 3117:14 3118:20,24 3119:22 3119:24,25 3130:10 3131:7,11 3132:1,23 3133:2 3136:6,11 3137:14 3150:16,23 3152:7 3155:7 3157:24 3159:12,14 3159:15 3160:4,21 3162:21 surely 3063:18 surprise 3080:16 surprised 3103:9 3110:3,4,11 surprising 3109:5 surrender 3059:1 3162:6 3164:6 surrendering 3163:2 surrounded 3109:8,20 symbolically 3154:5 system 3055:24 3098:11 S-H-E-A-R-I-N-G 3101:12	3143:16 3156:20 3161:21 3162:15,19 3163:19 3165:10 taken 3065:8 3079:21 3089:20,23,25 3090:9 3090:15 3091:22 3092:2,20,22 3095:20 3116:16 3131:5 3140:2 3143:1 3164:13 takes 3063:23 3067:18 talk 3046:2 3054:2 3057:12 3083:1 3086:2 3091:12,13 3094:20,22 3115:22 3130:7 3155:21 3159:7 3161:20 3162:22 3163:16 talking 3065:12 3066:21,22 3067:1 3077:10 3082:8 3104:6 3130:12 3152:11 3162:22 talks 3064:14 Tamara 3141:14 Tank 3102:16,17 3141:20 task 3049:5,19 3050:7 3054:10,14 3127:15 3160:20 tasks 3052:17 3139:11 tea 3076:21,22 3077:10 team 3066:7,15 3116:22 3119:12 3138:23 teargas 3046:4,7,8,11 3046:14,22 3047:1 3065:16 3066:3,11 3105:4 3126:5 3129:5 3129:7,14 3136:1,8 3136:13 3139:3,8 tell 3058:24 3072:4 3102:16 3142:5,22,23 3142:24 tells 3073:18 3075:7,12 3077:20 3079:12 3083:14 3100:1 3101:9 3132:6 3133:25 3134:20 ten 3165:14 term 3148:21 terminologies 3051:4 terminology 3051:2 terms 3044:24 3051:2 terrain 3082:19 Tertius 3100:22 thank 3048:3 3051:20 3068:8 3089:12 3095:9 3097:21,25 3099:10,14 3104:13 3108:2 3148:9,13 3150:21 3153:6 3155:6,15 3163:8 3165:1,8 thanks 3099:5 that's 3048:23,24	3049:24 3051:2 3052:14,16 3054:11 3054:16 3055:8,10,14 3056:14,18 3060:9,17 3064:8 3067:19 3069:14 3070:4,6,14 3071:4,14,22 3072:11 3073:6,17 3076:6 3086:24 3087:4,22 3092:11 3094:10 3095:8 3096:18,21 3098:13,23 3102:5 3103:24 3104:6 3105:8,24 3106:7 3107:8 3108:17,20 3112:9 3113:24 3114:15 3116:12 3117:9 3118:8,13 3120:22 3121:4,4 3124:12,23 3127:6,23 3128:11 3133:18 3134:11 3138:10 3140:22 3141:1 3143:18 3144:24 3159:16 3163:9,19 3164:15 theme 3155:25 theoretical 3141:9 3144:6 3145:4 theories 3144:10 theory 3061:12 3102:7 3141:25 there's 3058:16 3060:2 3063:9 3071:5 3087:20 3095:24 3096:25 3104:10 3107:10 3158:15 they're 3165:9 they've 3083:8 3115:14 thing 3046:6 3063:6 3075:17 3084:4 3085:8,18 3088:14 3090:17 3094:6,10,19 3094:19 3095:6,7 3114:6 3115:8 3120:13 3131:4 3137:18 3156:17 3158:18 3160:8 3161:4,13 3164:15 things 3051:23 3052:1 3059:9,23 3067:3 3075:14 3086:8 3094:23 3103:18,22 3105:11,17 3106:3,22 3107:6,24 3110:5 3125:19 3131:1 3158:21 3164:18 thing's 3160:19 think 3044:12 3047:11 3047:19 3052:24 3054:25 3061:5 3065:4 3066:21 3069:4 3071:6,10,14 3074:20 3075:19 3084:22 3086:4,24 3099:6 3100:22	3105:25 3108:6,6,18 3109:4,11 3110:24 3113:5,13 3115:12 3117:11 3120:15 3121:5 3122:21 3123:6 3126:10 3131:8 3132:10,15 3134:5 3137:23 3149:10 3150:19 3153:19 3156:16,19 3158:7 3160:25 3161:18 thinking 3058:19 3099:2 3115:10 third 3060:7 thirdly 3056:15 thorough 3103:5 thoroughly 3108:1 thought 3058:8 3082:10 3097:23 3103:7 3131:6 3132:18,19 3155:16 threat 3066:9 3067:12 3067:17 threatening 3109:6 three 3049:13,14 3051:21,25 3089:15 3139:23,25 3163:20 3163:20,20,23 Thursday 3071:12 3096:7,14 tidy 3122:17 till 3096:8,8 3122:13 time 3045:10,13 3047:5 3054:24 3061:22 3064:24 3069:24 3070:10,11 3072:20 3074:24 3076:21 3082:5,17 3085:22 3087:8 3088:5 3090:9 3091:4,6,7,17,23 3092:10 3093:8,25 3094:8,17 3095:20 3098:25 3102:13 3116:16 3117:16 3118:12 3119:10,15 3119:16,19,24 3124:15,21 3130:5 3136:13 3152:11 3156:4,10 3159:9 3161:1 3163:19 3165:5 times 3164:12 today 3060:24 3061:10 3076:24 Tokota 3163:4,9 told 3055:11,19 3059:13 3069:5 3070:5 3102:15 3107:22 3129:25 3136:24 tolerance 3147:14 tomorrow 3090:24 top 3078:17,24 3112:13 3112:14 3117:8 3123:17 3133:25	3148:3,4 topic 3095:10,11,12 3155:17 3163:18 Toronto 3101:13 touching 3052:8 Town 3100:13 traditional 3164:3 train 3155:18 trained 3128:11 3156:7 training 3045:17 3047:5 3054:2,3 3078:1 3128:18,18,19 3147:14 transgressiveness 3149:18 transpired 3108:20 transpiring 3092:12 transport 3079:8 travel 3077:1 tremendously 3054:9 trials 3100:18 tried 3044:17 3086:21 triggered 3081:8 troops 3114:9 trouble 3114:21,22 3137:24 3138:1,2,3 TRP 3117:8 TRT 3047:1 3104:20 3106:3 3107:5 3114:19 3115:24 3116:23 3117:12,19 3119:11,24 3125:20 3127:9,14 3128:18 true 3076:17 3140:18 3140:22 Truly 3162:13 trust 3054:14,19 3055:1,4 3161:18,23 3161:23,24 3162:1 truth 3048:24,25 3054:24 try 3054:5 3060:23 3061:4 3074:24 3076:5 3089:6 3116:2 3120:7 3151:7 3159:18 trying 3085:25 3126:12 3151:18 Tswana 3158:13,14,21 3159:5 TT1 3099:9 TT2 3143:17 3144:2 3145:8 Tuesday 3071:3,6,11 3165:7,14 turned 3129:8 turning 3159:11 two 3045:5 3048:4,11 3065:2 3079:25 3090:7 3099:17 3104:18 3105:25 3123:2 3126:20 3129:9 3130:19 3139:24 3145:8 3162:20 type 3047:2,6 3059:23
T				
table 3144:3 3145:9 tactical 3045:9,10,20 3051:10 3066:7,15 tactics 3101:22 3103:2 3141:4 3146:12 3154:17 take 3044:19 3048:9 3050:2 3057:15 3064:5 3071:25 3074:24 3076:22 3077:2 3082:18 3092:4 3105:15 3108:4,16 3110:18 3122:12 3127:15 3135:15 3139:23				

<p>3063:10 3068:21 3075:21 3080:21 3086:6 3087:9 3092:5 3092:18 3152:2 types 3085:13 T-O-N 3101:20</p> <hr/> <p style="text-align: center;">U</p> <p>unanticipated 3065:9 uncompromising 3146:12 undergoing 3134:21 undermined 3055:5 understand 3045:18 3048:19 3051:13 3053:22,23 3066:10 3069:3 3072:23 3083:4 3085:23 3090:1 3092:7 3097:9 3109:13 3113:16 3117:6,7 3120:1 3125:23 3126:15 3134:17 3136:8 3143:3,8 3146:2 3150:15 3156:6 3158:8,11 3159:2,7 3160:8,12 3163:14 understanding 3048:15 3052:10 3065:22 3071:1 3105:12 3106:8,25 3114:25 understood 3061:11 3095:13 3096:11 3155:8 undertaking 3059:1 3061:15,20 3062:3 underwent 3135:7 unexpected 3103:9 unfamiliar 3148:19 unfolded 3113:10 unified 3044:25 3045:6 3055:25 unit 3149:8 United 3101:3 3102:2 units 3049:15 3050:8 3113:20 3116:23 3128:6 3149:1,9,12 3152:3 university 3100:13 3101:13,14 3142:23 3143:24 unlicensed 3074:17 unpredictable 3149:21 3154:19 unrest 3101:10 unveiled 3054:24 up-to-date 3147:14 Urban 3144:13,16 USA 3047:23 use 3046:3,3,4,4 3061:2,24 3083:18 3095:13 3104:24 3106:12,17 3137:7 3157:18,22 3161:16 usual 3076:24 usually 3072:15,24</p>	<p>utilise 3046:21 3047:6 3081:2 utilised 3047:15 3136:8 utmost 3103:3</p> <hr/> <p style="text-align: center;">V</p> <p>valid 3058:8 3059:13 3134:6 Van 3101:16 variety 3152:19 various 3060:16 3103:6 3110:20,23 vast 3045:8 vastness 3056:8 vehicles 3113:15 3114:1 3155:9 verbal 3064:10 version 3052:8 3053:18 victim 3071:2 victory 3133:14 view 3051:22 3079:21 3126:21,23 3135:11 3156:25 views 3126:20 violence 3068:13,18 3070:1,12 3098:6 3100:17,19 3101:11 3141:14 3145:19 3151:1,15 violent 3128:25 3129:8 3135:22 3145:14 3146:1,6,14,20 3147:5,10,16,22 3148:7,23 3149:3,9 3149:13,13,20,24 3150:6,11 3151:22 3152:21 3153:4,10 3154:1,8,13,21 3155:4 violently 3070:9 VIP 3122:25 visuals 3046:23 voluntarily 3080:24 3082:4</p> <hr/> <p style="text-align: center;">W</p> <p>Waddington 3101:19 3102:11,16 3141:10 3141:20,20,20 3142:1 3142:12 3143:4,23 3147:4 3149:3 3150:5 Waddington's 3145:13 3145:25 wait 3048:7 3137:20 waiting 3137:13 3138:3 walk 3074:12 3121:10 walked 3075:3 walking 3119:20 want 3047:10 3054:18 3055:3 3057:15 3060:2,22 3061:21 3065:7 3071:23 3076:23 3093:14,15 3093:16 3095:2 3108:3 3109:24 3111:17 3117:21</p>	<p>3118:5 3120:2,3,4 3123:11 3125:17 3128:22,24 3130:13 3136:16 3137:9,17 3142:20 3143:7 3145:7 3146:17 3148:15 3151:2,25 3153:20 3154:24 wanted 3048:5 3053:17 3080:15 3086:15 3097:22 3105:19 3114:5,13 3138:2,2 3139:3 wanting 3114:20 3150:25 wants 3117:3 warning 3080:23 3081:5,7,12,15,16,22 3081:25 3127:8 wasn't 3059:3,6 3071:6 3087:21 3089:4 3096:20 3097:1 3120:12 3124:23 water 3046:3 3066:2,10 3104:19 3105:4 3116:23 3126:5 way 3050:24 3062:20 3063:18 3064:10,15 3065:7 3074:21 3076:4 3080:22 3082:11 3085:17 3087:10,14 3088:24 3095:5 3105:19 3111:18,23 3114:13 3132:8 3137:16 3155:21 3157:13 3158:23 3159:11,12 3159:14 3160:4,24 3163:14 ways 3056:12 3081:20 3103:22 weakening 3075:25 weaknesses 3055:12,19 3055:23 weapon 3046:2,13 3047:13,19,21 3058:15 3062:10 3074:8 3121:10,22,23 3121:24,25 weaponry 3106:14,17 3128:8 3151:21 weapons 3058:10 3059:1,2,4 3061:15 3061:20,23 3062:4,6 3074:11,23 3075:2,6 3082:10,12,14 3083:25 3084:19 3088:16,22 3097:2 3105:7 3121:14,15 3122:6 3127:12,19,25 3128:5 3162:7 3163:2 3164:3,6,21 wearing 3129:19 wedding 3132:16 Wednesday 3053:8 week 3151:19</p>	<p>weighing 3048:21 went 3052:7 3099:3 3106:3 3107:6 weren't 3061:24 3066:13 weren't 3120:2 west 3110:17 3111:1 3114:17 3119:11 3122:4 westerly 3120:7 3126:10 Western 3101:14 3117:18,18 we'll 3047:14 3072:7 3076:22 3077:2 3136:17 we're 3050:11 3064:15 3090:19,22 3146:2 we've 3045:3 3078:1 3087:17,18,19,23 3088:10,20 3137:4 3158:10 we're 3117:11 3153:14 we've 3082:8 3118:21 what's 3119:4 willing 3146:5 win 3153:8,13 wire 3070:16,21 3071:17,20 3073:1 3081:7,8,11,12,17 3089:19 3104:9,15 3108:8,15,22,24 3109:6,6,10,15,23 3110:5 3112:22 3113:9,20,25 3114:8 3115:3,4,8 3116:7,17 3117:16 3118:15 3119:6,14,17 3120:5 3120:8 3122:19,24 3123:22,23 3124:20 3125:4,5,6 3126:3,11 3126:12,16,21 3137:11 wire's 3125:10 wise 3082:17 wishes 3111:4 witness 3056:19 3066:20 3100:18 3111:17,21 3142:22 3143:3,5,6 Witnesses 3055:9 witness's 3094:12,14 wonder 3114:24 Wonderkop 3084:17 won't 3053:23 3062:10 3062:20 3063:11 3075:11 3097:10 3108:5 3131:3 3138:16 3161:12 3162:1 word 3061:25 3095:13 words 3046:20 3069:19 3073:12 3096:7,11 3103:17 3108:13 3117:18 work 3054:17 3056:23</p>	<p>3061:18 3066:12 3076:4,19 3082:16 3098:17 3106:22 3156:14 worked 3049:19 3050:14 working 3093:24 3136:14 3160:17 workshop 3050:15 worldwide 3144:19 worthwhile 3143:21 wouldn't 3084:10 3110:2,3,10 3114:21 3136:23 3138:3 3157:8 would've 3062:4 would've 3081:18 write 3050:24 3062:20 writer 3152:9 writing 3064:9,14 written 3062:18,22 3095:23 3100:2 3101:20 3140:24 3160:2 wrong 3052:7,21,25 3054:19 3055:6 3090:20,21 3093:19 3105:23 3106:1,3,10 3107:6 3112:2 3117:15 3123:5 3147:21 W-A-D-D-I-N-G 3101:19</p> <hr/> <p style="text-align: center;">X</p> <p>Xhosa 3159:4</p> <hr/> <p style="text-align: center;">Y</p> <p>yellow 3112:22,23 3116:6 3123:21 yesterday 3051:1 3056:2 3057:16 3058:1 3060:19 3061:10 3063:21 3069:4 3105:20,24 3112:8 3123:9 3155:8 3157:21 York 3099:22 you'd 3088:17 3097:24 you'll 3060:14,15 3099:17,18 3102:4 3109:4 3111:2 3144:2 3145:8 3156:16 you're 3044:3 3058:12 3065:4 3066:18 3074:12 3142:14 you've 3048:12 3055:11,12,18,23 3057:2 3070:5 3085:14 3096:10 3116:8 3119:9,10 3121:4 3139:21 3162:25 3164:7</p> <hr/> <p style="text-align: center;">Z</p> <p>zone 3123:9</p>
---	--	---	--	---

<p>Zulu 3159:5</p> <hr/> <p>0</p> <p>06h00 3079:2 09:30 3044:2 09:50 3052:23</p> <hr/> <p>1</p> <p>1 3044:20 3085:16 3095:22 3104:14 3124:13 3144:6 3146:23 3150:3 1.3 3060:15 10 3100:18 10:10 3062:8 10:30 3071:19 10:50 3073:6 100 3051:16 11:21 3077:4 11:41 3086:13 12:01 3095:2 12:21 3104:3 12:41 3113:12 13th 3060:11,12,24 3064:23 3065:3,8 3067:2,2 3086:21 3129:5,17,23 3130:19 3135:25 3136:8,19,25 3137:3 3163:9 13:29 3122:15 13:30 3076:25 13:58 3136:21 14 3044:1 3059:17,21 14th 3058:25 3059:6 3078:18 3079:20 3080:8 3084:12 3133:8 14:18 3146:15 14:38 3156:6 14:58 3165:3 16th 3053:10 3058:10 3059:1,2,5 3061:15 3067:3,5 3069:23,24 3080:1,8 3081:6 3087:21 3089:14 3095:16 3096:14 3130:23 3136:4,5,18 176 3104:12 177 3104:11 181 3110:22 1990 3145:1 1991 3144:13,16 1993 3098:25</p> <hr/> <p>2</p> <p>2 3068:7,12 3085:16 3095:22 3097:6 3144:9 3146:9 3148:25 3151:19 2:30 3071:6,11 20 3051:15 200 3051:16 3117:7 2001 3144:13,16 2005 3144:23 2006 3145:1 2012 3044:1 3060:11</p>	<p>3078:18 3143:22 3145:22 262 3061:5 3067:9 2967 3158:1</p> <hr/> <p>3</p> <p>3 3067:18 3069:23 3070:11 3077:1 3080:16 3084:24 3085:16 3089:10,19 3095:22 3097:19 3104:6 3130:8 3144:12 3146:22 3152:18 3154:10 30 3070:17 34 3055:6 3070:17,20 3070:22 37 3102:21,22</p> <hr/> <p>4</p> <p>4 3068:13 3070:12 3071:12 3144:15 3147:7 4PM 3069:24 42 3133:22 45 3071:12 46 3071:12 48 3069:25 3070:12 3071:5,10,11 49 3071:13</p> <hr/> <p>5</p> <p>5 3068:3,6,12,13 3144:18 3149:16 3151:10,12 50 3051:16 3071:13 3075:13 3077:11,22 3079:8 3080:16 3087:19 500 3080:17 3084:24 3089:10 3130:8 55 3135:2</p> <hr/> <p>6</p> <p>6 3067:25 3079:1,1,19 3084:15 3144:21 3152:23 3153:1 3154:17 69 3099:18</p> <hr/> <p>7</p> <p>7 3067:11,14,15 3144:25 3147:13 70 3070:18 79 3065:23,25 3066:1 3066:17 3067:4</p> <hr/> <p>8</p> <p>8 3145:3 3153:6 3154:24 8.1 3145:9 8/08/13 3060:8 80 3051:18,22,22 3066:5,17 3067:4 81 3110:19,22,24 3117:7,8</p>	<p>84 3133:22 85 3131:16,18 3133:4 3133:20,25 3134:12 86 3131:16 3134:12 87 3131:16</p> <hr/> <p>9</p> <p>9 3061:15 3067:24 3068:7 3154:4 90 3131:16 94 3047:18</p>		
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