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TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

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

#### HELD ON

DAY 299

13 NOVEMBER 2014

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<p style="text-align: right;">Page 39430</p> <p>1 [PROCEEDINGS ON 13 NOVEMBER 2014]  2 [09:02] CHAIRPERSON: The Commission resumes. Mr  3 Tip.  4 MR TIP SC: Thank you, Chair. Chair, in  5 the time available I propose to deal with a limited number  6 of topics and to do so as rapidly as I can, bearing in mind  7 that there are a number of parties who still have to  8 address the Commission.  9 The topics that I will deal with are first of all  10 an examination of the five employees who were killed in the  11 course of the 12th, 13th and 14th of August 2012 by the  12 strikers. The Commission has already received some detail  13 concerning those [mechanical interruption].  14 I am back on the air, thank you, Chair. Yes, I  15 was just in the process of saying that there is additional  16 material to which the Commission should with respect have  17 regard, that is to be found in the post mortem material,  18 and then we will also address an aspect concerning  19 particularly Mr Twala that should be highlighted.  20 I am going to make submissions in respect of all  21 five of these gentlemen. Mr Fundi of course as you know,  22 formally I act for Mrs Fundi, Mr Mabelane, Mr Mabebe, Mr  23 Langa - I've discussed this with my learned colleague Mr  24 Ramphela and he's very satisfied that I should do this. In  25 respect of Mr Twala we don't have a formal instruction but</p>	<p style="text-align: right;">Page 39432</p> <p>1 to Lonmin Security and its operation and what it could and  2 could not do, but those will be highlights.  3 In all of these topics, Chair, we will very much  4 bear in mind that we have had the opportunity to file  5 written submissions. It was a hard-pressed job; it turned  6 out to be enormous and the deadline came forward  7 inexorably, but we believe nevertheless that we have  8 captured at least the essence of the topics that particular  9 effect NUM and –  10 CHAIRPERSON: I wanted to say – I was  11 going to say it at the end, I may as well say it now – that  12 not only you but your colleagues as well, but you have  13 given us an enormous amount of assistance in the written  14 heads supplied and the references to the evidence  15 highlighting important aspects, so it is a formidable task,  16 it's going to be a formidable task to write the report. I  17 see it as a big mountain in front of us which we have to  18 climb, but we're substantially assisted by the heads that  19 we got from all the parties and topics that you deal with  20 you deal with in fair detail, full and comprehensive  21 actually heads, and they also will be of great assistance  22 to us and I think it appropriate to express our gratitude  23 not only to you but of course to your learned friends  24 appearing for the other parties and the evidence leaders  25 and the Human Rights Commission and LRC as well.</p>
<p style="text-align: right;">Page 39431</p> <p>1 we have given assistance to the family inter alia in the  2 presentation, and Mr Twala was of course a NUM official.  3 So that is an aspect that we think is important to  4 complete.  5 Then the second topic will be in the field of  6 labour relations, collective bargaining, and there I shall  7 seek to highlight some particularly important features of  8 the labour relations environment, particularly in respect  9 of the nature of collective bargaining and how it is to be  10 respected, and the purpose of that will again be  11 essentially to seek to be of assistance to the Commission  12 in that it will be generally submitted that the events that  13 the Commission has been concerned with over the past two  14 and a quarter years need to be inter alia closely connected  15 with the proper appreciation of what the labour relations  16 environment implies for those events.  17 Those will be the principal topics perhaps, and  18 then thirdly we will deal with aspects of the events of 10  19 and 11 August 2012. Chair, I will try to be brief there.  20 We have various references to the transcript. I had  21 thought to read through them, but I will instead just  22 summarise what the submissions are and give you the  23 references to look at more fully.  24 There will be one or two comments concerning  25 submissions made by my learned friend Mr Bham in relation</p>	<p style="text-align: right;">Page 39433</p> <p>1 MR TIP SC: Well, thank you, Chair, and  2 those remarks fortify me in the view that I can indeed deal  3 with the topics that I wish to highlight fairly swiftly.  4 May I just add, arising out of that and perhaps  5 echoing a little bit of the debate that we had yesterday  6 concerning the questions that Mr Semenya might address in a  7 supplementary note if he wished to, and to make this  8 general offer, and I'm again confident that all my  9 colleagues would share this, share my view, and that is if  10 in the course of the deliberations over the next many  11 months that the Commission must now undertake certain  12 topics appear not to have been fully addressed to the  13 satisfaction of the Commission, a word to us and we will  14 very, very gladly give any further assistance that we can.  15 CHAIRPERSON: If we do that of course  16 we'll ensure that whatever assistance we get would be in  17 written form –  18 MR TIP SC: Yes.  19 CHAIRPERSON: - and would be circulated  20 to all the parties so they can comment on it as well.  21 MR TIP SC: Oh, quite so.  22 CHAIRPERSON: That is a generous offer  23 and before it's withdrawn I hasten to accept it.  24 MR TIP SC: Yes, it's cast in stone and  25 of course this would, Chair, this would be done on an</p>

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1 absolutely transparent basis, yes.  
 2 CHAIRPERSON: I wouldn't expect anything  
 3 else. I think I have to set a deadline and that would have  
 4 to be – but of course the answer is we would be, the  
 5 initiative would come from – there are two aspects; insofar  
 6 as the initiative comes from us we don't have to set a  
 7 deadline because that's, we will be masters as it were of  
 8 that, but if parties wish to give us extra thoughts or  
 9 extra points they fell we haven't perhaps understood, I  
 10 believe there's a suggestion I don't understand McCann's  
 11 case properly, well I will see when I get a note on that  
 12 whether that's correct or not, but anyway the fact of the  
 13 matter is if there are points that people feel we don't  
 14 understand properly or we might overlook, haven't been  
 15 dealt with properly in the argument stage they're obviously  
 16 free again on this transparent basis we've referred to, to  
 17 give us extra notes on the point. But there I'm afraid I  
 18 think I must set a deadline of the end of January.  
 19 MR TIP SC: Yes, that's appreciated.  
 20 Certainly when I raised this proposal I had in mind that we  
 21 would react only to requests from the Commission and that  
 22 it shouldn't become another open season for further  
 23 discussions.  
 24 CHAIRPERSON: I understand that, but it  
 25 would be rather awkward if there's a big point somewhere

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1 that's eluded us all and it suddenly becomes clear to one  
 2 of the parties and it might well make all the difference,  
 3 or a significant difference on a particular part of the  
 4 matter, it would be rather embarrassing if they're not  
 5 allowed to tell us and that we blunder on, produce a  
 6 report, overlooking this point, if there is such a point.  
 7 So that's why we have to have the two aspects.  
 8 MR TIP SC: Yes, quite so. Thank you,  
 9 Chair. Then if I may turn to the first area that we wish  
 10 to address, namely the circumstances of the killings of the  
 11 five gentlemen I've referred to, why this is important to  
 12 complete, Chair, is that as we all know it's been in the  
 13 nature of the investigation of the Commission that a good  
 14 deal of scrutiny has been given to the circumstances of a  
 15 number of the other deaths that form part of your terms of  
 16 reference, and it's simply important that these five should  
 17 be on a par and that in particular the families of the five  
 18 should be confident and have the comfort of knowing that to  
 19 the extent possible all the relevant material is before the  
 20 Commission and will therefore receive full attention from  
 21 it.  
 22 Chair, some of this, as I said, are aspects that  
 23 arise out of the post mortem report, particularly in  
 24 respect to Mr Mabelane, that haven't been traversed. It's  
 25 distressing material and we will shortly be placing before

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1 you a further photograph. We do not intend to –  
 2 CHAIRPERSON: [Microphone off, inaudible]  
 3 MR TIP SC: You have it, yes. Copies  
 4 have been given to the other parties. We do not intend to  
 5 put that on the screen.  
 6 Then in respect of Mr Fundi and Mr Mabelane, of  
 7 course their circumstances are to an extent joint in that  
 8 they travelled in the same vehicle on the 12th of August,  
 9 and that essential history has already been placed  
 10 adequately before you.  
 11 I'll take the position up from 9:55 on that day  
 12 when, as we know from the Lonmin vehicle tracking system,  
 13 the Nissan Livina in which they were travelling came to its  
 14 final stopping point near the loop. Then events clearly  
 15 happened very swiftly. There has already been some  
 16 interaction between Mr Mabelane and other security officers  
 17 in respect of the arrangement, but what then takes place is  
 18 that a line of all the security officers is formed across  
 19 the road. The strikers continue their advance. Some  
 20 rubber bullets are fired, they have no effect. The  
 21 strikers charge. All the others escape with their lives,  
 22 and you'll remember that Mr Masibi has described that he  
 23 ran to his car with his keys in his hand, realised that he  
 24 would not have time to get in the car and to start it and  
 25 to drive away, and ran past.

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1 Mr Fundi and Mr Mabelane made a different call;  
 2 they got into the Livina, both of them, and again from the  
 3 vehicle tracking system we know that at 10 o'clock the  
 4 ignition of that Livina came on, evidently in an attempt to  
 5 start and drive away, and it then went off, and we can  
 6 confidently infer from that, Chair, that that would be the  
 7 very instant at which the Livina was surrounded by the  
 8 strikers who were now attacking, presumably that someone,  
 9 one of those strikers got hold of the ignition, the keys,  
 10 and switched it off. The ignition never came on again and  
 11 the events then unfolded.  
 12 There is one aspect that I would like just to  
 13 mention here and that is that in the course of the cross-  
 14 examination of Mr X, you may recall that I asked him the  
 15 question "Did either Mr Fundi or Mr Mabelane have an  
 16 opportunity to say anything or to plead for their lives, or  
 17 anything of that nature?" and his answer was spontaneous,  
 18 he didn't follow my suggestion of a plea. He said, "No,  
 19 all that they did was to apologise, but nobody was  
 20 listening, the strikers were attacking," and it is that  
 21 kind of detail which in the circumstances we submit should  
 22 be accepted as a part of plausible evidence from Mr X. It  
 23 add to what was happening. What we know is that then both  
 24 Mr Fundi and Mr Mabelane are indeed killed in the course of  
 25 the attack which continues.

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1 Now it is in relation to the detail of the death  
 2 of Mr Mabelane that I would like just to refer the  
 3 Commission to the post mortem report in respect of him.  
 4 Could we – oh, there it's coming, thank you. If we can go  
 5 to page 2 of the report firstly, Chair, you will see there  
 6 right at the top "General, paragraph 1, height 1.16  
 7 metres." Now that is not a mistake, Chair, and if you look  
 8 at paragraph 4 which describes the external appearance of  
 9 the body and the condition of limbs, (a), it is recorded  
 10 that there are third-degree 100 burns, that is apparent  
 11 from the material we've seen, but (b), all limbs amputated  
 12 and fractured, and that I believe is an aspect which has  
 13 not yet been brought to the attention of the Commission,  
 14 and if one then looks at the photograph that has been  
 15 submitted it – I should just source it, it is part of the  
 16 exhibit series ZZZZ6 and it is within that referenced as  
 17 DSC0357. That originally emanates from the SAPS hard  
 18 drive, and that as I said with respect is a disturbing  
 19 photo. I should just say what it depicts so that everyone  
 20 who doesn't have the photo will have some idea. It depicts  
 21 the burnt remains of Mr Mabelane, which is essentially his  
 22 torso. It shows that both limbs have been amputated at  
 23 just above the knee level, both legs, and both arms have  
 24 been amputated just a short distance from the shoulder, and  
 25 that, Chair, I –

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1 CHAIRPERSON: Do we know what caused the  
 2 amputation? Is it a sharp instrument of some kind, or is  
 3 it possibly the burning away of joint material or  
 4 something?  
 5 MR TIP SC: All that we have is the post  
 6 mortem report where the doctor has very deliberately used  
 7 the word "amputated" and you know one looks at the terminal  
 8 points of both legs and arms and one can see that there has  
 9 in fact been a severing and not a burning away. A burning  
 10 away would result in a different picture. One wouldn't  
 11 have that uniformity of the event.  
 12 Chair, when I was preparing the presentation of  
 13 this sort of detail I had resolved that I would refrain  
 14 from adding adjectives of my own and I intend not to do  
 15 that, but it is part of a request that we would very  
 16 respectfully make of the Commission, which is that the  
 17 Commission should take into account this material from two,  
 18 having regard to two facets in respect of these events.  
 19 The one is what was the conduct of the attacking strikers,  
 20 what did they do, and the second of course is to try  
 21 somehow to place oneself in the position of the persons who  
 22 were killed at the time of the event in order to try to  
 23 gain some sense of what must have been going through their  
 24 minds, and of course what was happening to them physically,  
 25 and we make that submission also as part of the general

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1 statement that I made earlier that when the families  
 2 ultimately see the report they will also have the  
 3 confidence that what happened to their fathers, husbands,  
 4 brothers, as the case may be, was fully appreciated by the  
 5 Commission. So what I might have to say is not so  
 6 important as what the response of the Commission would be.  
 7 May I then turn to page 1 of this post mortem  
 8 report, because there is another distressing detail.  
 9 Chair, before I go on to that, Mr Chaskalson has very  
 10 helpfully just sent me a note. When I described the  
 11 reference so that you can find the photograph if you need  
 12 to on the system.  
 13 [09:22] He says the full description should be ZZZZ6.116  
 14 and then DSC0357. Chair, what is to be seen on page 1 is  
 15 that paragraph D says "The chief post-mortem findings made  
 16 by me were the following. Black adult male with history of  
 17 burns, third degree 100 burns soot in the trachea." And  
 18 the trachea, of course, for anyone who is not familiar, is  
 19 that portion that we call the windpipe just below the  
 20 larynx which we call the voice pipe. It leads directly  
 21 into the bronchi which then disseminate into the lungs.  
 22 The significance of the finding which the doctor again  
 23 though prominent enough to include as a chief finding of  
 24 soot in the trachea indicates that at least for momentarily  
 25 or for some short while Mr Mabelane was in fact still

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1 taking in breath at the time that fire was beginning to  
 2 envelope him which gives one an idea of the extent to which  
 3 he must have endured the situation before finally  
 4 succumbing to the third degree burns. Chair, those are the  
 5 points that arise from this post-mortem that we thought it  
 6 important to place before you in this fashion. Then if I  
 7 may turn to Mr Fundi. We know that he also, of course, was  
 8 killed in the course of this event. We know the essence of  
 9 his injuries which were a fracture of the skull and also an  
 10 open fracture of the jaw. There is then, of course, the  
 11 additional detail which emerges clearly from the photograph  
 12 than it does from the post-mortem report which is that both  
 13 the upper lip and the lower lip had been sliced off or  
 14 hacked off. And here I must refer to the affidavit from  
 15 his brother, Mr Fundi, which is in exhibit AAAA40 and  
 16 you'll recall that his brother conducted the pre-funeral  
 17 washing and related ceremonies and he confirmed that he had  
 18 seen this, he had seen some other injuries, but also he  
 19 stated that half of the tongue had been cut out. And that  
 20 is something that needs to be addressed because there has  
 21 been not an entirely consistent interpretation of this in  
 22 the submissions that I've heard thus far. Chair, one, with  
 23 respect, can accept absolutely what he has said. It brings  
 24 Mr X into the picture again and we've given the references  
 25 to this in our written submissions. In that paragraph we

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1 pose the questions well what happened to these lips that  
 2 had been cut off and this tongue that had been removed  
 3 because they are nowhere to be seen, of course, in the  
 4 photographic material. And Mr X in his statement says what  
 5 took place and he refers there to the tongue having been  
 6 cut out and that in our submission is something that lends  
 7 plausibility and credibility to that fragment of his  
 8 evidence. He says those parts together with some blood  
 9 that had been as it were drained from Mr Fundi went into a  
 10 plastic bag and they were taken to the sangoma on the  
 11 koppie and they were used for the preparation of further  
 12 muti. And why we say that that should, with respect, be  
 13 accepted as evidence is that had he not been there then he  
 14 would not have known that the tongue had in fact been cut  
 15 out.

16 CHAIRPERSON: What tends to support that  
 17 and I just put this again as a prima facie comment, others  
 18 that don't agree they're free to make submissions on the  
 19 point, but the danger with Mr X, of course, was one didn't  
 20 know what information he'd been fed by other people. And  
 21 so the argument that his evidence is confirmed by things of  
 22 objective evidence is subject to the criticism that we  
 23 don't know whether confirmatory features were fed to him  
 24 before he made his statement. But if it's correct and I  
 25 take it this is implicitly what you're saying, if it is

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1 correct that the police and other people in contact with  
 2 him at the time he made his statements didn't know about  
 3 the tongue because it wasn't on the post-mortem material at  
 4 the time and if it's correct, the confirmation of that fact  
 5 only came to light afterwards, after he made his statement  
 6 when the brother's statement could have changed that would  
 7 be an indication that that detail at least wasn't fed to  
 8 him. And that would confirm part of his story. Am I  
 9 understanding your submission correctly?

10 MR TIP SC: Chair, your understanding is  
 11 absolutely correct. That's precisely the chain of  
 12 reasoning and that the post-mortem report, even with a  
 13 later addendum, really just spoke about lacerations of the  
 14 tongue which didn't convey that in fact half of the tongue  
 15 had been cut out. So it's on that basis particularly and,  
 16 Chair, you've put it precisely that we say it is that sort  
 17 of independent knowledge that makes this plausible. But  
 18 what is clear is, of course, what happened to Mr Fundi,  
 19 again I'll leave those circumstances in the hands of the  
 20 Commission for evaluation. Then if I may turn to Mr  
 21 Mabebe. Here there is a good deal of the information was  
 22 traversed albeit briefly by me with particularly Mr Blou at  
 23 a stage when we were seeking to unfold a number of features  
 24 of what had taken place that hadn't been otherwise dealt  
 25 with and to do so even if briefly rather than not at all.

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1 And, Chair, there if I may just summarise it on the same  
 2 basis as I've dealt with Mr Fundi and Mr Mabelane, Mr  
 3 Mabebe, as we know, comes to work, he has no reason to  
 4 expect of the nature that in fact unfolds when he arrives  
 5 at K4 shaft. Perhaps he's bewildered when the attack  
 6 begins, but very soon he would realise that he is in fact a  
 7 target. He is very seriously and quite viciously attacked  
 8 and we have those details. There is a terrible fracture of  
 9 the skull with brain extrusion, there is a fracture of the  
 10 jaw, there are five stab wounds. Four other people are  
 11 injured, Mr Janse van Vuuren who gave evidence says that  
 12 his life was saved only because his windscreen kept a heavy  
 13 steel pipe out. They all go to Andrew Saffy together in an  
 14 ambulance, at the same time. But what is important to  
 15 appreciate in respect of what Mr Mabebe went through is  
 16 that those terrible injuries don't kill him immediately.  
 17 So that after the attackers have gone and Mr Janse van  
 18 Vuuren sees that he is lying there next to a vehicle which  
 19 is now burning and drags him a little distance away for  
 20 safety, Mr Mabebe is still conscious and Mr Mabebe is still  
 21 able to say quite clearly to Mr Janse van Vuuren something  
 22 about the dreadful pain that he is in. And Mr Mabebe, as  
 23 we know, is still alive one and a half later when he gets  
 24 to Andrew Saffy. Probably by then in a situation of  
 25 extremeness and dies, we're not sure when, but not too long

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1 after. The question of the treatment of him medically  
 2 speaking is not in focus at the moment. It is really just  
 3 what he would have experienced in consequence of that  
 4 attack on him. Mr Langa, Mr Julius Langa, we know even  
 5 less about in respect of the circumstances. Actually I  
 6 heard Mr Mpofu, my learned friend, Mr Mpofu suggest  
 7 yesterday that this might have been just one or two people  
 8 who set on him. In our submission the probabilities are  
 9 that that would not have been the case and that this was  
 10 part of the general exercise that was being conducted at  
 11 that stage which was to intimidate people to the extent  
 12 where they might die and that Mr Langa was one of those.  
 13 And partly why I say that is that what we do know about Mr  
 14 Langa is that he sustained 18 stab wounds including a  
 15 series of deep penetrating wounds involved in the spleen,  
 16 the stomach, both lungs, the pericardium, the heart, the  
 17 liver and the only thought that I would identify perhaps  
 18 for further consideration by the Commission is that it may  
 19 be easy to say well there were 18 stab wounds, what is less  
 20 easy, with respect, is to form an image in one's mind about  
 21 how 18 stab wounds come to be inflicted on one person.  
 22 Just what the nature of that event is and that is why is we  
 23 say this was not a fracas or some incidental argument  
 24 between Mr Langa and some other person. Then Mr Twala  
 25 there is an aspect there that needs to be given some

<p style="text-align: right;">Page 39446</p> <p>1 further attention. Mr Twala, of course, we have some  2 description of what took place there from Mr X who  3 essentially describes that Mr Twala was called up as it  4 were that there were accusations made and that he was then  5 taken away and killed. Mr X wasn't at the place where he  6 died, but that's his essential sequence. Now what I'm  7 going to take the Commission to is a portion of the  8 evidence in chief of Mr Nzuzza and to examine what he said  9 about that. And I will seek to demonstrate that from that  10 it is quite clear what took place and that the evidence of  11 Mr X to which I've incidentally referred is in fact not  12 critical for a finding in respect of what took place.  13 Could we have please the transcript day 277 beginning at  14 page 35513?  15 CHAIRPERSON: What line do you want?  16 MR TIP SC: From line 11. As I said this  17 is the evidence in chief and I'm going to read the full  18 passage if I may and then seek to draw the inferences that  19 I say, with respect, should be drawn. So my learned  20 friend, Mr Mpofu is leading, he says "Okay, then later on  21 the 14th there is evidence that the body of Mr Twala or a  22 body, you might not have known the person's name, was found  23 near the koppie, do you remember that?" "I remember that."  24 "Mr X says you were involved in that incident. Can you  25 explain what, well firstly were you involved in the killing</p>	<p style="text-align: right;">Page 39448</p> <p>1 is that Mr Nzuzza's account of the exchange while he is  2 present with Mambush and Mr Twala is that quite clearly Mr  3 Twala is in fact facing some kind of accusation, presumably  4 headed or led or made only by Mambush and that his  5 credentials in a sense are at issue. And there  6 particularly in context, of course, it would be what, you  7 know what is he doing at the koppie. Is he a genuine  8 member of the strike, what is he doing? And that is why  9 one has, on that account, Mr Twala saying but this boy  10 knows me, he knows me. He can tell you about me. So  11 clearly what is happening there is that Mr Twala is seeking  12 some kind of voucher to be given in respect of who he is  13 and that he's a real worker etcetera, etcetera. He doesn't  14 get it as it happens from Mr Nzuzza. Mr Nzuzza says no I  15 don't actually know you and then perhaps somewhat  16 inconsistently he says there was just this occasion when  17 you wanted something from me and I didn't give it to you  18 and you then said well Twala will see that he, Nzuzza, is  19 fired. Now, Chair, what – the essential inference that I  20 respectfully submit is to be drawn from this is that that  21 is indeed a characterisation of what Mr Twala's position  22 was at that time. He was under challenge, he was seeking  23 to find some kind of support and corroboration and, he  24 didn't get it. Now that's all we know about the  25 interaction, we know nothing about any further discussion.</p>
<p style="text-align: right;">Page 39447</p> <p>1 of Mr Twala?" "No I was not there." "Okay, did you see Mr  2 Twala or the person that we've now seen in exhibit L as Mr  3 Twala, did you seem him on that day?" "Yes I saw him."  4 "What happened? Can you just briefly tell the Commission  5 where you observed him and how you observed him?" And then  6 this is the important part. Mr Nzuzza says "I did not know  7 who was, what his name was, I just knew that he works at 4  8 Belt. When I went I arrived, sat next to Mambush because  9 he was standing on his feet and talking and I just heard  10 him saying "The person who knows me" this was clearly Mr  11 Twala who was speaking "The person knows me as this one,  12 this boy sitting here, he knows where I work and so on and  13 that's when I said no old man don't say you know me. I  14 only met you once, one morning when I came off duty and you  15 wanted goggles from me, goggles or sunglasses from me. And  16 that's when I responded to him, I said I only met you on  17 that day, I did not know you and you said you will cause me  18 to be fired. And that's when I left, stood up and went to  19 a place where I was having cold drink on the side at the  20 Wonderkop." "Yes and did you see him or talk to him or  21 interact with him at any other stage on that day?" "No I  22 did not see him again. I just went to sit on the other  23 side." Now we're not going to address the question of  24 whether Mr Nzuzza description of how he left is accepted, we  25 accept it for this purpose entirely, but what is important</p>	<p style="text-align: right;">Page 39449</p> <p>1 CHAIRPERSON: Not only did he not get it,  2 he got an accusation of some kind of hostility to Mr Nzuzza,  3 a statement that he would cause him to be fired. So far  4 from getting positive support, he got something negative  5 from Mr Nzuzza which would strengthen the fact that in some  6 way or other Twala was under hostile scrutiny, potentially  7 hostile scrutiny.  8 MR TIP SC: Thank you, Chair, indeed that  9 emergencies very clearly from the latter part or that  10 exchange.  11 COMMISSIONER HEMRAJ: Mr Tip, I recall in  12 the docket dealing with Mr Twala's death there are  13 statements from witnesses, not Mr X and not warning  14 statements, that speak of this very issue where Mr Twala is  15 being questioned and someone is asked if he knows him and  16 the reply is yes he is the person who used to discipline  17 us. So there is some corroboration for this version.  18 MR TIP SC: Quite correct, Commissioner  19 Hemraj. That is to be found there. So this is not  20 uncorroborated.  21 CHAIRPERSON: There's another factor, Mr  22 Tip, I don't know whether you rely on it. It may be not  23 appropriate, I suppose, to rely on it, but I put it to you  24 to get your comment. He was a NUM office bearer and  25 whether he was really acting as kind of spy or whether he</p>

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1 was not, the fact that he was known to be a NUM office  
 2 bearer might well, this may be speculation, I suppose one  
 3 must be careful, might give rise to the inference anyway  
 4 that he was viewed with suspicion because he was a NUM  
 5 office bearer. And there was some kind – even though some  
 6 of the people on the koppie were NUM members, it does  
 7 appear, I think from the leaders as it were, well there was  
 8 hostility towards NUM because there were the events of the  
 9 11th and the 12th. And in fact it was said that they'd been  
 10 attacked by NUM, that's why they were carrying weapons to  
 11 defend themselves against them. Now here's somebody who's  
 12 a NUM office bearer and if his loyalty to the strike cause  
 13 is not entirely accepted then that would explain the  
 14 hostility. But I don't know, it may be dangerous to put  
 15 too much weight on it.

16 [09:42] MR TIP SC: It may well be that that was  
 17 a factor because you know, if you are an office-bearer of  
 18 any union people are aware of that, but I would with great  
 19 respect seek to position my submissions on the basis that  
 20 excludes that consideration because there seems to me to be  
 21 an inexorable line that has to be drawn from the exchange  
 22 that we see in the evidence-in-chief if Mr Nzuzza and what  
 23 happens to Mr Twala which is also objectively entirely  
 24 beyond dispute, which is that he is killed, and we know  
 25 that the spot where he is killed, it is approximately 100

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1 metres towards the back of the koppie away from where the  
 2 workers, the strikers were gathered, and it of course is  
 3 clear that Mr Twala would have been taken there by those  
 4 who killed him. If that is correct, then there is the  
 5 critical intervening moment, the decisive moment rather,  
 6 not the intervening moment, the decisive moment when a  
 7 decision is made that he is to be taken away and that he is  
 8 to be killed, because that can't happen as a matter of  
 9 spontaneous action by a couple of people who just take him  
 10 off. In our submission, the probability then is that  
 11 somebody with an individual or a small group, somebody  
 12 makes a decision, really it would be a cold-blooded  
 13 decision that he, Mr Twala, is to die and he is to be taken  
 14 away for that purpose.

15 The death of course as we know, is also a  
 16 horrible event, well all deaths are horrible but there's  
 17 particularly a horrible aspect to it. He too suffers a  
 18 number of stab wound injuries, 13 in total, but what  
 19 particularly characterises his death is the placing of this  
 20 bleached skull and horns of a cow or an ox on his chest.  
 21 And what we say about that is that it again on balance, can  
 22 be nothing other than a final violation of Mr Twala as a  
 23 person, even with his passage into death. It is of course  
 24 consistent with a notion that a decision has been taken  
 25 that he should be put to death because his position on the

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1 koppie is found to be unacceptable. That is as far as we  
 2 can take that on the available facts, but we do submit that  
 3 there is a continuum there that makes sense only on the  
 4 basis of what happens with Mr Nzuzza's evidence albeit that  
 5 Mr Nzuzza then leaves the scene, he says, to the point of  
 6 death. Chair, those are the matters that we sought to  
 7 place before you in respect of these deaths, and I won't  
 8 enlarge on them collectively at all.

9 If I may proceed to the next topic, which is the  
 10 issue of collective bargaining. This has been addressed.  
 11 Again I am going to condense what I had prepared to place  
 12 before you here because we've dealt with it in our written  
 13 submissions. We've set out some portions of the  
 14 Constitution. We have set out some extracts from the  
 15 Labour Relations Act, LRA. Lonmin have done the same. My  
 16 learned friend, Mr Burger, dealt with those in the early  
 17 stages of his submissions on Monday, and I am not going to  
 18 repeat those. All I am going to underline there is that  
 19 there is a very distinct and very important statutory  
 20 framework that bears on all these events with the  
 21 Constitution and its value as its bedrock and then detailed  
 22 provisions in respect of how collective bargaining – inter  
 23 alia how collective bargaining is to be done, how the  
 24 rights conferred by the Constitution are to be protected  
 25 and advanced. Why we say this is a departure point for

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1 these particular submissions is in part that paragraph 1 of  
 2 your terms of reference, if I may just read, it begins as  
 3 follows – well, it says the following, "The Commission  
 4 shall enquire into, make findings, report on and make  
 5 recommendations concerning the following, taking into  
 6 consideration the Constitution and other relevant  
 7 legislation policies and guidelines." And we say that what  
 8 that underlines is really a very important orienting  
 9 consideration which is that one has to bear in mind that  
 10 all the events that have been enquired into, particularly  
 11 over the 9th to the 16th of August have arisen, have  
 12 developed, have unfolded and finally all take place in a  
 13 work place and that work place is to a very substantial  
 14 extent, governed at the level of how labour relations is to  
 15 be managed through particularly the LRA. So in a sense, if  
 16 one would pose a question along the lines of well, to what  
 17 extent does the Commission need to have regard to things  
 18 like labour relations then our answer would be to a fairly  
 19 substantial extent, you are not dealing with an inquiry  
 20 into labour relations only. That's a different matter.  
 21 You are dealing ultimately with all the violence and the  
 22 deaths that ensued. But our submission is that in order to  
 23 accurately position that examination, it needs to have  
 24 regard to precisely where it started in the sense of what  
 25 breakdown, if there was one in the labour relations

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1 environment led to the kind of increase of hostility, the  
 2 breakdown in communication and relationships that in turn  
 3 produced a situation where violence and mayhem really  
 4 became what they were. So it's in that context that I make  
 5 these submissions, and I am going to very summarily deal  
 6 with one or two supplementary aspects. The one is that –  
 7 well, we've set out in our written submissions various sub-  
 8 paragraphs of sub-topics concerning collective bargaining  
 9 and how it works and the role of mandates and so on. None  
 10 of that I am going to reproduce in these oral submissions  
 11 unless there is a particular area of query, but what NUM's  
 12 role in all of this is of course an important role and it  
 13 needs to be examined closely and appreciated closely, and  
 14 part of that entails the very full description albeit in  
 15 fairly summary terms, it spanned the entire exercise of  
 16 NUM's approach to collective bargaining. Again, I am just  
 17 going to highlight that it begins with the process of  
 18 obtaining demands and processing them at section level, at  
 19 shaft level. It's grass roots. It's not imposed from  
 20 above. There is then an elaborate but effective process of  
 21 these being evaluated, condensed into a set of provisional  
 22 demands which then go back to a mass meeting for a set of  
 23 demands finally to be approved by the workers in that mass  
 24 meeting. NUM being what it is, which with respect is that  
 25 it is a mature union, those demands then go into a head

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1 office process where they are assessed in terms of a whole  
 2 range of considerations relating to the financial and  
 3 economic strength of the sector and the performance of the  
 4 companies and so on and ultimately, they come out of that  
 5 and if they are approved the negotiations begin. Those  
 6 negotiations then with the company have been described also  
 7 by Mr Gcilitshana and they conclude ultimately with the  
 8 obtaining of a mandate from the workers in a mass meeting.  
 9 Only then can a collective bargaining agreement be entered  
 10 into.

11 Now that happens at Impala, and as the Commission  
 12 knows a collective agreement is entered into there on 7  
 13 October 2011. It takes place also later at Lonmin and  
 14 there is a collective agreement dated 2 December 2011 but  
 15 effective from 1 October 2011. As that, there's absolutely  
 16 nothing to suggest any level of complaint in respect of the  
 17 content of those collective agreements over several months  
 18 particularly at Impala which is the critical one with this,  
 19 that's where the first derailment as it were takes places.  
 20 So when do they give the rise to this certificated miners,  
 21 that's the point, Chair.

22 CHAIRPERSON: When was that?  
 23 MR TIP SC: That's the very point I am  
 24 coming to if I may and that's a critical factor. But just  
 25 for a moment before I get to that which is 18 December

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1 2011, what I want to submit is that actually as at mid  
 2 December 2011 the entire platinum belt is working.  
 3 Collective bargaining has function. There are collective  
 4 agreements in place that are being respected and applied  
 5 and we are now shortly before the long break over Christmas  
 6 and New Year and so on and other than incidental issues  
 7 around say, AMCU and NUM and recruiting at Lonmin which are  
 8 of no consequence in the present context at all.  
 9 Everything is running smoothly. 18 December 2011 is the  
 10 critical factor moment because that is when Impala  
 11 management takes the unilateral decision that all  
 12 certificated miners are to receive an increase and it's a  
 13 substantial increase. AMCU's counsel have described it  
 14 quite appropriately as whopping increase and it was, for  
 15 one particular group of employees. Why? Because Impala  
 16 management have come to the view that other mines in the  
 17 area are paying that category of worker better and they are  
 18 concerned about losing some of those workers. They are not  
 19 concerned about anyone else, and that is why they singled  
 20 them out for this unilateral substantial increase. No  
 21 consultation, no negotiations, no forewarning, it's simply  
 22 done. And of course as one knows and we see echoes of this  
 23 in Lonmin, how do these decisions get taken? They get  
 24 taken by commercial management essentially who say well, if  
 25 we don't do this we may lose those people or some of them

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1 and if we lose some of those people our production is going  
 2 to be severely affected because they are critical to the  
 3 process. Only they can insert explosive charges, etcetera.  
 4 What will it cost us to get back on par for those people?  
 5 What will it cost us if we reopen negotiations? Oh well,  
 6 that's, we are not going to deal with it. So it's 18  
 7 December and all of my colleagues who practise in the field  
 8 of labour law will agree with what I am about to say, when  
 9 decisions of this kind are taken very often timing of  
 10 course is critical. What will be the impact of what we are  
 11 about to do with this unilateral decision and I am saying  
 12 this of course on the speculative basis, Chair, but with  
 13 some confidence in respect of what happens in practice.  
 14 Let's do this just before everyone goes away for the break,  
 15 and hopefully by the time they come back we will just  
 16 continue. The miners will be with us still and life will  
 17 go on. Now of course that doesn't happen at Impala. There  
 18 is a swift reaction to this and it happens if I may borrow  
 19 a phrase from the article that was put in from Mr Hartford  
 20 although he was talking about NUM, in fact what takes place  
 21 is that on the foothills of Lusikisiki and Flagstaff the  
 22 RDOs discuss what has happened. The miners don't discuss  
 23 it, they are happy. The RDOs discuss it and far from  
 24 Impala resuming with a contented workforce and peace around  
 25 this unilateral increase, come January 2012 when people



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1 return, there is almost instantly the demand from RDOs for  
 2 R9 000 basic wage. But that demand of course reflects in  
 3 part anger with Impala as to what happened but  
 4 unfortunately for NUM it also then turns into very, very  
 5 substantial anger with NUM and Mr Gcilitshana has dealt  
 6 with all of this quite fully in his statement. You may  
 7 recall that, of course he was the chief negotiator for  
 8 Lonmin, not for Impala but he's in contact with the people,  
 9 the NUM people at Impala to the extent that it's hearsay,  
 10 that wasn't a problem and none of it has been challenged.  
 11 But he underlined the following, he says, why do people  
 12 become angry with NUM where Lonmin – I beg your pardon,  
 13 Impala has unilaterally made this major differential  
 14 entries to one category of employees. Well, they're angry  
 15 because they say during the negotiations, during the time  
 16 that led to the conclusion of our agreement in October  
 17 2011, NUM was coming back to us in the feedback meetings  
 18 and in the mandate meetings and it was saying, we've  
 19 negotiated hard for you and Impala can't do better and now  
 20 suddenly they can do better. And workers, Chair, have very  
 21 well developed antennae when it comes to collective  
 22 bargaining issues and regularity of process and where there  
 23 is a demonstration that some irregular has been done that  
 24 in fact creates a differential and operates to their  
 25 prejudice they identify it immediately and they react

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1 immediately. If they feel that there is a lack of bona  
 2 fides, they pick that up and they react to it. So when NUM  
 3 has said to them, this is what we've been able to achieve  
 4 for you and nothing more, the coffers aren't empty,  
 5 therefore you haven't actually done the best you can. And  
 6 there was –  
 7 CHAIRPERSON: - coming to that now. That  
 8 among the beneficiaries, among the miners who go the  
 9 increase were the NUM negotiators.  
 10 MR TIP SC: Well, that was the second  
 11 point I was about to make and it's a very, very important,  
 12 we say coincidental aggravating feature. So it wasn't so  
 13 much the negotiators, it was that both chairpersons of the  
 14 two Impala NUM branches at the time were certificated  
 15 miners. But that's sufficient for a wave of rage to  
 16 spread, and we have seen repeatedly and frequently in the  
 17 consideration of how views get disseminated at Lonmin, and  
 18 the same happens at Impala. You've got workers who live  
 19 very close together and it just requires one or two people  
 20 to say but do you know what, NUM said there was no more  
 21 money but what happens? The two chair people of NUM, they  
 22 are getting this 18% extra and they are betraying our cause  
 23 and said Mr Gcilitshana that that gave rise then to this  
 24 duality of anger partly directed to Impala but of course by  
 25 far the more immediately available avenue for expression of

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1 rage is the Union, and hence he says very swiftly this  
 2 demand for R9 000 very predictably also turned into an  
 3 unprotected strike and that was a very violent strike also  
 4 and a lot of that violence was directly against members of  
 5 NUM and the officials of NUM. NUM's offices were attacked.  
 6 NUM officials had to leave for their own safety, so it  
 7 becomes really a very fragmented and dangerous environment.  
 8 [10:01] When one looks at it from the key, through the  
 9 key lens of collective bargaining there has been a  
 10 breakdown. And that breakdown is anything but cured when  
 11 in April if I remember that date correctly, 20 April 2012,  
 12 Impala again unilaterally announces a set of across the  
 13 board increases now in order to bring an end to this  
 14 unprotected strike and that includes promotion of RDOs. It  
 15 includes again the benefits, wages that are increased, time  
 16 periods in the collective agreement are brought forward,  
 17 very substantial advantages ensue. And why again that is a  
 18 particularly exacerbating feature of a breakdown of a  
 19 fissure in the collective bargaining environment is that  
 20 all those strikers and as happened later at Lonmin this  
 21 became not only a strike of Impala RDOs but a strike of all  
 22 workers at RDOs. Everyone gathered and as it happens  
 23 everyone received benefits.  
 24 Perhaps the RDOs of course got the largest  
 25 because of their category promotion but everyone

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1 benefitted, so one has a process where collective  
 2 bargaining has simply not been observed in the most  
 3 fundamental way possible. The breakdown, the first  
 4 unilateral increase triggers an unprotected violent strike  
 5 which is brought to an end by again unilateral management  
 6 decisions and all those strikers have seen the message.  
 7 Forget about the union. Forget about collective bargaining  
 8 and everything that is involved. Just do it yourself.  
 9 Violence will accelerate a response and that's the message.  
 10 So that is why we say that far from being just a somewhat  
 11 distant parallel in some respects with what took place at  
 12 Lonmin Impala demonstrates very, very clearly what happens  
 13 when the collective bargaining regime, when the statutory  
 14 framework is breached and that's a problem.  
 15 So may I then turn to looking at what happens in  
 16 Impala, I beg your pardon, Lonmin? Now, interesting,  
 17 Chair, what we know from Mr Da Costa is that as at 21 June  
 18 2012 which is of course another key date when the first two  
 19 RDO representatives, when the first small march takes place  
 20 to his office, as at that stage Mr Da Costa has been  
 21 receiving reports from within his management and security  
 22 environment that RDOs at Karee have held a number of  
 23 meetings at Karee but they've been very poorly attended.  
 24 And why – that's paragraph 3.6 of his main statement, 0017.  
 25 Why that is significant, Chair, we're now talking about

<p style="text-align: right;">Page 39462</p> <p>1 June 2012, several months after the conclusion of the 2 strike at Impala but even at that stage Lonmin is 3 essentially functioning without difficulties on the 4 collective bargaining front.</p> <p>5 The collective agreement of 2 December 2011 has 6 been in operation without difficulty for some seven or 7 eight months by then, well, longer going back to 1 October. 8 And in short what one can say about it is that the 9 situation at Lonmin was in fact not just a bed of dry 10 tinder which would ignite upon the mere spark arising, so 11 Impala didn't immediately trigger the events at Lonmin. I 12 must underline the word "immediately" because clearly it 13 does play a very clear role in the sense that the way 14 things happened at Impala become the way that things 15 happened at Lonmin but they're not immediate. And that is 16 important when one looks at the response of Lonmin to the 17 approaches at Karee.</p> <p>18 Now, we know and perhaps we can just call up on 19 the screen please XXX3. If we can go to page 5 I think of 20 that bundle I may – yes, that's the document. Just go back 21 a bit, page 3, I'm sorry. Yes, Chair, I'm going to look at 22 just a few aspects of this. This you will recall is the 23 memorandum that Mr Da Costa sent through to EXCO at Lonmin 24 shortly after the first approach to him on 21 June. This 25 is dated 27 June. Now, what – before I get to that Mr Da</p>	<p style="text-align: right;">Page 39464</p> <p>1 we know was in fact a member of the negotiating team for 2 Lonmin and he showed himself in the course of cross- 3 examination on various topics relating to labour relations 4 to be well-informed and to be sensitive to actually what 5 the entire paradigm is supposed to achieve. That 6 understanding by him is reflected in important ways in the 7 memorandum that he sends through to Lonmin.</p> <p>8 Let me – sorry, if I may have a moment just to 9 get my copy, on the following page there if we can just go 10 one page down, yes, under the rubric there of proposal this 11 is now what he is suggesting to EXCO. He says I suggest 12 that, I propose that this is how we deal with it. And the 13 first one is feedback will be given to the two 14 representatives who met with the vice-president as follows 15 and the first bullet point is the only one that I'm going 16 to underline. "Lonmin has well-established processes for 17 the negotiation of wage increases and other conditions of 18 employment and is not in favour of ad hoc negotiations 19 taking place outside of those processes." Now, that is a 20 very important statement for Mr Da Costa to make to his 21 EXCO because he very succinctly there highlights a core 22 aspect of sound collective interaction and sound labour 23 relations and that is that the agreed structures have to be 24 respected. They have to be cultivated. I said a few 25 minutes ago that workers are very sensitive to derailments,</p>
<p style="text-align: right;">Page 39463</p> <p>1 Costa was cross-examined quite extensively in respect of 2 various aspects including the – sorry, let me just check. 3 I just want to check my consumption of time, Chair. 4 I've got time to deal with this, Chair. Mr Da 5 Costa was cross-examined by a number of people including 6 myself on the response of he himself and then of course 7 Lonmin as the company to the approaches by the Karee RDOs 8 and I aligned myself with what I had already heard which 9 was that Mr Da Costa's response to them initially was 10 absolutely appropriate, namely that he saw them and that he 11 met with them and that he established from them what it was 12 that was their concern. And let me just underline that. 13 It's a theme that I'll echo once or twice again as I go 14 through this topic.</p> <p>15 Why it was appropriate for Mr Da Costa to see 16 those employees is because collective bargaining and labour 17 relations generally as a philosophy and as a management 18 framework has also – gives very clear recognition to 19 practical considerations such as what on the basis of a 20 ordinary sense of fairness is appropriate to do in a 21 particular situation, what in terms of an ordinary 22 cultivation of relationship and the prevention of immediate 23 frustration is acceptable, and that is why when Mr Da Costa 24 sees the RDOs that come to him as at 21 June is not to be 25 faulted. Then there is his reaction. Now, Mr Da Costa as</p>	<p style="text-align: right;">Page 39465</p> <p>1 demonstrations of bona fides. Workers are generally 2 requiring reinforcement.</p> <p>3 CHAIRPERSON: I apologise. If it wasn't 4 my phone I would cause the owner to be evicted from the 5 chamber but I can't do that. I'm sorry.</p> <p>6 MR TIP SC: Perhaps I might say that you 7 have to excuse yourself for 15 minutes while we take the 8 first comfort break.</p> <p>9 CHAIRPERSON: Are you suggesting I take 10 the tea adjournment now?</p> <p>11 MR TIP SC: We'll defer it, Chair.</p> <p>12 Thanks, okay, so Chair, this is – collective bargaining 13 involves if I may just take a sideways step for a moment in 14 order to underline very, very prominently why this is a 15 correct statement, collective bargaining is in a sense of 16 course a regime that has been structured through policy 17 dimensions. It's a very important regime and it goes all 18 the way back to the certification of the Constitution 19 itself where the Constitutional Court said, well, 20 collective bargaining is there as a means of equalising the 21 power balance because employers on their own of course have 22 all the power.</p> <p>23 Employees on their own have no power. It is only 24 when they come together that collective bargaining can take 25 place and only when they come together properly of course</p>

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1 that they can enforce their power through a strike. The  
 2 structure envisages only lawful strikes, protected strikes,  
 3 again huge problem when it's an unprotected strike. But it  
 4 is that equation that there is also inevitably the  
 5 dimension that there has to be majoritarianism when it  
 6 comes to the formulation of demands so that if you have a  
 7 collective bargaining arrangement and a union or more than  
 8 one union possibly which is formulating demands then as  
 9 happens with NUM's processes which have been outlined you  
 10 will have different demands from different sections.  
 11 Somehow they will have to reconciled and those who wanted  
 12 an increase of 23% have to be reconciled with those who are  
 13 content with an across the board increase of 14% as an  
 14 opening gambit.  
 15 So there is this give and take and that is why in  
 16 the sense there has to be continuing cultivation and  
 17 protection of the mechanism so that the buy-in by all  
 18 workers is maintained. Now, that, coming back to Mr Da  
 19 Costa's statement that we see there, if one begins what he  
 20 correctly calls a process of ad hoc negotiations then of  
 21 course there is immediately the process of the fracturing  
 22 of the collective coherence of the process because then it  
 23 becomes open for ad hoc groups to formulate their own  
 24 demands and the entire situation becomes precisely what the  
 25 statute doesn't envisage and what the policy doesn't

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1 desire.  
 2 Incidentally if I may just jump ahead for a  
 3 moment we saw a very clear illustration of that at Lonmin  
 4 and you will recall that after the RDOs had their series of  
 5 interactions with Mr Da Costa and through Mr Da Costa with  
 6 EXCO a group of team leaders came to see him on the same  
 7 basis. They also had a set of demands. Well, that was  
 8 easy to deal with because there are only 15 or 20 team  
 9 leaders and they're not RDOs. They're not drilling the  
 10 rock face and they're not certificated miners and they are  
 11 sent away, but it's precisely that kind of process that is  
 12 always the latent peril when one starts to defuse the  
 13 integrity of collective bargaining.  
 14 So this is really a ground rule and it needs to  
 15 be viewed in precisely that term. This is the ground rule  
 16 and Mr Da Costa is saying to EXCO our feedback must tell  
 17 them that this is the ground rule. Now, as soon as you  
 18 established that ground rule then of course one has to  
 19 examine what is the best way for this particular situation  
 20 to be dealt with and if I may go on to the next if you just  
 21 scroll up the page a fraction please, sorry, I mean,  
 22 downwards to the lower – ja. In keeping with the general  
 23 statement of the ground rule Mr Da Costa then says, "This  
 24 feedback will be given on 2 July 2012." That of course  
 25 you'll recall is the date on which he is scheduled to meet

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1 again with the RDOs.  
 2 Then he says to EXCO, "The feedback outlined  
 3 above is not likely to resolve the matter." Again critical  
 4 statement and showing a real astute understanding on the  
 5 part of Mr Da Costa of what the likely dynamics are of what  
 6 has begun by this first approach to him on 21 June.  
 7 They're not likely to resolve the matter. More work will  
 8 be required over the next few weeks in this regard. The  
 9 following is proposed. Bullet number one, critical,  
 10 "Engage both the NUM and AMCU at national level to inform  
 11 them of this development and to solicit their opinion on  
 12 the matter." Now, that again, something that certainly I  
 13 and I think others also in the course of the cross-  
 14 examination of Mr Da Costa indicated that that too  
 15 indicated a thoroughly sound grasp on his part of how this  
 16 situation could be approached in a constructive way and in  
 17 a way that would maintain its coherent relationship with  
 18 the overall framework.  
 19 There are a few elements that need to be  
 20 identified here and singled out. First of all he says  
 21 engage both NUM and AMCU. Now, that of course has a real  
 22 recognition for what was a factual complicating feature at  
 23 Lonmin at the time which was the NUM overall remained the  
 24 bargaining agent for the whole of Lonmin. NUM was at that  
 25 stage certainly still well entrenched as the majority union

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1 at Eastern Plats and Western Plats but AMCU had most  
 2 certainly become the majority union at Karee. The RDOs  
 3 were from Karee. So he is recognising a practical  
 4 situation and here I echo what I said a while back about  
 5 common sense being a very vital component of a sound labour  
 6 relations practitioner's approach. It's common sense.  
 7 The second important feature there is that he  
 8 says at national level, to be underlined and to be  
 9 endorsed, and why that is important is that there is an  
 10 appreciation that the relationships at Karee can't easily  
 11 be addressed at a local level and be resolved at a local  
 12 level. He also understands does Mr Da Costa and this is an  
 13 important point that the wage agreement has been entered  
 14 into at a national level. Mr Gcilitshana is the chief  
 15 negotiator. He is a national office bearer of NUM.  
 16 Negotiations aren't conducted at a place like Lonmin at  
 17 branch level.  
 18 [10:22] There are representatives from the branches in  
 19 the negotiating team, but no branch has the authority to  
 20 conclude or to amend a collective agreement. Then he says  
 21 again very constructively inform them of this development,  
 22 tell them what's happening, and finally and also with  
 23 insight he says solicit their opinion on the matter. Now  
 24 opinion may be a formalistic word, but that essentially  
 25 what he is saying is that we've got a complicated situation

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1 here, get both unions at national level involved, get their  
 2 views.  
 3 Now had that – and perhaps just for completeness  
 4 before I adumbrate on that, Chair, at the conclusion of the  
 5 memorandum, if we can just go to the next page briefly, Mr  
 6 Da Costa also says to EXCO engage with the NUM and AMCU at  
 7 Marikana to reach an agreement on the matter, and of course  
 8 that is essential as well. You've got to have buy-in at  
 9 the local level, but the input in respect of something like  
 10 the status of a collective agreement cannot come from the  
 11 local level.  
 12 Now Chair, why that approach sets out in this  
 13 memorandum to EXCO was a promising one had it been  
 14 observed, is that it would have immediately drawn in NUM  
 15 and AMCU at formal level to give their views. NUM  
 16 nationally would have come in and it would have looked at  
 17 the entirety of the situation. It may have begun by having  
 18 mass meetings at Eastern Plats and Western Plats, that in  
 19 itself may dramatically have changed the course of events,  
 20 but what would then happen is that NUM and AMCU would have  
 21 to address the situation of the de facto demand that had  
 22 come from RDOs at Karee, and that then sets up an entirely  
 23 appropriate dialogue process. Now we can't pretend, Chair,  
 24 that that would have simply been, or that that would have  
 25 been a simple interaction. AMCU is seeking to augment its

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1 position. NUM is seeking to defend its position and  
 2 perhaps reclaim membership. So there are those sorts of  
 3 considerations that would doubtless also feed into the  
 4 interaction, but once that approach and once that  
 5 interaction has been established, then those parties, all  
 6 three parties, in fact all four parties as it were – NUM,  
 7 AMCU, Lonmin and as a distinct entity, albeit not without  
 8 formal status, the RDOs at Karee – then need to address  
 9 what is a common problem. I recall that one stage in the  
 10 cross-examination of Mr Da Costa he was asked a little  
 11 about how did all this work and so on, and he said well, of  
 12 course a lot of attention would have had to be given to how  
 13 any negotiating forum could be established. So he was well  
 14 aware of the need for sensitivities there.  
 15 But what it would absolutely have crystallised  
 16 would be a response at that level to that situation from  
 17 these two unions, and after that, well things unfold. One  
 18 can't predict what would have said, but then the further  
 19 process of course develops from that position. That is  
 20 what happens in labour relations. One makes the first move  
 21 in accordance with sound principle. The second move has  
 22 then to take place, hopefully also in accordance with sound  
 23 principle, but it moves and that's the key thing.  
 24 So Chair, what I should just add here is that  
 25 you'll recall that Mr Gcilitshana described that NUM would

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1 have been happy to discuss outside collective bargaining at  
 2 a certain stage, but it's correct for me to make this point  
 3 that that was in the context of what had happened already  
 4 by mid-August 2012. So I say that only to avoid an  
 5 inadvertent translocation of that bit of evidence as  
 6 perhaps being what NUM's attitude would have been at 27  
 7 June. It was never canvassed and AMCU's views were never  
 8 canvassed in accordance with that suggestion because EXCO  
 9 then took a different route, and perhaps, Chair, I can turn  
 10 to that after the brief adjournment.  
 11 CHAIRPERSON: Thank you, Mr Tip, 15  
 12 minutes.  
 13 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 14 [10:43] CHAIRPERSON: The Commission resumes.  
 15 Yes, Mr Tip.  
 16 MR TIP SC: Thank you, Chair, if I may  
 17 continue. I'm about to turn to a consideration of what  
 18 EXCO decides, but perhaps before I do that I should say one  
 19 or two things further about Mr Da Costa's proposal about  
 20 giving the NUM, the national unions at national level  
 21 involved, and there is a point to be underlined there as  
 22 well. One is seeking to bring in those unions, each of  
 23 which have status at Karee. AMCU is already recognised in  
 24 respect of a wide range of entitlements, and the importance  
 25 of bringing them in and getting interaction with them going

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1 is that it also would inevitably clarify the position of  
 2 the RDOs, and one of the particular matters that would of  
 3 course necessarily be addressed is the position of the RDOs  
 4 that they do not want any of the unions involved.  
 5 Now that's a key proposition and there comes a  
 6 time in labour relations and industrial management of this  
 7 kind and the preservation of collective bargaining that one  
 8 has to be firm and a company has to be firm. So this is in  
 9 fact, implicit in all of this is that there has to be a  
 10 moment where the statements that are made to the RDOs by  
 11 Lonmin that Lonmin won't negotiate outside the collective  
 12 structures has to be given force.  
 13 However, what is critically absent in what  
 14 happens once the matter gets through EXCO is that that  
 15 interaction is extinguished before it starts actually, and  
 16 as soon as you remove those two unions AMCU and NUM at  
 17 national level, you remove an essential couple of  
 18 ingredients that must go into the pot of formulating a  
 19 workable, a practically workable formula for moving forward  
 20 and then you leave, as happened here, you leave the RDOs on  
 21 their own. It's their declared route, but it's an  
 22 unacceptable route. We know that from the ordinary  
 23 philosophy of labour relations, and we know that from what  
 24 actually happened at Impala where precisely that remained  
 25 the position. There too there was no engagement with the

<p style="text-align: right;">Page 39474</p> <p>1 unions.</p> <p>2 So there does come a moment when one has to say</p> <p>3 well, we will not in fact bargain with you because you are</p> <p>4 outside the collective structures, but here is an</p> <p>5 arrangement which has been devised to everyone's</p> <p>6 satisfaction between the two unions, Lonmin and now it's up</p> <p>7 to you, and if workers who are acting outside of these</p> <p>8 structures with the already clear intention, and that is</p> <p>9 something that Mr Da Costa perceived immediately right from</p> <p>10 the start, he was concerned that underlying all of this was</p> <p>11 the prospect of industrial action, as he put it,</p> <p>12 unprotected strike action, as he developed it in his</p> <p>13 evidence. As soon as you've got that prospect then one has</p> <p>14 to take an in-principle position that will deal with it.</p> <p>15 What EXCO does - to come to that now - is in</p> <p>16 effect to ignore this triumphant of recommendations from Mr</p> <p>17 Da Costa that I've gone through already, and they do what</p> <p>18 we submit Impala management did, they sit and they look at</p> <p>19 the thing from a commercial perspective and there is that</p> <p>20 very unsatisfactory bit of evidence that at one stage they</p> <p>21 ask for an opinion on what will be the consequence of</p> <p>22 reopening collective bargain, and then it's just dropped as</p> <p>23 a topic. It's never taken anywhere. What they do look at</p> <p>24 is well, what are the present relationships between what we</p> <p>25 are paying RDOs and what other people are paying RDOs and</p>	<p style="text-align: right;">Page 39476</p> <p>1 doesn't really fit into your wage structure, but of course</p> <p>2 it does, and technically it does and with respect, Chair,</p> <p>3 more than once you have said precisely this, but it's part</p> <p>4 of their remuneration. They would perceive it as part of</p> <p>5 their remuneration. Of course they did, but by definition</p> <p>6 in terms of the Basic Conditions of Employment Act</p> <p>7 remuneration includes all payments in cash or in kind that</p> <p>8 form part of the packages that a worker receives. So this</p> <p>9 is remuneration technically so and it has to be dealt with</p> <p>10 so.</p> <p>11 The fundamental problem with what EXCO did was to</p> <p>12 actually keep the RDOs in an isolated stream, to recognise</p> <p>13 them in their position as an isolated stream – and by</p> <p>14 isolated stream I mean maintaining their declared position</p> <p>15 of having nothing to do with the unions – and at the same</p> <p>16 time then to say to them well, we're not going to talk to</p> <p>17 you. So you don't do what Mr Da Costa did, which was to</p> <p>18 set up on a joint basis a forum that could address it.</p> <p>19 That's discarded by EXCO. It says here's an allowance,</p> <p>20 take it or leave it, and we're not going to talk to you.</p> <p>21 Well, that with respect is a formula for catastrophe. We</p> <p>22 know that it became such, but it was also on any reasonable</p> <p>23 interpretation in view of what was taking place at the time</p> <p>24 going to be a formula for catastrophe. So it is what</p> <p>25 happens, Chair, when one has these very deficient views in</p>
<p style="text-align: right;">Page 39475</p> <p>1 what will it cost us to bring us back into parity so that</p> <p>2 we keep them, and then you get to this utterly</p> <p>3 unsatisfactory formula of an allowance, unilaterally</p> <p>4 determined, not put on the table for discussion. It's ex</p> <p>5 cathedra, it is EXCO saying well this is what you're going</p> <p>6 to get, and of course it doesn't save the day.</p> <p>7 Chair, perhaps it might be useful for me just to</p> <p>8 take a moment to say something about the idea of an</p> <p>9 allowance because it may sound like something that is</p> <p>10 neutral but of course it isn't, not in the context of</p> <p>11 labour relations and collective bargaining. An allowance,</p> <p>12 like any other term and condition of employment is subject</p> <p>13 to negotiation and that is why one sees for instance in the</p> <p>14 collective agreement that we're dealing with here there is</p> <p>15 an allowance, a living-out allowance. It's negotiated.</p> <p>16 It's increased or it stays the same, whatever.</p> <p>17 Mr Gcilitshana has given evidence that it was the</p> <p>18 practice at Lonmin that even when matters such as bonuses</p> <p>19 came up for discussion a task team would be set up, a joint</p> <p>20 task team which would investigate it. It would produce</p> <p>21 figures and data and possibilities. They would then be</p> <p>22 negotiated and some agreement would be concluded. Now</p> <p>23 that's important. What EXCO did was to say well, this is</p> <p>24 an allowance, as though an allowance is somehow immune from</p> <p>25 collective bargaining, and it isn't, that an allowance</p>	<p style="text-align: right;">Page 39477</p> <p>1 respect of collective bargaining taken by management.</p> <p>2 Chair, you've remarked, if I may respectfully</p> <p>3 echo it, that even in the unlikely source of the Lonmin</p> <p>4 occurrence book security personnel are saying that, you</p> <p>5 know, we have difficulty; management are sitting in the</p> <p>6 office, they say these things, we then have to deal with</p> <p>7 this. So it was recognised by them that this ongoing</p> <p>8 refusal – admittedly that wasn't in August, but precisely</p> <p>9 the same consideration applies as at 21 June, 27 June, 2</p> <p>10 July.</p> <p>11 COMMISSIONER HEMRAJ: Mr Tip, previously</p> <p>12 when allowances were granted were these the subject of</p> <p>13 these discussions and negotiations with the unions?</p> <p>14 MR TIP SC: Not at all, no, these were</p> <p>15 not. You see this is, it of course should have been but</p> <p>16 what was, Commissioner Hemraj, if I may just say, you</p> <p>17 underline again an important differential that should be</p> <p>18 clarified. I've explained that allowances of this kind,</p> <p>19 even if properly so called, would form part of</p> <p>20 remuneration. They would form part of the negotiation</p> <p>21 framework, like any other allowance.</p> <p>22 If I may just take another sideway step and I'll</p> <p>23 come directly back to your question, an allowance has a</p> <p>24 historical place in labour relations and historically of</p> <p>25 course one had a tool allowance for journeymen, or a travel</p>

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1 allowance for people who had to come long distance to  
 2 perform their work, or possibly even a heat allowance for  
 3 people who worked in particularly heated environments that  
 4 posed dangers and so on. Those were all classified  
 5 properly as allowances that were paid in order to  
 6 facilitate you coming to do your work. So the tool  
 7 allowance, you do the work, you're using your own tools,  
 8 you get an allowance.  
 9 The wage is something different and now I'm  
 10 coming directly to your question, Commissioner. In truth  
 11 this allowance was an increase in the wages of RDOs. It  
 12 doesn't pretend to be anything else. It simply says well  
 13 here's an allowance. It doesn't say a risk allowance. It  
 14 will have to be negotiated anyway, but in truth, it is an  
 15 addition to their wage and the wage of course is absolutely  
 16 at the core of every negotiations.  
 17 There's a side effect incidentally here, that if  
 18 as an employer you call part of the remuneration an  
 19 allowance, when you negotiate, as we have seen both at  
 20 Impala and at Lonmin, a union will come and it will say our  
 21 opening demand is an across the board increase of 19%.  
 22 That's 19% on the basic wage rate. If half of that is  
 23 called an allowance then employees are entitled, if it goes  
 24 through on that basis, to 19% on half of what they're  
 25 actually getting. So these are not just minor distinctions

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1 in terms of description, they have real consequences. I'm  
 2 not suggesting that Lonmin's EXCO was necessarily looking  
 3 at it from that point of view, but over the long run it's  
 4 important, and again from a worker perspective, because  
 5 workers understand this, that if you get an increase in  
 6 your basic wage rate then that forms a new table, it's a  
 7 baseline, and every percentage increase that you get over  
 8 every year of negotiation is a percentage increase on that  
 9 baseline and the entire baseline moves up. If part of that  
 10 baseline lags behind because it's called an allowance,  
 11 you're actually moving up with less and at the end of the  
 12 day as the increases unfold, it's like compound interest,  
 13 you're actually getting less. So they're aware of that as  
 14 well.  
 15 But it is fundamentally in terms, here we are  
 16 really at the interface, Chair, of the considerations that  
 17 stand at the interface between the violent events that  
 18 you've been examining and the labour relations departure  
 19 points that contributed materially to it, and it is this  
 20 moment where EXCO fails to deal with it on a collective  
 21 interactive basis, makes a unilateral grant, which is  
 22 refused, and then reverts to the position that we're not  
 23 going to talk to you because you're not part of the  
 24 collective bargaining.  
 25 Mr Da Costa's memo, if I may just echo that, and

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1 I hope I'm not repeating it unduly, Mr Da Costa's memo of  
 2 27 June when he says get hold of AMCU and NUM at national  
 3 level and get their views, that would have avoided what  
 4 subsequently happened because there would have been  
 5 interaction. One way or another there would have been a  
 6 result that would have been sound and acceptable. So a  
 7 very important moment, Chair, in the context of this.  
 8 The last point, if I may deal with it, in the  
 9 framework of collective bargaining is that again  
 10 philosophically and in terms of the constitutional and LRA  
 11 imperatives that we've already looked at, that framework is  
 12 geared towards non-violence. Everything about it seeks to  
 13 prevent the generation of non-violence and when you break  
 14 it, of course you open the way for violence because you  
 15 open the way for unprotected strike action deliberately  
 16 being pursued by people without any regulatory influence  
 17 who understand that if there is enough build-up of pressure  
 18 because of violence and destruction, at some point somebody  
 19 will talk to us and we'll get what we want. It's not  
 20 incidental, it's understood, and that is why one, you know  
 21 at the seminars, we refer to them in our written  
 22 submissions, one has this understanding that this is how  
 23 you do it. How do you, what's rule number 1 with a strike  
 24 and solidarity? Well, you make sure that nobody breaks the  
 25 strike. You intimidate and there's violence and that's

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1 recognised in the academic journals and we have seen it  
 2 here as well. So that is why these things are of such  
 3 importance.  
 4 But the particular aspect of that that I want to  
 5 underline is what I'd begun to say, that the framework as a  
 6 whole, collective bargaining philosophically and  
 7 statutorily eschews violence as a mode of action. If it  
 8 does occur then it poses of course another testing moment,  
 9 just as Lonmin had at the time that the RDOs said we don't  
 10 want unions involved, that's a testing moment. Do you fall  
 11 in with that, or do you maintain first principle and look  
 12 for a way to deal with it?  
 13 When you get violence then one has to, with  
 14 respect you've got to say well this is the labour relations  
 15 issue and this is a violence issue. The violence issue, if  
 16 there is criminal conduct, which there must be if there is  
 17 violence, is not to be treated differently because it has a  
 18 root in a wage issue or an industrial dispute or whatever  
 19 it is. That line has to be preserved and that is why it is  
 20 necessary, with respect, to examine for example the appeals  
 21 by Mr Zokwana, my president at the time. He comes to  
 22 Lonmin on the Sunday afternoon in the immediate aftermath  
 23 of what has happened to Mr Fundi and Mr Mabelane. He has a  
 24 meeting with management. He determines, correctly, that  
 25 Lonmin is not in a position to secure the situation - that

<p style="text-align: right;">Page 39482</p> <p>1 is common cause – and he then starts to say to the 2 provincial office and then to the national minister, we 3 have to restore law and order. 4 Now Mr Zokwana was taken up in one way or another 5 in various places in his evidence and he was consistent 6 throughout, he says that this is no longer, when you have 7 violence of this order, of this nature, then peace has to 8 be restored before you can properly address the issues of 9 negotiation, and he was consistent in that, and in our 10 respectful submission that is sound on the basis of what I 11 am saying. 12 [11:03] Chair, we've had a lot of cross-examination which 13 has one way or another led to some blurring of the issue, 14 so a number of police officers have been cross-examined for 15 instance on the basis that the true dispute at Lonmin was a 16 wage dispute. Well, yes, that's the underlying dispute. 17 Well, then you policemen shouldn't have been there because 18 now you are interfering with a wage dispute. And we say 19 that those propositions and all of them along that line 20 need to be carefully examined. If a police officer and I'm 21 thinking of my learned friend Mr Mpofu's submissions about 22 what had been said by the provincial commissioner, if a 23 police officer says we are going to act there in order to 24 break a strike, well, then from a philosophical position 25 that would be incorrect and unacceptable and there can be</p>	<p style="text-align: right;">Page 39484</p> <p>1 is a consequence that it has to address and that 2 consequence is that it has to ensure that its elimination 3 in effect of any capacity to deal with large scale events 4 of the kind that arose as from the morning of the 11th, if 5 it no longer has the capacity then it has to ensure the 6 SAPS will be there on time and in sufficient force. 7 And it comes back to what of course I underlined 8 in my cross-examination of Mr Blou to this notion of 9 scenario planning which is two words that we respectfully 10 submit should be very close to centre stage in a 11 consideration of Lonmin and what it failed to do. Scenario 12 planning, you sit and you do the obvious. You say, well, 13 we've got this situation where both we see that there is a 14 very big mood shift on the 10th. Where is it going to go? 15 What do we need to prepare for? We must see to it that 16 SAPS is there because if that happens we cannot deal with 17 it. 18 The 11th, the events of the 11th one may say, 19 well, that's on the cusp. We submit that it's over the 20 cusp and that they should in fact have identified that 21 possibility, but once we get to the 12th, Chair, for Lonmin 22 security to at that stage still be at odds and ends as we 23 said in our heads - Mr Sinclair is putting out memoranda 24 that talk about a revenge attack and preparation for war, 25 Mr Blou is blindly unaware of any information of that kind,</p>
<p style="text-align: right;">Page 39483</p> <p>1 no doubt about that. If the police officer says we are 2 going to position sufficient forces there and take the 3 indicated action in order to break the criminal conduct 4 then that is appropriate. Chair, that's a distinction that 5 must be made. I'm going to leave the topic if I may of 6 collective bargaining. I hope that I haven't spent too 7 much time on it but it did seem to be something – 8 CHAIRPERSON: You've given us full heads 9 on it. They are there. What you've said has served to 10 explain and highlight the main points. 11 MR TIP SC: Yes. Well, then if I may 12 just very swiftly go through a few topics relating to other 13 aspects, and immediately drawing on the position of Lonmin 14 security my learned friend Mr Bham in the course of his 15 submission said, well, you know, when you look at Lonmin's 16 deficit in terms of its security apparatus and if you 17 examine what happened to Mr Fundi and Mr Mabelane you would 18 remember that it took a decision in 2005/2006 that it would 19 demilitarise its security apparatus. Well, that's fine but 20 we have very clearly both in our cross-examination and in 21 our written submissions made this point, and I echo it 22 because it seems to occupy fairly cardinal terrain here, 23 once Lonmin takes that decision, disposes of all its 24 armoured vehicles, reduces its security personnel, relies 25 on CCTV, relies on other sources of information then there</p>	<p style="text-align: right;">Page 39485</p> <p>1 of any prospect of that kind. He says, well, it's a 2 Sunday. We've never had these sorts of things on a Sunday. 3 Now, that we say is absolutely inexcusable, that failure to 4 actually do the ordinary thing, to take stock, to evaluate, 5 to plan to say if this happens again we're in trouble, 6 SAPS, and to see to it in a concerted way that SAPS is 7 there. 8 They didn't. They didn't – they complain and 9 they say we made calls and nothing happened. Well, you've 10 got to be far more deliberate in a situation such as this. 11 And we say that that kind of deficit really led to a 12 situation where Mr Fundi and Mr Mabelane died on the 13 morning of the 12th. If I may just say one thing about the 14 situation there in this context, you've heard that Mr 15 Mabelane was determined that his force of a dozen people or 16 so would maintain, would stop this march, that it would 17 prevent the destruction of the NUM office and we know that 18 that in retrospect was not a sustainable decision given the 19 nature of this crowd. 20 We know of course that he also didn't know about 21 Mr Louw's warning, do not engage. That's another deficit. 22 But what that underlines is this utterly unsatisfactory 23 feature in Lonmin's evidence on security which Mr Blaauw 24 described as, well, they may be an invidious position, 25 the security officers, because on the one hand they have</p>

<p style="text-align: right;">Page 39486</p> <p>1 got to defend. That's their duty. They must protect. On  2 the other hand we tell them, you know, if it's dangerous,  3 well, then extract yourself. They leave people like  4 Superintendent Mabelane and Superintendent Fundi hanging in  5 the middle. When they get there and they see march then  6 they say, all right, well, that's it. We run away. And  7 whatever they're going to burn gets burnt. It's just an  8 impossible situation to put them in.  9 Mr Mabelane takes his stand. Chair, you have  10 used the word in respect of him, "courageous". We echo  11 that with respect. It was an unsustainable decision. And  12 also to underline what an aspect of that because Mr Bham  13 referred to Mr Masibi, what Mr Masibi tells us in his  14 evidence is as part of the disagreement that there was  15 amongst the security officers when that line was being  16 formed, not only the question of how do you park vehicles  17 and so on, not only the question of that, well, there  18 aren't enough of us but also the question of there is no  19 armoured vehicle and had there been an armoured vehicle  20 then Mr Fundi and Mr Mabelane would've been able to leap  21 into that instead of jumping into their Livina in the hope  22 that they could get I started and drive off.  23 So it again, that underlines the clear  24 understanding of the security personnel themselves and what  25 my learned friend, Mr Bham, did not really address was a</p>	<p style="text-align: right;">Page 39488</p> <p>1 on the 10th.  2 NUM took up the position that its members and  3 others who wanted to go to work should be able to get to  4 work and they took up the position that they would perform  5 an escort function. And we stand by that decision, we have  6 in our heads and in our replying submissions and we say  7 that in a situation such as that there is again potentially  8 a difficult choice to be made but there are people who want  9 to exercise their right to go to work. They want to work.  10 They want to earn money. They want to look after  11 themselves and their families. And where Lonmin security  12 is not in a position to ensure safe passage then NUM took  13 it upon itself to do that escorting.  14 Now, as was noted in the OB there was a query I  15 think Mr Kwadi who said, was it Kwadi, ja, says well,  16 there's a bit of concern about NUM doing this because of  17 the risk that it takes the law into its own hands and that  18 might give rise to conflict and that's a concern. That  19 does come into the picture, Chair, and a holistic  20 assessment of everything that took place, we must have  21 regard to that, but on balance we say that what NUM did was  22 indicated and that otherwise, you know, one says, well,  23 you're taking the law into your own hands but it's in a  24 situation where you have strikers who have taken the law  25 into their own hands and who are asserting not only their</p>
<p style="text-align: right;">Page 39487</p> <p>1 query from yourself with respect, Chair, which is that the  2 presence of armoured vehicles are not necessarily there to  3 deal with a mass situation. They are there to protect your  4 personnel. Mr Bham rather dismissively spoke about, well,  5 can you imagine a situation where Mr Sinclair is at the  6 head of a procession of armoured vehicles. That's not the  7 point at all. It is this built-in deficit which is known,  8 it is known to Lonmin security because they have twice  9 motivated for the armoured vehicles to be obtained. It is  10 known to security officer Masibi when he sees where he is  11 that Sunday morning. And the only remedy, Chair, was to  12 ensure that there were armoured vehicles as a last resort  13 and that they were used or that SAPS was there and that  14 I've already made a submission about in relation to proper  15 planning and proper calling.  16 Chair, may I turn in the last minute that I think  17 I have available to me to one or two aspects relating to  18 the events of the 10th and 11th in respect of the position  19 of NUM? First of all the 10th, Chair, we know that what  20 happened was that intimidation began, it's documented  21 entirely at the logs. Mr Setelele has dealt with it also  22 in his statement. As we've set out in our written  23 submission one can be quite certain that there were more  24 events than those that are documented in the Lonmin log,  25 but those began as early as half past four that afternoon</p>	<p style="text-align: right;">Page 39489</p> <p>1 right to strike but some entitlement to make sure that you  2 don't exercise your right to work. That's unpalatable and  3 it's in that particular interface that we say it's  4 warranted.  5 My learned friend, Mr Mpofo, has spoken yesterday  6 about this Quantum as he has done from time to time which  7 is he says driving around and shooting at people and  8 forcing them to go work etcetera, etcetera, we have from  9 the start disagreed with that entirely. Even in his heads  10 at this stage, Chair, we see no reference to evidence to  11 that effect and ultimately of course Mr Setelele made a  12 statement and gave evidence and he says that in the course  13 of that night he went out with a Quantum on several trips.  14 As it happens he saw no intimidation. There was only one  15 occasion when there was a group of people who said, well,  16 you're breaking the strike and we're going to kill you, but  17 Mr Setelele was the person to whom propositions of that  18 kind had to be put and they were not.  19 So we ask you to disregard that. There are some  20 hearsay suggestions in the evidence of Mr Mabuyakhulu that  21 somebody came to the meeting on the 11th of August and spoke  22 about shooting from the Quantum and goes so far as to say  23 that someone was actually injured but there's absolutely  24 no, there's no corroboration for that at all. Chair, in  25 respect of the 11th we have addressed the events in and</p>



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1 around the NUM office I hope quite comprehensively in our  
 2 heads of argument. May I just say two things about it?  
 3 The one is that there have been suggestions that when the  
 4 NUM officials fired the shots that that was at a distance  
 5 of about 50 metres which of course is a very different  
 6 picture from what in fact it was. Now, Mr Gegeleza has  
 7 given a very close description and detailed description of  
 8 it and this confrontation actually ultimately happens right  
 9 in the vicinity of the intersection between – if I may just  
 10 refer YY2 – street B and street C in the area of the MTN  
 11 container which is right on the corner right next to the  
 12 satellite police station. The same is said -  
 13 CHAIRPERSON: What was the distance  
 14 there? What was the distance between the NUM people and  
 15 the advancing strikers?  
 16 MR TIP SC: At the time –  
 17 CHAIRPERSON: When the shots were fired.  
 18 MR TIP SC: At the time of the shots that  
 19 would've been a matter of metres, Chair.  
 20 CHAIRPERSON: Metres.  
 21 MR TIP SC: Well, it's – we have it  
 22 there. Chair, the evidence of Mr Gegeleza is that some of  
 23 the strikers had come around. They'd gone into street C  
 24 and were proceeding into street D. There were some NUM  
 25 members there outside the NUM office below the words WPL.

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1 Gegeleza and his small group were on the other side on  
 2 street B and they were outside the NUM office so that would  
 3 be a matter of 10 metres, Chair.  
 4 CHAIRPERSON: If it was 10 metres was  
 5 there not time regard being had to the fact that the  
 6 strikers appear to have been armed with pangas and spears  
 7 and so on according to the NUM evidence, was there not time  
 8 for the NUM people to give a warning to shout and say if  
 9 you come any closer we will have to fire and possibly to  
 10 have fired a warning shot or two in the air? Was there not  
 11 time to do that?  
 12 MR TIP SC: Chair, in – well, let me  
 13 first of all address the question of whether there may not  
 14 have been warning shots. Mr Gegeleza's evidence is that he  
 15 heard three or more shots. We also know because it has  
 16 been put by my learned friend, Mr Mpofo, and it's the  
 17 evidence, it's common cause really, that it is upon the  
 18 firing of the shots that the strikers turn and run away.  
 19 Now, Chair, there's a logical –  
 20 CHAIRPERSON: - shots two people appear  
 21 to have been injured as a result of gunshot wounds.  
 22 MR TIP SC: Well, correct, but there's a  
 23 logical corollary to that, Chair. Two people are struck by  
 24 bullets and they are already running away. As a matter of  
 25 logic we submit that that means that there were shots that

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1 induced them to turn and begin to run away. Now, I can't  
 2 say to you that those were warning shots because that's not  
 3 something that I –  
 4 CHAIRPERSON: I'm sorry to interrupt,  
 5 would the answer not be that what we – in a prima facie  
 6 view obviously at the moment, but what I think prima facie  
 7 we should do is to refer this whole matter as to what  
 8 happened in relation to the shots and the injuries to the  
 9 provincial DPP with the recommendation that he have it  
 10 fully investigated. The docket has already been opened, in  
 11 fact a temporary murder docket has been opened, but it  
 12 would appear that the investigation stopped when the  
 13 commission started. They haven't fully investigated. And  
 14 then consider in the light of the information received as  
 15 part of the investigation whether there should be a  
 16 prosecution.  
 17 MR TIP SC: Yes.  
 18 CHAIRPERSON: If the evidence indicates  
 19 that there were warning shots and this is why the people  
 20 were running away then of course the other question would  
 21 be why if warnings shots were fired and people were  
 22 reacting to that there were then shots fired at a dangerous  
 23 level, but anyway, those are all matter that the DPP would  
 24 look at.  
 25 MR TIP SC: Yes.

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1 CHAIRPERSON: So we don't have to make a  
 2 finding. We can't really make a finding based on what  
 3 you're saying. It would be inadvisable for us to make a  
 4 finding which might prejudice any future criminal case if  
 5 there was one.  
 6 MR TIP SC: Yes.  
 7 CHAIRPERSON: The most we can do is what  
 8 I've said. Isn't that where we can leave it?  
 9 MR TIP SC: Chair, entirely. I'm in full  
 10 agreement with you with respect and perhaps I should've  
 11 made it clear that the only purpose of my going into the  
 12 question of whether there might have been warning shots was  
 13 merely to see that that is left open here.  
 14 CHAIRPERSON: Yes.  
 15 MR TIP SC: That one shouldn't have a  
 16 finding that there were not warning shots.  
 17 [11:23] But on the question that you raise about the fact  
 18 that there are dockets and that there should be  
 19 investigations that they were suspended because of the  
 20 commission. NUM has no quarrel whatsoever with that course  
 21 of action. From day one we declared ourselves to be in  
 22 favour of action against anybody who had conducted himself  
 23 or herself in a way that required it. So where one has if  
 24 I can just put it bluntly, one has the firing of shots it's  
 25 a complicated situation which is unfolding very quickly.

<p style="text-align: right;">Page 39494</p> <p>1 One has injuries. That must be investigated. There are  2 dockets. They must be pursued and NUM aligns itself  3 without reservation with that and I may add, Chair, to that  4 that Mr Mabuyakhulu also gave evidence that as he was  5 fleeing and he had got to [inaudible] workshop he received  6 blows from apparently a member of NUM who was part of the  7 group that as seeking to keep them on the move. That too,  8 Chair, that can't be called part of the defence of an  9 officer or self-defence. That too must be investigated and  10 again we align ourselves fully with that course of action.</p> <p>11 CHAIRPERSON: I'd like to ask you a  12 question on another aspect of your argument. I don't know  13 how much time you've got left but it's quite an important  14 point that I'd like to ask you about and that is of course  15 the case that is put up by the strikers is they went  16 unarmed, sorry to argue at this stage, to the NUM office.  17 They went to ask the NUM people nicely to take up their  18 demand or the claim for increase in emoluments and so  19 forth. And it was because NUM attacked them that they then  20 took arms and went to the koppie. That's their case and  21 their excuse for not handing down, handing over their arms  22 later is they were keeping them to defend themselves  23 against NUM and that's a matter you've addressed in your  24 heads. And what I want to ask you about is the factual  25 dispute as to whether they were indeed unarmed when they</p>	<p style="text-align: right;">Page 39496</p> <p>1 make, the statement they put up was they needed the –  2 retained their weapons to protect themselves against NUM  3 because NUM had attacked them when they'd gone to them  4 unarmed. That statement, if the evidence we're now talking  5 about is correct, that statement of the strikers was  6 untrue.</p> <p>7 MR TIP SC: That is our position. What  8 we have said in our heads of argument is that we accept  9 that after this confrontation at the NUM office that they  10 armed themselves more heavily, but that is an entirely  11 different proposition from the blunt one and we qualify it,  12 we say that was because they intended to revisit the NUM  13 office but this time there would be no retreat and there  14 would be no surprise.</p> <p>15 CHAIRPERSON: I can't remember the  16 number. I'll have to look at the statement. Perhaps you  17 can tell me. How many weapons did Mr Cassim who was the  18 weapons merchant in Marikana, how many weapons did he sell?  19 I know he sold his whole stock but how big was his stock?</p> <p>20 SPEAKER: 30, Chairperson.</p> <p>21 CHAIRPERSON: 30, yes, thank you.</p> <p>22 MR TIP SC: Yes.</p> <p>23 CHAIRPERSON: So the armaments which  24 were, again which were possessed by the strikers increased  25 by 30 if that was the only source of additional armaments.</p>
<p style="text-align: right;">Page 39495</p> <p>1 approached the offices.</p> <p>2 Now, you deal with that to some extent at the end  3 of paragraph 211 of your heads on page 75 where you quote  4 the evidence of Mr Gegeleza who says, describes, he saw the  5 marchers turn the corner from street A to street B coming  6 in the direction of the satellite police station and the  7 NUM office. They were singing songs and moving fast,  8 running. Their mood was aggressive. And then he says he  9 saw sticks, knobkieries, pangas and spears amongst them.  10 Now, what I'd like to ask you is was that evidence of Mr  11 Gegeleza challenged in any way in cross-examination? I  12 couldn't find any passage on the matter but have you any  13 submission to make in that regard?</p> <p>14 MR TIP SC: I don't recall that being  15 challenged. In fact for the greatest part his description  16 of what happened was not challenged. There was some cross-  17 examination around the question of pangas in the sense the  18 although he had given that evidence pangas had not been  19 included in his statement if I recall correctly and there  20 was a query raised at that level, but may I just say that  21 security officer Debukwane on ZZ3 is quite clear that what  22 he saw were knobkieries and spears amongst them so they  23 were not unarmed. Those are both of course potentially  24 lethal weapons.</p> <p>25 CHAIRPERSON: The suggestion that they</p>	<p style="text-align: right;">Page 39497</p> <p>1 MR TIP SC: Well, that's correct but let  2 me say this that, you know, Marikana of course is a place  3 where a great many people had weapons anyway and you will  4 recall that Mr Setelele says in his statement that there  5 was, there were weapons in the NUM office that morning.  6 Usually there are none. Some came from strikers from whom  7 they'd been taken. Others came from NUM members who in the  8 course of the events of the evening had gone home to fetch  9 some. So it wouldn't – Mr Cassim's stock would in no way  10 define – it went, but that would in no way define the  11 quantity of weaponry around. Chair, what's on – perhaps  12 if –</p> <p>13 CHAIRPERSON: I don't know if you saw Mr  14 Wesley sign that he held up.</p> <p>15 MR TIP SC: I was avoiding looking at him  16 but - I've been informed of it so it's -</p> <p>17 CHAIRPERSON: There was a popular song  18 when I was young called only five minutes more, that's what  19 the -</p> <p>20 MR TIP SC: My time is now brutally short  21 and if I may just make one further point, Chair, related to  22 what you've asked me and that is why did, why were the  23 strikers going there that morning. Was it this innocent  24 expedition or was it what we absolutely believed and that  25 is that they were attacking with the intention to burn it</p>

<p style="text-align: right;">Page 39498</p> <p>1 down? Now, in the course of the submissions made for AMCU  2 by my learned friend, Mr Gotz, he spoke about this  3 information that the strikers were going to come to the NUM  4 office to burn it down and he called it a rumour from an  5 unidentified source. Now, that's simply materially  6 incorrect and this is the particular point I want to make.  7 In our replying submissions we've identified, we  8 prepared a short condensed version of factors that relate  9 to the motivation that the strikers had when they came to  10 the NUM office. The first one is that Mr Debukwane on the  11 Friday evening, so this is in the course now of NUM having  12 demonstrated its opposition to the strike and its escort  13 functions, he receives information that they are going to  14 have a meeting on the following day because they are angry  15 with NUM because what NUM is doing is not to adhere to the  16 embargo, the work embargo. Mr Debukwane gets another  17 report the following day and so of course does Mr  18 Motlogelwa. He also hears it and it comes through on the  19 system that now they're going to the NUM office. Friday  20 evening it was they were going to go and challenge them.  21 Now it has become they are going to burn the office, but  22 where does this information come from? Is this an  23 unidentified rumour? It's not. It comes from a trained  24 Lonmin security operative who is posted there on the ground  25 for the very purpose of discerning what it is that is being</p>	<p style="text-align: right;">Page 39500</p> <p>1 One could hardly have a better quality hearsay statement  2 than that. Chair, I thank you for the –  3 CHAIRPERSON: - the first sentence.  4 Thank you. Thank you very much.  5 MR TIP SC: Thank you, Chair.  6 CHAIRPERSON: I think Ms Nkosi Thomas,  7 you're next.  8 MS THOMAS: Thank you, Chairperson.  9 Thank you, Chairperson, honourable commissioners. We have  10 been allocated 45 minutes. We have no intention of using  11 the entire 45 minutes and we're happy to donate the  12 remaining time to my learned friend, Mr Semenya.  13 CHAIRPERSON: The donations have to be  14 made to me. I decide whether I'm going to keep them or I'm  15 going to hand them out, but I hear the suggested  16 destination of the donation.  17 MS THOMAS: Yes, perhaps all I can do is  18 to recommend that as chairperson considers the allocation  19 of that time Mr Semenya should be given preference. Chair,  20 we have filed brief heads. We have no intention of  21 regurgitating, repeating that which we say in our heads but  22 this is what we propose to do before you this morning. We  23 propose to deal briefly with the policy framework issues.  24 We also propose to deal with the facts to the extent that  25 they pertain to the former minister of police and those</p>
<p style="text-align: right;">Page 39499</p> <p>1 discussed and what it is that is being planned and he  2 reports that in to Lonmin security, its command centre. It  3 becomes part of the record. Now, that is not a rumour from  4 an undisclosed source and incidentally he's not  5 unidentified. Last week Ms Pillay when the question arose  6 informed the commission that in fact we know who it is.  7 There's a statement. We have a name. He just won't give  8 evidence for fear of his personal safety. He's not  9 unidentified. But when it comes, Chair, to classifying the  10 weight of hearsay evidence we submit that far from this  11 being a rumour that passes from some incidental person on  12 the scene –  13 CHAIRPERSON: I don't want to interrupt  14 you unduly. The five minutes is up but the point you're  15 making is a point that I think you can finish off in two  16 sentences as long as the sentences aren't too long.  17 MR TIP SC: Yes, all right, two  18 sentences, thank you, two short sentences.  19 CHAIRPERSON: Don't take advice from Mr  20 Mpofo on short sentences. I'm not sure that his practice  21 is necessarily the correct one. I say that in a friendly  22 way without being -  23 MR TIP SC: This report is from a high  24 quality source, part of his trained function, and  25 deliberately given for the purpose of a security operation.</p>	<p style="text-align: right;">Page 39501</p> <p>1 facts would really be the fact around the political  2 pressure basis. And having done so, Chairperson, we will  3 then deal with our learned friend's submissions in  4 particular our learned friend, Mr Mpofo's submissions, our  5 learned friend Mr Ngcukaitobi's submissions and the  6 evidence leaders, we part ways with them on a tiny issue  7 and we will then deal with that but for the most part the  8 evidence leaders and us are aligned on major issues.  9 As regards, Chair, the policy framework issue it  10 is not controversial. Perhaps one should start there.  11 Exhibit R before this commission being the policy that  12 governs situations such as the situation that occurred on  13 the 16th has been determined by the minister. He says in  14 evidence that it is not an event but it's the  15 implementation thereof. It's going to take a while.  16 Certain pieces of the policy have been implemented but he's  17 yet to roll out some of the components thereof. He cannot  18 we submit be criticised, Chairperson, for the policy not  19 having been fully rolled out. He explained fully why that  20 has not, why that is not so.  21 What is important is that the fact that the  22 policy has not been fully rolled out cannot be, is not the  23 cause as it were of what happened on the 16th and the days  24 prior. This we say at paragraph 15 of our heads of  25 argument and we rely in that regard on what Professor Gary</p>

<p style="text-align: right;">Page 39502</p> <p>1 White says. He says in that regard that it is not the 2 policy framework that explains the disastrous operational 3 outcome that was witnessed in the police actions at 4 Marikana particularly on the 16th, so to the extent, 5 Chairperson, we concede it has not been fully rolled out it 6 is not the, it was not because of that that what occurred, 7 occurred, Chairperson. Secondly as far as the policy 8 framework is concerned, Chair, there is the report that 9 served before this commission, the NDP report. The 10 evidence suggests that – uncontradicted but it is now 11 government policy. Certain portions of it have been 12 implemented, for example the demilitarisation – 13 CHAIRPERSON: The national commissioner 14 seems to have a different understanding of how the 15 minister, former minister, you concede that her 16 understanding was incorrect and that that is government 17 policy and needs to be implemented. 18 MS THOMAS: I didn't follow. I beg your 19 pardon, Chairperson. 20 CHAIRPERSON: The national 21 commissioner's evidence about that chapter of the national 22 development plan seem to be different. She said it was 23 just a discussion document. She was asked whether it was 24 going to implemented and when and so forth and she gave a 25 different answer, but I'm saying I'm putting to you that</p>	<p style="text-align: right;">Page 39504</p> <p>1 place. The minister would have been remiss in the extreme 2 had he said – had he having been so informed sat on the 3 information, sat on his – I don't want to use – not 4 conveyed accordingly, I don't want to use unhappy words, 5 Chair. 6 CHAIRPERSON: Sat on his chair perhaps. 7 MS THOMAS: Right, thank you. He would 8 have been criticised. It's a question of – and I think our 9 learned friends also on behalf of Lonmin used the phrase 10 "damned if you do and damned if you don't". The question 11 really is can it be said that the minister overstepped the 12 line, the bright line between meddling and oversight? 13 There is no evidence that suggests that such, that line has 14 been breached. Some of our colleagues agree. In fact 15 perhaps I'm getting ahead of myself but, I mean, the heads 16 have been read. I don't have to go page by page. But 17 there is a judgment that we refer to in our heads and the 18 evidence leaders referred to the Judge, judgment 19 Constitutional Court where the Constitutional Court makes 20 it clear that this, the kind of oversight that we have, the 21 executive exercising oversight over SAPS is part of our 22 constitutional scheme. It's not problematic. 23 There's nothing wrong with that. What becomes a 24 difficulty is meddling, i.e. the minister instead of 25 exercising his oversight functions delves into matters</p>
<p style="text-align: right;">Page 39503</p> <p>1 that's not your argument. You argument on behalf of the 2 minister is it is government policy. 3 MS THOMAS: Indeed. 4 CHAIRPERSON: And it is getting 5 implemented. 6 MS THOMAS: Yes, and certain portions of 7 it have been implemented i.e. the demilitarisation is 8 underway as we speak. That now takes us, Chair, to the 9 allegations of undue influence. We've dealt with those in 10 our heads. That debate starts from page 10 of our heads. 11 And all that there is to be said about this, Chairperson, 12 is that there is no evidence before this commission. Our 13 learned friend, yes, our learned friends for the families 14 in particular sought to make a big issue out of the fact 15 that the minister was called but two gentlemen, Mr Zokwana 16 and Mr Ramaphosa on the 12th, and having been so called he 17 conveyed the message to the operational team. They sought 18 to interpret that as political influence but it's 19 impossible, it was impossible in argument of our learned 20 friend, Mr Ngcukaitobi, to get past your Kalahari, Chair, 21 your example, proverbial Kalahari farmer issue. And that 22 is precisely because there is nothing controversial. 23 There's absolutely nothing wrong with either Mr Joe Soap or 24 indeed Mr Ramaphosa calling the minister of police and 25 saying intervene because acts of criminality are taking</p>	<p style="text-align: right;">Page 39505</p> <p>1 operational. There is no suggestion whatsoever before this 2 commission that the minister sought to give operational 3 directions to the generals. If anything the evidence is 4 overwhelming that the minister merely sought to validate 5 what is happening in Marikana. I hear, I have received 6 information that acts of criminality are underway. Is that 7 a fact? Then he gets told, yes, it is a fact. What is 8 happening? Are you operational guys taking care of the 9 situation? Yes, minister, we are in fact actively seized 10 with the situation and that's the general tenor of the 11 numerous conversations that he had with his operational 12 team, Chairperson. 13 [11:42] There is no evidence of the line being crossed, 14 there's no evidence of meddling, there's no evidence before 15 this Commission that operational orders have been granted, 16 were granted at any stage whatsoever by the Minister to the 17 operational team. And we accordingly submit that the 18 proposition that the Minister exerted undue pressure on the 19 operational team solely being mentioned merely for being 20 rejected, Chairperson. I'm now quickly going to move to – 21 deal with my learned friend, Mr Dali Mpofu's heads of 22 argument and what he says. 23 CHAIRPERSON: I was proposing to take the 24 tea adjournment around about now, I'll leave it to you to 25 decide whether you want me to take the tea adjournment now</p>

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1 and you can get refreshment to strengthen you to deal with  
 2 Mr Mpofu after the tea adjournment or whether you want to –  
 3 MS THOMAS: I'd rather confront Mr Mpofu  
 4 when I'm fresh, Chairperson. After the tea adjournment.  
 5 CHAIRPERSON: 15 minutes.  
 6 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 7 [12:01] CHAIRPERSON: The Commission resumes.  
 8 Yes, Ms Nkosi-Thomas? You were going to deal with the  
 9 allegations of undue influence from pages 10 and following  
 10 of your heads, I think.  
 11 MS NKOSI-THOMAS SC: Indeed, Chairperson.  
 12 We now propose, the submissions that we've made already  
 13 sought to summarise the crux of what we say there in the  
 14 written heads. I propose now, we propose to deal with Mr  
 15 Mpofu's, the points that he makes in his written heads as  
 16 regards this particular thesis.  
 17 He deals with this issue from page 116 and  
 18 following of his heads. At paragraph 337 of the heads the  
 19 following is said, is stated, Chairperson, that "After the  
 20 end of the NMF meeting," now this would have been on the  
 21 15th in the evening, 15th of August, "an extraordinary  
 22 sitting of the NMF was convened to discuss the situation in  
 23 Marikana and this was chaired by the National  
 24 Commissioner." He then continues to say, "It was at this  
 25 meeting that the decision was taken to proceed to stage 3

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1 of the operation or the tactical phase in the event that  
 2 the anticipated negotiations would fail."  
 3 At paragraph 340 says, "The National Commissioner  
 4 was also in telephonic contact with Minister Mthethwa  
 5 regarding this situation," and this is the 15th now and what  
 6 emerges from what is stated here, Chairperson, it appears  
 7 to be the case that the actus reus, the conduct, the  
 8 morally reprehensible conduct complained of on the part of  
 9 the Minister that yielded the unfortunate outcome on their  
 10 thesis is this that is found there, the fact that it was  
 11 decided on the 15th in the evening to execute stage 3, and  
 12 340, "The Minister was kept informed of that decision."  
 13 341, "She informed the Minister," so proceeds the argument,  
 14 "She informed the Minister that stage 3 of the operation  
 15 would be implemented." Then this is according to the  
 16 initial statement, that's something else, I'll leave that  
 17 out. 342, "It is respectfully submitted that the  
 18 Commission must disbelieve the evidence of the National  
 19 Commissioner on this point." Okay, and "this Commission  
 20 must proceed from the point of view that she informed the  
 21 Minister of the decision to implement stage 3 of the plan."  
 22 All of this is happening on the 15th, and then having laid  
 23 that foundation our learned friends proceed to conclude at  
 24 paragraph 361 of the heads that "In view of the foregoing  
 25 and to cut to the chase," this is what is stated there, "it

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1 is" – I think it must read "it is submitted," that must be  
 2 a typographical error - "it is submitted that a finding  
 3 ought to be made that actionable failure," and so on, "and  
 4 that the following persons should be charged." Mr Mthethwa  
 5 is mentioned there, 361.2, as accused number 2.  
 6 Of course having had the interchange, the  
 7 argument by our learned friends and the interchange with  
 8 the Chair and the Commissioners, this recommendation  
 9 properly construed should mean that a prima facie case has  
 10 been established so as to warrant a referral of the matter  
 11 to the NDP for further investigation. This is how perhaps  
 12 it should have been couched, but the foundation of that  
 13 recommendation by our learned friends is based on an  
 14 extraordinary meeting of the 15th in the evening, a meeting  
 15 in respect of which it is common cause the Minister was not  
 16 in attendance. The objective evidence before this  
 17 Commission demonstrates that from that time, the evening of  
 18 the 15th, until the occurrence of the tragedy the Minister  
 19 never spoke to either the Provincial Commissioner or the  
 20 National Commissioner. So the connection, the nexus is  
 21 unclear, with respect. Why is it that that meeting, which  
 22 is the one according to our learned friends that decided on  
 23 the implementation of stage 3, which according to our  
 24 learned friends it is stage 3 that led to the demise and  
 25 the injuries sustained by the protesters, where is the

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1 connection? There is simply none. One will look in vain  
 2 at the telephone records to find a connection because the  
 3 only connection that can be there would have been on the  
 4 assumed telephonic contact, which is what he refers to at  
 5 page 340. This is the one basis that this proposition  
 6 really it has been mentioned simply for purposes of  
 7 rejection by this Commission, with respect, Chair.  
 8 Now the conduct again in the sense of actus reus  
 9 relied upon, it seems, it seems – it's not clear, but it  
 10 seems to have been the phone calls between Mr Ramaphosa, Mr  
 11 Zokwana on the one hand, and the Minister, and this actus  
 12 reus is a moving target because when one looks at the  
 13 totality of the evidence, at some point the political  
 14 rhetoric is the actus reus that has the causal effect, but  
 15 for now we'll just confine ourselves to this second actus  
 16 reus which appears, occurs at paragraph 359 of our learned  
 17 friends' head. There it is stated that the unlawful  
 18 activities and utterances of the two commissioners were a  
 19 response to a political, or to the political pressure  
 20 exerted by Mr Ramaphosa via Minister Mthethwa and so on, as  
 21 the unlawful conduit.  
 22 Now having said this, although we've made our  
 23 submissions around the absence of evidence that shows  
 24 meddling, there's no such evidence, but be that as it may,  
 25 our learned friends having made this statement then proceed

<p style="text-align: right;">Page 39510</p> <p>1 elsewhere in the heads to mention the so-called, what they 2 call game changers. Now those game changers we submit, 3 Chair, that properly construed they constitute novus actus 4 because what is said there is that there was a revenge 5 issue that arises. I use that as an example, but we submit 6 that all of those so-called game changers, if the actus 7 reus which our learned friends are relying on is the 8 telephonic conversations of the 12th, then the chain of 9 causality was broken there on their own version by the 10 revenge issue and all of the game changers that they 11 mention, including the meeting of the NMF which according 12 to their argument is the one that decided to escalate to 13 stage 3.</p> <p>14 So Chairperson, we submit that there is no basis 15 whatsoever to support the recommendation made by our 16 learned friends that a prima facie case in the first place 17 has been made out which should, on the basis of which this 18 Commission should recommend that further investigation be 19 conducted by the NPA as far as the Minister is concerned so 20 as to establish culpability or otherwise, there's simply 21 nothing to justify such a course, so therefore we submit 22 that no such recommendation should be made. It's not 23 justified on the totality of the evidence before this 24 Commission. These submissions that we make apply with 25 equal force to Mr Ngcukaitobi's proposal, or rather</p>	<p style="text-align: right;">Page 39512</p> <p>1 down in cases like Govan &amp; Skidmore and other cases which 2 followed it in the Appellate Division. So I'm not sure 3 that necessarily affects the result of your argument, but 4 just we've got to set the correct test –</p> <p>5 MS NKOSI-THOMAS SC: Yes. 6 CHAIRPERSON: - in order to get the 7 correct answer. So the real question you have to address 8 is whether it is a more plausible inference than any other 9 inferences that there may be, that the Minister's remarks 10 had the effect of bringing about closing the ranks and 11 whether one can go further and infer from the fact that he 12 made those remarks that the submission made by the evidence 13 leaders is correct.</p> <p>14 MS NKOSI-THOMAS SC: Chairperson, thanks, 15 as regards the, for that helpful advice, he says advice, 16 yes. But it does not, Chair, with respect, alter the 17 outcome of the conclusion that we would have, applying the 18 same test because we say so because the Minister had - 19 first of all he is not saying, he's not judging the conduct 20 of what happened the previous day. That's the first thing. 21 Secondly, it cannot be disputed that there had been acts of 22 criminality. The only issue at that stage is that it was 23 unclear who had committed the acts of criminality, and so 24 on. So all that he's saying is that to the extent that you 25 conduct yourself as a professional force, not only –</p>
<p style="text-align: right;">Page 39511</p> <p>1 recommendation, and the fact that the matter should be 2 referred for further investigation.</p> <p>3 What remains to be dealt with is what the 4 evidence leaders deal with in their heads, namely the 5 closing of ranks. They deal with that at page 502 of their 6 written submissions and they arrive at that conclusion 7 based on the press conference, the statement that the 8 Minister made after the fact, addressing, I think it was a 9 parade, addressing the members of the police service, 10 mentioning things like "We appreciate a professional police 11 service; we appreciate your effort of maintaining and 12 upholding the rule of law," and so on. The interpretation 13 that they seek to ascribe to the content of that address by 14 the Minister is that it amounts to a closing of ranks. 15 There is no direct evidence as far as the Minister is 16 concerned to suggest that he was part of any such scheme, 17 if indeed such scheme does exist. In that regard we submit 18 that it can hardly be said that the only reasonable 19 inference that falls properly to be drawn from that address 20 by the Minister is that he was indeed participating –</p> <p>21 CHAIRPERSON: I'm not sure that that's 22 the test though. If the test is the civil standard and not 23 the criminal standard then the test is not whether it's the 24 only reasonable inference but whether it's the more 25 probably or plausible inference. That's the law as laid</p>	<p style="text-align: right;">Page 39513</p> <p>1 service – not only in respect of yesterday, but ever since. 2 We have to remember that this police service would have 3 been dealing with getting Agliotti and the likes in jail 4 and so on, so it wouldn't have been prudent for the 5 Minister on that day, simply because of what had happened 6 yesterday, which was yet to be investigated, to start 7 castigating and judging and being judgmental. So all that 8 he's saying is that to the extent that you've acted 9 professionally, and I assume that you've acted 10 professionally as you've been doing so in the past, I thank 11 you for that. To the extent that you've acted upholding 12 the rule of law, yes, I'm grateful for your service to this 13 country. He's not passing any moral judgment whatsoever. 14 So therefore the conclusion of the closing of ranks, Chair, 15 doesn't follow from that address, we submit.</p> <p>16 Chair, just one second, please, if I may be 17 indulged to check with my learned colleagues. Chairperson, 18 those are our submissions.</p> <p>19 CHAIRPERSON: Thank you, Ms Nkosi-Thomas. 20 Mr Semanya, you're next. 21 MR SEMENYA SC: Mr Badenhorst is. 22 CHAIRPERSON: I'm sorry, I beg your 23 pardon. Mr Badenhorst, sorry, I had my order, batting 24 order wrong. 25 MR BADENHORST SC: Chairperson,</p>

<p style="text-align: right;">Page 39514</p> <p>1 honourable members, we appear on behalf of the Department 2 of Mineral Resources. Seated next to me is my instructing 3 attorney, the State Attorney, Mr Mathebula. We appreciate 4 this brief opportunity to address you and unsurprisingly 5 almost forgotten in the process, Chairperson – 6 CHAIRPERSON: I didn't forget you. I 7 thought you were after Mr Semenya. 8 MR BADENHORST SC: No, no, I shouldn't 9 have said that. I withdraw that statement, Chairperson. 10 Chairperson, what we thought would perhaps be the most 11 helpful approach is to focus – or highlight is perhaps more 12 accurately stated – highlight seven points which were 13 raised in the written submissions, and these are the seven 14 points; firstly the interaction between Mr Ramaphosa and 15 Minister Shabangu in the days shortly before the 16th of 16 August; secondly the Lonmin siege comment, that is the 17 comment made during the speech on the 24th of May 2013; 3, 18 the undue influence charge, which is really related to 19 point 1; fourth, the requests for an adverse finding and 20 the referral made by counsel for the injured and arrested 21 persons; 5, the alleged failure to supervise the labour and 22 other licence conditions applicable to Lonmin; and the two 23 last points that – 24 CHAIRPERSON: Sorry, the fifth point as I 25 understand it is no longer within our terms of reference.</p>	<p style="text-align: right;">Page 39516</p> <p>1 because – and I do not intend repeating what I'm sure 2 you've heard several times now – it would have been 3 surprising for the Minister not to take the calls or to in 4 some way respond to it. Even if there was influence, even 5 assuming what she says is wrong and that she was in fact 6 influenced, it had no consequence. That with respect is 7 ultimately what we respectfully submit is your interest in 8 what was done or not done. 9 If I may then turn to the second point, and that 10 is the so-called siege comment. Now there was obviously a 11 great deal of reaction to that particular comment and there 12 we say again you're dealing with a meeting of the NUM shop 13 stewards on the 24th of May 2013. Now what we say in our 14 submission is that whatever she in fact intended to say or 15 did say is again something that is so far after the event 16 that we cannot, with respect, see how that should have an 17 impact on your findings in this inquiry. 18 I then come to the undue influence point. Now 19 this is of course a charge that the Minister has denied. I 20 have indicated that it is related to the first point. We 21 would simply, as we attempted to do, point out that there 22 is an interesting corroboration of the Minister reaching an 23 independent view in the form of her so-called Brakpan 24 statement and also her interview that morning with Mr 25 Gwala. She clearly was concerned about what had been</p>
<p style="text-align: right;">Page 39515</p> <p>1 MR BADENHORST SC: That is the – 2 CHAIRPERSON: I think in the light of the 3 deletion of paragraph 1.5 that's no longer within our terms 4 of reference, so – 5 MR BADENHORST SC: As it pleases you, 6 Chairperson. That is precisely the point we wish to make 7 and have made in our comments, so I would simply delete 8 that – 9 CHAIRPERSON: What was the sixth point 10 that's now the fifth? 11 MR BADENHORST SC: The sixth, the new 12 fifth point is the shoot-to-kill comment. That was the old 13 comment in April 2008, and finally, which would now be 14 number 6, the alleged failure by the Minister to discharge 15 her duties. 16 Chairperson, honourable members, the first point, 17 and that is the exchanges between Mr Ramaphosa and Minister 18 Shabangu, we submit that there has been given to you a 19 satisfactory explanation by the Minister. The fact that 20 there are some variances between their recall or versions 21 would in fact as usual be unsurprising. It would perhaps 22 be more questionable if they had exactly the same version 23 or the same recall of what had happened. 24 What we say also is in any event we say that the 25 very substructure of this charge is in fact devoid of merit</p>	<p style="text-align: right;">Page 39517</p> <p>1 happening and she said the criminal element, as she called 2 it during her evidence, had crept into the mix. 3 [12:21] And there again, with respect, we simply – 4 perhaps we should underscore the point. Whether or not she 5 was influenced she is after all the Minister of Mineral 6 Resources, so anything that affects that industry and this 7 clearly was a major effect on the industry as we all have 8 seen from the events at the time and since then, it would 9 have been irresponsible for her not to take the call or not 10 to do something about it. And with respect, what she did 11 is beyond reproach we submit. That brings me to the 12 finding that you are requested to make and that is – we 13 deal with it at page 13 of our table of submissions, the 14 statement made by the injures and arrested persons' 15 representative is that the involvement of the Minister in 16 any of these sordid matters should at least attract an 17 adverse finding against her as an individual or her 18 department or a referral for investigation of her conduct 19 by the Ethics Committee of Parliament and or the Public 20 Protector. We submit there's no merit in these requests or 21 submissions. We would ask what adverse finding and 22 referral of what conduct? It's simply left up in the air 23 and is no more than, we submit, than counsel's debating 24 points, devoid of substance. I'm left then with the two 25 last points. The shoot to kill comment on 10 April 2008,</p>

<p style="text-align: right;">Page 39518</p> <p>1 now again that was a statement made as you may recall, from  2 the press report which was quite frequently referred to  3 earlier in the proceedings by Mr Bizos. It is a comment on  4 which people will have their views, but with respect, it  5 was a statement made, as we understand from that press  6 report, to beleaguered residents of certain areas who had  7 been facing major crime problem and we submit the Minister  8 in fact refused to answer questioning on it. With respect,  9 correctly so because it is irrelevant to the business of  10 the this Commission.  11 We then finally deal with the failure to  12 discharge duties. Now this is how the charge is  13 formulated. "Failed to discharge her duty to advance the  14 lot of the historically disadvantaged South Africans."  15 Merely by stating that proposition exposes its flaw. It is  16 so vague, it was also to the best of what I could find in  17 the record, not put to the Minister in a way that she could  18 logically deal with it. And we have asked you in our  19 submission to in this regard apply the rule in Brown versus  20 Dunn which, of course, the Commission is very familiar  21 with. This sort of charge should be put to a witness so  22 that the witness can deal with it.  23 CHAIRPERSON: Before we even get there,  24 is it covered by the terms of reference? Would that not  25 also be a matter that – has fallen away, that issue?</p>	<p style="text-align: right;">Page 39520</p> <p>1 argument goes, where it points to criminal wrong doing on  2 the part of the police. That you direct that to be further  3 investigated and possible consideration being given by the  4 DPP to prosecute. You have also been asked similarly that  5 where there is pointers for delictual liability on the part  6 of the Minister.  7 CHAIRPERSON: Vicariously on the part of  8 the Minister, vicarious liability on the part of the  9 Minister.  10 MR SEMENYA SC: That's correct, Chair.  11 Whether it's vicarious liability on the part of the  12 Minister that the families and injured must rest on your  13 recommendation that you have found evidence of there being  14 possible civil liability of one kind or another. Now,  15 Chair, all this argument misunderstands what a Commission  16 is and we hope to explain it, Chair, that for my part I  17 would be seriously surprised if the President receives your  18 report which is an advice to him that says there are  19 pointers of criminal wrong doing on the part of the  20 National Commissioner of Police, please have this  21 investigated and where evidence prima facie points to  22 culpability then have the DPP prosecute. The President  23 shouldn't be interested in that and I can make the  24 submission that it must correct that the President knows  25 there are instruments in this country who's primary</p>
<p style="text-align: right;">Page 39519</p> <p>1 MR BADENHORST SC: Yes.  2 CHAIRPERSON: It has fallen away in light  3 of the leash in paragraph 1.5.  4 MR BADENHORST SC: With respect so, Mr  5 Chairperson, that is indeed the case in any event, as you  6 say. May I have moment just to confer with my attorney?  7 Thank you, Mr Chairman, that is all that we have to say.  8 CHAIRPERSON: Thank you, Mr Badenhorst.  9 Mr Semenya, I think it is your turn now.  10 MR SEMENYA SC: It indeed is, Chair.  11 Chair, I think in the nature of things we're going to field  12 a whole number of issues which have been raised against the  13 conduct of the SAPS and please pardon us –  14 CHAIRPERSON: I think as far as I can see  15 they've all been raised so far in the debate. It's not  16 necessary for us to raise them again, you know what they  17 are. Many of them are raised, I think all of them are  18 raised in the heads of your learned friends. So it's not  19 necessary for us to raise matters. Unless something arises  20 specifically, of course, but we must give you full  21 opportunity to deal with these issues.  22 MR SEMENYA SC: Thank you, Chair.  23 Perhaps the better place to start is this, you have been  24 urged as a commission by various parties to make  25 recommendations in relation to police action which, as the</p>	<p style="text-align: right;">Page 39521</p> <p>1 statutory responsibility it is to do that. They don't need  2 a recommendation from you, Chair, with respect to go by way  3 of advice to the President to go and tell the Independent  4 Police Investigative Directorate, in fact the nomenclature  5 just tells you. Their function is to investigate  6 independently where there are complaints about police  7 culpability. So should they wait for you, Chair, as a  8 commission to make that recommendation? What does the  9 President say to them? Whereas you have a statutory  10 responsibility to do this thing, please on the advice of  11 the Commission of Inquiry Marikana, I now advising you to  12 do that which is your function. So it is completely  13 unnecessary to explore that terrain, it's just outside your  14 province. But also, Chair, your report is an advice to the  15 President, it cannot seek to be legal advice to the  16 families and the injured. You would not be speaking to  17 them. If there is vicarious liability, so there is, I mean  18 they are capably represented by my learned colleagues, Mr  19 Mpofo and Mr Ntsebeza who would tell them that if they're  20 able to meet the elements of a delictual liability they can  21 sue the Minister vicariously to recover whatever damages  22 they're competent to do. But let me interrupt myself here,  23 Chair and say there is something even much more profound  24 because unless we understand what a commission does –  25 CHAIRPERSON: Mr Semenya, before you</p>



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1 carry on, in the terms of reference, at the very end we are  
 2 enjoined where appropriate to refer any matter for  
 3 prosecution and further investigation or the convening of a  
 4 separate inquiry to the appropriate law enforcement agency,  
 5 government department or regulator regarding the conduct of  
 6 certain persons. You are correct in saying that we won't  
 7 refer those to the President and say you do the necessary  
 8 because for the reasons you give, it's not for the  
 9 President to do the necessary. But clearly one of the  
 10 things he wants us to do, that he's told us to do is if we  
 11 think it's appropriate we must do the things that I've read  
 12 out. So it's therefore not correct to say that the  
 13 question of possible prosecutions and so forth is not a  
 14 matter we need consider because the terms of reference tell  
 15 us we must. But in the way which is set out in that term  
 16 of reference, i.e. to refer it where appropriate, to the  
 17 appropriate agency which in that case would be I take it  
 18 the Provincial Director of Public Prosecutors.

19 MR SEMENYA SC: Yes, Chair, I thought I  
 20 was careful enough to say in relation to the police. There  
 21 is already a statutory institution established by law in  
 22 matters of that kind.

23 CHAIRPERSON: I understand that, but the  
 24 word used is any matter, any matter and any matter is wide  
 25 enough to cover the conduct of the police, that's why the

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1 conduct of the police has been the subject of investigation  
 2 here. Apart from the fact that the conduct of the police  
 3 is also specifically dealt with in an earlier term of  
 4 reference. So that's why we've - in accordance with that  
 5 term of reference we've investigated at great length the  
 6 conduct of the police and we are then asked to make certain  
 7 findings, pursuant obviously to answering that term of  
 8 reference. But we're also told that we must, where we  
 9 consider it appropriate refer any matter which would  
 10 include matters relating to the police, Lonmin, AMCU, NUM  
 11 and the individual strikers to the prosecuting authorities  
 12 if we consider appropriate.

13 MR SEMENYA SC: I'm resisting the  
 14 proposition you're putting to me, Chair, I'm saying as a  
 15 matter of fact IPID is already doing that. That's the only  
 16 point I'm making. And Chair, I was about to say that the  
 17 other significant factor that tells us what functions  
 18 commissions do is this. All right we immediately look at  
 19 section 84.2F and you see those are the constitutional  
 20 powers of the President to appoint a commission. Then next  
 21 you realise that that happens under the Commissions Act and  
 22 there is something very, very instructive about that if you  
 23 look at it. It says "A commission of inquiry is to  
 24 investigate matters of public interest." Not to adjudicate  
 25 them, to investigate them. And then one goes to the terms

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1 of reference to go and see exactly what your instruction is  
 2 in terms those terms of reference by the commission to the  
 3 commission it says "Please investigate." Not to  
 4 adjudicate. And might we make this point, Chair, that if  
 5 you look for instance at the Inquest Act you'd see that the  
 6 function of an inquest is to investigate and if there is  
 7 any finding of prima facie criminal wrong doing to then  
 8 take the matter forward. I'm just saying at the very  
 9 highest. You'd also see that is often presided by a  
 10 judicial officer of one kind or another. Even where there  
 11 is conclusive evidence before an inquest it cannot make a  
 12 finding of murder for instance. Even if it can identify  
 13 who the killer is and that the death is unlawful and what  
 14 have and there's a good reason why that is so, why the  
 15 statute curbs its area of investigation to be purely that.  
 16 You do not want to end up with an inquest finding that  
 17 somebody has been murdered and in respect of the same event  
 18 a criminal court says the person has been acquitted. You  
 19 would then be having two structures which are having  
 20 conflicting opinions. So I caution by the same vein,  
 21 Chair, we ought to be careful in this Commission not to  
 22 make judicial findings and by that I mean finding certain  
 23 things to have been unlawful and finding certain things to  
 24 be civilly liable and the like. There are going to  
 25 processes I suspect where the Constitution reposes judicial

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1 function on civil courts and criminal courts that are going  
 2 to pronounce themselves one way or another on these issues.  
 3 So it would seem to us that at the very highest where the  
 4 evidence is available to enable the Commission to go down  
 5 that road to say there appears to be no reason to justify  
 6 the killing of Mr whoever. That's high you can go, Chair.  
 7 You cannot, as a commission with a duty to investigate then  
 8 go the distance of saying that so and so killing was a  
 9 murder or something. And if the evidence is available to  
 10 say he was murdered by Joe Soap because by that you'd now  
 11 be doing judicial function not an investigative function.  
 12 Now that leapfrogs me into the next point. And that is why  
 13 it is glibly said in some of the arguments that there is an  
 14 onus and the SAPS in the face of a killing if it cannot  
 15 justify it, those are the words used, then there must be  
 16 findings and recommendations that go in a direction that we  
 17 have already discussed. And then there are words to the  
 18 effect that there are parties before you which again  
 19 confuses the point. There's no party before you, Chair.  
 20 You are a Commission of Inquiry with a duty to investigate.  
 21 There are even questions of what test must be applied or no  
 22 test to be applied, an investigative body, Chair, should be  
 23 able to say you know what there's a reasonable suspicion  
 24 that this is true. I can't find it on the available  
 25 evidence, but there are pointers to that direction and Mr

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1 President this is the story and this is what we recommend.  
 2 Personally I again would be surprised if the President is  
 3 interested in what credibility profile Mr X offers.  
 4 Whether he's a credible witness or not a credible witness,  
 5 I wouldn't think that to be particularly important to the  
 6 President. But if there is a reasonable possibility that  
 7 what he says, in fact explains what the tragedy of Marikana  
 8 is and that got us into domestic shame and international  
 9 condemnation is true I think the President is interested.  
 10 In making sure that the policy formulations they do as  
 11 government and other measures they are able to do, even  
 12 legislatively, that can help South Africa avoid another  
 13 Marikana. That is what he would be interested in. You  
 14 cannot say in the face of that evidence which holds a  
 15 reasonable suspicion to be true to say what, no, Mr  
 16 President, I'm not going to tell you about it, it's because  
 17 it did not pass a threshold. What threshold? There are no  
 18 thresholds here.

19 CHAIRPERSON: Before you carry on, I had  
 20 a problem at the very beginning of this line of argument.  
 21 The terms of reference say the following. "The Commission  
 22 shall enquire into, make findings and report on and make  
 23 recommendations concerning the following, taking into  
 24 consideration the Constitution and other legislation  
 25 policies and guidelines." That's at the very beginning of

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1 the terms of reference. So I think I must have  
 2 misunderstood you because I thought you said that we  
 3 mustn't make findings, but if we say – can you imagine what  
 4 would happen if we say to the President, thank you, Mr  
 5 President, we've spent over two years, spent how many  
 6 million rand in sitting holding investigations. The  
 7 investigations are all there in the record, in the  
 8 exhibits. We're not going to make any findings because we  
 9 mustn't. We'll make some recommendations and that's all."  
 10 That can't be right. Perhaps I misunderstood you, so  
 11 perhaps you could [inaudible] and reformulate to the  
 12 Commission in a way that I can understand.

13 MR SEMENYA SC: The fault may not yours,  
 14 it might just be my ability to articulate myself as proper  
 15 as I should. Of course we're going to be discussing in the  
 16 course of our submissions what factual findings can be  
 17 made. Was the proper plan – was the plan proper, could it  
 18 have been done differently and a whole hose of other  
 19 things. Of course that's going to – the submission was  
 20 make the factual findings which you are entitled to make as  
 21 an investigative body. Please do not do adjudicative  
 22 functions, that's the difference between -  
 23 [12:41] That's what I had meant to convey with that  
 24 submission, Chair. Perhaps let me say, Chair, that  
 25 difficult as it is, but perhaps my duty as a lawyer entails

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1 that I do that. Speaking for myself personally I would  
 2 hope this process was to yield restoration. I hope it was  
 3 to yield reconciliation. I would hope there would have  
 4 been compensation and such similar things because as a  
 5 human being I think it touches me closely, but as a lawyer  
 6 I must point out that unlike something like the Truth and  
 7 Reconciliation Commission which operated on a particular  
 8 statute, which statute gave it powers to make reparations  
 9 and to pardon if certain criteria is met in relation to the  
 10 particular evidence of one or other individuals, this  
 11 Commission doesn't have those powers. Your powers are  
 12 contained and constrained by the Commissions Act and the  
 13 terms of reference. But my heart goes out to those who  
 14 suffered injuries and lost their loved ones in all of this.  
 15 Chair, my learned friend Mr Chaskalson correctly  
 16 says this to us; please let us not forget the horror that  
 17 day was. Let's not get numbed by the effluxion of time,  
 18 which is 24 months or so, and to lose sight of what that  
 19 horror was.

20 Might I just put for later, looking at the police  
 21 conduct, and I will hark back at what Mr Tip was saying,  
 22 Mrs Fundi has been coming here daily, Mrs Fundi, on days  
 23 that the Commission sits. It's two years down the line;  
 24 she's still in black, and I don't have the evidence, Chair,  
 25 but I want to give us somewhat a graphic account of

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1 ordinary life. I think, and I surmise that on 12 August  
 2 2012 early in the morning Mr Fundi wakes up, as he would  
 3 normally do when he goes to work, and says to his wife I'm  
 4 doing this type of shift, I'm knocking off at this type of  
 5 hour and oh, by the way, that domestic chore or that other  
 6 domestic chore we will get to be able to do it next  
 7 Saturday when I'm off, kisses his wife and leaves the door.  
 8 He's not signing a death warrant. He is consciously doing  
 9 what you and I are entitled to do; we wake up every  
 10 morning, we come to work without necessarily knowing that  
 11 to be a life-threatening endeavour, and he does it because  
 12 he has to fend for his family.

13 Now he gets to work obviously to go and do  
 14 security services, which he has been doing for Lonmin. Now  
 15 he is with his colleagues there, as is practice and habit  
 16 in the past they would do the security measures. There  
 17 would be unprotected strikes. They would use their non-  
 18 lethal weapons to use force if circumstances so require it,  
 19 and so too was the day of 12th August 2012. But this time  
 20 he gets hacked to death.

21 Now this country, Chair - this is where I'm going  
 22 – this country cannot allow to be numbed, Mr Chaskalson  
 23 warns us. We cannot be numbed by this. There are a whole  
 24 number of dastardly criminal things which people do amidst  
 25 us. They kill for a cell phone, they kill for that, but

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1 it's not many who get killed for going to work. You  
 2 shouldn't die in a democratic country for purely going to  
 3 work. They don't want anything from you. Their motive is  
 4 just to stop you from doing your work –  
 5 CHAIRPERSON: [Microphone off, inaudible]  
 6 stop you from exercising your constitutional right not to  
 7 strike if you consider it appropriate to do that.  
 8 MR SEMENYA SC: And it is done in a  
 9 milieu where we are told that one of the fundamental human  
 10 rights is right to life, but why not that of Mr Fundi? And  
 11 I can say the same about a whole host of others that Mr Tip  
 12 has referred us to.  
 13 Now it would be a folly if, as we must, we only  
 14 look at what the police do or not do. But let me try,  
 15 Chair, to give us this construct. Because we are living in  
 16 a constitutional democracy, the Constitution then says to  
 17 all of us the responsibility to maintain law and order is  
 18 that of the police alone. There is no other institution in  
 19 the country under the Constitution which has that duty, and  
 20 then it says in relation to Public Order Policing because  
 21 part of the maintenance of law and order is intended to  
 22 give competing interest at times an opportunity to co-exist  
 23 in the same space, we will do it this way; we will have a  
 24 Public Order Policing unit within the police service. The  
 25 primary function is that law and order, but is to make sure

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1 that those who want to exercise their constitutional rights  
 2 of assembly are able to do that with those who want to  
 3 drive to work. So it says I'm going to have a Regulation  
 4 of Gatherings Act and I'm going to structure it in a way  
 5 that makes sure that we are able to have a section 4  
 6 meeting and allocate various responsibilities to each one  
 7 of us just so that you can give expression to a lawful  
 8 conduct which is stipulated in section 18 of the  
 9 Constitution, and then says to Public Order Policing  
 10 because you're not dealing with robbers and people in  
 11 large-scale criminal activity, unless under extreme  
 12 circumstances I'm not authorising you do discharge your  
 13 duty with methods that are lethal, because after all your  
 14 responsibility under this statute is to help those who want  
 15 to express their legal right to do it and to do it safely,  
 16 and if there should be disruptions, please, rule number 1,  
 17 no force; rule number 2, if it has to be there it must be  
 18 minimal force; 3, no more than is required to disperse  
 19 those things, and we'll talk about section 9(2)(d) a little  
 20 later. So already the law constrains the use of force in  
 21 relation to the regulation of conduct like that. Now this  
 22 is the country where we want to live, all of us, where  
 23 those constraints are placed on police in respect of lawful  
 24 conduct.  
 25 Now then you have panga-wielding individuals and

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1 we are told that they are on an unprotected strike. No,  
 2 Chair, we are being numbed again. It is not strikers with  
 3 pangas, it is something that a democratic society, such as  
 4 we are, a constitutional democracy, such as we are, should  
 5 trigger complete outrage.  
 6 Can I show you, Chair, what we describe to have  
 7 happened to Warrant Officer Baloyi - Lieutenant Baloyi I'm  
 8 told, sorry, Chair. You will find that in our written  
 9 submissions on page 60, paragraph 136.10. There in his  
 10 statement Lieutenant Baloyi says that he suffered nine stab  
 11 wounds, two stab wounds on the head, two stab wounds were  
 12 on his right shoulder, two on his left shoulder, three on  
 13 his left hand, one on his stomach below the umbilical cord,  
 14 and one on his buttocks. He describes the circumstances  
 15 leading up to the injuries he sustained, more pertinently  
 16 he says that within two seconds of teargas being fired and  
 17 once some of the strikers were approximately 15 metres away  
 18 from where he stood outside the Nyala, some of the strikers  
 19 started running towards him and he threw a stun grenade to  
 20 the oncoming strikers. He ran to the Nyala and upon his  
 21 arrival at the door of the Nyala he realised that the  
 22 strikers had caught up with him and were attacking him and  
 23 other members of SAPS. He ran past the Nyala with the  
 24 strikers still chasing him. Whilst running he fired rubber  
 25 bullets at the strikers. He also used his shotgun to wade

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1 his way through the group of strikers while he was being  
 2 stabbed from behind. He was hit on the head with something  
 3 like a panga. He tripped and fell to the ground. The  
 4 strikers started stabbing him in the chest while he was  
 5 kicking and ducking. The strikers attempted to disarm him  
 6 of his shotgun. He was stabbed below the umbilical cord  
 7 with an assegai and ended up surrendering the shotgun. He  
 8 later discovered that his pistol and radio were also taken  
 9 by the strikers. Now these are men and women that we ask  
 10 under the Constitution to come and look after our law and  
 11 order, and now he can't because he has been medically  
 12 boarded with post traumatic stress disorder, quite fitting.  
 13 What country should look at this and accept it as  
 14 par for the course in a constitutional democracy, and point  
 15 at those police officers every moment he's available to say  
 16 but you are police officers after all. Would it be a  
 17 convenient stage to have our lunch, Chair?  
 18 CHAIRPERSON: We will reassemble at  
 19 quarter to 2.  
 20 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 21 [13:54] CHAIRPERSON: The Commission resumes.  
 22 Yes, Mr Semenya?  
 23 MR SEMENYA SC: Thank –  
 24 CHAIRPERSON: Sorry, we were at page 61  
 25 of your heads. You were reading 136.10. I don't know

<p style="text-align: right;">Page 39534</p> <p>1 whether you're going to go on with that or are you going to 2 move on to something else? 3 MR SEMENYA SC: No, I'll be speaking 4 about something quite alright to that though and, Chair, the 5 attempt really is to try and see if you were not able to 6 probe the other side of the coin. Now the law then says to 7 Public Order Policing, if you should use force at all and 8 the circumstances warrant it, use rubber balls, use teargas 9 and the police go out to Marikana, this is now the 13th of 10 August 2012 and what they do, they discharge the teargas. 11 Now one would have thought that the worst consequence that 12 must follow that is if you fire it without an order there 13 will be disciplinary process and it may have its 14 consequences. That's the top line of it and then we sit 15 and listen to argument that says, firing a teargas is 16 attacking strikers and because you fire it without cause 17 they will attack and hack you to death. 18 CHAIRPERSON: The hacking to death part 19 will be, we can put it aside for the moment, but I take it 20 firing teargas at someone is actually an assault, if 21 someone, if I walk down the street and someone fires 22 teargas at me, isn't that an assault? It may be justified, 23 the circumstances it may be such as to make it lawful but 24 it is an assault, isn't it? 25 MR SEMENYA SC: I'm trying to portray the</p>	<p style="text-align: right;">Page 39536</p> <p>1 time in their careers. 2 Quite another, and Mr De Rover helps us to avoid 3 this numbness that Mr Chaskalson has warned us against. He 4 says to us, in the Netherlands in a particular tenure 5 period they lose one police officer who dies in a line 6 of duty. In South Africa in five years we lose 800 of 7 them, so we are beginning to become a society that is 8 euthanized if I use a very strong word, to crime and 9 violence. Chair, you would remember – 10 CHAIRPERSON: I don't know if euthanized 11 is the right word, I think it is sort of paralysed. 12 MR SEMENYA SC: No, not even paralysed, 13 we're beyond paralysis now, even those who are anaesthetised 14 they still have sensus. 15 CHAIRPERSON: Anaesthetised is the right 16 word, anaesthetises. 17 MR SEMENYA SC: Those who are 18 anaesthetised are still alive and just numb to pain. We're 19 on the other side now but, yes Chair, I take the advice. 20 The real point is, you would recall, Chair, last week 21 Monday when the week started, I think it was last week 22 Monday. 23 CHAIRPERSON: We sat for two days last 24 week, Wednesday and Thursday. 25 MR SEMENYA SC: I remember that but I</p>
<p style="text-align: right;">Page 39535</p> <p>1 distinction that must exist between you and I and a police 2 officer, the constitutional obligation to maintain law and 3 order. 4 CHAIRPERSON: Ja, but if I'm walking down 5 the street and a policeman fires teargas at me and I'm not 6 disturbing the peace or anything of that kind, then he is 7 still assaulting me, I would thought, whether I'm entitled 8 to react and to kill him is of course another question and 9 I'm entitled to defend myself against assault but there are 10 bounds which I cannot see and if I exceed the bounds then 11 of course I myself commit offence, is that right? 12 MR SEMENYA SC: I'm gingerly trying to 13 make sure that I use my language a little carefully, Chair. 14 An assault and an attack may be synonymous at a particular 15 point, but there is a particular point where the 16 differences are manifest. Now particularly in this 17 instance where, let's take Warrant Officer Baloyi as an 18 example, Lieutenant Baloyi as an example who discharges a 19 stun grenade without an order in self defence, in a mist of 20 an attack and there we're told that triggers an attack on 21 the police. And the submissions we're trying to make, 22 Chair, is that that's not the type of society we're talking 23 about. We can see and live with the consequences or a 24 police officer must be able to live with the consequences 25 of misconduct if they act arrantly at a particular point in</p>	<p style="text-align: right;">Page 39537</p> <p>1 think it was last week Monday, if I'm correct where South 2 Africa was hit with a story, that in the East Rand some two 3 police officers have been robbed of their firearms, they've 4 been bungled in a van and locked in there. 5 CHAIRPERSON: Yes. 6 MR SEMENYA SC: Is this the 7 constitutional democracy that we are trying to have where 8 you articulate as we correctly do often, the fundamental 9 rights of human dignity, freedom and equality, where your 10 law enforcement officers are subjected to that and if we go 11 back to Marikana and we look at what happens there, Mr Noki 12 goes, Chair, and says to police officers who are numbering 13 700 odd, there won't be two bulls in this kraal, one is 14 going to have to leave. Do you and I, Chair, want to live 15 in a country where in the face of that type of threat, what 16 the police must do is to say, oh, Mr Noki, you know what, 17 very correct, we are living here, surely that can't be 18 correct, surely we shouldn't permit a society that allows 19 somebody so brazenly to approach a police force, a police 20 service and say to them, you see those who were coming from 21 the Eastern Cape don't go back. We're going to let the 22 world see all of us here, kill each other. Chair, that is 23 horrible and we will get somewhere if South Africans in all 24 our midst are not quiet about it. 25 We must have our hair raised and we must have the</p>

<p style="text-align: right;">Page 39538</p> <p>1 ability to rebuke that type of conduct amongst ourselves  2 but if we leave it and we almost flow with it, then Mr  3 Chaskalson is right, again we are being numbed by the  4 continual assault on our sense of decency and our rights  5 and freedom, so the constitution promises all of us, but  6 that's not all, Chair. The unfurling of a barbed wire will  7 ultimately result in the death of 34 people, because if I  8 understand the argument as it goes, you know you should  9 have known that that may provoke a reaction on the part of  10 the strikers. You know unfurling of a barbed wire in a  11 normal democratic society should not provoke that response,  12 Chair. It is a defensive measure, it is not hurting  13 anybody. It is done for ill advised purposes. It is one  14 thing, society must be able to steel, live with itself  15 despite those types of errors which may be properly managed  16 under disciplinary processes of the police.</p> <p>17 Then rolls the one Nyala and Mr Noki comes and he  18 says, no, you shouldn't do this thing here. Now what  19 should the police do if they are to avoid another Marikana  20 2, when Mr Noki in those set of circumstances says, look,  21 you are not roll this barbed wire here, in fact you must  22 go. What should the police do? Do they go? I don't want  23 to, Chair, with respect embellish the point but at the same  24 time I don't want to underestimate somebody saying, the  25 police are going to die here in the hippos and they are not</p>	<p style="text-align: right;">Page 39540</p> <p>1 Chair, you would recall Mr De Rover says to us, if that  2 group went into the union building no police service will  3 contain them.</p> <p>4 That's how grave the situation is, Chair. That's  5 how grave the situation was on the 16th of August and we  6 will have to jump some difficult hoops in addressing the  7 other actions of the police and whether they were  8 appropriate or not appropriate, but we are not going to be  9 able to measure that until we have a clear understanding of  10 the nature of the threat and what the Noki group was doing.  11 I would hope that one day when the report is out and  12 published hopefully, if the Mail and Guardian judgment goes  13 in a particular direction in the Constitution Court, I  14 would hope that type of report keeps telling South  15 Africans, we are going to have to keep the police in check,  16 but by and large South Africa would have the rights that  17 the constitution promises all of us, if we are able to all  18 express outrage at conduct like this. If you are able to  19 get to that point where all of us will say, as Mr Ntsebeza  20 would use the expression, not in our name. You are not  21 going to bear arms against the State and that is what the  22 people on the 16th were doing.</p> <p>23 Now if that can be accomplished, Chair, then  24 maybe we will build a type of society where we even stop  25 for a red light. There is this big question, Chair, that I</p>
<p style="text-align: right;">Page 39539</p> <p>1 doing it even remotely. They are doing it whilst bearing  2 arms, and yes, that's the point I should make, Chair, and  3 we refer to it tangentially in our heads and I express my  4 regret for the typos that are seen all over the place and –</p> <p>5 CHAIRPERSON: Well, you people had to  6 produce the heads under great stress of time. There was  7 short time to do it, a lot of work has to be done, I  8 understand the typos. You don't have to ask for  9 forgiveness, but if you ask for it you can have it.</p> <p>10 MR SEMENYA SC: Thank you, Chair. It is  11 a mis-description, Chair, to say that there were strikers  12 who were on unprotected strikes and carrying weapons. It  13 is a huge mis-description. The correct description about  14 this, Chair and Commissioners, is that there was a 3 to 400  15 people who were bearing arms against the State. Show me  16 any higher treason and if we bring home that this group of  17 people were attacking the police they are attacking the  18 authority of the State, the only authority that is able to  19 maintain law and order. That's the gravity of that problem  20 and if we diagnose the problem proper, it is the type of  21 factual finding that we would be asking from the police and  22 it is not in the original heads, that we would be asking  23 for as SAPS that the Commission makes, it must make a  24 factual finding that there were people who were bearing  25 arms against the State. And it is not an exaggeration,</p>	<p style="text-align: right;">Page 39541</p> <p>1 think must be asked. I'm surprised it has taken us so long  2 to get there. I hazard a guess, Chair, with respect, I  3 hazard this guess that if the strikers in Marikana in  4 August 2012 were not armed not one striker would have been  5 dead, not one employee would have been dead, no one  6 security would have been dead of Lonmin, no one police  7 officer would be dead.</p> <p>8 CHAIRPERSON: If they had in fact  9 listened to the appeal which General Mpenbe had made on the  10 afternoon of the 13th and laid down their arms, walked away  11 to the koppie, continued with their strike and as you say,  12 well, there would have been, at that stage of course there  13 would have been four dead people because there were four  14 people dead already, but if they hadn't have the arms at  15 all, because then an attempt hadn't been made to enforce  16 this unprotected strike by violence and intimidation and as  17 you say there would have been no death at all. That must  18 be right.</p> <p>19 MR SEMENYA SC: That must be right, I  20 can't see how anybody can give account effectively as the  21 expression has now found a life of its own in this hearing.  22 Chair, now let's examine this. We then ask the question,  23 why are you armed at all and the answer is, no, we're armed  24 to defend ourselves against NUM. Can that even be offered  25 as an explanation, Chair, for 300, 400 people?</p>

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1 CHAIRPERSON: The first question you have  
 2 to answer first, sorry, the first question you've got to  
 3 answer is, were they armed when they went to NUM offices,  
 4 armed with dangerous weapons, when they went to the NUM  
 5 office on the morning of the 11th of August? According to  
 6 the arguments of Mr Tip they were armed. There was  
 7 evidence to the affect that they had, some of them anyway,  
 8 had pangas and spears and so on and if that's correct then  
 9 the explanation they give that they were armed later, that  
 10 they were only armed later and that was because they had  
 11 been shot at by NUM is clearly not correct.

12 MR SEMENYA SC: Yes, -

13 CHAIRPERSON: One of the questions we've  
 14 got to decide, a question which we have to make a finding  
 15 is whether it is true that they were unarmed when they went  
 16 to the NUM office and they just went to ask the NUM people,  
 17 please to raise their demands with the employer. If we  
 18 accept their version that they weren't armed and they only  
 19 got arms later because they had be fired at, that's one  
 20 thing, but if we reject that version, well, Mr Tip's  
 21 argument, then of course the case adopts a different  
 22 dimension, doesn't it?

23 MR SEMENYA SC: Yes, yes, indeed, Chair,  
 24 but we would hope also to make the argument that we know  
 25 they were also armed in the same manner on the 16th. So I

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1 want to explore the entire -

2 CHAIRPERSON: I'm sorry to interrupt you  
 3 unduly, but is the further, I'm just thinking aloud,  
 4 putting points to you, to help you, to help us by giving  
 5 arguments on the points that I'm thinking about. Even if  
 6 they originally got arms to protect themselves against NUM,  
 7 the next question that arises is, did they have to keep  
 8 those arms if the police said, you don't need them to  
 9 protect yourself against NUM, we're here, we won't allow  
 10 NUM to attack you, because remember General Mpembe's  
 11 evidence was that they wanted to escort the group for two  
 12 reasons. Firstly to stop them doing things they shouldn't  
 13 be doing, attacking people in the informal settlement on  
 14 the routes, but they also wanted to protect them in case  
 15 there is a problem from NUM. So that's the further point  
 16 that has to be considered.

17 MR SEMENYA SC: Indeed, Chair, I'm  
 18 indebted to you, but how does this even work, assuming they  
 19 were entitled to arm themselves to the teeth so that they  
 20 protect themselves against NUM, now what do you have? You  
 21 have a group of 3, 400 people with pangas and spears and  
 22 machetes and all sorts of other weapons against 300 of NUM  
 23 people with machetes and then they hack one another in self  
 24 and private defence, what type of country is this? It  
 25 can't even be stated as a basis of bearing arms in that

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1 manner. You go as, Chair, you correctly point out, you go  
 2 to the police and you say, look, we are being threatened  
 3 here, we are threatened by even officials of NUM and there  
 4 is an investigation and so the consequences of the law take  
 5 hold. What you don't do is to go to Mr Cassim and take his  
 6 entire stock and maybe let me interrupt myself there,  
 7 Chairperson, because I might just, it might just slip my  
 8 mind. One of the recommendations we wish you would make,  
 9 it is not in our written submission, Chair, in relation to  
 10 Mr Cassim, traders who trade in weapons of that kind must  
 11 keep a register and they must sell to somebody whose  
 12 particulars they can have, the ID have and the purpose for  
 13 the use of that thing, just so that when General Mpembe  
 14 comes to Lonmin and you know he might have done nothing  
 15 wrong, as a trader he probably is entitled to do what he is  
 16 doing.

17 [14:05] CHAIRPERSON: Before we get to General  
 18 Mpembe coming to Lonmin, I was just thinking about your  
 19 recommendation you as us to make. Firstly you would say an  
 20 arms dealer like that, or weapons dealer like that has got  
 21 to keep a register of people to whom he's selling the  
 22 weapons, with detail, I would imagine with details like  
 23 their ID number, require production of proof of identity,  
 24 that's the first thing. But secondly it may also be  
 25 necessary to say that the arms dealer must have reason to

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1 believe, or rather must not - I don't know how one would  
 2 formulate it, perhaps you can think about that and come  
 3 back to us - must not have reason to believe, must have  
 4 reason to believe that the person to whom he's selling the  
 5 weapon will use it only for a lawful purpose that needs it,  
 6 so I don't know how effective that would be. It will  
 7 presumably have some effect, so that if possible the number  
 8 of dangerous weapons in circulation is reduced. But  
 9 anyway, I'd be grateful if you'd think about that and  
 10 perhaps formulate a proposal for us which we can put in our  
 11 recommendations.

12 MR SEMENYA SC: We'll do that. We'll do  
 13 that, Chair. And that's typically why a commission of this  
 14 kind would be useful because you'd find that Mr Cassim is  
 15 trading, he's acting within the law, he does nothing wrong  
 16 he's doing, but now that we know he's located in a place  
 17 that tends to be volatile in events of industrial action  
 18 such a measure would be necessary at least to mitigate the  
 19 problem.

20 CHAIRPERSON: I think there's another  
 21 section that could be put in the act, if I'm thinking aloud  
 22 in response to what you're putting, is I think it would be  
 23 necessary also for the prospective buyer of a weapon of  
 24 this kind that we're talking about to make a statement to  
 25 the prospective seller as to how many weapons he's got, or

<p style="text-align: right;">Page 39546</p> <p>1 perhaps he hasn't got any weapons. In other words a man  2 comes along and he says I'd like a panga and I need it  3 because I want to protect myself for various reasons. It  4 would be relevant to ask him well, how many pangas have you  5 got, and if he then says I've got six and then the merchant  6 would say I'm sorry, I can't sell you one. If of course he  7 says I've got one, of if he says I've got one and if you  8 can subsequently prove that he's got more than, that he had  9 weapons already when he made the purchase, that would be a  10 crime in itself and you say that – so indirectly you could  11 also have some kind of a basis for restricting the sale of  12 dangerous weapons. There may again be, I'm sure there are  13 more ideas you could think of, but that just strikes me as  14 your argument. It's clearly an important matter. We've  15 got to control the number of dangerous weapons in society.  16 We've got to see to it that they're only possessed for  17 lawful purposes and that the weapons merchants must be  18 under some kind of restraint, such as applies to second-  19 hand dealers and scrap metal purchasers and that kind of  20 thing, but far more reason actually for control of this  21 kind than exists in the other cases to which I've referred.  22 MR SEMENYA SC: Indeed, Chair, and for  23 argument sake when General Mpmembe gets met with no, these  24 people are faceless, at least he would go in my example to  25 Mr Cassim and say who did you sell to, and that can make a</p>	<p style="text-align: right;">Page 39548</p> <p>1 perhaps Ms Pillay with her customary efficiency can tell  2 us, it can then be put on the screen. It was handed in as  3 an exhibit, section 9(2)(d) of the Regulation of Gatherings  4 Act.  5 MR SEMENYA SC: Chair, I wouldn't imagine  6 that the Regulation of Gatherings Act is an exhibit.  7 CHAIRPERSON: I thought it was put in as  8 an exhibit during the cross-examination of one of the  9 witnesses when we were in Rustenburg, long, long ago.  10 MR SEMENYA SC: I thought maybe the  11 Standing Order as opposed to the Regulation of Gatherings  12 Act –  13 CHAIRPERSON: Look, I may be wrong, but  14 my recollection -I've got a pretty clear recollection that  15 it was referred to and put in as an exhibit, but I could be  16 wrong and it wouldn't be the only thing in respect of which  17 I'd be wrong.  18 MR SEMENYA SC: But I'll try to read it  19 in a way that we can all follow. It reads, "If any person  20 who participates in a gathering or demonstration, or any  21 person who hinders, obstructs or interferes with persons  22 who participate in a gathering or demonstration -  23 (i), kills or seriously injures or attempts to  24 kill or seriously injure, or shows a manifest intention of  25 killing or seriously injuring any person; or</p>
<p style="text-align: right;">Page 39547</p> <p>1 search and seizure a little bit more pointed. At least  2 there's an avenue, there's a tool somewhere there.  3 CHAIRPERSON: And Mr Cassim has got to be  4 satisfied the person he's selling the weapon to is the  5 person whose identity card he's seen, so if the – he writes  6 down the number and later it appears that the person, the  7 card belongs to somebody who doesn't look remotely like the  8 photograph, the photograph doesn't look remotely like the  9 person who came to buy the weapon, then Mr Cassim is in  10 trouble. It's perhaps unfair to refer to Mr Cassim. I'm  11 going to use a neutral letter of the alphabet, Mr A, the –  12 MR SEMENYA SC: Weapons dealer.  13 CHAIRPERSON: - the weapons dealer.  14 MR SEMENYA SC: Yes, Chair. Chair,  15 before I also go to more difficult spots, I wish to refer  16 us to the provisions of section 9(2)(d) of the Regulation  17 of Gatherings Act, and maybe if I were to read it. Of  18 course Chair would know that the earlier subsection of that  19 section deals with who'd be able to do what in dispersing a  20 gathering that is recalcitrant and what is the ultimate  21 available power in terms of the statute that deals with  22 that, and 9(2)(d) then says, "If any person who  23 participates" –  24 CHAIRPERSON: I've got an idea it is an  25 exhibit, so if you can tell us what the exhibit number is,</p>	<p style="text-align: right;">Page 39549</p> <p>1 (ii), destroys or does serious damage to, or  2 attempts to destroy or to do serious damage to, or shows a  3 manifest intention of destroying or doing serious damage  4 to, any immovable property or movable property considered  5 to be valuable,  6 such a member of the police or above the rank of  7 warrant officer may order the members of the police under  8 his command to take the necessary steps to prevent the  9 action contemplated in subparagraphs (i) and (ii), and may  10 for that purpose [we emphasise] if he finds other methods  11 to be ineffective or inappropriate, may issue an order the  12 use of force, including the use of firearms and other  13 weapons."  14 CHAIRPERSON: [Microphone off, inaudible]  15 my recollection is correct, there it is.  16 MR SEMENYA SC: [Microphone off,  17 inaudible]  18 CHAIRPERSON: It's not an exhibit, I'm  19 told. My recollection was defective then, I'm sorry.  20 Anyway, there it is.  21 MR SEMENYA SC: Now we've asked the  22 operator to be given a copy.  23 CHAIRPERSON: I see. I was wrong in  24 thinking it was an exhibit, but anyway, we've got it on the  25 screen, so that's nice.</p>

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1 MR SEMENYA SC: Now there are a number of  
 2 things that flow from this, Chair. Of course the statute  
 3 is not constitutionally impugned in one way or another. It  
 4 is good law as far as this Commission is concerned, but it  
 5 is significant that it also obtains under the Regulation of  
 6 Gatherings Act and it contemplates that where the  
 7 circumstances exist such as are described there, the police  
 8 are entitled to use firearms and other weapons if other  
 9 methods prove ineffective.

10 Now police experts are correct to say, you know,  
 11 the use of an R5 in Public Order Policing, it's a no-no and  
 12 maybe we should make recommendations to that effect,  
 13 et cetera. The legislature seems to have recognised that  
 14 this instrument called the Regulation of Gatherings Act is  
 15 intended to facilitate legally valid discourse in an  
 16 exercise of a constitutional right. It's not saying you  
 17 threaten to kill or you manifest an intention to do so,  
 18 damage property, then the police are going to use rubber  
 19 bullets on you. It says if those methods don't work then  
 20 the law authorises the use of firearms and other weapons.

21 So it's important that the context within which  
 22 we measure the events in Marikana must be within the  
 23 parallel lines of the statutory power that is there. We  
 24 cannot abridge those powers which the police have, and our  
 25 discussions about whether or not it is TRT line or this and

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1 the other, must also be construed within the parameters of  
 2 the law. That's what the law says.

3 Another general remark, Chair, that we ought to  
 4 make and to which a whole number of judgments in this  
 5 country have told us is that we shouldn't sit here with, as  
 6 I describe it, with a systole of 120 over a diastole of 80  
 7 and saying you know, with that type of blood pressure we  
 8 look at the events with a pause button on our computer and  
 9 the rewind button in the waiting and begin to count, okay,  
 10 on exhibit X, Y, Z there appears to be, okay, maybe 10,  
 11 okay, and that other one is facing the other direction and  
 12 maybe this group is now split into two. That's precisely  
 13 what is cautioned against, Chair. We should see that  
 14 scenario through the eye of the TRT man. He does not have  
 15 the benefit of rewind button, count them. If he did his  
 16 conduct would not fall within the confines of self and  
 17 private defence. He would fail at that level already.

18 Self and private defence, Chair, properly  
 19 understood as I believe we all do, says you don't have that  
 20 luxury of weighing the various options available to you and  
 21 choosing the best amongst them. By definition it says you  
 22 don't have that opportunity. Now I make this submission in  
 23 the light of the type of arguments that we have heard.  
 24 After four seconds there was a curtain of dust. They  
 25 should have waited to see the dust fall down before they

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1 can do the next four seconds. I ask the question, how much  
 2 time is between the first four seconds and the second four  
 3 second?

4 CHAIRPERSON: [Microphone off, inaudible]  
 5 four seconds there were calls for cease fire of course.  
 6 But ignoring that, you say four seconds is a relatively  
 7 short period.

8 MR SEMENYA SC: No, Chair, I'm saying  
 9 there is no moment between the first four seconds and the  
 10 beginning of the second four seconds, and for now I'm just  
 11 addressing the question of do you then wait and say okay,  
 12 let me see what happens when this dust is down, and we  
 13 should be careful not to go down that road.

14 We refer in our written heads at page 22 where  
 15 the courts we say in various judgments that we cite there,  
 16 including the R v Patel, at the top of page 23 says the  
 17 court there, "Men faced in moments of crisis with a choice  
 18 of alternatives are not to be judged as if they had both  
 19 time and opportunity to weigh the pros and cons. Allowance  
 20 must be made for the circumstances of their position."  
 21 What is the blood pressure of a police officer who is faced  
 22 with, assuming we're able to get this home, faced with  
 23 people coming with spears and pangas and actually others  
 24 shooting, with a present knowledge of 10 deaths that have  
 25 happened by that point, no difficulty to ascribe some of

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1 those to some of these members who are coming in front of  
 2 you? What is the opportunity of the judgment that we are  
 3 imposing on them?

4 I make the point, Chair, that it is one thing for  
 5 us to sit here and not immerse ourselves in the real danger  
 6 that was present and immediate to them. If a TRT man had  
 7 an opportunity to look at his rifle and say where is  
 8 automatic, is it here or is it here or is it there, and can  
 9 I pull it back then he is not under imminent threat.  
 10 [14:25] He has an opportunity to judge that and to look  
 11 at what is coming in front of him. Now, I'm giving us a  
 12 graphic example of the exhibit if you are to look at it.  
 13 Warrant Officer Kuhn in one of the frames you see him come  
 14 around the, I mean, the strikers are coming around the  
 15 corner of the kraal. He is on their side of the street  
 16 with the street, I mean, the pathway going to Nkaneng  
 17 behind him. By the time the shots are fired he's on the  
 18 other side of the path. He was backtracking. We see him  
 19 almost trying to trip there. And if we do justice to this  
 20 assignment it means therefore that we must immerse  
 21 ourselves in the foot of the Warrant Officer Kuhn and then  
 22 measure whether or not the conduct was consistent with that  
 23 of a reasonable person given the same set of circumstances.  
 24 What we shouldn't do is as I have observed we  
 25 have 180 degree view here of stills of photos that we keep



1 watching every day and then impute that understanding of  
2 the environment as I say under an air-conditioned  
3 auditorium and then talk about it. Again I would like to  
4 touch on some of these broad principles of law and see if  
5 I'm not able to migrate them closer to help us understand  
6 the facts with which we are concerned.

7 COMMISSIONER TOKOTA: Sorry, before you  
8 do that, there was an argument, I may have misunderstood  
9 it, but if I misunderstood it you'll excuse me. There was  
10 an argument of comparing the events of the 13th and the  
11 events of the 16th. A policeman standing in front of the  
12 group approaching him, the group went past and didn't do  
13 anything. You take Kuhn on the 16th. He's in front of the  
14 group. If I understood the argument the submission  
15 would've been that they would've done the same thing they  
16 did on the 13th. What do you say to that argument?

17 MR SEMENYA SC: Maybe a number of points,  
18 Commissioner Tokota, but this is precisely what is the  
19 danger. You have a general of the police service, a  
20 general, standing tall as General Mpembe does saying to  
21 arms-bearing people leave your weapons and leave. And I'm  
22 going to count to ten he says. At three they just stand up  
23 and walk past. I'm saying even that honest officer could  
24 not have known better that he would survive that if they  
25 attacked him. We shouldn't just look at that type of

1 conduct and think it's okay to defy a police order like  
2 that. Can you imagine if you and I were to drive out of  
3 here and the police officer entitled under the law to stop  
4 because they have reasonable suspicion to do A, B, C, D and  
5 you're like who do you think you are?

6 You just press your accelerator and go and all of  
7 us are able to do likewise. Why? Because we can. No, no.  
8 And if you go to the 16th and you look at Warrant Officer  
9 Kuhn you can see the man is in trouble if he doesn't move  
10 back. You can see other police officers, the POP members  
11 running into the Nyalas. Why? Because some people are  
12 going to be coming. There ought to be a particular point  
13 at which we say not in our name as Mr Ntsebeza would say.  
14 You don't go to Nkaneng like that. I was going to make  
15 another separate point about proportionality, Chair.

16 At scene one we have something like 328 rounds of  
17 live ammunition discharged in the eight seconds or 12  
18 seconds – if the contention proves correct it is 12  
19 seconds, 328. And then the argument goes that shows you  
20 how disproportionate the force is in relation to the  
21 threat. And I'm hoping to be able to persuade you, Chair  
22 and Commissioners, that there are a whole host of  
23 imponderables that the evidences does not help you tidy up  
24 and help you come to the conclusion that you are being  
25 invited to come to. Some of those are these and perhaps at

1 the risk of being too simplistic I illustrate, I make this  
2 example. Chair, if I'm facing imminent threat to life, to  
3 my life, and I fire at an attacker who gets struck by one  
4 bullet and nine other bullets are shown to have missed, it  
5 is not proper reasoning to go, well, you fired 10 where one  
6 could work. That's not logic.

7 What the law discourages is that type of force  
8 which is over and above that which managed to contain the  
9 threat. That is what the law discourages. Now, you  
10 haven't been shown which of the 320 something odd bullets  
11 that were discharged on that day were fired in  
12 circumstances where the threat has been contained and, and  
13 that's the most important part, and it is that additional  
14 force responsible for the death of the individual. If you  
15 cannot tie all of these imponderables as I describe them  
16 you're not able to say force was excessive. Now, for  
17 argument's sake we are told –

18 CHAIRPERSON: I just want to understand  
19 your argument. Let me put to you the why I understand it.  
20 If I'm wrong you can correct me. A man thinks he's in  
21 imminent danger. He has to fire to defend himself. Then  
22 he fires 10 shots. Only one hits his assailant. And let's  
23 assume for the sake of argument it's the first one. The  
24 other nine missed and he needed that one shot to defend  
25 himself. Then can you say that he acted disproportionately

1 because in addition to the one shot that hit the target  
2 which on the assumption that we're making was necessary the  
3 force became disproportionate because he fired another nine  
4 that missed. Is that your argument?

5 MR SEMENYA SC: Let me make it even more  
6 graphic. The subsequent nine bullet are fired in the air  
7 and backward.

8 CHAIRPERSON: If they're fired in the  
9 air and backwards then they wouldn't count at all.

10 MR SEMENYA SC: That's what the –

11 CHAIRPERSON: If the ten were fired all  
12 at the assailant and only one was necessary and only one  
13 hit the target and it was the first one then the fact that  
14 there were other non-causally connected bullets fired the  
15 question would arise, did that mean that the force was  
16 still regarded as proportionate. Well, do you require to  
17 look at causally connected bullets in order to assess the  
18 proportionality or otherwise? Am I understanding you  
19 correctly? That's basically the point you're making.

20 MR SEMENYA SC: That is the point I'm  
21 making, Chair, and I may push that example and say if a  
22 bullet that finally stops him is the bullet 10 on the same  
23 facts you'll come to a different verdict.

24 CHAIRPERSON: - question, I just want to  
25 isolate the question. It's always helpful to know the

<p style="text-align: right;">Page 39558</p> <p>1 question, what the question says before you know where you 2 can find the answer. If your argument is that you only 3 count causally connected bullets then it doesn't matter 4 whether it's the first or the tenth, so your argument – I 5 don't want to put an argument to you that you don't agree 6 with. I'm just trying to make sure I understand your 7 argument. Is your argument that only causally connected 8 bullets count? 9 MR SEMENYA SC: It is that, Chair, to say 10 when the law says you cannot use more force than is 11 reasonably required to contain the threat it will punish 12 you where that additional force you use is causally 13 connected to the outcome. If it isn't it's not 14 disproportionate to anything and that's why I'm making a 15 graphic example that if I fire the other nine bullets you 16 cannot make the argument that one bullet was adequate, you 17 fired ten, therefore your force was disproportionate to the 18 threat. It doesn't work that arithmetically. 19 Again let me touch on something that has been, 20 that requires some address, Chair, which in our respectful 21 submission illustrates the dangers of hindsight. The 22 argument goes somewhat like this that JOC should have 23 halted the operation after scene one and maybe scene two 24 would not have happened. If on the evidence we are 25 satisfied that JOC only knew of one shooting then I'll say</p>	<p style="text-align: right;">Page 39560</p> <p>1 two, after scene two? Nobody will make that argument. 2 Why? Because we know there was no scene three. So I'm 3 saying if you want to impute some wrong on the JOC you 4 would have to transpond in their minds the understanding 5 that there's going to be scene two because if they don't 6 know that they can't stop scene one. We blame them for 7 scene – for not stopping at scene one because you now know 8 scene two has happened. And the distinction between scene 9 one and scene two is ours. It is us trying to better 10 understand what happened on the 16th. As far as Brigadier 11 Calitz was concerned there was one operation of dispersal. 12 There wasn't we're going to disperse here and make another 13 plan for dispersal at koppie three as some of the arguments 14 advanced have been formulated. 15 CHAIRPERSON: - simple as that, Mr 16 Semenya. The test might be not that there had to be a 17 scene two but there may have been a scene two and if the 18 JOC had received after this fusillade of bullets, give the 19 appropriate expression there, bodies down and report to 20 IPID and so on, after all that happened if they then got 21 information from Colonel Vermaak for example in the sky 22 that people were going off in the direction of koppie three 23 and the police were in pursuit and that something was going 24 to have to happen at scene three, the argument I take it is 25 – no sorry, at scene two, koppie three, scene two. The</p>
<p style="text-align: right;">Page 39559</p> <p>1 there is a flaw in the argument that they should have 2 halted the operation after that one shooting. 3 CHAIRPERSON: By one shooting you mean 4 the firing of one – 5 MR SEMENYA SC: Scene, no, scene one. 6 CHAIRPERSON: Scene one. So they knew – 7 the assumption you're making or the question is they knew a 8 lot of shots had been fired over a period of eight and ten 9 or 12 seconds at scene one. They knew that a number of 10 bodies were down. They knew that what had been envisaged 11 as part of the plan hadn't actually happened. The plan had 12 been disrupted. Things have happened that were not 13 intended to happen. And you're saying they could still 14 carry on with scene two. 15 MR SEMENYA SC: No, no, Chair, I'm 16 looking – 17 CHAIRPERSON: I'm not being difficult. 18 MR SEMENYA SC: No, no. 19 CHAIRPERSON: I'm trying to make sure I 20 understand you. 21 MR SEMENYA SC: I hope I do, Chair. I'm 22 saying the criticism that says at that time, JOC, you 23 should have halted the operation suffers from this 24 hindsight and let me illustrate it. Can anybody mount an 25 argument that JOC should have halted the operation at scene</p>	<p style="text-align: right;">Page 39561</p> <p>1 argument I take it would be that there'd been a lot of 2 bloodshed already. Things weren't going according to plan. 3 Before any further shots are fired no further 4 dispersal attempts should be made. If the people were all 5 holed up as it were in koppie three then the police should 6 perhaps have formed a ring around koppie three but not 7 fired further shots until the situation could be carefully 8 assessed. I take it that's the argument. Whether it's a 9 good argument or not it's for us to decide in the end, but 10 the – I take it that's really what the argument is. Mr De 11 Rover says they should've stopped at the end of scene one. 12 General Mpembe also told him that. His evidence was a 13 little bit – I won't say contradictory but equivocal about 14 when he came but that appears to be his attitude as well. 15 So it's from your own camp as it were that the 16 point comes. However but I put the problem to you as I 17 understand it and I'd be grateful to hear your submissions. 18 What I'm saying to you is not – you had to be sure that 19 there will be a scene two but if you think that there may 20 be scene two and you may think that a lot of firing will 21 take place, that there'll be bloodshed which could be 22 avoided by holding back, not firing, but just surrounding 23 the koppie and trying to keep things under control in that 24 way, that would be the argument you've got to meet I think 25 on that point.</p>

<p style="text-align: right;">Page 39562</p> <p>1 MR SEMENYA SC: And it is one to which I 2 will concede immediately but already it imports a knowledge 3 at JOC, that's why I'm talking about JOC, a knowledge in 4 JOC that having heard there's bodies down, bodies down, 5 there is still an operation going on trying to chase 6 certain people and they knew that there might again be 7 trouble. Then they have to be faulted for not halting 8 scene one, but you don't have that information. You don't 9 have that evidence in our respectful submission. And – 10 COMMISSIONER HEMRAJ: Are you perhaps 11 saying that what the JOC knew that what was to follow was 12 the sweeping through of the koppies and - 13 MR SEMENYA SC: They did not even know 14 that the operation hadn't ceased. That's the point I'm 15 making. 16 CHAIRPERSON: But I'd have to, we'd have 17 to look very carefully at what Colonel Vermaak was 18 reporting from the eye in the sky and one of the problems 19 is that for some reason I don't understand the police 20 didn't record all the radio traffic but that's a problem we 21 sit with, but we have to look and see what they were being 22 told in the JOC after they heard that fusillade on the 23 radio and after Brigadier Pretorius sent an SMS to IPID, 24 after Brigadier Pretorius spoke to I think it was Captain 25 Loest. It's not quite as simple as –</p>	<p style="text-align: right;">Page 39564</p> <p>1 and that in fact we will be asked, we happen to have been 2 already, to find that they did know before scene 2. We 3 were asked I think if I remember, I think Mr Chaskalson 4 asked us that, they did know about scene 1 before scene 2 5 even started. And they had time to stop it. Obviously if 6 they didn't know, they only knew after the end of scene 2 7 then the argument doesn't arise. Then clearly they 8 couldn't have stopped it before scene 2 happened if they 9 didn't know that scene 1 had happened. That must be so 10 surely. 11 MR SEMENYA SC: No, but I'm not even 12 advancing that before I invite a reply from the evidence 13 leaders on the point. We know that even Brigadier Calitz 14 at 16:03 is inviting IPID, so they knew about that. The 15 point I'm trying to make is that if you want to criticise 16 at the level of saying their failure to stop the operation 17 must assume that they knew the operation was still ongoing 18 despite, that is the first thing. Secondly, they knew it 19 is going to wherever, where there is likely to further 20 casualties then the criticism is home and dry, I can't 21 resist it. But I'm saying you have to find those 22 constituent elements building bricks to construct that 23 conclusion. I know somehow I did raise the McCann 24 question, can I address McCann? 25 CHAIRPERSON: You're now moving away from</p>
<p style="text-align: right;">Page 39563</p> <p>1 MR SEMENYA SC: I'm not making a point 2 higher than an invitation really that we must measure each 3 one of them on the available information to them at a 4 point. If the information that we now know was not 5 available to them at the point we would be erring in 6 imputing our afterthought to them at a time that this 7 episode was unfolding and I place it principally on one, 8 the evidence of General Annandale is that it was very late 9 that he realised there were actually two incidents in the 10 JOC. 11 CHAIRPERSON: I'm going to cut the 12 argument short in this way. If the evidence stands that 13 the people in the JOC only knew about what happened at 14 scene one after scene two was over then you can't argue 15 they should've stopped their operation after the end of 16 scene one so that scene two couldn't have happened clearly. 17 If that evidence is accepted the argument doesn't arise. I 18 would think not. 19 [14:45] The problem is, I withdraw the word problem the 20 complication arises from the fact that there is evidence 21 upon which an argument is based, whether the argument's a 22 good one is a different matter. But there is evidence on 23 which the argument is based that the evidence that they 24 only knew after the end of scene 2, after scene 2 that 25 scene 1 had happened. But that evidence may not be correct</p>	<p style="text-align: right;">Page 39565</p> <p>1 – you've made your point about stopping after the end of 2 scene 1. Now you're moving onto the next chapter which is 3 McCann, question mark. 4 MR SEMENYA SC: Correct, Chair. 5 CHAIRPERSON: My attention is drawn to a 6 very important item of information, it's now quarter to 7 three. Would you like to tell us what you're going to have 8 to say in your chapter in the McCann question mark at 3 9 o'clock. 10 MR SEMENYA SC: I can undermine the 11 importance of that question, Chair, I must consider. 12 CHAIRPERSON: 15 minutes. 13 [COMMISSION ADJOURNS COMMISSION RESUMES] 14 [15:26] CHAIRPERSON: The commission resumes. 15 Yes, Mr Semenya. 16 MR SEMENYA SC: Thank you, Chair. I was 17 about to deal with McCann. Now Chair, one of the not so 18 important factors about McCann is that it is a judgment of 19 the European Court of Human Rights and a, it's binding on 20 members states who are signatories to the convention and 21 that South Africa is not one of those but that's not the 22 important element about it. I thought and if I'm incorrect 23 in my view then I withdraw the submission. I thought 24 McCann was being advanced as a legal basis to hold in our 25 case the members in the JOC criminally liable for conduct</p>

<p style="text-align: right;">Page 39566</p> <p>1 done by the TRT at scene 1. Something like that.  2 CHAIRPERSON: I don't think so. I've  3 been, there is apparently a suggestion going around that I  4 don't understand McCann myself. So I've got to be very  5 careful the way I put to you what I'm going to put. In my  6 understanding is this, that where there is an operation  7 which is poorly planned, remember the facts in McCann were  8 the court held by a very narrow majority actually, the  9 court held that's on the fact, not so much the law, the  10 court held that the operation to deal with the IRA  11 terrorists who were coming to Gibraltar to commit acts of  12 terrorism the planning of how to deal with them was  13 defective. They could have been dealt with in a particular  14 way which wouldn't have had led to such, as much bloodshed  15 as there was. So the plan was devised, the special, the  16 SAS people were dealing with it. They implemented the plan  17 and the inquest court in Gibraltar held that they acted in  18 self defence and acted appropriately, self and private  19 defence and so the inquest court found them not liable  20 guilty of anything and that was, that finding was not  21 upset, not challenged in any way by the European Court of  22 Human Rights. But the European Court of Human Rights said  23 though the individual shooters get off, because they acted  24 appropriately that doesn't excuse the people who came up  25 with the defective plan. That's the, my understanding of</p>	<p style="text-align: right;">Page 39568</p> <p>1 because in the left hand room he can stopped without any  2 bloodshed. That's my understanding of how the principle  3 works. The question is whether even if McCann didn't exist  4 whether on those facts the person who decided to shunt him  5 into the right room rather than the left would be liable,  6 would be guilty either for murder if he or she, you must  7 remember there also have female senior police officers  8 these days, if he or she foresaw that there was a  9 reasonable possibility of death if he went right and acted  10 recklessly. Alternatively if that foresight wasn't there  11 but a reasonable person in the situation would have  12 foreseen it would have been culpable homicide. That's how  13 it works as I understand but it's not that the controller  14 shall we shall is vicariously liable for anything that the  15 people in the, the facts in our case anything the TRT did,  16 if there's liability on this principle it would be, it  17 would be because things could have been arranged  18 differently without bloodshed, things were arranged in a  19 way which gave rise to a foreseeable situation where they  20 would be killed which could have been avoided by doing,  21 planning it differently. Then the liability would be a  22 direct liability on the part of the planner who came up  23 with the defective plan. That's my understanding of the  24 principle. As I say I may learn a bit more about it in due  25 course but that's the way I see it and that's the point.</p>
<p style="text-align: right;">Page 39567</p> <p>1 the case. I will presumably get a note in due course  2 pointing my errors out, that's the way I see it. I have  3 read the judgment. The question is whether that principle  4 applies in our domestic law. It doesn't apply proprio  5 vigore because it's as you say, it's just persuasive and  6 its persuasive really as to whether that principle applies,  7 the question is whether that principle applies in our  8 domestic law and then we were referred to Mhlanga AJP's  9 judgment and then there was the example that I put up of  10 the homicidal criminal is running amok in, running in the  11 police head quarters and he's running down the passage and  12 there's a T-junction and he can, if those who are in  13 charge, who are able to do so somehow shunt him into the  14 room on the left we just close the door, no one will be  15 killed but if they allow him to go into the room on the  16 right which is a whole lot of warrant officers and higher  17 officials all with nine millimetre pistols and they will be  18 attacked by this person and they would have to defend  19 themselves it's reasonably foreseeable that he will be  20 killed. It's also reasonably foreseeable that he will be  21 killed by policemen acting lawfully in self defence. But  22 if the McCann principle applies then they will still be  23 liable, not the shooters in the right hand office but the  24 people who were controlling the situation will be liable  25 for not sending him into the left hand room, they would,</p>	<p style="text-align: right;">Page 39569</p> <p>1 MR SEMENYA SC: I'll make a short and a  2 little longer answer, Chair. We don't need McCann to  3 improve on our law of vicarious liability, we don't.  4 CHAIRPERSON: We're busy with vicarious  5 liability. We're busy with direct liability and McCann  6 would just be a foreign case which would be, would have  7 some persuasive force, of course it wouldn't be binding on  8 us. We could say it's very interesting that they say that  9 but we don't agree because our law is different.  10 Alternatively we may say well its interesting they say it  11 and its persuasive in the sense that it's as sensible  12 solution to a legal problem which we haven't encountered  13 directly but hat, if we have to lay down the law is the way  14 we lay it down. That's the way I see it.  15 MR SEMENYA SC: Secondly, Chair, if I  16 read McCann it had nothing to concern itself with whether  17 the officers would be criminally liable or not. It  18 concerned itself as far as UK is concerned with whether or  19 not it UK as a country is in breach of Article 2 which is  20 the right to life and it dealt with the question of  21 compensation. It's in civil liability those issues are not  22 complicated. We don't need McCann. We are able to  23 establish them. McCann is not authority for the  24 proposition that I correctly described when I opened of  25 whether you can imbue criminal liability on remote people.</p>

<p style="text-align: right;">Page 39570</p> <p>1 McCann did not deal with that. It did not concern itself 2 with that and you'll recall, Chair, then there was 3 reference to Walters where McCann is being referred by 4 Judge Kriegler in that matter. 5 CHAIRPERSON: But on a different 6 principle. 7 MR SEMENYA SC: On a different principle 8 all together. So I'm saying it, you don't even have the 9 ability as a commission sitting here to say I can learn 10 something from McCann a principle which McCann is not even 11 advocating. Vicarious liability, civil liability, direct 12 civil liability, all of that our law of delictus repeat 13 with good authority on those points. Of course if you can 14 show that your claim is good in delict as a results of the 15 negligent conduct of somebody sitting in JOC why do you 16 need McCann. You don't. Our law is good on that. Chair, 17 can I touch on something different. Of course if you're 18 facing an avalanche you have to somewhat, do what I'm 19 doing. There was – 20 CHAIRPERSON: How do you, I don't want to 21 dictate the order in which you argue your case. How do you 22 deal with my example of the homicidal criminal running 23 around in the police headquarters and he's shunted, allowed 24 to go into the right hand room where he faces certain death 25 because people will defend themselves, have to defend</p>	<p style="text-align: right;">Page 39572</p> <p>1 liability on an non actor, on the ground other then common 2 purpose. 3 CHAIRPERSON: Is he a non actor, he may 4 not be a trigger puller but is he not an actor if he gives 5 instructions that one door is to be, you know my example. 6 One door is to be open and another door is to be closed and 7 so forth. He is like the general on the battlefield, he 8 isn't actually the frontline shooting the enemy, he's 9 giving instructions from his headquarters but to say that 10 he's not doing anything at all and therefore there's no 11 actus reus or non reus they can attributed to him is with 12 respect not right. 13 MR SEMENYA SC: No, Chair, you would 14 remember actus reus is the wrongful conduct. To say to 15 close the door is not a wrong conduct and – 16 CHAIRPERSON: Not closing the door could 17 lead to death. 18 MR SEMENYA SC: No, no, no. But you 19 would have to have the conduct of those people who caused 20 the death but I'm merely saying which is an interesting 21 debate we're having, Chair, that in common purpose cases 22 it's where you been sitting at home on your computer and 23 you have common desire to go rob a particular place and you 24 are guilty, it doesn't matter the remoteness of your 25 station in relation to what happens at the grocery store</p>
<p style="text-align: right;">Page 39571</p> <p>1 themselves in killing him. Which he will avoid if he goes 2 in to the left. That's the, you may say that doesn't arise 3 on our facts and that's of course a question that I'll get 4 to later. But on those facts and viewed as a matter of 5 domestic South African criminal law, remember I put it to 6 you the basis that the controller foresees, the first 7 example, foresees that this man will go to certain death or 8 reasonably possible go to his death if he goes to the right 9 hand room and the controller's reckless when that happens, 10 the question is whether that would be murder. 11 Alternatively if he didn't foresee it but it was reasonably 12 foreseeable then it might be culpable homicide. 13 MR SEMENYA SC: Well my – 14 CHAIRPERSON: Unless you say no, no that 15 criminal liability doesn't arise at all on those facts. 16 MR SEMENYA SC: Chair, my kneejerk 17 reaction would be to say that you're going to have 18 difficulties the actus reus element of a criminal trial. 19 You would remember what brings under criminal law home 20 those people who did, were not direct participants, it's 21 common purpose, that's how you avoid that I don't need to 22 show that your conduct is connected, is the causative cause 23 of this because you were in common design with whoever you 24 went out with. Now it's a kneejerk reaction but I can see 25 the complication arising out of bringing imputing criminal</p>	<p style="text-align: right;">Page 39573</p> <p>1 where the robbery is to take place. The law as I 2 understand it bring you in that circle of culpability on 3 the ground of common purpose. So it doesn't matter what 4 you do, if you are able to show that you are somehow 5 connected with the common design of those who are 6 perpetrating the offence. But I intend taking it no 7 further than that, it makes for provocative intellectual 8 thinking on the issue and I accept the challenge. 9 CHAIRPERSON: - apply on the facts of 10 this case depending on one possible factual finding but 11 anyway we will – 12 MR SEMENYA SC: Maybe let me explore it 13 if it is at that level, a possibility. Commissions don't 14 make law, Chair. 15 CHAIRPERSON: Don't make law but 16 sometimes Commissioners if they have to, if they have to 17 give advice, have to say what they think the law is because 18 it won't be binding if they - again it might just be 19 persuasive to the point which may arise in a court later. 20 MR SEMENYA SC: And yes, if the facts in 21 this, in a Commission's hearing are such as may advise the 22 President that legislation of this kind may require 23 constitutional scrutiny or it may require an enactment 24 order, that's good advice, that's why Commissions are 25 there. But I mean you're not creating law in a Commission.</p>

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1 That' doesn't happen.

2 CHAIRPERSON: Let me ask what you think

3 the law is, in fact in this case I had to do that. Because

4 I had to say what, how you approach an application for

5 someone to give evidence from a remote venue through a

6 television link and I went into the law and I set out the

7 law as I understood it and I quoted, you remember you read

8 it, comparative material from elsewhere and it may be that

9 at some future stage a court will be asked to make an order

10 of that kind and it may look at what I said and either say

11 it's wrong or say well it's got useful ideas which will be

12 incorporated. So even though it hasn't got the force of

13 law, it won't find its way into the law reports but it

14 might at some stage in the future, if anyone ever remembers

15 it, be looked at as a source of persuasive material on how

16 the court should decide a legal question. The same might

17 apply here.

18 MR SEMENYA SC: Well, Chair, I thought

19 maybe you were not travelling in any virgin territory

20 there. As you're entitled to do applying the law that is

21 there, you have been given powers to make procedural

22 regulations that give you powers to make procedural orders

23 and you did.

24 CHAIRPERSON: Well that isn't quite

25 right. The three commissioners have the power to determine

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1 what the procedure would be, those laid down general rules

2 of procedure. The actual application of the rule we laid

3 down, whether it applied and should be used in the

4 particular case was something I had to consider myself, but

5 anyway. Let's not waste more time on that.

6 MR SEMENYA SC: Okay. Chair, I was going

7 to move on to again another concept which –

8 CHAIRPERSON: - before you move on, with

9 how this problem could arise in practice in this matter.

10 The, there is evidence to the effect that there was a plan

11 devised on the Monday night, Tuesday morning by Scott with

12 public order policing inputs from Merafe for example. This

13 plan was thought to be relatively risk free, that that plan

14 could only be executed early in the morning, it couldn't be

15 executed on the Thursday because they had to wait to find

16 out what was going to happen at 9 o'clock and therefore

17 another plan had to be devised. These are all, I'm not

18 saying these are the facts, these are factual findings that

19 may be laid. The 6:30 JOCCOM decided that if they didn't

20 lay, if the strikers didn't lay down their arms a plan

21 would have to be devised according to Brigadier Calitz to

22 deal with the situation and Brigadier Calitz said, in fact

23 the minutes the plan had to be devised. Brigadier Calitz

24 said that Colonel Scott was the man who had to do it. Well

25 Scott eventually produced a plan. I know there's an

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1 argument about when the other plan was abandoned, when the

2 new plan came into operation. But I'm not concerned with

3 that at the moment. A new plan was devised. It is said

4 and it's been argued that that plan was far riskier than

5 the original plan which couldn't be implemented on the

6 Thursday and there was a distinct risk of bloodshed if that

7 plan were implemented and that it was implemented and there

8 was bloodshed. Now I understand that a whole lot of

9 factual issues which arise which may render the argument

10 inoperative but the, but put crisply one possible

11 permutation is there was a risk free plan which could only

12 be implemented on the Friday. The decision was taken to go

13 on the Thursday when the risk free plan couldn't be

14 applied. Because it was Thursday, because it was later in

15 the day there was a lot of risk and that risk in fact

16 produced deaths. So on that basis the, what one can, for

17 shorthand purposes call the McCann principle might find an

18 application if it's part of our domestic law and there may

19 also be other questions about international obligations and

20 so on. But just focus on it narrowly, the question that

21 may have to be to be considered is whether as a matter of

22 domestic law with the criminal law of South Africa, whether

23 on the facts that I've outlined there might or might not be

24 criminal liability. That's something in respect of which

25 you may wish to present arguments to us, either today or

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1 tomorrow or in writing later.

2 MR SEMENYA SC: Let me better reflect on

3 it, Chair.

4 CHAIRPERSON: If we get the note that

5 I've been told we will get pointing out the, my errors in

6 understanding the McCann principle and that note will be

7 available to you as well and you will be able to take it,

8 framing your reply.

9 MR SEMENYA SC: Thank you, Chair, but

10 that question also got a bulb in my brain going on and as

11 Mr De Rover would say policing Chair, is not a Chinese

12 parliament, it's not a Chinese Parliament, you don't in the

13 face of an operation then have 30 generals sitting here

14 each one of them giving you a permutation of how an

15 operation could be done differently and then juggle them up

16 in space and just see and have a vote on it. That maybe

17 we'll go with option C as opposed to option Z, that's not

18 how policing works and it becomes important that we

19 understand the environment which this Commission has been

20 invited to investigate and report on and as I think we make

21 the point in our written submissions the test shouldn't be

22 whether or not plan A or B or C would produce better

23 outcomes because you can never know that. The scrutiny

24 that must be placed on the police is having had made that

25 decision to go with that plan at that time did your conduct

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1 have enough measures in it to mitigate the risks associated  
 2 with it. That is what you should judge. Let's take the  
 3 Merafe, Mpembe episode of the 13th of August. Maybe the  
 4 people would not be, would not have been attacked after the  
 5 teargas and maybe we would not have lost five people if  
 6 Merafe's option was to arrest them there. But our sense of  
 7 assessment tells us that Mpembe's option was a better one  
 8 and we have a sense that you know what it could probably  
 9 have produced worse outcomes if the Merafe option had been  
 10 taken. We harbour that but that's not how you measure the  
 11 police action.  
 12 [15:26] If on that dispute of view between Merafe and  
 13 Mpembe the police regime was to say this is a call for a  
 14 POP, not you, General, POP, we would not criticise Merafe  
 15 for not listening to the General. We would have to measure  
 16 that now that the power to make this decision was that of a  
 17 POP you have made it, did you factor the risks associated  
 18 with disarming them at that time, and if you haven't and  
 19 you were negligent about it, then the consequences are  
 20 yours. We don't say the Mpembe one would not have produced  
 21 those outcomes. I don't know if I'm conveying the  
 22 distinctions quite lucidly as I must.  
 23 CHAIRPERSON: I'm sorry, I have  
 24 difficulty in understanding that. Very often in say a  
 25 culpable homicide case – let's talk about culpable homicide

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1 just to make it simple – very often in culpable homicide  
 2 cases you say the accused was negligent in doing that. It  
 3 was open to him to do this. The reasonable person would  
 4 have done this. What he did deviated from the standard of  
 5 a reasonable man because he did that and that caused the  
 6 death. Now here if you've got two alternative plans the  
 7 accused adopts one plan and that plan leads to disaster  
 8 which was reasonable foreseeable it would, and it was open  
 9 to him and the reasonable man would have adopted the other  
 10 plan which wouldn't have led to disaster and that was  
 11 foreseeable, then you would be able to get a conviction of  
 12 culpable homicide, I would have thought.  
 13 MR SEMENYA SC: No, no, no, Chair, you're  
 14 right with that example, but I think the point I'm trying  
 15 to make is if you're measuring whether a particular driver  
 16 is negligent or not in relation to a particular accident,  
 17 what you do not do is to postulate that had you taken the  
 18 trip the following day the accident would not have  
 19 happened. That's not how it works. How it does work is to  
 20 say having made the decision to be on that road were you  
 21 driving at high speed, did you factor in the rain, did you  
 22 factor the distance? You measure the individual in  
 23 relation to the facts as they exist for him.  
 24 CHAIRPERSON: I don't know if that's  
 25 right. Take your traffic example. Someone has got to

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1 travel from Pretoria to Johannesburg. He's got a choice of  
 2 going today or tomorrow. If he goes today he's warned you  
 3 shouldn't go today, it's terrible weather, there are all  
 4 sorts of problems, it's extremely dangerous to travel  
 5 today. Wait till the storm clouds have passed. Tomorrow,  
 6 you don't have to go tonight, wait till the storm clouds  
 7 have passed, you can travel through tomorrow without any  
 8 problem, and he says no, no, I'm going tonight and he does  
 9 and there's catastrophe, you mean to tell me you only judge  
 10 him by what has happened on –  
 11 MR SEMENYA SC: Yes, yes.  
 12 CHAIRPERSON: - and you can't have regard  
 13 to the fact that he made a foolish decision which a  
 14 reasonable person wouldn't have made to travel in the face  
 15 of all those adverse weather conditions today and he didn't  
 16 wait till tomorrow? I'd be very interested to know whether  
 17 that's the law of South Africa.  
 18 MR SEMENYA SC: You see, if I say to you  
 19 in that example, Chair, that you have warned me about all  
 20 of these things, I'm going to drive at five kilometres per  
 21 hour, why can't I take my trip? Because the things that  
 22 you are warning me against are presupposing I'll be driving  
 23 at 80 and of course I'll be exposed to those –  
 24 CHAIRPERSON: Those aren't my facts. My  
 25 facts are even at five there are all sorts of dangers of

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1 floods and even the five kilometres an hour vehicle can be  
 2 swept into the river and people can drown.  
 3 MR SEMENYA SC: In that example I do four  
 4 and a half.  
 5 CHAIRPERSON: I don't want to waste time;  
 6 your time is precious, but –  
 7 MR SEMENYA SC: Yes.  
 8 CHAIRPERSON: - you know, these are the  
 9 points you're arguing and I –  
 10 MR SEMENYA SC: Yes.  
 11 CHAIRPERSON: If there are difficulties I  
 12 see I must put them to you.  
 13 MR SEMENYA SC: No, I accept that, Chair.  
 14 Chair, can I deal with another concept, because I'm trying  
 15 to have us understand the environment within which the  
 16 terms of reference invite you to measure the conduct of the  
 17 police. Mr De Rover has referred us to what he calls  
 18 associative threat perception and I could hear argument  
 19 saying ja, that already is an admission of liability if  
 20 you're going to have that type of thing.  
 21 Can I try and make the submission into helping at  
 22 least me, if not the Commission, understand that concept.  
 23 If anybody screams fire we are going to all hurdle up there  
 24 and we are going to stampede and perhaps suffer serious  
 25 injury or a calamity worse, and somebody asks you did you

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1 see the fire, that question does not understand human  
 2 behaviour and I use it in relation to two elements  
 3 pertaining to this case, the cease fire call and the  
 4 shooting call. Chair, and this probably requires us to  
 5 have a closer understanding of how police work. If in your  
 6 radio you hear that the police are under fire and as a  
 7 police officer you race there, you will join the police in  
 8 returning the fire of those who are firing at the police.  
 9 You are not going to hold an inquiry with them and then  
 10 find out what exactly did they do and were you the  
 11 offending one, et cetera. It doesn't work that way, and  
 12 they are trained to work in pairs and it's precisely to say  
 13 given the nature of your environment you require certain  
 14 primitive instincts that help you accomplish your  
 15 constitutional obligation for law and order differently.  
 16 Now the associative threat perception in the  
 17 environment of the facts that we are talking about is  
 18 exactly that. A police officer would know my colleague  
 19 can't shoot in vain. That's not how we work. But I don't  
 20 also ask him, even the McCann is a typical example, you  
 21 don't have to ask did you arrest him and does he have a  
 22 detonator or doesn't he have a detonator. That's not how  
 23 it works. Once a judgment call is made by your member who  
 24 you have joint brief with and you understand what the brief  
 25 is and what the threat is and what his training is, you

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1 must accept reasonably that his conduct would be in line,  
 2 it's not supposed to be out of line. You're not doing work  
 3 with somebody you just don't know, you met at the corner of  
 4 the street, and you must assume therefore that if he covers  
 5 this angle, you will cover that other angle. That's the  
 6 nature of the concept, if I understood Mr De Rover  
 7 correctly.  
 8 Cease fire; it is one thing if you are shouting  
 9 that to people in an auditorium like this, quite a  
 10 different one where Mr White as a police expert tells us I  
 11 can understand that Brigadier Calitz did not here the  
 12 shooting. There's enough commotion there, the engines are  
 13 going on and as we say the helicopters are hovering around  
 14 there, there's rubber bullet and what have you, so it's  
 15 reasonable possible that he did not hear it. Cease fire  
 16 happens when we are cold and calculating here, four  
 17 seconds. How much response time is available? Again we  
 18 have to be human on these things; how much response time is  
 19 available? Is it 30 nanoseconds? Does the one hear the  
 20 cease fire from the other tail end of the line? And we  
 21 know we have what, 53 of the TRT people that discharge  
 22 their firearms. So we have to understand that, and as I  
 23 say they are not working on a blood pressure of 120 over  
 24 80. It's something quite radically different, and because  
 25 tomorrow I'll be dealing with difficult aspects of what I

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1 believe is our case it is important that we prepare the  
 2 canvass against which we are going to measure their  
 3 conduct. If we don't we might err.  
 4 Chair, my learned colleague George Bizos referred  
 5 you to a section of our heads and that was paragraph 95,  
 6 and expressed an exclamation that we don't seem to  
 7 recognise some of the limitations of our case. 95, Chair,  
 8 you will find at page 40 and that's where we try very hard  
 9 to define how we understand our case. If we can have  
 10 paragraph 95 on the screen, this is how it reads, "The  
 11 position of SAPS in these proceedings and specifically in  
 12 relation to the persons who died as a result of police  
 13 action is that their deaths" – and here comes the  
 14 qualifier, Chair, "where evidence is available occurred in  
 15 circumstances of self and/or private defence, alternatively  
 16 putative self or private defence." We have come now to the  
 17 end of the proceedings to know that if we haven't been able  
 18 to place evidence before the Commission in relation to the  
 19 deaths of certain individuals, then that's what it is,  
 20 there is no such evidence and no justification can be  
 21 gleaned from it.  
 22 CHAIRPERSON: The ruling was based on  
 23 oral evidence. The ruling related to oral evidence.  
 24 MR SEMENYA SC: No, Chair, I'm saying if  
 25 oral or otherwise we have not been able to place sufficient

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1 evidence before you that could explain or justify the death  
 2 of so and so, then we haven't, and I think the finding will  
 3 go so far as to say that has not been shown, that there  
 4 doesn't appear to be any justification for the killing of  
 5 so and so, and in paragraph 136, if we go there, of the  
 6 heads, and for instance we start with 136.1, there we say,  
 7 "The circumstances under which Mr Sokanyile died are set  
 8 out in the statement of Constable Mguye. In summary he  
 9 explains that after the attack on the police Lieutenant  
 10 Vermaak ordered some members of POP and TRT to go with him  
 11 to pursue a group of strikers who had run into the informal  
 12 settlement across the gravel road from where the attack on  
 13 the police occurred. Lieutenant-Colonel Vermaak informed  
 14 the POP and TRT members that one of the strikers had an R5  
 15 rifle taken from him," and we continue describing the  
 16 evidence there.  
 17 But more significant when we talk at paragraph  
 18 136.4, in the written submission we say, "Lieutenant-  
 19 Colonel Vermaak has offered conflicting evidence regarding  
 20 the shooting incident in which he gave orders to members of  
 21 the TRT to shoot at the striker who had an R5 rifle in the  
 22 informal settlement. He testified that the person that he  
 23 pursued with the TRT members disappeared into the informal  
 24 settlement. On this account it clearly cannot be Mr  
 25 Sokanyile that he and the TRT members were pursuing. We



<p style="text-align: right;">Page 39586</p> <p>1 submit that nothing turns on the contradiction on either 2 account. The SAPS is unable to make a submission whether 3 or not the death of Mr Sokanyile occurred in circumstances 4 excusable in law." So we do make that admission which was 5 not immediately apparent in the opening statement we made 6 when the hearings commenced, and so too we say on page 59 7 in relation to the deaths of others.</p> <p>8 Chair, can I step back and understand what SAPS 9 did in relation to koppie 3? Firstly we tend that the 10 evidence of Mr De Rover, not direct evidence, purely an 11 attempt by Mr De Rover to reconstruct the events and see 12 whether or not that reconstruction can help the Commission 13 better understand what may have happened. There was no 14 direct evidence in relation particularly to those bodies 15 that were found inside the koppie, and the De Rover 16 evidence was an attempt at trying to help us seek possible 17 scenario that may explain them.</p> <p>18 We haven't been able to get to the point where we 19 say, in relation to those at least that there is sufficient 20 evidence before the Commission to show that their deaths 21 were in circumstances that are excusable in law. We 22 haven't been able to get there.</p> <p>23 Then we're going to have to deal with the various 24 issues, including the planning, but I would hope before we 25 get into the real evidence in relation to the operation</p>	<p style="text-align: right;">Page 39588</p> <p>1 officer test to measure all of those type of things. But 2 if you ask me my instinct would go with Mr De Rover. A 3 decision of that magnitude should enjoy the entire top 4 brass of the South African Police Service if they're doing 5 their work correctly. It's an important decision, it has 6 ramifications of note as we now know. And we can ask the 7 next question whether or not there was enough probing about 8 whether it should have been carried in the manner it was 9 and those are matters with which I propose, if you allow 10 me, Chair, to deal with tomorrow. But I thought I should 11 bring home that one. I have also thought perhaps I'm still 12 able to deal with what the evidence leaders deal with in 13 relation to the National Commissioner. I think the section 14 they're referring to about the removal of the National 15 Commissioner is section 8 of the Police Act, but I'm making 16 no higher point than to say probably the section that they 17 may want to rely on would be 9. And Mr Mpofu I see he 18 agrees with me. But, Chair, the warning that rings in my 19 head is that if anybody ever looked at the terms of 20 reference and the issues with which the Commission was to 21 busy itself with, it must be most unfair that the National 22 Commissioner now all of a sudden is faced with a probe into 23 the fitness or otherwise of her office. It could not have 24 naturally flown from looking at the terms of reference that 25 that is the issue. And if she was better advised that not</p>
<p style="text-align: right;">Page 39587</p> <p>1 that we put aside, or deal at least in part if not properly 2 with the issues like the decision to disarm. You recall we 3 deal with two decisions of the Provincial Commissioner that 4 people be disarmed on the 13th and another one that people 5 be disarmed on the 16th.</p> <p>6 In that regard, Chair, our submission is if you 7 find that that decision is lawful then cadit quaestio. You 8 cannot then say it is also reckless. The two are mutually 9 destructive. Reckless decisions should not be outcomes of 10 lawful conduct, and it's cardinal that we make that 11 distinction because you look at the Constitution and it 12 says to you that look, you have a duty, Mr Police Officer, 13 to obey a lawful command. The only command that we, the 14 fathers and mothers of the Constitution tell you, you can 15 ignore is one which is manifestly illegal. Now there can't 16 be anything manifestly illegal by saying, as I say, there 17 are people who are bearing arms against the State, they 18 have killed state agents.</p> <p>19 [15:46] They have killed security personnel, they have 20 killed co-workers. In my submission, Chair and with the 21 damage that had happened at that time it is a lawful 22 decision which was given to the police. We can investigate 23 and do deeper probing tomorrow as to whether the how, the 24 when that lawful command was implemented, was in the 25 circumstances reasonable and we'll be using the reasonable</p>	<p style="text-align: right;">Page 39589</p> <p>1 even one of the terms of reference of that commission would 2 be to do that, not that the legislation will permit that, 3 it will be an offence against a whole number of instruments 4 that deal with the removal of office of the National 5 Commissioner. But assume it did that at least she would 6 have been forewarned, she would have known how to protect 7 her rights, she would have taken various other positions in 8 relation to this matter. So it's a little ambush, maybe 9 that's a strong word, but it's unfair that her fitness to 10 hold office becomes a subject matter of the Commission into 11 Marikana where her conduct is said to constitute a 12 misconduct within the meaning of that section. Enough unto 13 the day is the evil thereof, Chair, if you'll permit me can 14 I stop here?</p> <p>15 CHAIRPERSON: Sorry I beg your pardon? 16 MR BUDLENDER SC: We announced when the 17 program was settled that we'd start at quarter to nine 18 tomorrow.</p> <p>19 CHAIRPERSON: I see, just as well you 20 told me.</p> <p>21 MR BUDLENDER SC: With your consent, 22 Chair.</p> <p>23 MR SEMENYA SC: Why, Jeff? 24 CHAIRPERSON: The Commission will adjourn 25 until 8:45 – Mr Budlender, I suggest you listen. The</p>

1 Commission will adjourn until 8:45am tomorrow morning.

2 [COMMISSION ADJOURNED]

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