

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 300

14 NOVEMBER 2014

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<p style="text-align: right;">Page 39591</p> <p>1 [PROCEEDINGS ON 14 NOVEMBER 2014] 2 [08:45] CHAIRPERSON: The Commission resumes. In 3 order to create a bit more time for argument we've agreed 4 that today we won't have two tea breaks, we'll have one 5 short five-minute comfort break and thereafter we'll have a 6 10-minute tea break. I know that's going to put pressure 7 on everybody, but it's a sacrifice we have to make for the 8 public good. Mr Semenya. 9 MR SEMENYA SC: Chair, Commissioners, 10 thank you. I thought to start by dealing with the analysis 11 on our terms of what was the nature of the group from the 12 koppie on the 16th. Chair, you would realise that there are 13 sharp differences that SAPS has with some of the parties 14 with SAPS contending that it was really a distinct large 15 group of people who were on the koppie and a similarly 16 distinct smaller group of armed strikers on the koppie, and 17 the significance of that difference in our submission is we 18 do realise when a measure such as the unfurling of the 19 barbed wire started that that type of Public Order Policing 20 technique achieved what is a predictable response from the 21 normal public order situations, 2/3000 of those dispersed 22 without incident, without anything, and yet remained the 23 other 3/400 who were armed and who we say no normal Public 24 Order Policing techniques were capable of defusing or 25 dispersing them, and we do know as a matter of record that</p>	<p style="text-align: right;">Page 39593</p> <p>1 to Mr Ntsenyeho in various frames from even the previous 2 days to identify this is the same person with the yellow 3 backpack and show us that individual again even on the 16th, 4 and argued that he did not have any weapons with him. But 5 if you look at the frame of the 16th he is barely an arm's 6 length away from the man who's shooting at the police. So 7 you would have to ask the question can he innocently say 8 that there is even practical ways of discriminating him 9 against the one who's shooting at the police? And the 10 argument we make there is that he clearly is in concert, or 11 has associated himself sufficiently with the conduct of the 12 many. 13 There are verbal threats which are uttered by Mr 14 Noki and others and they are talking the "we," "we are 15 going to show the world how we are going to kill each other 16 today. It must with respect be with reference to the "we" 17 as a group, canvassing all of them. 18 On the 13th the evidence at the railway line shows 19 a group moving in unison on the command of its leaders and 20 those at scene 1 who were possibly members of the group of 21 13 August 2012 as well. We make the point that there is 22 evidence that those who went around the kraal followed an 23 instruction from Noki not to run away and that was the 24 evidence that we heard, that he commanded all of those 25 people that he was with shortly before they approached the</p>
<p style="text-align: right;">Page 39592</p> <p>1 even as late perhaps as it was that the teargas and stun 2 grenade and water cannons were used on them, the result is 3 what we still had. 4 With that said, Chair, can I invite us to deal 5 with an allied topic, which is what exactly was the nature 6 of the threat that was faced by the police on the 16th, and 7 I invite us to look at page 101 of our written submissions, 8 that is on page 41, paragraph 101 on page 41. We say 9 there, Chair, that there is an argument that the threat to 10 the police at scene 1 was posed by the front group of 11 strikers who came around the kraal and that some of those 12 strikers who came around the kraal but were at the back of 13 the group did not pose any threat to the police, and we 14 made the submission that this argument is wrong and it is 15 wrong for the following reasons. The evidence 16 overwhelmingly shows that the members of the group that 17 moved around the kraal were acting in concert and with 18 common purpose. Even those who may not have had weapons on 19 them, if there were any, because we are still contending 20 that if there were any they were moving with a group of 21 heavily armed people and reconciled themselves with that 22 reality. 23 Chair, you'd remember that the evidence leaders 24 referred us to Mr Ledingoane, referred us I think to Mr 25 Ntsenyane who – Mr Ntsenyeho – yes, Chair, they referred us</p>	<p style="text-align: right;">Page 39594</p> <p>1 kraal, and we make the submission that the suggestion in 2 argument that the threat for instance posed by individuals 3 who fired at the police could have been handled using a 4 sniper suffers from the same flaw. It's not an individual 5 that was a threat to the police line, it was the armed 6 group as a whole acting in concert with a common purpose 7 under the leadership and direction of Mr Noki. 8 Chair, we may need to emphasise what we stated 9 yesterday in our respectful submission that you are not 10 dealing with a situation of some 3, 4 individuals who are 11 in confrontation with 3, 4 police officers in an ordinary 12 course of events in this country. You're really talking 13 about a cohort of 700-odd police officers who were in clear 14 display on the 16th and who the group of 3 or 400 decided to 15 defy. Happily if we understand the submissions by the 16 evidence leaders there is agreement that whatever happened 17 on the 16th of August 2012 was not premeditated executions 18 and we say over and above the elements which the evidence 19 leaders identify in support of that conclusion it would 20 have been quite a feat to persuade the commanders at 14:30 21 to commit a crime of that magnitude at 15:30. 22 CHAIRPERSON: [Microphone off, inaudible] 23 understand Mr Mpofu to contend for that. Remember in his 24 argument when he and I had a discussion as to what 25 happened, probably happened, the understanding was he</p>

<p style="text-align: right;">Page 39595</p> <p>1 conceded that the TRT people were probably forming a human 2 block, as it's been described, and the intention was that 3 they would disperse and disarm and arrest, but that what 4 then happened was the, when the teargas and water cannon 5 was used at a later stage than perhaps was appropriate, 6 that had the effect – remember this was the argument of the 7 evidence leaders as well that that broke the advancing 8 group into three, one group being on the side of the kraal, 9 the other one being the head group where Noki was, and then 10 the third group were the ones who turned around and ran, 11 that in effect the – this is as I understand the concession 12 – in effect the front group was sort of pushed forward by 13 the teargas and the water cannon and rubber bullets, rubber 14 balls it was, and that created the impression in the minds 15 of the TRT that they were being attacked and that's why 16 they fired because they argued that in the circumstances 17 the principles of putative defence don't apply because the 18 rules don't apply. But I understood the concession to be 19 that the intention wasn't to mow them down, deliberately to 20 mow them down, that it resulted from this particular 21 combination of circumstances. If I've stated incorrectly 22 I'll be corrected.</p> <p>23 Yes, Advocate Hemraj points out that what was I 24 think conceded was that the TRT were there as a human block 25 to prevent the strikers from going into Nkaneng. There was</p>	<p style="text-align: right;">Page 39597</p> <p>1 went all over the world and was viewed with shock and 2 revulsion and so forth, but although Professor Piketty 3 doesn't state it in direct terms there is an impression 4 created certainly I think in the eyes of the casual reader 5 that what happened in South Africa at Marikana was that 6 strikers were killed because they were striking, and 7 Professor Piketty in fact refers to two earlier incidents, 8 one in Chicago, both in the 19th century, one in Chicago and 9 the other in France, where the impression seems to be – I'm 10 not aware of the details of those two incident, but this is 11 a bit like Peterloo I suppose earlier in English history, 12 where effectively people were shot because they were 13 striking. Now, and certainly we have read in the media 14 that certain people internationally have made the 15 accusation against South Africa that how dare South Africa 16 criticise other countries when they themselves shoot 17 strikers because they're striking. Now am I correct in 18 thinking that it's not contended by anybody that the 19 strikers in this case were killed because they were 20 striking?</p> <p>21 MR SEMENYA SC: It must be common cause 22 at least before this hearing, Chair.</p> <p>23 CHAIRPERSON: If there is a contrary 24 impression out there either in South Africa or in the rest 25 of the world, that's something which should be –</p>
<p style="text-align: right;">Page 39596</p> <p>1 fears that certain things might happen if they went into 2 Nkaneng, but the point was, I think it was quite clear from 3 the concession that it wasn't the contention that this was 4 a deliberate massacre, that the idea was to mow them down, 5 but was the results of a particular confluence of 6 circumstances which were described. So I don't know that 7 it's necessary for you to elaborate on the point. It seems 8 to me to be correct to say that nobody at this stage of the 9 inquiry suggests that. If I'm wrong I'll be corrected, but 10 I don't think I'm wrong.</p> <p>11 MR SEMENYA SC: Yes, that was the only 12 submission we were making, that the evidence leaders also 13 make the point that whatever we can say about what happened 14 on the 16th could not have been a function of a premeditated 15 decision to execute the people as has happened, and I 16 recall you, Chair, you even pointed to the fact that in the 17 middle of international media being present there it could 18 not, that conclusion could not –</p> <p>19 CHAIRPERSON: There's a further point 20 that's linked to that that I had intended raising earlier, 21 but I didn't. It's probably appropriate to raise it now. 22 Mr Mpofo in his argument begins by a quotation from the 23 best-selling work by the French economist, Professor Thomas 24 Piketty, and he quotes it on the first page of his heads, 25 making the point of course that what happened at Marikana</p>	<p style="text-align: right;">Page 39598</p> <p>1 MR SEMENYA SC: Dispelled.</p> <p>2 MR MPOFU SC: Chairperson, I'm sorry, 3 just in fairness to Mr Semenya, I don't want him to argue 4 on the basis of these concessions and understandings which 5 I'm going to contest. Firstly if there's an impression 6 that they were shot because they were striking, it's not 7 out there, it's in here and I'm going to deal with it when 8 I argue.</p> <p>9 CHAIRPERSON: Are you going to contend 10 they were shot because they were striking?</p> <p>11 MR MPOFU SC: Yes, "Today we are ending 12 the strike." That's what Mbombo said.</p> <p>13 CHAIRPERSON: I see, alright. If that's 14 your contention then obviously it's one that we have to 15 address. If it's your contention and you're going to 16 advance it then we'll have to think about it. If you're 17 correct we'll uphold the contention and if you're not, we 18 won't.</p> <p>19 MR SEMENYA SC: Yes, Chair, can I then 20 address another point? The case SAPS is making in relation 21 to what may in part explain the events of the 16th is that 22 the plan was interrupted and we know when we look at what 23 is called the Scott's Plan that indeed the plan was that 24 the barbed wire was going to be unrolled, or rolled out, 25 there was going to be an announcement made to the strikers,</p>

1 they were going to be given an opportunity to disperse and
 2 that did not happen for what we now know through the
 3 evidence that the strikers went to the unfurling barbed
 4 wire. We need hardly make that point any higher, it's
 5 evident even from the video clips that depict the events of
 6 that day.

7 Somewhat a little contentious is the role and
 8 function of the NMF, extraordinary session of the NMF. Two
 9 elements to it; the one it's even if it were to be
 10 contended that the decision to disarm the strikers the
 11 following day was made by the NMF, we would submit that
 12 that would be perfectly lawful that the highest top brass
 13 of the South African Police meet and look at the gravity of
 14 the situation unfolding in Marikana with 10 lives down and
 15 say no, this has to stop. What we may debate later, as we
 16 definitely will, would be the question of was that done
 17 with the care required of police service in the
 18 circumstances.

19 But there is another difficult subject around the
 20 NMF and that relates to the fact that the National
 21 Commissioner as well as the Provincial Commissioner do not
 22 mention that event until, even Roots appears not to be
 23 alive to the meeting that was held there and the evidence
 24 by both the NATCOM and the PC on that issue is that it was
 25 an inadvertent omission, but I think, Chair, we can make in

1 mitigation of that error, if it is found to be one, the
 2 very fact that there doesn't seem to be anything ominous
 3 about what was discussed there, so the –

4 CHAIRPERSON: I know you say that, but
 5 why won't they tell us what happened? Why do we get these
 6 evasive responses to the questionnaire that I sent out?
 7 Why does the National Commissioner herself when I ask her
 8 about it say that she can't remember? I mean things had
 9 gone dramatically wrong the next day. I would have
 10 imagined that the discussion that took place is something
 11 that she would have remembered, but she gives me the answer
 12 when I asked her was the risk discussed, she says "I can't
 13 be expected to remember pedantic detail about time." Now
 14 these are the factors which lead one to, prima facie
 15 obviously, subject to what you're going say, to infer that
 16 something is being concealed from us and it must be
 17 something awkward because you don't conceal things that
 18 aren't awkward. So if it was as you say it was, nothing
 19 wrong with what was said, perfectly in order,
 20 understandable, why didn't they tell us all that? Why do
 21 they go to these extravagant lengths to conceal what
 22 happened from us? Normally when a witness does something,
 23 conceals something or says something untrue, very often
 24 there's a reason or very often actually it points, just
 25 like an arrow pointing in the direction of the truth. Now

1 in what direction does this concealment point?
 2 [09:05] MR SEMENYA SC: Well, Chair, again, a
 3 matter of conjecture on my part that it may very well have
 4 been thought that an announcement of that fact would show a
 5 decision was taken by them as opposed to the Provincial
 6 Commissioner. Even something innocuous like that, I'm
 7 referring to the content of that conversation with the top
 8 brass. We can accept that whatever it is that was
 9 discussed was also communicated to the JOC the following
 10 day.

11 CHAIRPERSON: I don't want to make things
 12 difficult for you by heckling you, but I have got problems
 13 that I must put to you. The decision taken was to endorse
 14 her proposal, so therefore it was a proposal she made, not
 15 a decision she made, a proposal she made which they
 16 endorsed, that's the first point. The second point is you
 17 remember I asked her, I said to her your experience is not
 18 in the operational matters, your experience is in financial
 19 administration. She said yes. I said there were
 20 experienced operational people around the table among your
 21 fellow provincial commissioners and if any of them – if
 22 there'd been an argument to say no, no but the risks, we
 23 must look at it very carefully, perhaps we mustn't accept
 24 your proposal in the form you've presented it, what would
 25 your attitude have been, and she said oh no, she would

1 obviously have accepted that because she accepted her
 2 limitations in that field, in that area. And then the
 3 further point is what the JOC was told, as far as we know,
 4 the JOCCOM was told, was simply that she had decided, that
 5 that was recorded in the occurrence book, and in fact
 6 Major-General Annandale made it his business to see that
 7 that was recorded, stood over Brigadier Pretorius while she
 8 wrote it. So I'm not sure, with respect, that – I must put
 9 the problems to you because I may be overlooking something,
 10 but I'm not sure, with respect, that the conjecture you put
 11 is actually going to work.

12 MR SEMENYA SC: Chair, I was attempting
 13 obviously to answer the difficult question, but also put in
 14 the postulate that whatever may have been discussed there
 15 couldn't be something inconsistent with what the PC then
 16 tells the rest of the world at 9:30 the following day. It
 17 can't be incongruent to that and what the PC tells the rest
 18 of the world at 9:30 that morning is something lawful.
 19 It's we are going to wait until there is a voluntary
 20 disarmament on their part, but if there isn't we're going
 21 to have to act.

22 Let me attempt, Chair, again to tackle another
 23 point. You'd recall, Chair and Commissioners, that there
 24 was a whole illustration made during the evidence which the
 25 evidence leaders were suggesting there were two areas on

<p style="text-align: right;">Page 39603</p> <p>1 which around the kraal the advancing strikers could have 2 been blocked, path A and path B. The difficulty we have 3 with that proposition is we are not told if they were 4 blocked then what, what was going to happen next. Does 5 that mean the police would then retreat back to the JOC and 6 say to the PC we feared that we are going to be under 7 attack and in the light of that we decided to come back to 8 the JOC and to re-strategise. And if we take that 9 conjecture forward, the armed strikers got into the 10 settlement and killed people and we'd hear the police 11 service that says to the rest of South Africa, oh the only 12 reason we retreated there is because we feared we were 13 going to be attacked. It can't work like that in a 14 constitutional democracy. The only people who have, as we 15 submit, the right under the Constitution to maintain law 16 and order, it's them, and it is not available for them, as 17 it might very well be for you and I, Chair, to retreat and 18 run away and tell everybody else and mayhap even with 19 aplomb that we may get for running away. This is their 20 constitutional mandate, they have a duty to maintain law 21 and order. You just don't block it at A or B and do 22 nothing about it. In fact I think a better proposition, if 23 that were a possible avenue, would have been for Brigadier 24 Calitz to say mission abandoned. Then everybody else gets 25 into their cars and the people move, why block them at all?</p>	<p style="text-align: right;">Page 39605</p> <p>1 kraal, where do you use the non-lethal methods? Because 2 you're behind there. The only path, Nyala 4 has already 3 closed that side of the kraal, you close with Nyala 6 the 4 other mouth of the kraal, they are on the other side, how 5 do you disperse people like that? All they have to do is 6 to stand another distance away from you, then you'll have 7 to open. 8 CHAIRPERSON: But what would they have 9 done – you remember the plan didn't prevent the strikers 10 from going into Nkaneng provided they took the long road as 11 opposed to the short road. If they had gone west into 12 Nkaneng from the other side there wasn't a problem. And in 13 fact if some of the earlier people who left had gone into 14 Nkaneng they weren't prevented from taking their weapons. 15 That was something that I remember General Annandale 16 conceded in his evidence. So if you stopped them going 17 directly into Nkaneng opposite the kraal you're then 18 effectively putting the clock back a bit and they're either 19 going to stay where they are or go back to the koppie - 20 because remember the information was they didn't want to 21 give up possession of the koppie and they would fight to 22 retain it and so forth - or they're going to go the long 23 way and go into Nkaneng. But the plan was, you remember, 24 that once they are in a fenced-off area then it would be 25 possible for the warning to be given, which presumably</p>
<p style="text-align: right;">Page 39604</p> <p>1 CHAIRPERSON: Does it follow, I mean I 2 can understand if the only alternative once they'd blocked 3 them was to go back to the JOCCOM, to the JOC, abandon the 4 mission, but would that have been the only thing they could 5 have done? Once they've blocked them so they can't come 6 forward, they then, presumably the police would have stayed 7 there, they could then have used the teargas and the non- 8 lethal methods, you know, the force continuum, the water 9 cannon. Remember at the demonstration, we saw how powerful 10 the water cannon is, it knocks you backwards. They could 11 have used the water cannon, they could have used the 12 teargas, they could have used the stun grenades, they could 13 have used the rubber balls. The indications are that the 14 non-lethal methods actually did have the effect of driving 15 that section of the advancing strikers, not in the front, 16 backwards. So if they'd blocked them so that – they then 17 used the water cannon and so forth, the non-lethal methods 18 in a manner which didn't drive some of the strikers forward 19 and create the impression that they were trying to attack 20 the police, but drive them all back and presumably they 21 would have gone back towards the koppie, and then the plan 22 could have been resumed, but I mean these are what Mr 23 Burger calls counterfactuals, aren't they? 24 MR SEMENYA SC: Let's test that, Chair. 25 You block them at path B, that is at the mouth of the</p>	<p style="text-align: right;">Page 39606</p> <p>1 would be the section 9(2) warning which Brigadier Calitz 2 was going to give, and then the rest of the plan could have 3 been resumed. How successful it would have been, of 4 course, is another matter, but it was always going to be 5 that plan. So the police can't be heard to say well it's 6 unfair to suggest we should have carried with our plan if 7 they were going to, wanted to carry on with it anyway. The 8 lack of wisdom of the plan kicks in at an earlier point, 9 but we don't have to discuss that now. 10 MR SEMENYA SC: But then it means where 11 you have blocked them you would have to unblock that to go 12 to them, to the koppie. 13 CHAIRPERSON: The original plan 14 envisaged, you remember, that there was going to be a block 15 on the other side of kraal and there was some suggestion 16 that there would have been some kind of gap through which 17 the police were going to enter. That was always inherent 18 in the plan. 19 MR SEMENYA SC: No, Chair, you remember 20 when Nyala 6 was originally positioned in that way, the 21 plan was that they were going to move out as the police 22 from the western side of the kraal. It's only when Nyala 4 23 and Nyala 6 were brought in that they were going to now use 24 the eastern side of the kraal and that is where it is 25 suggested a block must happen. Now I'm saying if you have</p>

<p style="text-align: right;">Page 39607</p> <p>1 blocked both of them and they went back and you intended to 2 continue the operation you'd have to unblock that so that 3 you go out of it.</p> <p>4 CHAIRPERSON: It doesn't it depend on the 5 nature of the block. If it was a wire block from Nyala 6 6 then there was some suggestion you could create a space. 7 If it was a human block of TRT people in a line then you 8 haven't got a problem at all, have you?</p> <p>9 MR SEMENYA SC: Well perhaps this 10 illustrates my point, Chair, with the exchange that we have 11 had; this is a decision that to be made by Calitz together 12 with all the commanders there in fractions of seconds and 13 look at which of those options would have been feasible and 14 which one would have been practical to implement and what 15 efficacies would be with one or opposed to the other.</p> <p>16 CHAIRPERSON: I'm sorry, I don't quite 17 understand. The situation we're postulating at the moment 18 is there was a human block created, the problem was the 19 non-lethal force created the situation where some of the 20 strikers in the front were pushed forward with consequences 21 that we know. But if that hadn't happened, the human block 22 had been called and they couldn't advance, then wouldn't 23 there have been effectively a standstill? I mean Calitz 24 and company could have then had a meeting, decided what to 25 do, they might well have decided to call off the operation</p>	<p style="text-align: right;">Page 39609</p> <p>1 saying that on the evidence it looks like even the TRT line 2 wouldn't do it. I don't see how a POP line similarly lined 3 on the mouth of the kraal could have stopped them 4 advancing.</p> <p>5 Around a different subject, the question of the 6 Scott's plan, of course Chair, if we are correct that there 7 was an attack on the police line of the nature we describe, 8 even on Colonel Vermaak's description of the events that 9 they were impi-like, that POP techniques could have 10 contained that threat, then there clearly is nothing wrong 11 with what is the Scott's plan because it sought to cater 12 for that which goes beyond standing order 262. And we take 13 solace when we read the submissions of the evidence 14 leaders. They too think somehow 262 should be able to be 15 amended to accommodate something more. It's implicit in 16 their recommendations if you read them.</p> <p>17 MR BUDLENDER SC: Chair, we say there's a 18 lack clarity as to whether that applies and it should be 19 amended to make it clear that it applies in these 20 circumstances. We don't say that it doesn't apply, we 21 leave that open.</p> <p>22 MR SEMENYA SC: Yes, but that grey area 23 says let's clarify it to make sure that it is patently 24 clear it caters for things beyond –</p> <p>25 CHAIRPERSON: There was an opacity, I</p>
<p style="text-align: right;">Page 39608</p> <p>1 until the next morning, that's another possibility which 2 arises. But there were various things they could have 3 thought about, but they were experienced, Calitz was an 4 experienced POP man, some of the others were as well, 5 Merafe and others, though Merafe wasn't there, he was 6 elsewhere. But some of the others were also experienced. 7 One would hope that it would not have been beyond their 8 ability to come up with something that would have worked 9 and would have been relatively risk free.</p> <p>10 MR SEMENYA SC: There are two things, 11 Chair. Chair, perhaps two things. There was indeed a TRT 12 basic line human block there, it didn't work, it produced 13 the result that it did. But –</p> <p>14 CHAIRPERSON: Why didn't it work? If the 15 non-lethal force had been used slightly earlier before the 16 strikers had got to that point and presumably the ones at 17 the front would have done what the ones slightly further 18 back would have done, turned around and gone back. The 19 problem was this concatenation of circumstances brought 20 about by the fact that the non-lethal force was only used 21 after some of the strikers had passed the point at which 22 the non-lethal force was going to be used. Isn't that so?</p> <p>23 MR SEMENYA SC: That's a different point. 24 I was answering, or attempting to answer the first one, 25 whether a human block could have blocked them out and I'm</p>	<p style="text-align: right;">Page 39610</p> <p>1 think is the right word, in 262 which should removed. 262 2 should spell out clearly what is to happen in this kind of 3 situation and we will make recommendations in that regard 4 and hopefully we'll get assistance, well we have already 5 got some assistance from you in your heads, maybe if you've 6 got other ideas which would help to make it clearer they 7 would be gratefully received.</p> <p>8 MR SEMENYA SC: Well, Chair, within SS we 9 made a submission the legislative instruction that is 10 9(2)(d), the statute there contemplates the use of weapons 11 and firearms if events cannot be contained otherwise.</p> <p>12 CHAIRPERSON: It authorises the use of 13 firepower in particular circumstances, it doesn't say how. 14 That's a detail which one would expect the standing order 15 to provide.</p> <p>16 MR SEMENYA SC: Indeed, Chair. Another 17 subject was the question that there was relative calm after 18 the killing of Mr Twala and any offensive action by the 19 police would only serve to escalate as opposed to de- 20 escalate the conflict. Again if we are correct, Chair, 21 that the decision taken by the PC on the 15th that offensive 22 action would have to be taken was clearly intended to 23 contain what was perceived to be the real threat, and the 24 real threat in the wake of the 9th to 16th was indeed that 25 you have heavily armed people who are responsible at the</p>

<p style="text-align: right;">Page 39611</p> <p>1 time the decision was made for the death in part of 10 2 people. There was enormous damage to property, police 3 officers had been killed, security personnel has been 4 killed, how much more can you expect an escalation? Would 5 an escalation be another 10 more deaths by that time, 20 6 more that were to be contained? Of course the threat in 7 our submission is precisely the very fact that there are 8 this many, they are this determined, they are this armed 9 and they pose a threat to law and order. That's what had 10 to be contained, we would submit.</p> <p>11 Another argument is offered that of course there 12 could have been a way of putting a filtering line. Now our 13 submission in relation to that, Chair, is that if we do 14 justice to the evidence and we recognise the terrain, and 15 we accept the evidence that virtually the people who came 16 to the koppie came from all directions really, and you have 17 limited resources as the police do, where do you put this 18 filtering line? Is it on the western side, is it on the 19 eastern side, is it on the southern side, is it on the 20 northern side? And clearly if they can see there is a 21 filtering line there they will go the other direction and 22 that filtering line, its efficacy is compromised or 23 undermined or cancelled for that matter. That would be our 24 submission in relation to that.</p> <p>25 Again, Chair, let us look at another matter; says</p>	<p style="text-align: right;">Page 39613</p> <p>1 said to Zokwana. He said to Zokwana there's no way you can 2 disarm someone on the koppie if he's got an axe and you've 3 got a rifle, there will be bloodshed. He then proposed 4 another approach which one can call the Mpembe plan, which 5 was to get information and we know that a process was 6 already underway of a team of detectives who'd come from 7 Gauteng and they were going through all the footage and 8 seeking to identify the people, with the aid of Lonmin, who 9 had weapons and find out their names and where they were 10 and so forth, and he asked Mr Zokwana to get the NUM people 11 anonymously to provide information also as to who had 12 weapons in the hostels, who had weapons in the informal 13 settlement, so that the weapons could be got there because 14 these were daytime strikers, or daytime arms bearers. They 15 used to go home, come in the morning and go home in the 16 evening, some of them even went home for lunch. So that 17 was the Mpembe plan. The Mpembe plan was, if it had been 18 implemented, been given a chance, of course it couldn't be 19 because the order came you've got to act on Thursday. If 20 the Mpembe plan had been followed, substantially less 21 risky, it would have dealt with the matter, or may well 22 have done, in a much less disastrous fashion. I don't know 23 that General Mpembe has got the credit that he deserves 24 for, (a), the sensible approach he adopted on the 13th, and 25 what was clearly his approach on the Wednesday evening. So</p>
<p style="text-align: right;">Page 39612</p> <p>1 General Mpembe and says General Mbombo in their 2 communication with Lonmin officials, there will be 3 bloodshed, and the arguments, if we understand them, is 4 that that must mean that both of them did foresee the 5 bloodshed of strikers. But again, Chair, the evidence by 6 both of them is we have used those words to try and impress 7 on Lonmin people to appreciate the urgency of the dialogue. 8 What could be wrong with that? What could be wrong with 9 that as an explanation to say please let's avoid any 10 bloodshed, please go and speak to the people in the koppie. 11 Please, dialogue is the best way of resolving that.</p> <p>12 [09:25] Now we dislocate those expressions in those 13 communications and heighten them to the level of suggesting 14 that there was a foreseeability of some bloodshed occurring 15 the following day. If this discussion of bloodshed and 16 reference to bloodshed was said among the police persons 17 themselves to the exclusion of others, it would bear 18 contextually a different meaning altogether.</p> <p>19 CHAIRPERSON: I think, if I may say so, 20 that you're not taking into account for the purposes of 21 your argument the evidence that General Mpembe gave when he 22 came back and he gave, I asked him questions about what 23 he'd said on the Wednesday night and I understood his 24 evidence to be that he wasn't telling an untruth to 25 Zokwana, what he was saying – I'm concerned with what he</p>	<p style="text-align: right;">Page 39614</p> <p>1 it's not just appropriate to have regard to what he said to 2 Lonmin, we've also got to have regard to his clear thinking 3 on the matter as expressed to Mr Zokwana.</p> <p>4 MR SEMENYA SC: Chair, even there it is 5 an attempt to say it's important we go to the koppie and 6 talk to the people. So –</p> <p>7 CHAIRPERSON: I'm not in any way 8 challenging what you say there. You've made the submission 9 very strongly that Lonmin bears some of the blame for what 10 happened because they were obdurate and they, we were asked 11 what is the source of their obligation to talk to the 12 strikers. Well the answer given was a request from the 13 police. They were doing their best to deal with a very 14 difficult – I think everybody commented on the matter, 15 accept it was a very difficult situation. Mr White was 16 quite candid about that, very difficult situation the 17 police had. They needed all the help they could get from 18 Lonmin. They asked Lonmin and Lonmin for reasons which 19 attempts have been made to explain, didn't cooperate. If 20 that's the point you're making, that prima facie is a sound 21 submission.</p> <p>22 MR SEMENYA SC: That's right, also an 23 attempt on my part to say we place those bloodshed 24 utterances in the context in which they obtained. The 25 other aspect we have to address because of the submissions</p>

<p style="text-align: right;">Page 39615</p> <p>1 made by Mr Ntsebeza relates to the scarifications. Chair, 2 if one looks at the post mortem reports, this is what 3 stands out; those that were done by Pathologists Morad and 4 Ngude do not distinguish between scarification marks that 5 are old and new, but they do make reference to them and the 6 others are described as fresh scarifications. Now of those 7 who were at scene 1 it is only Mr Ledingoane and Mr 8 Gwelani, two only who did not have scarifications. 9 CHAIRPERSON: And we know they weren't 10 anywhere near the front line, so they weren't part of the 11 front group who you say were the makarapa. 12 MR SEMENYA SC: I will still invite you, 13 Chair, to say that please accept – 14 CHAIRPERSON: [Inaudible] in the wrong 15 direction. That point is not put as a point against you, 16 it's a point in your favour. 17 MR SEMENYA SC: No, no, no, I accept 18 that. 19 CHAIRPERSON: They weren't part of the 20 front group. They weren't part of the group who you say 21 were the makarapas. They were people who were 22 unfortunately shot at from a distance when they weren't 23 part of any advancing group. So it doesn't help, you 24 wouldn't expect them to have scarification marks because 25 they were in a different position. Your point is all the</p>	<p style="text-align: right;">Page 39617</p> <p>1 then you are able to use solid structures to channel people 2 in a particular direction, not in an open field where they 3 can go anywhere they choose. 4 The evidence leaders have obtained now the 5 opinion of Dr Naidoo in relation to the death of Mr Mati 6 and Chair, yes, we know that Dr Naidoo did not perform the 7 post mortem, he came to the conclusion different to the 8 pathologist that performed that post mortem. He came to 9 that conclusion based on looking at the post mortem report 10 and the photographs and the Chair correctly directs that a 11 proper resolution of that conflict of expert opinion, if 12 the second one is also one, is that there must be this 13 conference and response by the pathologist who did the post 14 mortem report to say whether or not he still stands by it 15 and if he needs to advance further reasons why his 16 conclusion is a correct one, can then give it to the 17 evidence leaders. But we cannot at this moment move from a 18 premise that says Mr Mati was killed by a bullet wound. 19 That conclusion cannot stand, and absent an agreement by 20 the experts, unfortunately the Commission would have to say 21 there's no agreement on that point. It can't do better 22 than the evidence that is available before it. 23 So the argument goes in respect of another 24 element that Captain Loest did not fire on the 16th and so 25 did the others not, and if you understood the argument it</p>
<p style="text-align: right;">Page 39616</p> <p>1 front group people who were killed had scarification marks. 2 That's your submission. 3 MR SEMENYA SC: That's the submission 4 we're making, Chair. Even where there is argument directed 5 at saying there was channelling at the kraal, nobody can 6 advance an argument with cogency that suggests that 7 channelling was per plan or per design or per instruction 8 of anybody. What I think we see, or what spawns that type 9 of argument is once you freeze the images at a particular 10 point you are then able to see them positioned in a way 11 that – to use the language that has been said around that – 12 which has the effect of channelling them. But nobody is 13 advancing an argument that says there was a design or a 14 decision or anything that the people should be channelled, 15 and that must be so, Chair, because to channel them it 16 means you would have appreciated that the only way in which 17 they could have an escape or an exit would be through one 18 direction. 19 We have just been having the exchange, Chair, 20 that said a whole number of people dispersed westwards. 21 Even after the shooting a whole number of people did 22 disperse westwards. So it cannot be channelling, and if I 23 understand what the Public Order Policing techniques do, 24 channelling as a method is – and the exhibits are there to 25 show us – it's an effective tool in urban settings because</p>	<p style="text-align: right;">Page 39618</p> <p>1 is intended to convey this conclusion that there could 2 therefore not have been a threat to life, but Chair, you 3 would recall even in examination of Captain Loest I 4 pertinently put it to him that if nobody in that line had 5 fired at the advancing group, what would he have done, and 6 he said he would have fired too. So it is understandable 7 why he felt sufficiently covered by those who were 8 discharging their firearms at the time. 9 CHAIRPERSON: Wasn't there also some 10 suggestion that in this kind of operation the commanders 11 shouldn't fire? 12 MR SEMENYA SC: Indeed, Chair, but 13 obviously this is in instances where the commander orders 14 the firing. Well, the facts are a little different, but 15 yes, that is the case, Chair. 16 It is significant, Chair, to draw your 17 Commission's attention to this piece of evidence that when 18 one looks at the people who were lying on the ground at 19 scene 1, you do also see Mr Magidiwana at that point where 20 he is, he still has his arms with him. So it cannot be 21 that even however belated the non-lethal measures that were 22 taken could not get him just to drop those arms and move on 23 and say well, this is it. He is still having them at that 24 point. 25 We need to address what may again seem a – which</p>

<p style="text-align: right;">Page 39619</p> <p>1 may conduce to a misinterpretation in our submission of 2 Colonel Vermaak's evidence in relation to the events of the 3 13th. He says from the chopper he could see no reason why 4 the teargas was discharged because as his observation went 5 it could not have been that the people were going to the 6 settlement. 7 But Chair, a careful scrutiny of the record will 8 show that the settlement which Colonel Vermaak was 9 referring to is the one the other side of the river and 10 that is not what General Mpembe was attempting to do, 11 because he wanted – that is now General Mpembe wanted to 12 have the Nyalas comes into the road that separated the veld 13 from the settlement, the entire settlement, and that 14 vindicates another point, Chair, because there is a debate 15 as to whether or not at that time the strikers were going 16 to the koppie or they were going to the settlement. 17 Now we say look at the body of Warrant Officer 18 Lepaaku. That body is almost adjacent to the road 19 separating the veld and house number C05, which is on the 20 other side of that road. So to say that they were not 21 close to the settlement, to the informal settlement, cannot 22 be correct if you reference that with the point where 23 Warrant Officer Lepaaku was killed and the other striker as 24 well. 25 Very late in the day we were given a report by</p>	<p style="text-align: right;">Page 39621</p> <p>1 in our note since they go to the question of weight. 2 CHAIRPERSON: I think you'd better 3 include them in your note because – 4 MR BUDLENDER SC: Chair, we'll also have 5 something to say about that in our notes. 6 CHAIRPERSON: Yes, yes, I understand. 7 There are two points; one is admissibility, admission I 8 suppose, and the other is weight. I can understand there 9 may well be arguments about weight, but I don't know that a 10 commission of this kind we should be too strict on the 11 admissibility side. 12 MR MPOFU SC: Chair, while we are at 13 this, we also object to the document. 14 CHAIRPERSON: Alright, you've got that on 15 record. 16 MR MPOFU SC: Obviously we can only 17 object on the admission, not the weight, since we've 18 resolved not to read it. 19 CHAIRPERSON: I see. When you exercise 20 your hard-won rights to reply you can deal with the matter. 21 MR SEMENYA SC: Well yes, Chair, I don't 22 know whether that is going to be ZZZZ-something. 23 CHAIRPERSON: Ms Pillay will let you know 24 when we take the first comfort break. 25 MR SEMENYA SC: Thank you, Chair. Can I</p>
<p style="text-align: right;">Page 39620</p> <p>1 the Bapo Ba Mogale of some three academics who wrote on the 2 question of muti, Chair. We would like that to be admitted 3 as an exhibit as well. We have attempted to give everyone 4 the CVs that were not initially attached to the report – 5 CHAIRPERSON: That is the report by Dr 6 Mufamadi and two others? 7 MR SEMENYA SC: That is correct, Chair. 8 CHAIRPERSON: And we were given 9 yesterday, I think, or was it the day before, CVs of Dr 10 Mufamadi and her colleagues. 11 MR SEMENYA SC: Indeed, Chair, and we'd 12 say whatever – 13 CHAIRPERSON: Mr Mpofu I understand 14 didn't object to the document, he just said he wasn't going 15 to read it and he said it wasn't of any value, so there's 16 obviously no difficulty about admitting it and we will have 17 to read it because we have to read everything. We're not 18 in the fortunate position as Mr Mpofu who reads 19 selectively. But anyway, it's in and I'm sure Ms Pillay, 20 who's nodding her head, she will – we won't waste time with 21 it now, she will give it an exhibit number and that will be 22 communicated to everybody. 23 MS LE ROUX: Chair, the Human Rights 24 Commission has objections to that document. I'm not sure 25 if you'd like me to put them on the record or include them</p>	<p style="text-align: right;">Page 39622</p> <p>1 try and tackle another aspect, Chair, or at least to finish 2 this exhibit and say of course it is going to be a question 3 of what weight is to be placed on it, but as we pointed out 4 earlier, it is quite a fresh explanation coming from what 5 from my reading of the CVs, well qualified individuals who 6 can speak on that. They may not be able to persuade you 7 that X is a believable witness, and that's not where we 8 seek their support. 9 Where we seek their support is to say to us that 10 we can accept that there are people in this country who 11 practice traditional, who have belief in traditional 12 medicines. They use it for a whole number of things, and 13 in the main it is for non-violent purposes, but there are 14 instances when it is used precisely to fortify oneself in 15 relation to whatever is perceived to be a threat to them 16 and to get themselves strong. 17 Now you would recall even at this hearing at the 18 very least there is an attempt to explain the use of the 19 muti on a plinth that says it was used for defensive 20 purposes, and we are not told exactly what defensive 21 curtain it offers one who has underwent that muti in the 22 face of an attack, but it could clearly not have been 23 intended to be an attack, a defence against a police 24 attack. 25 [09:45] And Mr Mpofu then invites us to say if they truly</p>

<p style="text-align: right;">Page 39623</p> <p>1 believed that, that the muti would render them invisible, 2 then it is not rational when we see that they realised that 3 the police see them and therefore it can never offer itself 4 as a rational explanation. Well, there is an answer to 5 that, Chair, and it is this; often there is no congruence 6 between faith and reason. This country has a fair 7 population of Christians who believe that Jesus Christ 8 walked on water, that he was born of a Virgin Mary, that he 9 took six pieces of fish to feed a whole body of people, 10 multitudes of people, that he turned water into wine and a 11 whole host of other things. Are they rational? I don't 12 want to go down that road, but I am merely trying to 13 illustrate that it is a belief system. It is shared by 14 many. We respect it. And equally where the Constitution 15 says there must be – the right to believe is protected 16 under the Constitution, it must include the belief of those 17 who think muti does what they say it can do. We may not 18 like it and –</p> <p>19 COMMISSIONER TOKOTA: Let me perhaps 20 interrupt you to say that actually speaking for myself as a 21 Black person in South Africa, I agree with Mr Mpofu that 22 the Blacks do, some of the Blacks do believe in muti use 23 for various reasons. So speaking for myself you can bring 24 in the professor from UK or from wherever, he is not going 25 to change that. And the fact of the matter, you can</p>	<p style="text-align: right;">Page 39625</p> <p>1 says that many who had some role to play can say that they 2 do not bear any form of responsibility. "I think the 3 responsibility has to be collective and as a nation we 4 should dip our heads and accept that we did fail the people 5 of Marikana, particularly the families and the workers and 6 those who died, we did fail them," end of quote at that 7 point. The significance of all of this Chair, is there is 8 in our respectful submission merit to that. The tragedy 9 that is Marikana was produced by a confluence of factors, 10 as we said, and if it is to be avoided we as a nation would 11 have to act differently and bring all our shoulders to the 12 wheel to get a different result, and we say in those 13 written submissions from paragraph 3, Chair, that the place 14 to start is to accept a common understanding of what 15 constitutes acceptable public order discourse for South 16 Africans. It must also be plain to understand what impedes 17 the achievement of peaceful protest. It must be accepted 18 by all that what we want is a South Africa that is able to 19 offer those who want to exercise the constitutional right 20 of assembly to do so, and to do so within the constraints 21 that are placed on the exercise of that right by the 22 Constitution and the law.</p> <p>23 We also make the submission that there must also 24 be a common understanding of what militates against the 25 attainment of peaceful protest and assemblies. We must</p>
<p style="text-align: right;">Page 39624</p> <p>1 believe in what you believe in, like Christians and so on, 2 and maybe Mr Mpofu is right in saying it's not even 3 necessary to read these things because that's what it is 4 inherent within certain Black populations.</p> <p>5 MR SEMENYA SC: And to the extent that it 6 may be common cause amongst some of us it then begins in my 7 respectful submission to explain what may otherwise be 8 inexplicable, and I am making this submission purely to 9 remove the temptation that we should look at a rational 10 basis for the use of muti. Chair, at the beginning of our 11 written submissions we refer you Chair, to the sage words 12 in our submission of the Deputy President in relation to 13 this whole conspectus of issues, and we quote the evidence 14 where he says, "The tragedy that has occurred at 15 Marikana" –</p> <p>16 CHAIRPERSON: Sorry, page? 17 MR SEMENYA SC: Page 1. 18 CHAIRPERSON: Page 1 of your reply? 19 MR SEMENYA SC: Of my written 20 submissions, Chair. 21 CHAIRPERSON: The main heads, thank you. 22 MR SEMENYA SC: There the Deputy 23 President says to us, "The tragedy that has occurred at 24 Marikana has to be approached as a collective failure by 25 many role-players, many stakeholders," and I don't think he</p>	<p style="text-align: right;">Page 39626</p> <p>1 agree that a South Africa we do not want is one where 2 public dissent, be of a social, economic, political or 3 labour nature is expressed by groups of persons bearing 4 weapons and bent on conflict and mayhem. We must agree 5 that we do not deserve a South Africa that looks with 6 complicit acquiescence at public display of criminal 7 conduct where industrial disputes which can be resolved 8 through negotiation and dialogue are left to fester until 9 police intervention is inevitable, where capital can for 10 commercial reasons ignore its legal obligations designed to 11 ameliorate the working, social and living conditions of its 12 employees and hope to subdue disaffection of its workforce 13 through police intervention. It must be a country where 14 those who hold political oversight do take accountability, 15 I think it should read, for some of the protests which are 16 spawned by political grievances, where civil society does 17 not express outrage when law and order is disregarded and 18 where the police are forced to go above the public order 19 tools of law enforcement with resulting deaths and injuries 20 to persons, where trade unions can with ease abdicate 21 leadership and responsibility flowing from the wrongful 22 conduct of their members.</p> <p>23 We also make the submission in paragraph 5 that 24 capital place an important role in the economy of the 25 country, and that with that accepted, the right of capital</p>

Page 39627

1 to participate in the economy must also answer to its duty
 2 to resolve industrial grievances through negotiation
 3 principally and that the role of capital in such a
 4 democratic discourse is one which appreciates its
 5 responsibilities imposed by law, in this case being mining.
 6 The responsibility of capital is also to conduct its
 7 business within the prescripts of the Constitution and the
 8 relevant legislation.
 9 More importantly and directly we say about
 10 Lonmin, it was obliged to comply with its legal obligations
 11 set out in the Mining Charter and its social labour plan,
 12 which obligations were intended to ameliorate the living
 13 conditions and working condition of its own employees,
 14 which are also intended to restore the dignity of workers
 15 eroded by past practices of overcrowded single-sex hostels,
 16 and it could do this as capital appreciating its leverage
 17 in negotiations must always prefer dialogue as a tool for
 18 resolving industrial conflict.
 19 That Chair, we submit is the South Africa that we
 20 submit we should all be striving for and it is achievable
 21 only in our respectful submission if, as we say, all
 22 shoulders come to the wheel, but most importantly, before
 23 we make our final submissions it's important that we
 24 explain the –
 25 CHAIRPERSON: I'm sorry to interrupt you,

Page 39628

1 Mr Semenya, would this be a convenient stage for us to take
 2 the first – it's really a comfort break, we would only be
 3 five minutes, I hope.
 4 MR SEMENYA SC: Indeed, Chair.
 5 CHAIRPERSON: Will it be convenient for
 6 you? I don't want to interrupt your, the flow of your
 7 argument but –
 8 MR SEMENYA SC: Indeed Chair.
 9 CHAIRPERSON: Please everyone try to be
 10 back here in five minutes.
 11 [COMMISSION ADJOURNS COMMISSION RESUMES]
 12 [10:04] CHAIRPERSON: The Commission resumes. Mr
 13 Semenya.
 14 MR SEMENYA SC: Chair, I'm almost at the
 15 tail-end of our submissions, barring the questions that I
 16 may have to field from the Commissioners, and –
 17 CHAIRPERSON: Most of the questions that
 18 you have to field you've already had, you've dealt them I
 19 think as best you could in the circumstances.
 20 MR SEMENYA SC: Thank you, Chair. There
 21 are those, a few of these that I must deal with. Chair,
 22 you'd recall there is also a suggestion, if not something
 23 higher, that Brigadier Calitz ought to have given a warning
 24 at koppie 3 and it seemed as though it is a warning as
 25 contemplated by Standing Order 262.

Page 39629

1 CHAIRPERSON: Well, there's also the
 2 suggestion he should have given a warning as required by
 3 section 9(2) of the Regulation of Gatherings Act. If he
 4 was going to embark upon a dispersal as envisaged in the
 5 section then it would seem that he – this is something that
 6 perhaps you can argue on. If you're not ready to argue on
 7 today you can give us a note on it, but it is an issue
 8 that's been raised and we certainly would appreciate
 9 assistance on it. In other words it's not just the
 10 standing order, it also is whether if he was engaged in a
 11 dispersal operation, a lot of people gathered on the
 12 koppie, he wanted to disperse them, those with dangerous
 13 weapons they could then be seized because the, by the
 14 police under I take it the Criminal Procedure Act and they
 15 could be arrested actually for possession of dangerous
 16 weapons, but the first thing he wanted to do was a
 17 dispersal and if it's correct that before you can exercise
 18 powers to disperse a gathering you have to give a warning,
 19 then he would have had to give a warning. Anyway, that's
 20 the issue. I don't know what the answer will be. I would
 21 appreciate submissions on it. If you're able to give us
 22 them now, fine. If you give them to us later in writing,
 23 we will gratefully accept that.
 24 MR SEMENYA SC: Yes, Chair, perhaps a few
 25 submissions in that regard would suffice. Part of what

Page 39630

1 triggers that enquiry is somewhat the fact that we are
 2 trying to distinguish scene 1 and scene 2 as if they are
 3 different operations. They are not different operations.
 4 We have for convenience here made them separate topics to
 5 be handled separately because it is easier to do that, but
 6 Brigadier Calitz was not involved in two, and his
 7 colleagues were not involved in two scenes. They were
 8 involved in one operation which was the dispersal,
 9 disarmament and arrest of all those armed strikers, and I
 10 should add to that, Chair, that whereas regulation 9(2)
 11 requires –
 12 CHAIRPERSON: Section.
 13 MR SEMENYA SC: - section rather, of the
 14 Regulation of Gatherings Act requires the warning, in this
 15 instance the police did even more. They begged the people
 16 to disarm. They begged them to disperse. This is now on
 17 the other wild side of the spectrum, and even the begging
 18 and the pleading, and we see even Mr Mathunjwa go down on
 19 his knees –
 20 CHAIRPERSON: He wasn't exactly acting as
 21 a police agent when he did that.
 22 MR SEMENYA SC: No, no, no, no, no, he
 23 wasn't, Chair, and I'm not advancing that as an argument.
 24 I'm merely saying that if the law requires the police to
 25 act that way is clearly intended to say make them aware

1 this is what is what is required of you, and the police
2 went beyond that point to say we beg of you, in many
3 repeated ways, and did that with a loudhailer and said to
4 them please disarm and disperse. That didn't work.

5 In relation to koppie 3, Chair, it was pointed
6 out to me that the operation did not even stop at koppie 3.
7 There were further violent acts of damage to property that
8 went on beyond koppie 3 and where the police had to attend
9 to it. So I don't know if the postulate is put that the
10 incident should have been stopped at scene 1, whether the
11 police if told that we are under attack at K4, somebody
12 would say no, don't attend to it, we have stopped the
13 operation. That would not be a practical way of dealing
14 with things.

15 There is also criticism about the use of
16 specialised units in Public Order Policing. The first
17 response that we must offer as a submission in that regard
18 is to say that if you are talking about Public Order
19 Policing incidents proper – and by proper I mean those that
20 obtain within the constraints of the law – clearly that
21 recommendation to that effect is sound, but we need to be
22 practical about this. We need to accept that we are not
23 there as a country in our appreciation of the important of
24 law obedience, that a Marikana would happen. You would
25 have, as my learned friend Mr Burger would say, marauding

1 any incident because all incident that are happening around
2 the area is reflected [inaudible]. It is AMCU who
3 instigates such a thing, so please, as from now on, as from
4 now we do not want to hear anything about that [inaudible]
5 address you. Denounce violence, it means weapons, no
6 weapons, and then get your mandate, give us what we agree
7 and people disperse." So we point to that very direction
8 question by General Mpembe, "Are you saying they are going
9 to disarm tomorrow?" he says yes, but –

10 CHAIRPERSON: [Microphone off, inaudible]
11 goes on and he does seem to be saying effectively what he's
12 going to say the next day, the speech he's going to make,
13 as far as I read it, a sort of trailer almost of what he's
14 going to say the next day. This is one of the passages
15 that was referred to earlier in support of the contention
16 that Mr Mathunjwa gave a definite promise that they would
17 lay down their arms, but there are other passages which go
18 the other way and General Annandale certainly said that he
19 didn't regard what Mr Mathunjwa said as amounting to a
20 definite guarantee or undertaking that they definitely
21 would lay down their arms, but this passage I think is
22 support for the proposition that Mr Mathunjwa was very
23 confident that they would, and he conveyed that confident
24 to the police. We know now with 20/20 hindsight that he
25 was overconfident, but certainly to be fair to the police,

1 individuals, heavily armed, who are bent on mayhem. What
2 do we do there? And as we make a submission section 9(2)
3 does tell us what we do if the criteria is met for the use
4 of firearms and weapons.

5 I'm also informed by my learned colleagues that I
6 should draw the attention of the Commission to exhibit
7 GGG4, page 11 of that exhibit. Page 12, I'm told, Chair.

8 CHAIRPERSON: It's a long time ago when
9 we'd received that exhibit. Can you perhaps just remind us
10 what it is? I know we'll read it, but if there's a nice
11 clear passage that you can give us at the moment it will
12 help. It is GGG4, para 12.

13 MR SEMENYA SC: Not para 12, page 12,
14 from line 14. If we can go, at the top of the right-hand
15 corner of the page it says 681, 681.

16 CHAIRPERSON: That's page 12.

17 MR SEMENYA SC: There in the middle you
18 would see, Chair, that General Mpembe says, and he's
19 speaking to Mr Mathunjwa, "No, thanks, president, are you
20 saying tomorrow they will hand in their weapons, they will
21 disperse?" Says Mr Mathunjwa, "Yes, I mean if you are
22 [inaudible]. I said it clearly that we have been portrayed
23 as AMCU as the union that is instigating violence all over
24 the world, so denounce any end to violence if you are
25 committing such, please denounce. We do not want to hear

1 they were told by a very confident Mr Mathunjwa that all
2 would be well the next day. I think that's a fair summary.

3 MR SEMENYA SC: "We'll all be happy
4 tomorrow," words to that effect. I'm not suggest that he
5 gave an unequivocal undertaking that he will deliver that
6 type of promise, clearly, but there was certainly amongst
7 the police an expectation that that might very well be a
8 possibility of the people disarming voluntarily.

9 CHAIRPERSON: There's a further point in
10 your favour on that point and that is according to the
11 evidence it does look as if the police still laboured under
12 what I think one can now describe as a misapprehension that
13 all the strikers were really AMCU people and even the NUM
14 people really more ex-NUM people than actual NUM people at
15 that stage, and one sees interchangeably in the documents
16 reference to the strikers and AMCU. So if the police had
17 been led to believe, I suppose by Lonmin, that the strikers
18 were all really AMCU, or that AMCU was substantially behind
19 the strike, that would have encouraged the police to
20 believe that if the president of AMCU thinks that the
21 strike is going to stop, or not the strike but the weapons
22 are going to be handed down, they will accept the
23 instruction or the request from the president of the union.
24 It's difficult to be overly critical of the police for
25 given the mindset they were in, it would be difficult to be

<p style="text-align: right;">Page 39635</p> <p>1 overly critical of the police for assuming that Mathunjwa 2 was right and that they'd all be happy the next day. 3 MR SEMENYA SC: The one other aspect we 4 have to address is was Marikana an unprecedented event. 5 You'd recall there has been a lot of controversy around 6 that and we have been told the May event of 2012 bears 7 similar resemblance to Marikana and that claim cannot 8 stand. Well, firstly the Lonmin security tells you, Chair, 9 Commissioners, that they've never seen anything like that 10 in Marikana – In Lonmin, not in Marikana, in Lonmin, and 11 they have handled many unprotected strikes, and the 12 security tells you normally as a matter of course if you 13 stood up and said disperse, that is what would happen. It 14 didn't happen on the 12th. So there is that evidence which 15 we submit must bear weight to what the police are 16 describing. 17 There's also the evidence which has not been 18 controverted, that use of teargas, which is the doctrine in 19 Public Order Policing, has never triggered an attack on the 20 police on its use, where strikers say because you are 21 throwing teargas at us, that is the reason for us to attack 22 the police. That's a separator as well, Chair. 23 There is yet another separator. History has it, 24 and the evidence has not been controverted, that the 25 unfurling of a barbed wire as a defensive measure has never</p>	<p style="text-align: right;">Page 39637</p> <p>1 said "Engage, engage," he was actually intending to speak 2 to the POP people. This was then repeated by Colonel 3 Vermaak because he'd remembered what happened the 13th and 4 he was afraid that they hadn't, weren't responding, and 5 what Mr Mpofu said, as I understand him, was that that, by 6 that time the POP people were already in the Nyalas and 7 that was understood by the TRT people as being a command to 8 them and that was also part of the explanation for what 9 happened. He then I think went on to submit that in fact 10 the TRT people fired not so much in self-defence, or what 11 they thought was self-defence, but because they were 12 obeying this command to "Engage, engage," which they 13 thought was addressed to them. Now I'd be grateful – again 14 if you're not able to deal with it at the moment I'd be 15 grateful to receive a note on that from you. 16 MR SEMENYA SC: Chair, Captain Loest 17 testified on the point that they understood that "Engage, 18 engage" to be an instruction to POP. They never responded 19 to it as TRT members. So there is direct evidence that 20 contradicts that argument. 21 Also an appreciation of how this operation was to 22 happen was clearly that the POP people were going to be 23 responsible for the conduct of POP and so too those of NIU 24 would be taking instructions from NIU and STF from people 25 of STF. It was not contemplated that because you are the</p>
<p style="text-align: right;">Page 39636</p> <p>1 provoked the response that was observed on that day, and 2 for that reason it could not have been foreseen that its 3 use would have the consequences that it had. Most of the 4 time public disturbance events occur as a matter of 5 spontaneity when they begin to get out of order. They 6 often start in a particular fashion and then emotions go 7 awry and after that things may very well go wayward, but it 8 is with some element of fluidity and spontaneity to them. 9 What is different with Marikana is this is planned, it is 10 militarised, it is by individuals who even prior to the 11 16th, some of whom would have been associated with very 12 violent deaths of policemen and of co-workers and of 13 security personnel of Lonmin. That's a separator. We have 14 never had that type of thing in the past, says the police, 15 and there is no reason to disbelieve them. 16 That must trampoline me, Chair, to what must be 17 my concluding submissions, unless – I'm pointed to also 18 deal with the question whether as SAPS we had taken an 19 adversarial posture against Colonel Vermaak. 20 CHAIRPERSON: I would also like you to 21 deal with, if you can, with the submission that Mr Mpofu 22 made that, it related to the use of the word "Engage, 23 engage." He said, I'm not sure I'm doing full justice to 24 his submission, but as far as I'm concerned it doesn't 25 matter. He referred to Brigadier Calitz as saying when he</p>	<p style="text-align: right;">Page 39638</p> <p>1 operational commander, Brigadier Calitz would be giving 2 instructions to STF people to do A or B or C in relation to 3 the event. It is clearly that they were going to act under 4 the command of Gaffley, who was in charge of them as STF. 5 So it has to be understood in a proper context about how 6 multi units operate in a particular environment. 7 Are we adversarial against Colonel Vermaak? 8 Clearly not, Chair. There is Captain Baloyi who says 9 things that are negative for SAPS. There's nothing wrong 10 with that. Everybody has been allowed to come and say what 11 they have to say and even Colonel Vermaak has not been able 12 to say he was, (1), precluded from making certain 13 disclosures, never went that far. 14 [10:24] And never went as far as to suggest that on the 15 contrary he was advised to state an untruth. It never went 16 so far as that and we submit that it is not unexpected that 17 in an organisation that large you would find people who 18 hold disparate positions in relation to a particular 19 matter. And Chair, when we don't address the question of 20 incident 1 and 2 it's not because we abandon the fact that 21 those incidents didn't happen, we are saying nothing turns 22 on that. There is clear evidence that can explain events 23 precipitating, or the events immediately before the 24 shooting happened at the kraal which bear no controversy 25 around it. Unless if the insinuation is you are lying to</p>

<p style="text-align: right;">Page 39639</p> <p>1 the Commission when you say they happened, in which event 2 then we'd have to address a different matter. And I don't 3 place so much weight to it because as we made the 4 submission, Chair, I don't think the President is 5 interested in questions of credibility. 6 The President in your report is interested in 7 understanding those issues that can help the government 8 shape its policy and its conduct so that South Africa can 9 avert Marikana 2. That's what the President is interested 10 in. If we are in a civil or criminal trial and credibility 11 issues were primarily in relation to the adjudication of a 12 particular matter then I think my emphasis on whether or 13 not this witness is credible and the other not would have 14 been slightly different, and slightly differently nuanced 15 for that matter. If I was an onus-bearing party and had to 16 rely on a particular witness to carry my case it would have 17 been different. I think this process is a slightly 18 different one. 19 My final remarks, Chair. Chair, it's very 20 important for us as a country to understand the role of the 21 police, and errant police officers do not belong in the 22 South African Police Service and there is no attempt on the 23 part of at least us as a legal team on instructions that we 24 have received to defend that. But it is very important for 25 us also as a nation to understand that they are the only,</p>	<p style="text-align: right;">Page 39641</p> <p>1 the – 2 CHAIRPERSON: Ja, alright. 3 MR CHASKALSON SC: Sorry, Chair, we 4 really don't have time for breaks at this stage. I would 5 oppose a request for a break at this stage. 6 CHAIRPERSON: We'll take a tea break a 7 bit later on, but we're going to stop at 1 o'clock, it's 8 half past 10. 9 MR MPOFU SC: Well, that's – the break, 10 Chairperson, was actually meant to – anyway we can do it at 11 the tea break to discuss with the evidence leaders – 12 CHAIRPERSON: We told you yesterday that 13 you would have half an hour, after the discussions we had. 14 MR MPOFU SC: Yes. 15 CHAIRPERSON: I take it you've prepared 16 half an hour's worth – 17 MR MPOFU SC: No, I haven't, Chairperson, 18 other things have just arisen now. That's why I wanted the 19 break so that we can discuss the question of time 20 allocations because there's more time now. 21 CHAIRPERSON: My fellow commissioners 22 urge me that I should give Mr Mpofo his five minutes and so 23 I do that. 24 MR MPOFU SC: Thank you. 25 [COMMISSION ADJOURNS COMMISSION RESUMES]</p>
<p style="text-align: right;">Page 39640</p> <p>1 only instrument under the Constitution who have a 2 responsibility for the maintenance of law and order, and 3 they do it under very difficult circumstances. It is 4 bloodcurdling, Chair, when Mr De Rover says to us in five 5 years we lose 880 members of the police service in the line 6 of duty. It's a serious number for a country to sustain 7 and – 8 CHAIRPERSON: In quick summary, I think 9 it's over 120 a year. It's more than two a week. 10 MR SEMENYA SC: Something like that, 11 Chair, and it is people who our safety rests on. It is 12 people who the law authorises them to carry firearms and 13 other weapons within the constraints of the law so that you 14 and I, Chair, can have our law and order in place, and when 15 we do judge their conduct we should do that in deep 16 appreciation of the special place they occupy. I'm not 17 defending individuals, I'm defending the institution of the 18 police service and I'm saying whatever else we lose, what 19 we should not lose is the importance and centrality in the 20 organisation of our constitutional order. Those are our 21 submissions, Chair. 22 CHAIRPERSON: Thank you, Mr Semenya. Mr 23 Mpofo you've got half an hour. 24 MR MPOFU SC: Chairperson, can I request 25 that we take a short break so that we can – I can discuss</p>	<p style="text-align: right;">Page 39642</p> <p>1 [10:37] CHAIRPERSON: The Commission resumes. I 2 understand the matter that you wanted to deal with in the 3 adjournment has been successfully dealt with, MR MPOFU SC. 4 MR MPOFU SC: It has, Chairperson, thank 5 you very much. 6 CHAIRPERSON: I take it Mr Wesley is 7 going to keep the – be the timekeeper. 8 MR MPOFU SC: Mr Wesley, yes. I am 9 assuming – well Chairperson, as matters stand now I have 40 10 minutes, so what I would propose is that because it's 20 to 11 11, we can go until 11, and then I will do it in two 12 instalments. 13 CHAIRPERSON: What happens at 11? 14 MR MPOFU SC: No, I was saying if, 15 depending on when you want to take the – 16 CHAIRPERSON: Oh, tea? 17 MR MPOFU SC: - the tea break, yes. I 18 was proposing if you do it at 11, then I can break it into 19 two instalments. 20 CHAIRPERSON: Well, if you prefer that – 21 MR MPOFU SC: I would. 22 CHAIRPERSON: - I personally would prefer 23 to go on and then take the adjournment when you are 24 finished, but obviously if it will help you to help us 25 more, then I will do it the way you suggest.</p>

<p style="text-align: right;">Page 39643</p> <p>1 MR MPOFU SC: Thank you, Chairperson. I 2 think let's leave it to me for now. Thanks. 3 CHAIRPERSON: Alright. 4 MR MPOFU SC: I might go for your option, 5 depending on – Chairperson, thank you very much. I am 6 obviously racing against the clock here. So what I am 7 going to do, Chairperson, firstly is to deal with the issue 8 of concessions, real and otherwise, that have been spoken 9 about. The first one is that Mr Semenya somewhat has made 10 my job easier because of what I will go as far as to call 11 concessions that he has made. I am sure he will contest 12 that, but in the absence of time, if I have to develop any 13 of the points I am going to make, Chairperson, then I will 14 leave it for the notes. So I am going to be very cryptic. 15 The first one is that Mr Semenya told us yesterday that the 16 conduct of the strikers was – he said treasonous, I am sure 17 he wants to treasonable, but it was treason, it amounted to 18 treason. Now Mr Semenya represents the South African 19 Police Services, so I am sure whatever view he espouses 20 here must be the view of his clients, and you will remember 21 that I read out the extract from Colonel Scott that the 22 Chairperson helped me to find where the similar sentiment 23 had been expressed that once they killed a police, then it 24 was no longer about these small matters of killing non- 25 strikers or enforcing a strike, it was now a challenge, to</p>	<p style="text-align: right;">Page 39645</p> <p>1 to a submission which I made on Wednesday, Chairperson, 2 that if the TRT indeed made a human block then we have this 3 very simple situation; whereas in that gap the TRT had the 4 time, the means and the wherewithal, and the regulations to 5 boot, to prevent the further movement of the strikers by 6 using barbed wire or by using a physical block of some sort 7 with Nyalas or whatever, they chose to have what Mr Semenya 8 has called a human block. But it was not just a human 9 block of you know, comrades holding each other like this. 10 It was a human block of more than 50 people armed with 11 automatic or semi-automatic rifles. That's the difference, 12 and therefore that is also a very important statement to 13 note, which takes us Chairperson to the concessions that I 14 was said to have made. I disowned one of them when we were 15 talking now and you correctly said I will deal with it when 16 I am replying. 17 Let's start with the question of premeditated 18 murder. Let me - firstly I was not making any concessions 19 on that question, Chairperson. I was simply saying that 20 one of the theories, and I think I tried to explain this, 21 it was a theory that I said against myself I had not put to 22 anybody but it's one that I had just gained from reading 23 and rereading the documents, and the spark was the 24 reference by General Naidoo I think to section 49, that one 25 of the theories that one could look at was that – well</p>
<p style="text-align: right;">Page 39644</p> <p>1 use Mr Semenya's words and Colonel Scott, it was now a 2 challenge against the authority of the State, and Mr 3 Semenya has said exactly the same thing. 4 Now that, Chairperson, is a crucial, crucial 5 concession to make because it goes exactly to what we have 6 been trying to explain for two years, that these people 7 were regarded as the enemy. We know what happens, what we 8 should do, what should we do as a country with treasonable 9 people who threaten the authority of our State? We must 10 declare war against them. That is what our army is there 11 for, and that is why from the point – that's why we call 12 the 13th a game changer, we have been calling it since the 13 beginning until now, because it was the point at which the 14 whole business changed into war and that is exemplified by 15 many things which I don't have to go into now, what I call 16 the frenzy of activity that followed that point. So from 17 that crucial turning point onwards we were no longer in the 18 territory of just small matters, we were in the land of 19 treason and war. 20 Then the second concession which is important 21 relates to what happened at scene 1 where Mr Semenya in his 22 address this morning, not yesterday - the other, the 23 treason was yesterday - refers us to the fact that the TRT 24 formed a human block, and that's in relation to something 25 else which I am going to discuss just now. Well, it goes</p>	<p style="text-align: right;">Page 39646</p> <p>1 section 49, reference to section 49 but also Captain 2 Loest's evidence that they were told to stand fast and not 3 retreat and so on and so on. And I said one of the – and 4 the fact that they straddled the road at some stage - I 5 said one of those theories will be that at best for them 6 they were told that they must not allow the so-called 7 militant group to pass through and they must arrest them by 8 any means necessary, at all costs. That would still be 9 unlawful because remember, well firstly it would be 10 illogical because there was always going to be phase 6 if 11 they were so desperate to get those armaments. But you 12 can't instruct people of that kind of – who are bearing 13 those kinds of arms, to say to them don't retreat, and that 14 is where the trick is, Chairperson. Mr Semenya tells us 15 that why must we expect them to run away because their duty 16 is to protect the State or whatever. Well, Chairperson, we 17 must expect them to retreat because that duty to protect 18 the State doesn't just lie on them, it also lies on the 19 POP, and what did the POP do? They retreated, in front of 20 our eyes here on the screen. They retreated into the 21 Nyalas and that was it. So if the TRT had done the same, 22 you know, instead of – I didn't understand the submission, 23 whether they will be protecting their egos or what, but 24 they had exactly the same duty to retreat as the POP, which 25 did in an exemplary way, which by the way was in front of</p>

1 them. So the POP would have been closer to the strikers
2 than the basic line. So their failure to retreat cannot be
3 explained by this notion that what we expect of them as a
4 police force and so on and so on, because whatever we
5 expect of them as a police force, applies equally to POP.

6 But the real point is this, Chairperson; even if
7 you take that postulation - we have no excluded the issue
8 of premeditated murder at all, but we have said at the
9 lowest, let's say that at scene 1 at the very lowest there
10 was dolus eventualis - and I don't have to go, Chairperson
11 would understand what I mean by that in the sense that they
12 should have foreseen and so on and so on.

13 CHAIRPERSON: Not they should have
14 foreseen, if they should have foreseen but didn't then it's
15 culpable homicide, if it is a crime. For dolus eventualis
16 you have to say they did foresee and they were reckless, as
17 they proceeded with their conduct were reckless as to the
18 consequences.

19 MR MPOFU SC: Thanks, Chairperson, yes.
20 But Chairperson, I just want to point something to you.
21 You will remember, if you look at our opening statement,
22 whatever the exhibit number is, you will see that the 10
23 points that we made there, Chairperson, we differentiated
24 between scene 1 and scene 2. I am paraphrasing because I
25 don't have it in front of me, but we said at scene 1 there

1 was murder, unjustifiable homicide, I think that those were
2 the words that we used. We said that there was murder
3 there. And then we said at scene 2 there was premeditated
4 extrajudicial executions, and that's where there is a
5 subtle difference. The reason we made that difference,
6 Chair, was because we had - in our consultations it was
7 clear that whatever had happened at scene 1, at scene 2 the
8 killing zone and all what we know about it, the fact that
9 no warning was given, the fact that the people were
10 surrounded and trapped there, I think the way I put it to
11 Brigadier Calitz - again I am paraphrasing - I said to him
12 apropos that question of why they were not warned, I said,
13 look, you had these people surrounded - I said, you had
14 these people surrounded. Yes. I said underneath them
15 there was the earth, the ground. Yes. On top of them
16 there were helicopters flying. Yes. So there was nowhere
17 to go, and yet you didn't even say to them - and we have
18 had that discussion on Wednesday and so on and so on. Just
19 from that point it was clear that the executions, as we
20 call them, at scene 2 were definitely premeditated.

21 But now here's the thing, Chairperson. Here's
22 the thing; you see you are permitted as Commissioners in my
23 respectful submission to say if indeed there is prima facie
24 evidence that what happened at scene 2, as we claimed in
25 our opening statement was premeditated and coldblooded

1 executions, and you would be fortified in that belief by
2 the evidence of Myburgh, whatever problems at the lower
3 scale of reasonable suspicion that he did not - he could
4 not have made up this, what he said he heard someone
5 saying, "These people deserve to die," there can't be a
6 better description of an execution than that. But if you
7 put all those things - and even at a prima facie level
8 accept that what happened at scene 2 were coldblooded
9 executions then, Chairperson, you are quite entitled to
10 extend that to say, well, as Mr Semenya has said it was
11 actually one transaction, one operation. The fact that
12 here for argument's sake we divided it up is just neither
13 here nor there. Then you are quite entitled to say, well,
14 if it was execution at scene 2, it must have been execution
15 at scene 1 as well because the - if it was indeed one
16 transaction and one thing, you would remember this kind of
17 logic I used - I am just digressing a little bit - when we
18 were talking about the planting of weapons, I can't
19 remember which witness I was cross-examining but I said to
20 that witness, look, if you are coming to this Commission
21 and giving us the excuse that the reason you were removing
22 these weapons was because the medics were asking you to do
23 so, then since we know that you removed weapons at scene 1,
24 where there were no medics, then surely that could not have
25 been the reason. And there was a long debate about it, but

1 it's that kind of thing because if you are going to lie
2 about something regarding the one scene, but somehow it
3 doesn't fit on the other, then at worst it must be assumed
4 that the non-applicability doesn't apply even where it to
5 the naked eye might be seeming to apply.

6 So that's our submission on the question of
7 premeditated murder. We are not excluding it exactly
8 because we, in fact at scene 2 we are alleging it, but at
9 scene 2 we are alleging executions, at scene 1 we are not
10 excluding them but at scene 1 we are prepared to accept for
11 the sake of argument that dolus eventualis might have been
12 - but that's not a concession that we make that there was
13 no intention to kill them.

14 More so, Chairperson, the other concession that
15 we certainly do not make, which I am glad the Chairperson
16 alluded to it because it gives an opportunity to deal with
17 it, is that the people were not killed because they were
18 striking. We certainly do not make that concession. Why?
19 Because I said it on Wednesday, what were the first words -
20 as the Chairperson said, the words that were said to the
21 world by General Mbombo? "Today we are going to end the
22 strike. Today we are going to end the strike." That, and
23 Mr Semenya actually said this, he said, whatever, when you
24 were asking him about what was discussed at the NMF,
25 whatever they discussed can't be inconsistent with what

<p style="text-align: right;">Page 39651</p> <p>1 General Mbombo told the world the following day. What did 2 General Mbombo tell the world the following day? "Today we 3 are going to end the strike." So whatever they discussed 4 at the NMF must have had something to do, on Mr Semanya's 5 formulation must have had something to do about ending the 6 strike. And we know – and that takes us to the next point, 7 Chairperson, you – sorry, Chairperson – 8 CHAIRPERSON: Do I understand you 9 correctly to say, it may well be - I don't think you put it 10 any higher than that - that what has been concealed in 11 relation to what happened at the NMF was there was a 12 decision to break the strike, which would have been an 13 improper decision? 14 MR MPOFU SC: That's correct, 15 Chairperson. In fact – 16 CHAIRPERSON: That's revealed as it were 17 - 18 MR MPOFU SC: Yes. 19 CHAIRPERSON: - by the remark that the 20 Provincial Commissioner made in her eNCA interview. 21 MR MPOFU SC: Yes, Captain Adriaio and 22 all, and the D-day and so on. 23 CHAIRPERSON: No, never mind the D-day. 24 MR MPOFU SC: Okay well – 25 CHAIRPERSON: The breaking the strike -</p>	<p style="text-align: right;">Page 39653</p> <p>1 costs supposed to be concealed from this Commission, and it 2 must have had something to do with breaking the strike and 3 we know how far that chain can go. 4 So it seems clear now that for political reasons 5 – oh, and you must also read that whole statement that I've 6 just made together with the blatant untruthful evidence of 7 the National Commissioner around whether the Minister was 8 told that stage 3 was going to be gone into and so on and 9 so on. That retreat, which is clear from the minutes, 10 which Annandale has agreed was what happened, is what was 11 said, is that the Minister was told about stage 3, which 12 means he knew what stages there were and he must have known 13 that the stage 3 is the tactical stage and that's why the 14 retreat was done here and in Rustenburg. 15 It would mean that there is another intention to 16 hoodwink the Commission into minimising the role that was 17 played by the senior political people and that alone, as 18 the Chairperson says, in the Zeffert's Law of Evidence – 19 the Chairperson will be familiar with this – it's said that 20 if you are lying it doesn't necessarily mean you are 21 guilty, but if you are lying – as the Chairperson put it 22 better than me – it points the arrow – 23 CHAIRPERSON: It can point. 24 MR MPOFU SC: - it can point the arrow at 25 something else that you are concealing, and that can be</p>
<p style="text-align: right;">Page 39652</p> <p>1 MR MPOFU SC: Yes, was only General 2 Mbombo. 3 CHAIRPERSON: The Provincial Commissioner 4 said, I think it was after the press conference, she had an 5 interview on eNCA, we saw that video clip when she said it 6 there. She did say of course that it was a slip of the 7 tongue, but she also conceded that she did nothing to 8 correct it in the period thereafter. 9 MR MPOFU SC: That's correct. Yes, 10 Chairperson, actually you took the words out of my mouth. 11 I was just about to say, we, at least you and I, 12 Chairperson, in our debate on Wednesday, and I think you 13 repeated it this morning, said very obviously something, 14 something is being concealed about the discussions of the 15 NMF. One can't put it higher than that. Otherwise really, 16 why would you be fed with evasive written answers and all 17 that goes with it, the so-called pedantic detail theory of 18 the National Commissioner. But now we are getting closer 19 to what that something was. That something surely, but 20 surely, we speculated the other day, we said it was 21 something political. I said, maybe it's the pressure of 22 the Minister, you said maybe it's the Malema issue, it 23 doesn't matter, it could be both, it could be one of them, 24 but that something must have been (a), political. 25 [10:57] (B) unlawful, and (c), something that was at all</p>	<p style="text-align: right;">Page 39654</p> <p>1 debunked with these, or decoded with the submissions that 2 I've made. 3 That brings again the link between the political 4 pressure and what actually happened on the 16th even closer 5 because the strike, properly so called, was not the 6 business of the police. 7 CHAIRPERSON: What goes against that, I 8 must confess this is a matter that caused me a lot of 9 puzzlement. What's against that is you have the very 10 proper approach of General Mpembe on the 13th saying we just 11 want the weapons, lay down the weapons, we're not going to 12 arrest you, you can carry on, and I think Lieutenant- 13 Colonel McIntosh said something similar to the strikers 14 when he negotiated with them, and even the plan – now 15 unless one accepts it's a trap, which I don't think is 16 suggested, what the police intended to do was to disarm 17 these people, disperse them by the non-lethal methods and 18 so on. That was apparently going to happen, unless we 19 suggest that's the total – we accept that's just a total 20 pretence, but I don't think that can be suggested. So if 21 they dispersed them and disarmed them, then it wouldn't 22 have followed that the strike would have been broken. It 23 might be that the strike would have been more difficult to 24 enforce by the militant strikers because they wouldn't be 25 able to use violence and intimidation to the same extent,</p>

<p style="text-align: right;">Page 39655</p> <p>1 but if that had been done the strike wouldn't have been 2 broken. So I've been puzzling for a long time about how 3 those items of the evidence which tend to point one way can 4 be reconciled with the statement that the Provincial 5 Commissioner made. It's one of the mysteries. Maybe we'll 6 find the answer –</p> <p>7 MR MPOFU SC: Yes. 8 CHAIRPERSON: But it is a mystery, I'm 9 afraid.</p> <p>10 MR MPOFU SC: Yes, the – 11 CHAIRPERSON: Certainly everyone I think 12 would agree, and Mr Semenya would be the first to concede 13 I'm sure, that it wouldn't have been a proper approach for 14 the police to throw its State provided force into the scale 15 on behalf of Lonmin to break a strike.</p> <p>16 MR MPOFU SC: Yes. 17 CHAIRPERSON: That's a matter between the 18 employer and employee and the police have got no business 19 with that. Their job is to maintain law and order.</p> <p>20 MR MPOFU SC: That's correct. Thank you, 21 Chairperson, and then while – I'll move on to something 22 else. I hope that that mystery will be resolved when the 23 Commissioners deliberate in less pressurised conditions 24 than I'm operating under now. 25 Then again, Chairperson, just to touch on this</p>	<p style="text-align: right;">Page 39657</p> <p>1 take the words out of my mouth. It's written here, I've 2 said if any of us had suggested any such thing I'm sure we 3 wouldn't have finished the sentence because the Chairperson 4 would have –</p> <p>5 CHAIRPERSON: Mr Semenya suggested it 6 actually, but anyway, if there's a perception around – 7 MR MPOFU SC: It must die. 8 CHAIRPERSON: - that you were more 9 interested, well maybe your clients of course would affect 10 – but that somehow those deaths were on a higher scale than 11 the others –</p> <p>12 MR MPOFU SC: Ja. 13 CHAIRPERSON: - if that's a perception 14 anybody has it's a wrong perception – 15 MR MPOFU SC: No, it's very wrong, ja. 16 CHAIRPERSON: I'm not sure Mr Semenya 17 said it, but it doesn't matter, if there's a perception, 18 it's no longer there. 19 MR MPOFU SC: It's no longer there, yes. 20 CHAIRPERSON: It's an ex-perception. 21 MR MPOFU SC: What is happening in this 22 Commission, Chairperson, and I'm glad my learned friend Mr 23 Tip at least has joined us on the side of people who are 24 saying if anybody, whether it's a member of NUM, whether 25 it's a striker, whether it's AMCU or whatever, is</p>
<p style="text-align: right;">Page 39656</p> <p>1 comparative analysis between scene 1 and scene 2, scene 2 2 in a strange way also provides us with the answer to the 3 putative self-defence issue because there's no – nobody, it 4 would be laughable if anybody would suggest putative self- 5 defence in relation to scene 2 and the killing zone and so 6 on and so on, and therefore if it was not putative defence 7 there, if they shot people knowing that they are not being 8 attacked, then we can certainly infer that at scene 1 it 9 was also not putative self-defence. I won't put it higher 10 than that. Again it's the one transaction theory which I 11 advanced earlier.</p> <p>12 Chairperson, I have an obligation to do this 13 because yesterday - you know I don't know how many times we 14 must say this; there has never been any suggestion that the 15 injured and arrested or any of the parties who represent 16 the other victims have said that the deaths that occurred 17 on the 16th are more important, or whatever was being 18 suggested by Mr Semenya yesterday, than the 10 deaths that 19 preceded them, or the seven non-striker deaths, because we 20 know that three were strikers. That has never been our 21 case. It will never be our case. If any –</p> <p>22 CHAIRPERSON: It could scarcely be. (a), 23 you never said it and if you had said it I would have been 24 down on you like a tonne of bricks. 25 MR MPOFU SC: Again, Chairperson, you</p>	<p style="text-align: right;">Page 39658</p> <p>1 implicated in the gruesome deaths that preceded the 16th, 2 those people must be found, tried, arrested and locked up 3 in jail for the rest of their lives. There should be no 4 doubt about this. So that – you know the only people in 5 this room, Chairperson, who do not take that position are 6 the people who are guilty of murdering those people, that 7 is SAPS and Lonmin, because Lonmin says charge all the 8 people who made all these gruesome dastardly, what, what, 9 except us, Lonmin, we are innocent. SAPS says the same; 10 charge everyone, you know it's bad, gruesome, look at this 11 picture, they're all guilty except us, SAPS. We are not 12 saying that. We are saying charge even ourselves if we are 13 – and that, Chairperson, if you take from the biblical 14 example of the wisdom of Solomon you will know who is the 15 guilty party among those people. One does not need 16 Solomonic wisdom, as Holmes JA once said, to work out that 17 one. The people who are playing holy-holy are the guilty 18 ones.</p> <p>19 Now the next issue, Chairperson, is - also I just 20 want to say this, I have to say this; it does not matter, 21 Chairperson, it does not matter how morally reprehensible 22 the actions of the strikers were, we all agree it's 23 gruesome, look at, we just have to look at the pictures, 24 but in this country, Chairperson, we have decided that the 25 death sentence has been abolished and what this police did,</p>

Page 39659

1 because they felt that their fellow policemen had been
 2 killed, they sentenced these people to death and executed
 3 them. The executions in this country are not allowed even
 4 if they were judicially sanctioned, let alone extrajudicial
 5 executions that were committed on the 16th. So one doesn't
 6 have to doubt the moral reprehensibility of what was done,
 7 but it cannot deserve the firing squad that the world saw
 8 being meted against our people on the 16th.

9 Now the other thing, I just want to touch then,
 10 Chairperson, on the, what I've called the three game
 11 changers. Maybe we could take that break now, just so that
 12 I can isolate – because it's just three points, three broad
 13 points, but I can split them up into –

14 CHAIRPERSON: How long are you still, do
 15 you –

16 MR MPOFU SC: About five, let's say five,
 17 15 minutes, Chairperson.

18 CHAIRPERSON: Well, let's check with Mr
 19 Wesley, how much time has he still got, Mr Wesley?

20 MR WESLEY: 11.

21 CHAIRPERSON: How much?

22 MR WESLEY: 11, Chair.

23 CHAIRPERSON: 11. Alright, we'll take a
 24 10-minute adjournment –

25 MR BUDLENDER SC: Chair, I want to say

Page 39660

1 that Mr Mpofo's unique contribution to this, not his only
 2 contribution but unique contribution to the work of this
 3 Commission is the ability to make 13 minutes become 18 and
 4 17 become 42, and I think we should all thank him for that.

5 MR MPOFU SC: I'll accept that,
 6 Chairperson, as a compliment.

7 CHAIRPERSON: We're busy with 11.
 8 Alright, let's take a 10-minute adjournment now and then
 9 he's got 11 minutes and then Mr Chaskalson and you, Mr
 10 Budlender, have the rest of the sitting until we adjourn
 11 at –

12 MR MPOFU SC: Thank you very much,
 13 Chairperson.

14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [11:22] CHAIRPERSON: The Commission resumes.
 16 Before Mr Mpofo continues with his address I've been asked
 17 to address two requests to the members of the public who
 18 are present in the auditorium. The first relates to the
 19 headsets that you all have today, I'm asked to ask you
 20 please to leave them here in the chamber and they will then
 21 be collected and returned to the contractor. The other
 22 request relates to the headset that someone was using
 23 yesterday and didn't hand in, so there's one headset short,
 24 I'm quite sure it was taken through inadvertence, but I'm
 25 asked that the person concerned must please bring it back

Page 39661

1 because otherwise the Department is going to have to pay
 2 for it. So those are two points. One, leave your headsets
 3 in the chamber today and two, the person who took the
 4 headset away yesterday please bring it back and hand it in
 5 so we don't have to pay for it. Then I'm asked to make an
 6 announcement that the Human Rights Commission as one of its
 7 contributions to the work of Commission has arranged for a
 8 photograph of all the counsel, legal representatives plus
 9 the Commissioners to be taken at the end. And apparently
 10 we're all going to have to be here at the front and some
 11 kind photographer is going to take the photograph or
 12 photographs. So just after we adjourn, I hope it won't
 13 take too long, but just after we adjourn the photographs
 14 are being taken and its, as I've said, it's one of the many
 15 contributions the Human Rights Commission has made to our
 16 proceedings.

17 Then finally before we carry on with Mr Mpofo I'm
 18 told that Mr Bizos, whom I think can be described as the
 19 doyen of human rights lawyers in South Africa, as we well
 20 remember has made a contribution to our proceedings as
 21 well, unfortunately he's not here today, but I ask Ms
 22 Weldon please to convey a message of congratulations – I
 23 think I can take it upon myself to speak on behalf of us
 24 all, to convey to him our very sincere congratulations on
 25 the attainment of the 87th anniversary of his nativity.

Page 39662

1 It's his 87th birthday today, we're very happy for him, we
 2 wish him all the best. We hope he has a great day, a
 3 wonderful year and many happy returns with good health all
 4 the say. So please would you convey that message to him Ms
 5 Weldon? I think we can possibly give him a round of
 6 applause. Mr Mpofo.

7 MR MPOFU SC: Thank you, Chairperson, I'm
 8 glad that Mr Bizos's birthday coincides with day 300 of
 9 this Commission, Chairperson. Chairperson, I just want to,
 10 with the very limited time I have, I'm just going to touch
 11 on very quickly, one is Commissioner Hemraj had asked me
 12 about a reference of what Brigadier Calitz's responses were
 13 when I asked him about the no warnings, particularly at
 14 scene 3. Scene 2 rather, it's on page 20534, that's one of
 15 the answers, line 14 to 25, day 173 where he said there was
 16 time, or no chance, geen kans at scene 1 which is nonsense.
 17 And then the other quick point which I wanted to make,
 18 Chairperson, is that just to agree with Mr Semenya, my
 19 learned colleague, on his analysis of if there's going to
 20 be an inquiry into the fitness of office of the National
 21 Commissioner, which we also advocate in our submissions,
 22 one should not just look at section 8 as suggested by the
 23 evidence leaders, but also section 9 of the Police Act.
 24 Actually the inquiry is probably placed at section 9, but
 25 there's no harm at looking at both, reading section 8 with

<p style="text-align: right;">Page 39663</p> <p>1 section 9. And then I just want to make this point to 2 round off the point I was making earlier about the death 3 sentence, that I'm told and I won't say this under oath 4 because I have not Googled it myself, but I'm told that 5 incidentally after the death sentence was abolished in 6 England it was reserved for another 40 years for treason. 7 So is that correct, yes. South Africa has abolished 8 completely. 9 CHAIRPERSON: Completely? 10 MR MPOFU SC: Yes except when it's war, 11 in times of war. When the Constitution is suspended. 12 CHAIRPERSON: There is an exception, that 13 is the exception. 14 MR MPOFU SC: Yes. 15 CHAIRPERSON: But that exception wouldn't 16 apply in anyway. 17 MR MPOFU SC: Yes, but that just shows 18 you then it means then the South African Police Services 19 were using the English system. Now the next issue, 20 Chairperson, is that I just want to deal very quickly with 21 matters that deal with the game changes. The first one is 22 an issue that you canvassed with my learned colleague, Mr 23 Tip, about the crucial matter of whether or not the 24 strikers were armed when on their way to the NUM offices on 25 the 11th. It's a very important issue, Chairperson, we</p>	<p style="text-align: right;">Page 39665</p> <p>1 that the reason why they went to arm themselves. And Mr 2 Gegeleza by comparison to Mr Mabuyakhulu, Chairperson, as a 3 witness was – it would be like comparing a Mercedes Benz to 4 a Volkswagen. He was a very unsatisfactory witness, one of 5 his highlights was that the armed people of NUM only 6 carried one stick and on spear, or something like that on 7 which I cross-examined him. So the Commission must make a 8 finding that Mr Mabuyakhulu evidence that they were in the 9 same way as they were on the 10th, in other words not armed, 10 except for their sticks, that that should be the basis and 11 that whatever follows then with the game changer then I've 12 already argued. The next one is game changer two, 13 Chairperson, which is what happened on the 13th, very, very 14 important. Two points, one is the point that was debated 15 between my learned colleague, Mr Semenya and Commissioner 16 Tokota. And that question is the lingering question of if 17 as I put, I think it was Brigadier Calitz where I said what 18 was the attack, what was the attack and he said well it was 19 the crouching and the singing and so on. If that is true 20 then Commissioner Tokota put it to Mr Semenya which I don't 21 think was answered properly why under the exact same 22 conditions did firstly they not attack the five or seven 23 policemen who were standing in front of them. At least one 24 of them you can see on the video. I think I put the 25 distance in the end to about two metres or so between them</p>
<p style="text-align: right;">Page 39664</p> <p>1 can't brush it off. I would have thought that the analysis 2 made by Mr Gotz of the Cassim rush so to speak would have 3 put that matter to rest. But insofar as he didn't 4 Chairperson must also take into account the fact that 5 there's actually evidence, oral evidence of Mabuyakhulu who 6 was a very good witness that they were not armed which was 7 not challenged. In fact when it was challenged it provided 8 one of the most interesting moments in this Commission 9 because Mr Semenya played the video we say you can't be 10 serious, look at that video and it turned out to be the 11 video of the NUM people. 12 CHAIRPERSON: Unfortunately we haven't 13 got a video for reasons that – 14 MR MPOFU SC: Yes it was the NUM people 15 walking and then that was clarified. 16 CHAIRPERSON: We've only got the after 17 the incident video, we haven't got a prior one and that was 18 canvassed and I think that may have explained it. 19 MR MPOFU SC: No all I'm saying, 20 Chairperson, that insofar as Mr Mabuyakhulu was challenged 21 it turned out that he was being challenged with the wrong 22 video, the NUM people were assaulting him. He even said I 23 can even see my stick there, one of them has taken my 24 stick. And then, of course, the evidence of the strikers 25 who kept on saying, near the railway line and everywhere</p>	<p style="text-align: right;">Page 39666</p> <p>1 and the strikers, but more importantly going to putative 2 self defence, if those policemen did not believe that 3 because those people were crouching and singing and so on 4 that it constituted an attack how could the ones of the 16th 5 believe the same thing? So that does away both with the 6 putative self defence, but also what I call the mirroring 7 of the two scenes. But more importantly, Chairperson, 8 about game changer two is the following fact. And it goes 9 back to this issue of the execution and the death sentence 10 meted out against the strikers because remember our case is 11 that the motives that were at play here, paramount among 12 the police, was the revenge motive which we have spoken 13 about. And with Lonmin it was making money and saving the 14 NUM, but as far as the revenge motive is concerned, 15 Chairperson, ask yourself the following rhetorical 16 question. 17 CHAIRPERSON: You've got five minutes 18 left. 19 MR MPOFU SC: Yes, I have a stopwatch, 20 Chairperson and Mr Wesley. Ask yourself the following 21 question rhetorically, Chairperson, if the members of SAPS 22 were prepared to kill, to murder a general of the police, 23 one of their own because of what happened on the 13th. If 24 they were prepared to kill a general how much more about 25 the people that they thought were the ones who had murdered</p>

<p style="text-align: right;">Page 39667</p> <p>1 their colleagues? I'll leave it that. If they were 2 prepared to kill a general, no less than a general, their 3 leader, the chief of the JOC, they were prepared to murder 4 him you can imagine what their feelings were against the 5 strikers. Then, Chairperson, let's go to the last game 6 changer which is the political motive. I just want you to 7 add one more - you and I, Chairperson, I was giving you the 8 factors which would point to what I'm hoping would be a 9 finding that the discussion of the NMF at least included 10 the political considerations. One of the things I want you 11 to add, Chairperson, is the evidence of Mr De Rover. Mr De 12 Rover said that an operation of this kind, in his expert 13 opinion, could never have been carried out without the 14 political sanction from above. Now all of us have said 15 that, I've said that and so on. The importance about the 16 fact that it comes from De Rover is that Mr De Rover is the 17 police expert, he's the SAPS expert. It was not Mr White 18 or Mr Hendrickx or Mr Mpfu or whatever. He is brought 19 here by SAPS and he says there is no way that a operation 20 of this type could happen without a political say so from 21 above. So there's no ground upon which the Commission 22 would not be entitled – 23 CHAIRPERSON: I'm sorry - approval from 24 the executive and the judiciary. 25 MR MPOFU SC: Oh.</p>	<p style="text-align: right;">Page 39669</p> <p>1 curtain. And they say, Chairperson, please do not expect 2 that any of the players here did not foresee the 3 possibility of death. As Mr Jamieson, I think, conceded, 4 it was put up by Mr Gotz and as is implied in the 5 concessions made by Mr Ramaphosa, everyone foresaw the 6 possibility of death. And then the last one was please 7 don't try to – I know I have half a minute, ja, don't try 8 to whitewash powerful politicians at all costs or do – what 9 I saw this morning, Chairperson, to round off that 10 submission, most of us who watched television yesterday 11 would have seen some of the scenes that will probably have 12 a negative effect into the future of our democracy, of 13 police storming into – POP storming into parliament. But 14 that is not what I want to talk to you about, I want to end 15 my address by quoting what one of the members of parliament 16 said there, Mr Naren Singh of the IFP. He said to those 17 people "Do not, in the name of protecting one man, you are 18 protecting one man" he said "but opening a wound in our 19 nation that would bleed forever." And that is a plea that 20 we would put to this Commission or a warning or a plea that 21 our job is to make sure that this does not happen again. 22 And that as humanity as South Africans, although the Deputy 23 President said that we are collectively guilty we reject 24 that. But we say that we are collectively victims all of 25 us as South Africans are victims, all of humanity are</p>
<p style="text-align: right;">Page 39668</p> <p>1 CHAIRPERSON: So that indicated to me 2 that the political set up to which he's accustomed in the 3 Netherlands isn't the same as ours. 4 MR MPOFU SC: Yes anyway that's akin to a 5 declaration of war which we say this was. But, 6 Chairperson, I want to end with this, when I asked the 7 people I represent what should be final message to the 8 Commission what came out were the following, what I would 9 call warnings that they were giving. But I'll change them 10 into pleas because I don't think I'm in a position to make 11 warnings. But they said please, Chairperson, whatever you 12 do, do not insult the intelligence of South Africans and 13 the people of the world. Please follow the requirements of 14 your job, you and evidence leaders are supposed to be the 15 only non-partisan people here, to be impartial and to do 16 your respective functions without fear, without favour and 17 without prejudice. Secondly, please do not ignore the 18 obvious as to what was being concealed at the NMF meeting. 19 We've already covered that. And then please do not condemn 20 the victims and insult them with theories such as the muti 21 theory and apropos what Mr Semenya was saying about these 22 beliefs. I can refer him to the oxymoron of a holy war. 23 Even people who believe in other religions sometimes use 24 those religions either for defensive, for creating 25 defensive curtains. Even prayer is used for a defensive</p>	<p style="text-align: right;">Page 39670</p> <p>1 victims and you must remember that, Chairperson. As from 2 today all of humanity will be under the slogan that says we 3 are all Marikana. So we accept collective victimhood, but 4 we reject the collective responsibility. The 5 responsibility must go where it rests, to those people who 6 were instigated and made sure that our people are mowed 7 down and executed in cold blood. Thank you very much, 8 Chairperson. 9 CHAIRPERSON: Thank you, Mr Mpfu. Mr 10 Chaskalson. 11 MR CHASKALSON SC: Thank you, Chair. Mr 12 Budlender and I are going to split the reply. I'm going to 13 try to address very briefly seven issues. The first is 14 what should be done about the fact that no visible policing 15 was put in place in response to Brigadier Engelbrecht's 16 intelligence reports of 11 August. The second is Lonmin's 17 – 18 CHAIRPERSON: What was the first one? 19 MR CHASKALSON SC: What should be done 20 about the fact that no visible policing was put in place in 21 response to Brigadier Engelbrecht's intelligence reports? 22 CHAIRPERSON: I see, thank you. 23 MR CHASKALSON SC: The second is Lonmin's 24 complaints about the phase 2 against it. The third is 25 AMCU's submissions about dangerous weapons and the criminal</p>

<p style="text-align: right;">Page 39671</p> <p>1 law. The fourth is SAPS's contention that the JOC didn't 2 know that the operation was continuing from scene 1 to 3 scene 2. The fifth is what one can infer from the post- 4 mortems in relation to the presence of muti marks on the 5 victims of the 16th and what inferences may or may not be 6 drawn from that. The sixth is to clarify our punitive 7 recommendations and the seventh is to respond to the issue 8 in relation to the terms of reference and our submission 9 that there should be an inquiry under the SAPS Act into 10 misconduct or the fitness of the office of the National 11 Commissioner. Now if there's time after Mr Budlender's 12 submissions we'd like to show a presentation that we've 13 prepared which identifies with photographs the exact place 14 where 41 of the 44 victims died between 12 and 16 August. 15 It's 41 out of 44 because in respect of three of the 16 victims who died in hospital, Warrant Officer Lepaaku, Mr 17 Sagalala and Mr Ntsoele. We can't find conclusive 18 photographic evidence or video which shows the exact point 19 that they were killed.</p> <p>20 CHAIRPERSON: Where they sustained the 21 fatal injuries.</p> <p>22 [11:42] MR CHASKALSON SC: Indeed, where they 23 sustain the fatal injuries. We thought that this 24 presentation would be an appropriate presentation to use on 25 the last day of the Commission to remind ourselves what</p>	<p style="text-align: right;">Page 39673</p> <p>1 references, it's day 198, 24278, line 14 to 24279, line 6, 2 in respect of the 11th, and 24274, line 20, to 24275, line 3 25, in respect of the 12th, and we know that SAPS did not 4 implement a visible policing strategy on the weekend of 11 5 and 12 August and that there were tragic consequences for 6 Mr Fundi, Mr Mabelane, and Mr Mabebe. I leave Mr Langa out 7 of that group because I'm not sure that SAPS's Visible 8 Policing strategy would have had the effect of saving him. 9 It may well have saved Mr Fundi, Mr Mabelane and Mr Mabebe.</p> <p>10 So somewhere from Brigadier Engelbrecht through 11 Major-General Mpembe to Major-General Naidoo and then on to 12 the operational members the communication chain broke down 13 and SAPS failed to take action that may very well have 14 contained the situation at Marikana before it spun out of 15 control. Now in our submission this is a very –</p> <p>16 CHAIRPERSON: I'm sorry, Mr Chaskalson, 17 even if one puts out of the reckoning for the moment the 18 intelligence that was communicated to General Mpembe, there 19 was of course a plan in place which provided for the 20 establishment of the JOC, which wasn't implemented. Major 21 Govender who dealt with Visible Policing as well, Major 22 Govender was to be the official in charge of that; he 23 wasn't even informed of the plan according to him.</p> <p>24 MR CHASKALSON SC: Indeed, there are two 25 separate breakdowns. The one is the specific intelligence</p>
<p style="text-align: right;">Page 39672</p> <p>1 we've been doing for the last two years. There may be time 2 to do so. If there isn't we will circulate it to the 3 parties and make it available to you and your Commissioners 4 so that it may be of assistance to you in preparing your 5 report.</p> <p>6 CHAIRPERSON: Perhaps it could be put on 7 the website as well of the Commission.</p> <p>8 MR CHASKALSON SC: Well, Chair, it's not 9 the sort of material that should go on the website –</p> <p>10 CHAIRPERSON: I see.</p> <p>11 MR CHASKALSON SC: - because the pictures 12 are particularly gruesome and –</p> <p>13 CHAIRPERSON: I see. I understand.</p> <p>14 MR CHASKALSON SC: To start then with the 15 issue of the intelligence reports from Brigadier 16 Engelbrecht, it was raised in our primary argument by Ms 17 Pillay, and she made the point that Brigadier Engelbrecht 18 reported to Major-General Mpembe on 11 and 12 August about 19 imminent attacks on NUM and on the workers at K4 and the 20 need for visible policing, two separate reports.</p> <p>21 Now Major-General Mpembe says he was on leave and 22 handed the matter over to Major-General Naidoo. Major- 23 General Naidoo claims not to remember receiving any SMSs or 24 telephone calls from Major-General Mpembe in this regard 25 either on the 11th or the 12th. If I can give you the</p>	<p style="text-align: right;">Page 39674</p> <p>1 in relation to an attack on the NUM office and K4 -</p> <p>2 CHAIRPERSON: There were two points –</p> <p>3 MR CHASKALSON SC: And the separate, the 4 second is the failure to implement the plan. We've 5 addressed the failure to implement the plan at length, but 6 in relation to the failure to act on the intelligence, the 7 failure of SAPS as an institution to act on the 8 intelligence of Brigadier Engelbrecht, in our submission 9 it's a very serious matter and it seems from the evidence 10 that it was either Major-General Mpembe or Major-General 11 Naidoo who was at fault in this regard. That's what the 12 evidence suggests. We can't say who, but we would ask the 13 Commission to recommend that the issue be investigated 14 further by SAPS itself because this is a matter for 15 disciplinary proceedings, for further investigation and 16 disciplinary proceedings. Somebody failed to do a very 17 important job and a job which may have saved people's 18 lives. It's for SAPS to find out who that person was and 19 to take the necessary action.</p> <p>20 If I can then move to the Lonmin case on phase 2, 21 now Lonmin asks you not to make any findings against them 22 in relation to the failure to discharge their social labour 23 plan housing obligations. They claim the issue falls 24 outside your terms of reference. They claim it would be 25 substantively unfair to them to make any findings against</p>

Page 39675

1 them because the housing problem is a problem that
 2 government should be dealing with. They claim that even if
 3 they had built the 5500 houses it wouldn't have made a
 4 difference because it would have made no material change to
 5 the housing backlog faced by the employees, and they claim
 6 it would be procedurally unfair to them because they say
 7 they had limited time to address the phase 2 issue and they
 8 were only able to put up one witness.
 9 The only thing that they don't claim is that they
 10 actually fulfilled their SLP housing obligations. It's not
 11 an oversight on their part. They don't make that claim
 12 because it's manifestly unsustainable. They must always
 13 have known it was an unsustainable claim because when they
 14 finally got their opportunity to put up their one witness
 15 to speak to the merits of their defence they chose Mr
 16 Seedat, who on his own admission has no personal knowledge
 17 whatsoever relevant to the SLP obligations. So instead of
 18 a witness we got a spin doctor, and that is in fact what
 19 happened.
 20 Now in argument they continue ducking and diving
 21 to avoid the merits. Now we'd urge this Commission not to
 22 let them get away with it, and we'll take their evasive
 23 complaints one by one. The terms of reference complaint is
 24 a red herring. The Chair's ruling makes that clear. There
 25 couldn't ever have been any reasonable doubt that the

Page 39676

1 failure to address the housing issue "created an
 2 environment conducive to the creation of tension, labour
 3 unrest, disunity among its employees by the [inaudible]
 4 conduct." It's not a test for legal causation in relation
 5 to deaths. It's a test about the creation of an
 6 environment conducive to the creation of tension.
 7 But even if there was some doubt, that was
 8 actually removed by the one piece of evidence that Mr
 9 Seedat actually was qualified to give on the basis of
 10 personal knowledge, namely that the Lonmin board itself
 11 recognise that the tragic events at Marikana were linked to
 12 the critical shortage of decent housing for its employees.
 13 That was Mr Seedat's evidence and the reference is in our
 14 heads, it's day 292, page 38355, lines 4 to 21. So that's
 15 the terms of reference complaint.
 16 The "it's not fair not to look at government"
 17 complaint is a non-starter. In an ideal world your
 18 Commission would have been able to investigate the failures
 19 of government and to make recommendations in this regard
 20 and we don't for a minute suggest that there haven't been
 21 manifest failures on the part of government. But the
 22 amendment of the terms of reference changed that and it
 23 leaves your –
 24 CHAIRPERSON: I must say in fairness to
 25 the President when he, we'll quote this in the report but

Page 39677

1 when he wrote to me to tell me that he was changing the
 2 terms of reference, taking out 1.5, he did indicate it
 3 might be necessary at the end of our work to reconsider
 4 that and to have some kind of investigation in some form
 5 into the issues raised by the deleted 1.5. So it's not
 6 something that has necessarily disappeared from the radar
 7 screen forever.
 8 MR CHASKALSON SC: Indeed, but where the
 9 situation now is, Chairperson, is that your Commission has
 10 a legal duty to perform the function that has been assigned
 11 to it in accordance with the reduced terms of reference and
 12 it would be an unlawful abdication of that function to
 13 decide you won't investigate Lonmin, which you're asked to
 14 investigate, because you can no longer investigate
 15 government. It would in fact be unlawful.
 16 Then we come to the "it wouldn't have made a
 17 difference" argument. We find that in Mr Burger's address
 18 on day 296, page 28993, lines 3 to 17, and I'd like to
 19 quote it. "Can I then conclude on this issue by the
 20 counterfactual? Assume for the moment there's going to be
 21 a finding, assume for the moment that we're going to be
 22 criticised in a vacuum, what's the counterfactual here?
 23 Because then the Commission will have to address the
 24 reality; what if 5500 houses had been built, what effect
 25 would that have had on the tragedy? Remember we employ

Page 39678

1 28000 employees and we've got 10000 contract workers.
 2 Let's forget about the contract workers" - sensible
 3 concession - "and think away that the government should
 4 provide housing to them," not just the government, their
 5 employers, "but of the 28000 we've employed we've now built
 6 houses for five and a half thousand. What about the other
 7 20 and a half thousand?" That argument, the arithmetic is
 8 wrong, it would have been 22 and a half thousand. "Is that
 9 going to take away their complaints? Is that going to
 10 create trust between the employer and the employee? I
 11 wouldn't have thought so."
 12 Let's step back from this argument and just look
 13 at it, because it's quite a breathtaking argument for
 14 Lonmin to make. It amounts to an argument that Lonmin has
 15 been so neglectful of the housing needs of its workforce
 16 that the 5500 houses in their SLP would have been no more
 17 than a drop in the ocean of squalor in which they expect
 18 their workers to live. That's what the argument is.
 19 Well, Lonmin may have been bad, but it wasn't
 20 that bad. The figures that Mr Burger quoted to you are
 21 actually incorrect for two reasons; first is they conflate
 22 the total workforce with the number of migrant workers in
 23 categories 4 to 9, which is the real inquiry, migrant
 24 workers, and second they ignore the houses that were
 25 already available for Lonmin's category 4 to 9 migrant

<p style="text-align: right;">Page 39679</p> <p>1 workers either through hostel conversion process or through 2 housing developments undertaken by Lonmin prior to 2000. 3 Now we've prepared a table which we have 4 circulated by email and given in hardcopy to Lonmin and 5 made available to you and your Commissioners, Chair. It's 6 table 1 which shows the correct figures on the basis of 7 Lonmin's own documents with the sources, and there we see 8 that the total number of category 4 to 9 employees was 9 23044, not 28000 quoted by Mr Burger, that the total number 10 of these workers who were in decent housing by 2012 was 11 5883, which is 25%, 1 in 4. The total numbers not in 12 decent housing by 2012 was 17161, 74.47%, three-quarters. 13 We then look at what would have happened if 14 Lonmin had delivered. It would have created another 1130 15 on outstanding hostel conversions and another 5497 houses, 16 that's the 5500 minus the three that they managed to build. 17 That would have changed the situation, so instead of 25% of 18 the workers in decent housing and 74% not in decent 19 housing, you would have had 54% in decent housing and 45% 20 not in decent housing. 21 Now in our submission it would have been a very 22 material difference. It's not just that more than half the 23 migrant workers would have been in decent housing, it's 24 also that the remaining 45% would have seen that their 25 employer was in the process of addressing their living</p>	<p style="text-align: right;">Page 39681</p> <p>1 the time to put it forward. 2 But if you're still concerned about procedural 3 fairness, we'd point out that with the exception of 4 paragraph 26 of our heads of argument, which refers to a 5 DMR report, every submission in our heads of argument is 6 based exclusively on legal instruments or Lonmin's own 7 documents. So it's either a proclamation or the Mineral & 8 Petroleum Resources Development Act, or it's a document 9 from Lonmin. 10 CHAIRPERSON: The DMR document they had 11 already, hadn't they? 12 MR CHASKALSON SC: No, they got through 13 us but they didn't have independently. But we'd invite you 14 to ignore paragraph 26. If they didn't have enough time to 15 consider this document in the two months since they 16 received Dr Forrest's report we don't need to depend on it. 17 If you read our heads on the basis that we found our 18 submissions exclusively on legal instruments and Lonmin's 19 own documents and the testimony of Mr Seedat, you'll see 20 that Lonmin has no complaint about unfairness and what 21 you'll see from the heads, and it's in the heads, I'm not 22 going to take you to them in any detail, but paragraphs 14 23 to 22 show that there was a clear obligation on Lonmin to 24 build 5500 houses between 2007 and 2011 and Lonmin was at 25 all times aware of this obligation.</p>
<p style="text-align: right;">Page 39680</p> <p>1 conditions. Instead three-quarters of the migrant 2 workforce was living in squalor and Lonmin had done nothing 3 about it for more than a decade. In fact they'd compounded 4 the problem by pushing 7 out of every 8 hostel residents 5 into the informal settlements. So it very much would have 6 made a difference, is our submission. 7 CHAIRPERSON: There was a suggestion that 8 they had a choice, they didn't have to take the living-out 9 allowance, they could have used, taken advantage of 10 accommodation provided by Lonmin, but when I asked Mr 11 Seedat how that would work in practice he wasn't able to 12 explain how such choice could have been exercised - 13 MR CHASKALSON SC: Indeed, Chair, well - 14 CHAIRPERSON: - what alternative there 15 was apart from the living-out allowance. 16 MR CHASKALSON SC: Well Chair, it wasn't 17 possible because there wasn't any available housing. That 18 leaves the procedural fairness complaint. It can be easily 19 addressed. First of all it's grossly overstated. Lonmin 20 has had Dr Forrest's preliminary report since 15 August. 21 That's more than a month before Mr Seedat testified, more 22 than two months before they filed their reply to that 23 preliminary report. So they can't complain that they 24 didn't have a proper opportunity to assemble a rebuttal of 25 the complaint against them. If they had an answer they had</p>	<p style="text-align: right;">Page 39682</p> <p>1 Paragraphs 23 to 27 show that they managed to 2 build only three of the 5500 houses they committed to 3 building and that failure was the product of a unilateral 4 repudiation of their original obligation. Paragraph 29 5 shows that their complaints about delays in proclamation 6 are spurious. 7 Paragraph 30 shows that their complaints about 8 affordability are irrelevant because the SLP obligation was 9 a binding legal obligation under the act. So affordability 10 didn't enter into it. At best it gave them an opportunity 11 to approach the department for a variation. 12 But paragraph 31 shows that in any event the 13 budget for the entire programme could have been funded by a 14 reduction of less than 20% in the \$607 million, and I 15 emphasise dollars, not rands, that Western Platinum paid in 16 dividends to Lonmin and Incwala over this period, or a 17 reduction in the R1.3 billion payments that Western 18 Platinum made to Lonmin and its Bermuda subsidiary over the 19 same period, ostensibly for marketing services that the 20 figures show cost considerably less than half that amount. 21 So the money was there, it was just sent elsewhere. 22 So we would urge this Commission to find that 23 Lonmin was in clear default of its housing obligations 24 under the SLP and to ask that this finding be brought to 25 the attention of the DMR. It's for the DMR to decide what,</p>

<p style="text-align: right;">Page 39683</p> <p>1 if anything, to make of it, but it does need to be stated 2 and it does need to be brought to the attention of the DMR. 3 That brings me to the issue of dangerous weapons 4 at a gathering. AMCU submitted that the mere carrying of 5 dangerous weapons at a gathering was not a criminal offence 6 prior to the post-Marikana amendment of the Regulation of 7 Gatherings Act. That's incorrect. Section 2(2) of the 8 Dangerous Weapons Act empowered the Minister to prohibit 9 the carrying of dangerous weapons at gatherings by means of 10 a notice which would specify the category of gatherings and 11 the category of objects which were to be treated as 12 dangerous weapons – 13 CHAIRPERSON: Was that section in 14 operation in August 2012? 15 MR CHASKALSON SC: The section was in 16 operation and the notice that was made under it is 17 Government Notice 1633 of 1 October 1996. 1633 of 1 18 October 1996, which prohibited persons from being in 19 possession at any time at any gathering at or in any public 20 place of any object belonging to a class or type that was 21 specified in schedule, paragraph 2 of the schedule, and 22 that paragraph includes spears, assegais, knobkieries, 23 pangas, knives with blades longer than – the list is long 24 and so any person carrying one of the objects at a public 25 gathering in Marikana was guilty of an offence and we don't</p>	<p style="text-align: right;">Page 39685</p> <p>1 long, long time back. They were responsible for literally 2 thousands of deaths in KwaZulu-Natal in the 80s and 90s. 3 They've been responsible for deaths in labour unrest right 4 through the period of the 80s and 90s, and they continue to 5 be responsible for deaths. We do not retreat from a very 6 firm submission that they must be stamped out. 7 We do flag a concern that there is a risk that 8 the fragile peace that prevails in Marikana could be 9 disturbed by mass arrests for possession of weapons in 10 gatherings in August 2012, particularly if they're 11 perceived to be arrests effected on a partisan basis, or 12 for an ulterior purpose. How to assess that risk and what 13 weight to give it are matters for the discretion of the 14 NPA. We would merely ask the Commission to identify that 15 risk in its report and to emphasise that whatever decisions 16 are taken in relation to the prosecutions, to prosecutions 17 for contravention of the laws relating to armed assembly, 18 those decisions must be taken on an even-handed basis. If 19 they're not taken on even-handed basis it would really, 20 well, make matters much worse in Marikana rather than 21 better. 22 [12:02] Then there's the suggestion – 23 CHAIRPERSON: Of course, another thing 24 that can be done, and I don't know whether you are going to 25 deal with it and that is, what I recalled earlier when you</p>
<p style="text-align: right;">Page 39684</p> <p>1 retreat from our submissions in this regard in paragraph 2 13.36 of our heads. 3 We do however need to add to those submissions in 4 two respects, and they're two important respects. The 5 first is it's not only the strikers who participated in 6 armed assemblies during the week of 9 to 16 August 2012. 7 Exhibit ZZZZ6.27, which is the videos taken by Lonmin 8 Security on the afternoon of the 11th of August, show a 9 group of NUM supporters marching triumphantly around the 10 Wonderkop Hostel complex with dangerous weapons in the 11 afternoon of 11 August. Now that's a long time after there 12 may have been any need to defend themselves from any attack 13 that may or may not have taken place in the morning. 14 CHAIRPERSON: Are the hostels a public 15 place? 16 MR CHASKALSON SC: The hostels I would 17 submit would be a public place for these purposes, and we 18 would submit that if the laws in relation to armed assembly 19 are to be enforced against the strikers they must be 20 enforced against the NUM supporters too. 21 The second is a more complicated submission and 22 that is that despite our belief that this country must 23 stamp out armed assemblies, and that is a submission that 24 we regard as very important, armed assemblies have 25 bedevilled political life in this country since, well, a</p>	<p style="text-align: right;">Page 39686</p> <p>1 weren't in the chamber, the Mpembe plan that apart from 2 arresting people for what happened, as far as in relation 3 to dangerous weapons and assembly, if existing dangerous 4 weapons in the possession of people in Marikana can be 5 seized by the police, then presumably some of the dangers 6 would also fall away. 7 MR CHASKALSON SC: And maybe that a 8 possible recommendation in this regard is some – a 9 suggestion of some sort of amnesty for surrender – in 10 return for surrender of weapons, that is something that 11 might be a way of addressing both issues. But the one 12 principle that we would want to come out of this Commission 13 is that going forward, armed assemblies have to be treated 14 ruthlessly. The suggestion that the JOC was unaware that 15 the operation was proceeding, in his argument yesterday Mr 16 Semenya suggested that there isn't evidence that the JOC 17 was aware that the operation was proceeding to scene 2 18 after scene 1. Now that, with respect, is not correct. 19 The transcripts of the radio transmissions make clear that 20 anyone in the JOC listening to the radio after the scene 1 21 shootings, would have been aware that the operation was 22 proceeding and that SAPS were still trying to remove 23 strikers from the koppie. We've prepared a time line of 24 the relevant transmissions in annexure 2. The crucial 25 points and that's extracted from the transcript of - the</p>

<p style="text-align: right;">Page 39687</p> <p>1 consolidated transcript of the radio transmissions. The 2 crucial points in the time line are, the first 15:53:50 3 which is marked in red at the top, which is when the scene 4 1 shootings take place. Then there's the item in yellow at 5 16:04:04, the times on the left at the ETV times, the times 6 on the right are the times of the video or the times of the 7 cell phone. When Brigadier Pretorius sends her text to 8 IPID calling them to the scene and saying "having operation 9 at Wonderkop, bad, bodies, please prepare your members as 10 going to be bad." That is the earliest – well, the 11 earliest point at which the JOC can be said to have known 12 about the shootings is of course at the shooting, at the 13 time of the shootings themselves because of the evidence of 14 Mr Botes and Captain Kidd that it was audible on the radio. 15 The second point is 16:04:04 by which stage Brigadier 16 Pretorius knew that it was going to be bad. That is in 17 fact before she received the telephone calls from Captain 18 Loest. The next marker in this time line which is in red, 19 if we scroll down, is the 27 seconds between 16:08:15 and 20 16:09:17 which is when Mr Mkhonjwa becomes the first victim 21 to be shot at scene 2. So that's the point at which the 22 first victim is shot at scene 2, and then at the end of 23 this time line, 16:19:47 Mr Mpumza marked in red is the 24 last victim to be shot at scene 2, to be killed at scene 2. 25 Now, we've marked the transmissions in between and we'd</p>	<p style="text-align: right;">Page 39689</p> <p>1 going to happen at scene 2. The post-mortem evidence and 2 muti marks. Mr Ntsebeza cited some statistics from the 3 SAPS table in exhibit KKK10 in relation to the presence of 4 fresh muti marks on the victims at scene 1. Unfortunately 5 that SAPS table is not entirely accurate, so we prepared 6 our own table with reference to the post-mortem reports in 7 exhibit A with the correct statistics or the correct 8 details and fully referenced. I want to emphasise that the 9 evidence leaders are of the view that the evidence of fresh 10 muti marks on accused persons cannot be used to infer an 11 intention to attack the SAPS because muti is at best 12 neutral in this regard. Some people taking muti may have 13 been wanting protection in the industrial dispute as Mr 14 Mpumza suggests – sorry, Mr Nzuzza suggests. Others may 15 have been wanting protection from SAPS not because they 16 intended to attack SAPS but because they had already seen 17 on the 13th, that SAPS had killed some of their colleagues. 18 Others may have been intending to attack SAPS and may have 19 wanted protection for that but at best, it's neutral. So I 20 want to emphasise our submission that fresh muti marks 21 don't themselves provide evidence of an intention to attack 22 SAPS. Having said that, the Commission must reach whatever 23 conclusion it's going to reach on the basis of the correct 24 facts in relation to fresh muti marks and they are the ones 25 that are set out in the table. What I would indicate</p>
<p style="text-align: right;">Page 39688</p> <p>1 invite, I don't want to spend much time on it now, we'd 2 invite you and your Commissioners Chairperson, to look at 3 them, but by the time that Brigadier Pretorius sent a text 4 to IPID there were at least ten radio communications that 5 would have made clear that the operation was continuing. 6 Several of them would have suggested that the water cannon 7 was still needed so that – and you can infer from that that 8 the crowd hadn't dispersed. Two of them would have alerted 9 the JOC to the fact that the water cannon was needed in the 10 vicinity of a koppie. Before Mr Mkonjwa was shot and after 11 Brigadier Pretorius's text, there were at least another 12 12 communications which showed that the operation was 13 continuing. Several of these would have made clear that 14 SAPS were engaging the strikers in a koppie. Shortly after 15 Mr Mkonjwa was shot, the JOC would have heard a report that 16 there were two bodies, one of which was him, behind the 17 second koppie, and I emphasise the second koppie, and after 18 that report and before Mr Mpumza was killed there would 19 have been at least another nine reports that would have 20 indicated to the JOC that the operation was continuing and 21 several of these reports would have alerted the JOC to the 22 fact that more shooting was taking place. So we submit 23 that the JOC was aware that the operation was continuing, 24 that it was continuing in circumstances where what had 25 happened at scene 1 created very real risks for what was</p>	<p style="text-align: right;">Page 39690</p> <p>1 quickly in relation to the table is we've distinguished 2 between scene 1 and scene 2. We've identified the position 3 at scene 1 and in scene 2, where the relevant victim was 4 killed. We've got a column that says "marks fresh or 5 recent," and you will see that in seven of those entries 6 there is a question mark because the report doesn't 7 specify. 8 What I would like to point out in that regard is 9 that it's not a coincidence that all seven come from two 10 doctors who consistently don't distinguish between fresh or 11 old scarification marks, so the fact that there's no 12 mention of fresh scarification marks don't – is not an 13 indication that there weren't fresh scarification marks, 14 it's a reflection of the fact that the two doctors don't 15 distinguish and we've given the references. Over the page 16 there are two more entries in respect of the two victims 17 who we cannot place, Mr Segalala and Mr Motswele. Those 18 are the correct facts. I do want to emphasise again that 19 our primary submission is whatever the facts show are 20 neutral in relation to an intention to attack. 21 CHAIRPERSON: I wanted to ask you about 22 that. What is the significance, if any, of muti marks, 23 recent muti marks, scarification marks? I take it would be 24 a basis for suggesting that the at worst for the strikers, 25 the strikers concerned were minded to attack the police and</p>

<p style="text-align: right;">Page 39691</p> <p>1 wanted to be invulnerable and so forth. It would tend to 2 support the submission that there was an attack or more 3 accurately there wasn't an original intention to attack or 4 possibly to attack. If of course – than then brings us to 5 the next question, was there actually an attack? Now there 6 was threats and there is however an argument that whatever 7 threats there had been when, at the crucial moment there 8 wasn't an attack and the argument would be that that was 9 because if there was going to be an attack the intending 10 attack is repented and decided not to attack, where they 11 have realised this matter was more serious than that. So 12 if there in fact, at the end of the day one were to hold, 13 and obviously when the matter is, you've got to give 14 careful consideration to, that there wasn't in fact an 15 attack, it might be based upon an argument that there, if 16 it is a correct argument, that there wasn't an incident 1 17 and there wasn't an incident 2, and an analysis of the 18 final video that was produced. If one concludes that there 19 wasn't an attack, whatever the intention may have been 20 earlier, then how relevant is the muti evidence? 21 MR CHASKALSON SC: Well, it ceases to 22 have relevance. If the conclusion on the basis of the 23 evidence as a whole is there wasn't an intention to attack, 24 then the muti evidence takes the matter nowhere. 25 CHAIRPERSON: And if there was an attack,</p>	<p style="text-align: right;">Page 39693</p> <p>1 misconduct on the part of SAPS members. We haven't 2 consolidated them in our concluding section on punitive 3 recommendations. We'd merely emphasise now that we don't 4 want them to be lost in the wash. Wherever we mention in 5 the main body of the heads that a SAPS member should be 6 investigated for misconduct, we stand by that submission 7 and we just also make the obvious point that where we 8 recommended a criminal investigation into a SAPS member for 9 misconduct we'd also recommend that SAPS be instructed to 10 investigate – 11 CHAIRPERSON: It would helpful if you 12 could provide an omnibus note collecting all these 13 references for us. 14 MR CHASKALSON SC: We will – 15 CHAIRPERSON: To save us the task of – 16 MR CHASKALSON SC: We will do so, Chair. 17 And that – 18 CHAIRPERSON: Such revised submissions as 19 you are making now in this hearing. 20 MR CHASKALSON SC: We will do that, 21 Chair. And that leaves the issue of the – an inquiry in 22 relation to the National Commissioner and whether this 23 falls within your terms of reference. There are four 24 issues, one of which is a non-issue. What's the correct 25 provision of the SAPS Act is the first. Is it within your</p>
<p style="text-align: right;">Page 39692</p> <p>1 even if there's a question as to whether there was an 2 attack or not, the muti evidence would obviously be 3 relevant and have to be considered. 4 MR CHASKALSON SC: Yes, save for our 5 submission is that muti could reflect one of three 6 possibilities or possibly other possibilities that we 7 haven't thought of. 8 CHAIRPERSON: I am putting it at its 9 highest. 10 MR CHASKALSON SC: Chair, then to come to 11 the punitive recommendations. The first is to emphasis the 12 additional criminal investigations we mentioned in our oral 13 arguments but are not in our heads, because we don't want 14 our heads to be treated as the laundry list of the only 15 investigations, and there are two that spring to mind. The 16 first is the investigation of SAPS shooters who have not 17 provided statements which provide a satisfactory 18 explanation for their shooting at scenes 1 or 2, or in 19 respect of whom there's objective evidence that the 20 shooting was unjustified. The second is the investigation 21 of NUM supporters who can be seen with dangerous weapons in 22 that group that I've just discussed on the afternoon of the 23 11th. 24 Now through the main body of our heads of 25 argument, we have also identified a range of instances of</p>	<p style="text-align: right;">Page 39694</p> <p>1 terms of reference. Is it fair to the National 2 Commissioner and are there grounds for an inquiry? The 3 non-issue is section 8 or section 9. We concede that we've 4 got the wrong section, it's section 9. Section 9 is an 5 allegation into misconduct. 6 The terms of reference question, we would submit 7 answers itself in terms of clause 5 in particular which 8 says, "The Commission shall where appropriate refer any 9 matter for prosecution, further investigation or the 10 convening of a separate inquiry to the appropriate law 11 enforcement agency, government department or regulator 12 regarding the conduct of certain persons. And we would 13 submit that that would embrace an inquiry under section 9 14 of the SAPS Act. Then there is the question, is it fair to 15 the National Commissioner? And I don't fully understand 16 the argument. She's known that her conduct was going to be 17 scrutinised with a view to potential criminal liability or 18 further inquiry in terms of clause 5 of the terms of 19 reference. Several parties have been making submissions 20 that she should be investigated for murder. We don't know 21 whether the Commission will or won't accept those 22 submissions, or culpable homicide. But it's not clear to 23 us how she can complain if the Commission concludes that 24 her misconduct fell short if that which would justify a 25 murder investigation but still amounts to misconduct of the</p>

<p style="text-align: right;">Page 39695</p> <p>1 sort that might justify her dismissal and so requires an 2 inquiry in terms of section 9. The issues in relation to 3 the National Management Forum, what happened at the 4 National Management Forum, and what SAPS' response to that 5 was, had been very fully ventilated in this Commission. 6 There could never have been any doubt on the part of the 7 National Commissioner that this was something the 8 Commission was taking very seriously. Now some people are 9 saying that must be referred for prosecution or for 10 investigation with a view to prosecution. We are saying, 11 at the very least it must be referred with a recommendation 12 that an inquiry be set up in section 9. 13 CHAIRPERSON: What do you say about the 14 changes between the report that was sent to the President 15 and the media extract which she made on the morning of the 16 17th? 17 MR CHASKALSON SC: That is – that too we 18 have concerns about and we make the submission in our heads 19 of argument that those changes seem to have emanated from 20 her office. She was certainly aware of the changes. 21 CHAIRPERSON: She was asked about them 22 and she didn't pretend, she didn't – to be fair to her she 23 didn't hide behind anybody else. She said, "I accept 24 responsibility" and so forth. And of course, if she'd read 25 the report that was sent to the President and that was the</p>	<p style="text-align: right;">Page 39697</p> <p>1 authorised. 2 MR CHASKALSON SC: Indeed, Chair, it's 3 quite an astonishing natural justice argument because it's 4 a suggestion that there should be a hearing. Before there 5 is a hearing about whether there is going to be a hearing, 6 because of course the ultimate hearing, if there is going 7 to be a hearing is going to be the inquiry itself. So 8 there is – 9 CHAIRPERSON: She would have the 10 opportunity to say there shouldn't be a hearing because 11 there isn't a basis for it. 12 MR CHASKALSON SC: Yes. But that's a 13 hearing before the President, not – before the Minister, 14 not before this Commission. Then the last question is are 15 there grounds? And we would stand by what we say in 16 paragraph 1302 amplified by the exchanges that we've just 17 had in relation to the press statement. But when I went 18 back to 1302 I realised to my shock that we hadn't 19 emphasised the actual facts of what her role was at this 20 extraordinary session of the NMF. We focused more on a 21 cover up than on what had or hadn't been done. Because 22 whatever her role was, she was party to a decision that in 23 our submission was a reckless decision that left 34 people 24 dead the next day. And because of her evasive attitude 25 at the Commission we don't know whether she drove that</p>
<p style="text-align: right;">Page 39696</p> <p>1 nature of the information she had, then when she applied 2 her mind in the light of that information, to the statement 3 that she was going to make it's arguable, it's not for us - 4 MR CHASKALSON SC: Well – 5 CHAIRPERSON: - you might have seen the 6 difference. 7 MR CHASKALSON SC: We would submit that 8 she should have seen the difference because there is a very 9 big difference. The one speaks about two separate 10 incidents, one of which is quite difficult to explain or 11 both of which are quite difficult to explain, but the one 12 much more difficult than the other. And the other just 13 speaks about one incident. 14 CHAIRPERSON: There is another point. In 15 the context of natural justice, if we were to suggest, I am 16 not saying that we will, but if we were to suggest that an 17 inquiry be held, she would have the opportunity to make 18 representations to the relevant authority, the President in 19 this case, as to why the inquiry shouldn't be held. So I 20 would have thought that there wouldn't be a problem in 21 relation to natural justice. She doesn't have to be heard 22 by us before we make the suggestion. The complaint, the 23 difficulty would be related as far as she is concerned 24 possibly, to the holding of the inquiry. But she would be 25 able to address before the inquiry is authorised if it is</p>	<p style="text-align: right;">Page 39698</p> <p>1 reckless decision, or whether she was a passive party at 2 the extraordinary sessions. We don't know that. But her 3 role in the attempted cover up of the decision coupled with 4 suggestions of improper political considerations on her 5 part, that are reflected in the transcript of the 6 Provincial Commissioner's meeting with Lonmin on the 14th, 7 suggest that she may well have been a primary player in 8 relation to that decision, either way, there are grounds 9 for a misconduct inquiry. Our submission is that SAPS 10 should not be led by someone who on the best version for 11 her was party to a reckless decision that left 34 people 12 dead, and then participated in an attempt to cover up her 13 involvement in that decision. So we stand very firmly 14 behind the submission that there should be an inquiry in 15 terms of section 9. 16 [12:22] Chair, I've reached the limit of what I think I 17 can do without interrupting or taking away from Mr 18 Budlender's time, if there is time at the end and we can 19 get to the presentation that we've prepared, we'll ask 20 leave to do so. 21 CHAIRPERSON: I think it might be 22 convenient for us a short, a very short comfort break at 23 this stage before we have Mr Budlender in argument. 24 [COMMISSION ADJOURNS COMMISSION RESUMES] 25 [12:27] CHAIRPERSON: The Commission resumes.</p>

Page 39699

1 Yes, Mr Budlender.
 2 MR BUDLENDER SC: Thank you, Chair.
 3 There are five matters which I wish to address. The first
 4 is Lonmin's defence that it was not under a duty, under a
 5 legal duty to negotiate with the strikers. The second is
 6 Lonmin's decision not to close down its mining operations
 7 during the strike. The third is Mr Mathunjwa's account of
 8 his meeting with Mr Kwadi on the 16th of August. The fourth
 9 is a brief remark on the question of a memorial, and then I
 10 have some very brief closing remarks I wish to make.
 11 So firstly as to Lonmin's defence of no legal
 12 duty to negotiate, a large part of Lonmin's submission was
 13 that it was not required by law to negotiate with the
 14 strikers. It says that the Constitution and the Labour
 15 Relations Act and its own internal protocol did not oblige
 16 it to do so. Now in fact they are wrong in respect of the
 17 Constitution because the Bill of Rights operates
 18 horizontally where appropriate and there could be no doubt
 19 that the right to life binds and obliges an employer to do
 20 whatever it reasonably can to avoid the loss of life by its
 21 employees. It was a breach of its constitutional
 22 obligations.
 23 But in any event the argument misses the point
 24 because the Commission's terms of reference require it to
 25 inquire into and make findings and report on, and make

Page 39700

1 recommendations concerning amongst others, the following
 2 matters in relation to Lonmin, "1.1.1, whether it exercised
 3 its best endeavours to resolve any disputes which may have
 4 arisen (industrial or otherwise) between Lonmin and its
 5 labour force on the one hand, and generally among its
 6 labour force on the other." It's not a question of whether
 7 they had a legal duty to do so, whether they used their
 8 best endeavours to resolve the dispute.
 9 Secondly you're required to report on and make
 10 recommendations on, "1.1.2, whether Lonmin responded
 11 appropriately to the threat and outbreak of violence which
 12 occurred at its premises." Appropriately; it's not just a
 13 matter of legality, it's whether it did the right thing.
 14 Thirdly, "1.1.4, whether it employed sufficient
 15 safeguards and measures to ensure the safety of its
 16 employees, property and the prevention of the outbreak of
 17 violence between any parties." Not a question of a
 18 legality, question of correct, whether it acted correctly.
 19 "1.1.6, whether by act or omission it directly or
 20 indirectly caused loss of life or damage to persons or
 21 property." And Chair and Commissioners, that goes to the
 22 point which we made at the outset of our submissions. The
 23 question is not just whether Lonmin, or for that matter
 24 other parties, are legally liable for what happened, it's
 25 also whether they exercised their best endeavours – to use

Page 39701

1 the words of the terms of reference – and whether they
 2 acted appropriately to exercise, to use the terms of
 3 reference. That's what you are mandated by the President
 4 to consider and it's no answer to say well, I didn't have
 5 to act appropriately because I wasn't legally obliged to
 6 act appropriately, or I wasn't obliged, I didn't have to
 7 use my best endeavours because I wasn't legally obliged to
 8 use my best endeavours. The answer is then you didn't use
 9 your best endeavours.
 10 Mr Burger asked repeatedly where does the duty
 11 arise from. Well, we say that the duty arises, whether or
 12 not it's a legal duty, it arises from the duty of a
 13 responsible employer to act responsible and to act
 14 appropriately where there is a risk of the loss of human
 15 life. It is a duty not to say well, 44 deaths gave us good
 16 reason to negotiate outside our structures and to be
 17 flexible, but 10 deaths weren't enough. 10 deaths do not
 18 give us reason to be flexible, only 44 deaths give us
 19 reason to be flexible. That's not what a responsible
 20 employer does and it's not an appropriate response.
 21 CHAIRPERSON: Is it relevant that they
 22 were requested by the police, the police came, they invited
 23 the police in to help them, the police came to them and
 24 urged them to negotiate? Is that relevant on this part of
 25 the –

Page 39702

1 MR BUDLENDER SC: Well, that's very
 2 material of course, very material. If they are told please
 3 negotiate and they say we won't, all the more reason. Then
 4 Lonmin's other explanation for not –
 5 CHAIRPERSON: I'm sorry, one more point
 6 before you move on. We've had a bit of an argument here as
 7 to what exactly "negotiate" means but I'm not sure that
 8 it's necessary for us to go that far. Did they have to
 9 negotiate or just talk?
 10 MR BUDLENDER SC: What they had to do was
 11 to talk to the people about what their complaint was and
 12 what their demands were and to try to resolve the issue.
 13 Now whether you do that by a process of full-on negotiation
 14 or you do it by other means is a matter which one has to
 15 decide if you like in the terms of situational
 16 appropriateness. But the one thing you can't say is we
 17 won't talk to you, we refuse to talk to you because of a
 18 principle which is, which Mr Da Costa admitted led to a
 19 completely cynical outcome, was a refusal to talk at all
 20 because they said we'll only talk to you through the people
 21 whom we know you're at war with. That was utterly cynical.
 22 Mr Da Costa acknowledged that, and that's not what a
 23 responsible employer does.
 24 Lonmin's other answer, the one answer is we
 25 didn't have a legal duty. The other answer is that they

<p style="text-align: right;">Page 39703</p> <p>1 couldn't negotiate because the miners were inflexible about 2 the 12 500 and therefore there was no point in talking to 3 them. Now that is firstly not founded in fact, and 4 secondly it's frankly absurd.</p> <p>5 CHAIRPERSON: Isn't that mainly ex post 6 facto? There was no basis –</p> <p>7 MR BUDLENDER SC: That's –</p> <p>8 CHAIRPERSON: Sorry, if you're going to 9 make that point I won't say anymore.</p> <p>10 MR BUDLENDER SC: That's precisely the 11 point I was going to make as to why it's not founded in 12 fact. It's not founded in fact because at the time of the 13 events Lonmin had no information at all that the strikers 14 would not budge on a demand for an immediate payment of 15 R12 500. There was no such evidence of that kind before 16 it. Subsequently, we have witnesses who came here 17 subsequently and said that and there's a lot of debate 18 about that, but at the time when they refused to negotiate 19 or refused to talk they had no information which suggested 20 that talking would be absolutely useless unless they're 21 paid R12 500 the next month, and so it's factually 22 unfounded. It's an ex post facto rationalisation.</p> <p>23 Secondly, it's absurd because everyone knows, 24 even I know that people often make very large demands as a 25 starting point and very often they say we're intransigent</p>	<p style="text-align: right;">Page 39705</p> <p>1 evidence is at page 37794 to 37796.</p> <p>2 The problem with Mr Seedat's evidence is that, 3 (a), it's purely theoretical, and (b), it doesn't answer 4 the question. It's theoretical because he wasn't on the 5 scene at the time when the decision was made to continue 6 mining operations full-on. He arrived later. He doesn't 7 say, and he can't say why the decision was in fact made.</p> <p>8 But you do have evidence about why it was made 9 and that was given by Mr Mokwena and I'd like that on the 10 screen because it's a critical passage in the evidence. 11 It's day 292 and it's page 38211 and I'm starting at line 12 17. So Mr Ramphele is questioning Mr Mokwena and he says 13 at line 17, "So it was known, will you agree with me that 14 it was known to Lonmin that there was danger for those 15 employees who were to report for work?" Mr Mokwena, "That 16 is correct." Mr Ramphele, "It is also correct that in your 17 recruitment you recruit a large number of people coming 18 from very distant places and they have to find 19 accommodation in neighbouring villages. Is that correct?" 20 "That is correct." Mr Ramphele, "And that if these people 21 were going to be going to work," and if you'd just look at 22 this paragraph, "if they were going to be going to work 23 they would face the same violent action by those who do 24 not, did not want them to go to work." Mr Mokwena, "That 25 is true." Mr Ramphele, "And that it was a known danger, it</p>
<p style="text-align: right;">Page 39704</p> <p>1 and we won't budge, but they do budge once talking and 2 negotiations take place. That was Mr Ramaphosa's evidence. 3 I know that as having been an employer in a small non- 4 governmental organisation. Everybody knows that. People 5 make demands and when you talk they moderate their demands. 6 One can reasonably expect that the management of the 7 world's third largest platinum miner knew that, and if they 8 didn't know that they had no job managing that company. I 9 don't believe that's the case. They knew it. They knew 10 full well when you talk things shift.</p> <p>11 Then I want to address two matters where it 12 appears that Lonmin is in any event legally liable. The 13 first matter is Lonmin's decision not to close down its 14 mining operations. Now in his evidence on day 289 Mr –</p> <p>15 CHAIRPERSON: Sorry, I just want to get, 16 for the purpose of clarity, close down mining, you mean put 17 it on care and maintenance?</p> <p>18 MR BUDLENDER SC: Yes. Yes, I'll come to 19 that, thank you, Chair. In his evidence on day 289 Mr 20 Seedat addressed the issue of closing the mine to avoid 21 further loss of life. He said "You can't simply switch off 22 and close down because there are certain essential 23 services, maintenance services which have to be continued 24 for safety and other reasons," and that apparently involves 25 something less than 10% of the workforce at most. The</p>	<p style="text-align: right;">Page 39706</p> <p>1 was a known danger that Mr Langa on his way to work would 2 in all probability if he were to meet the strikers, would 3 be faced with the same fate of these people that were 4 injured on the 10th?" Mr Mokwena, "That is correct."</p> <p>5 CHAIRPERSON: The 10th of course was the 6 wrong date.</p> <p>7 MR BUDLENDER SC: Yes. Mr Ramphele, "And 8 therefore you would agree with me that not informing Mr 9 Langa that he should not come to work because of the 10 circumstances was something that one can call 11 irresponsible?" Mr Mokwena, "That could be the case, 12 Chair," and then he goes on to explain why the decision was 13 taken. This is the evidence of the decision which was 14 actually taken, not Mr Seedat's subsequent spin on the 15 decision that was taken. "If I may say, one of the options 16 that actually we considered was to close the mine and we 17 deliberated extensively and looked at what that could mean 18 for employees who then we would have to pay because they'd 19 absolutely nothing to do with the strike." So it was a 20 matter that was discussed extensively, let's close the 21 mine. "The question then was if we close the mine the 22 workers who are not on strike have to be paid because 23 they're not on strike, and we realised then that it was 24 going to be very difficult to determine who was actually on 25 strike and who was not on strike if we were to pay people</p>

Page 39707

1 after closing the mine. Further we also looked at the
 2 issue that if we close the mine, continue paying people who
 3 are not striking, the likelihood would have been why would
 4 anyone therefore go back to work if they're paid because
 5 there is an unprotected strike. So it was a complex issue,
 6 Mr Chair. I want to admit, however, that it was a
 7 consideration on our part actually to close the mine as a
 8 tool to avoid further damage." So they closed, what
 9 actually happened is not what Mr Seedat says might have
 10 happened, what actually happened is they considered closing
 11 it, they debated it intensively and they said no, we are
 12 not going to do that because we don't want to have to pay
 13 wages to strikers and we don't want to have to pay non-
 14 strikers for not coming to work. That's the reason.
 15 That's the decision, and so Mr Seedat's explanation of the
 16 essential services didn't even arise. They didn't even
 17 consider whether they should keep the essential services
 18 going. That was not even up for debate. They said we
 19 won't close.

20 CHAIRPERSON: Presumably if they kept the
 21 essential services going there would be a much smaller
 22 workforce, much easier to protect them on their way to work
 23 and way back.

24 MR BUDLENDER SC: Yes, Mr Chaskalson
 25 points out, and under those circumstances if they said we

Page 39708

1 are keeping the essential services going just to keep
 2 things afloat there would have been no incentive for anyone
 3 to attack the workers because there was no production
 4 taking place, no smoke from the stacks. It would have just
 5 been a safety operation. So a deliberate, a cold and
 6 deliberate decision was made by Lonmin to instruct people
 7 to come to work, knowing that they might be killed, and the
 8 reason that decision was made was because that would be in
 9 Lonmin's financial interest.

10 We say with all due consideration, that was a
 11 cynical and in fact appalling decision. The managers, in
 12 the comfort of their offices, deliberated intensively and
 13 decided for financial reasons to instruct their employees
 14 to come to work, knowing that this would put their lives at
 15 risk, and the results were predictable, as Mr Mokwena
 16 acknowledged. The decision was not only cynical and
 17 appalling, it was also unlawful, if you read the judgment
 18 of the SCA in Media24 versus Grobler. The deaths of Mr
 19 Mabebe and Mr Langa were the direct result, the direct
 20 result of the decision of Lonmin not to close down the mine
 21 or put it on a maintenance basis. They were the direct
 22 predictable, foreseeable and unlawful consequence of a
 23 decision by Lonmin, and the law is quite clear, if you
 24 can't provide a safe workplace you may not tell your
 25 employees to come to work. It's as simple as that.

Page 39709

1 Lonmin also failed to comply with its legal
 2 obligation to provide adequate protection for its security
 3 staff. Their security staff said please buy us some hard
 4 vehicles. Lonmin said no, we're only going to provide
 5 soft-skin vehicles. But whatever the merits of that
 6 decision, it didn't prevent Lonmin from saying to its
 7 service provider, Protea Coin, please provide hard-skin
 8 vehicles when in fact there was a hard-skin vehicle
 9 initially. Could we have a look at exhibit ZZZZ6.23.068?
 10 This is on the – there's the vehicle, on the 9th of August
 11 2012. It's a very large, very intimidating hard-skin
 12 vehicle owned by Protea Coin on the 9th of August. Now
 13 apparently that vehicle was burnt out, but there's no
 14 explanation for why Lonmin didn't say to Protea Coin that's
 15 what we want at the very time when it was most needed. It
 16 was there when it was not most needed and it was not there
 17 when it was most needed.

18 That brings me to the third matter, which is Mr
 19 Mathunjwa's account of his meeting with Mr Kwadi on the 16th
 20 of August. I need to reply to the submissions on behalf of
 21 AMCU in that regard. In our heads of argument we submitted
 22 that initially Mr Mathunjwa gave a false account of what
 23 had happened during his meeting with Mr Kwadi on the 16th of
 24 August and in response Ms Barnes on behalf of AMCU argued
 25 firstly that Mr Mathunjwa couldn't have been expected to

Page 39710

1 give a detailed account of such an informal meeting in his
 2 statement, and secondly that in any event he was consistent
 3 in his testimony that AMCU wanted to negotiate in an ad hoc
 4 central forum on behalf of the strikers.

5 But we submit that's not the evidence. Firstly
 6 in his statement exhibit KK Mr Mathunjwa describes the
 7 meeting with Mr Kwadi in some detail in three paragraphs.
 8 He doesn't refer to the demand that Lonmin recognised AMCU
 9 as a bargaining agent before he goes to the mountain to try
 10 to persuade the workers to return to work, and that was
 11 very material because if Mr Mathunjwa had demanded this
 12 because he needed something to take to the strikers and he
 13 didn't get it, then his need for it and his inability to
 14 obtain it were very material to the events which followed
 15 and one would expect them to be in the statement and say
 16 actually I knew I was going to have trouble persuading the
 17 strikers. I tried to get something to take to them but
 18 Lonmin was hard-headed and wouldn't give it to me.

19 Then secondly during his evidence-in-chief Mr
 20 Mathunjwa gave a detailed account of his discussion with Mr
 21 Kwadi and again didn't mention this in any way. And then
 22 thirdly he was cross-examined on this by Mr Burger. It's
 23 day 24, page 2551 from line 11, I'll just read it. Mr
 24 Burger puts to him, "What you wanted to get from management
 25 is an undertaking that if the workers go back to work and

<p style="text-align: right;">Page 39711</p> <p>1 there's going to be a discussion on wages, you want to be 2 part of the discussion?" Mr Mathunjwa says, "That's your 3 opinion." Mr Burger says, "No, I'm putting it to you as a 4 fact," and Mr Mathunjwa answers, "That is not correct." Mr 5 Burger says, "And you said to management on the morning of 6 the 16th, don't be technical with me, meaning don't refer me 7 to bargaining structures. If these people get off the 8 koppie I want a seat at the table," and Mr Mathunjwa said, 9 "Where is that, Sir? Can you give it to me?" and then it 10 was, after Mr Mathunjwa had been shown the transcript OO13 11 he conceded that he had sought this undertaking from 12 Lonmin. So his evidence initially was not correct. 13 I do, however, want to record something publicly 14 in this regard. I want to record publicly that this in no 15 way detracts from the moral courage which Mr Mathunjwa 16 showed in attempting to persuade the strikers to leave the 17 koppie on the 16th of August when he would obtain no benefit 18 from it, AMCU would obtain no benefit from it, and he 19 risked being attacked as a sell-out by going to the 20 strikers and saying it's time to leave the koppie and lay 21 down your weapons. He showed considerable courage in doing 22 so and he ought to be congratulated for that, and I want to 23 say that it does not lie in the mouths of those who did not 24 lift a finger to prevent the catastrophe to criticise Mr 25 Mathunjwa for his conduct. It's not for them to say that.</p>	<p style="text-align: right;">Page 39713</p> <p>1 facie I have and on the night of the 15th he also expressed 2 the view which is one which does him credit. 3 MR BUDLENDER SC: General Mpembe 4 certainly did some things which were right. When Mr Tokota 5 asked earlier in the hearing did the police do anything 6 right, he certainly did some things which were right, but 7 there are things which we've submitted he did wrong and we, 8 one of the things he did wrong was he didn't call off the 9 operation as the overall commander after scene 1. 10 [12:46] He could have done it. I'm not going to re- 11 traverse that. I don't want to re-traverse General Mpembe, 12 though I think some people on our team would like me to, 13 but he did, he certainly did some things right with the 14 meetings that he had with NUM were sensible and wise. His 15 decision not to confront the strikers initially on the 13th 16 was sensible and wise. Unfortunately he blotted his 17 copybook rather badly we say in other respects, but I'm not 18 going to go there. 19 Then Chair and Commissioners, may I say something 20 very brief about the question – 21 CHAIRPERSON: Just before you leave it, 22 Mr Mpofu has submitted that he was from a factual point of 23 view superseded as overall commander and I suppose you 24 don't have to go there, but if that submission has some 25 substance then that detracts from the submission you made,</p>
<p style="text-align: right;">Page 39712</p> <p>1 They should be ashamed of themselves. 2 If anyone of us, if you ask who used their best 3 endeavours, it was Mr Mathunjwa, no-one else, literally no- 4 one else that I can find. You can say really stretched and 5 tried and hard and pushed, only Mr Mathunjwa. So we 6 criticise his evidence, but his conduct is with respect to 7 be respected. 8 CHAIRPERSON: I don't think he was the 9 only one who used his best endeavours. I'm not sure with 10 respect that's correct. I think there's a lot to be said 11 for what the stance – never mind some of the things he was 12 perhaps persuaded to say, but the stance he took, General 13 Mpembe, was also commendable. 14 MR BUDLENDER SC: Sorry – 15 CHAIRPERSON: I thought you said the only 16 one who used his best endeavours – 17 MR BUDLENDER SC: To whom are you 18 referring, Chair? 19 CHAIRPERSON: General Mpembe. General 20 Mpembe may have said things that he shouldn't have said in 21 evidence, but – 22 MR BUDLENDER SC: We certainly – 23 CHAIRPERSON: - he made the right 24 decision on the 13th. I know the evidence leaders take a 25 different view, but Mr Mpofu takes the view that prima</p>	<p style="text-align: right;">Page 39714</p> <p>1 criticising him. 2 MR BUDLENDER SC: Yes, if that's what 3 he'd said. If he'd come and said I couldn't stop it 4 because it was taken away from me, control was taken away 5 from me, then one could have dealt with that. But there 6 was a closing of ranks and he said no, no, no, no-one – he 7 said "I took the decision." 8 CHAIRPERSON: [Microphone off, inaudible] 9 some things which caused concern, but he also said to 10 Mathunjwa you talk to General Mbombo, I'm not in charge 11 anymore. 12 MR BUDLENDER SC: Which he denies. He 13 can't have it both ways. He can't say give me credit for 14 saying that to Mr Mathunjwa but I didn't say it. He 15 can't – 16 CHAIRPERSON: If we find he did say it to 17 Mathunjwa, you don't suggest that that aspect of Mr 18 Mathunjwa's evidence is questionable and shouldn't be 19 accepted? 20 MR BUDLENDER SC: No, it's entirely 21 consistent with the known facts. Then can I come to the 22 question of the memorial. We made the proposal in our 23 written submissions that there should be some form of 24 memorial. We left it open as to what that should be. It 25 doesn't have to be a statue. There are many ways of</p>

Page 39715

1 memorialising an event, but we made the submission that
 2 there should be some memorialising of what happened and
 3 that it must be, that the memorial must be a memorial for
 4 all. It must be a part of the process of restoration and
 5 reconciliation, not a new source of division. If it is
 6 going to be a physical memorial, location is very
 7 important, and Mrs Fundi has made the point to us that if
 8 the location is not acceptable to everyone the memorial
 9 will not serve its purpose, and so both the process of
 10 identifying the memorial and the memorial itself have to be
 11 inclusive, part of a process of reconciliation, otherwise
 12 we will in fact reopen old wounds and reopen very deep
 13 wounds.

14 Finally in closing, Chair, may I say this; Lonmin
 15 produced the, made available to the Commission the very
 16 interesting report of the Stonechild Inquiry in Canada and
 17 one of the conclusions of that commission provides the
 18 appropriate response, we submit, to what SAPS did
 19 immediately after this catastrophe, namely close ranks.
 20 Immediately after the catastrophe the Minister, the
 21 National Commissioner and Brigadier Calitz all announced
 22 that the police had acted correctly and told the police
 23 that they had acted correctly, and the passage in the
 24 Stonechild Report which we think is helpful is at page 207,
 25 and this is what the report says, "Certainly the Saskatoon

Page 39716

1 Police Service must treat its members with respect and
 2 dignity and observe the procedural and substantive
 3 protections of the law. If, however, the Saskatoon Police
 4 Service becomes an advocate for its members it assumes a
 5 role that is antithetical to its responsibility to the
 6 public. In assuming such a partisan rule the Saskatoon
 7 Police Service contributes to a public perception that the
 8 police cannot police themselves and that complaints against
 9 the police are futile." That we submit is a very telling
 10 observation which is very much applicable to the response
 11 what we have had in this Commission.

12 Policing, Chairperson and members of the
 13 Commission, is a difficult and sometimes very dangerous
 14 task and Mr Semanya is quite right in that regard. We all
 15 need the South African Police Service and we desperately
 16 need a police service on which we can rely and which we can
 17 trust. The South African Police Services' dogged denial
 18 that it did anything wrong, its invention of evidence, its
 19 concealment of evidence and its attempts now that those
 20 efforts have failed to argue that the Commission may not
 21 make any meaningful findings and recommendations are not in
 22 the interests of the South African Police Service and they
 23 are not in the interest of our country. It's time,
 24 Chairperson, for some accountability. It's time for a
 25 change and it's time for a change from the top. Those are

Page 39717

1 our submissions, members of the Commission.
 2 Finally, may I take the liberty of speaking on
 3 behalf of all of us, without a power of attorney, to – I'm
 4 the shop steward, I'm told. I would like to take the
 5 liberty of thanking you, Commissioners, on behalf of all of
 6 us. We're all indebted to you for your patience, for your
 7 hard work and for your commitment to finding the truth and
 8 we wish you the best as you now undertake the task of
 9 producing your very important report. Thank you.

10 CHAIRPERSON: Before I say something,
 11 didn't you want to show us something about the position of
 12 the deaths? How long is that going to take? Have we got
 13 time for that?

14 MR CHASKALSON SC: If we go quickly
 15 through it, it will take maybe 12 minutes.

16 CHAIRPERSON: I don't think we've got
 17 that, I'm afraid. But you'd said you'd give us copies
 18 later.

19 MR CHASKALSON SC: Can we give it an
 20 exhibit number so that –

21 CHAIRPERSON: Ms Pillay is in charge of
 22 that. She'll give it –

23 MR CHASKALSON SC: ZZZZ49.

24 CHAIRPERSON: Alright, thank you. Thank
 25 you very much. Before we adjourn for the last time, there

Page 39718

1 are some things I want to say. I want to begin by thanking
 2 the municipalities of Rustenburg and Tshwane which made
 3 venues available to the Commission free of charge and thus
 4 made a significant contribution to the Commission's work.

5 I also want to express our gratitude to the
 6 officials of the Department of Justice and Constitutional
 7 Development and the Secretariat of the Commission for all
 8 they've done to facilitate the working of the Commission.

9 We're also grateful to the evidence leaders and
 10 their researchers for all the dedicated work they did to
 11 enable the Commission to carry out its functions.

12 We also want to express our gratitude to the
 13 legal practitioners who represented the various parties who
 14 participated in the proceedings of the Commission, thank
 15 them for their inputs, for their submissions, which I'm
 16 sure will contribute very significantly to a report which
 17 we hope will be of assistance not only to the people
 18 directly involved in the events at Marikana, but looking
 19 ahead, to the country as a whole.

20 It's also important to acknowledge the coverage
 21 given to the Commission's work by the media who've enabled
 22 the public both in this country and beyond our borders to
 23 follow what has been happening at the Commission.

24 We have on occasion found it necessary to engage
 25 with the witnesses in what might be considered a robust

1 manner. This has been done in an effort to enable us to
2 understand and evaluate the evidence and to decide what
3 weight we can attach to their evidence.

4 We, the Commissioners, will as diligently as we
5 can consider all the evidence and all the arguments that
6 we've heard before making our conclusions, before reaching
7 our conclusions.

8 As I've said, I want to thank all the people I've
9 mentioned and to say that it's ultimately been a much more
10 harmonious commission than I thought it would be in the
11 beginning. I was very pleased to see the – issues I won't
12 go into, but by and large the Commission has proceeded and
13 all the people have taken part in a very harmonious way and
14 I think that also will be seen in the end to contribute to
15 a satisfactory result as far as our work is concerned. And
16 on that note the Commission adjourns for the last time.

17 [COMMISSION ADJOURNED]

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A	39693:25 39694:14 39699:15 39700:19 39701:5,6,13,13 acted 39700:18 39701:2 39715:22,23 acting 39592:17 39594:6 39630:20 action 39610:18,22 39673:13 39674:19 39705:23 actions 39658:22 activity 39644:16 acts 39631:7 actual 39634:14 39697:19 ad 39710:3 add 39630:10 39667:7 39667:11 39684:3 additional 39692:12 address 39598:15,20 39614:25 39618:25 39633:5 39635:4 39638:19 39639:2 39644:22 39660:16 39660:17 39669:15 39670:13 39675:7 39676:1 39677:17,23 39696:25 39699:3 39704:11 addressed 39637:13 39674:5 39680:19 39704:20 addressing 39679:25 39686:11 adequate 39709:2 adjacent 39619:18 adjourn 39660:10 39661:12,13 39717:25 ADJOURNED 39719:17 adjournment 39642:3 39642:23 39659:24 39660:8 adjourns 39628:11 39641:25 39660:14 39698:24 39719:16 adjudication 39639:11 administration 39601:19 admissibility 39621:7 39621:11 admission 39621:7,17 39675:16 admit 39707:6 admitted 39620:2 39702:18 admitting 39620:16 adopted 39613:24 Adriao 39651:21 advance 39598:16 39607:22 39616:6 39617:15 advanced 39656:11 advancing 39595:7 39603:1 39604:15	39609:4 39615:23 39616:13 39618:5 39630:23 advantage 39680:9 adversarial 39636:19 39638:7 advised 39638:15 advocate 39595:23 39662:21 39716:4 affect 39657:9 affordability 39682:8,9 afloat 39708:2 afraid 39637:4 39655:9 39717:17 Africa 39597:5,15,15 39597:24 39603:11 39623:21 39625:18 39626:1,5 39627:19 39639:8 39661:19 39663:7 African 39599:13 39639:22 39643:18 39663:18 39716:15 39716:17,22 Africans 39625:16 39668:12 39669:22 39669:25 afternoon 39684:8,11 39692:22 agency 39694:11 agent 39630:21 39710:9 ago 39632:8 agree 39623:21 39626:1,4 39633:6 39655:12 39658:22 39662:18 39705:13 39706:8 agreed 39591:3 39653:10 agreement 39594:16 39617:19,21 ahead 39718:19 aid 39613:8 akin 39668:4 alerted 39688:8,21 alive 39599:23 allegation 39694:5 alleging 39650:8,9 allied 39592:5 allocations 39641:20 allow 39646:6 allowance 39680:9,15 allowed 39638:10 39659:3 alluded 39650:16 alright 39598:13 39621:14 39641:2 39643:3 39659:23 39660:8 39717:24 alternative 39604:2 39680:14 altogether 39612:18 AMCU 39632:23 39633:2 39634:13,16 39634:18,18,20	39657:25 39683:4 39709:21,24 39710:3 39710:8 39711:18 AMCU's 39670:25 ameliorate 39626:11 39627:12 amended 39609:15,19 amendment 39676:22 39683:6 amnesty 39686:9 amount 39682:20 amounted 39643:17 amounting 39633:19 amounts 39678:14 39694:25 amplified 39697:16 analysis 39591:10 39656:1 39662:19 39664:1 39691:17 Annandale 39602:6 39605:15 39633:18 39653:10 annexure 39686:24 anniversary 39661:25 announced 39715:21 announcement 39598:25 39601:4 39661:6 anonymously 39613:11 answer 39600:11 39602:13 39608:24 39614:12 39623:4 39627:1 39629:20 39655:6 39656:2 39680:25 39701:4,8 39702:24,24,25 39705:3 answered 39665:21 answering 39608:24 answers 39652:16 39662:15 39694:7 39711:4 antithetical 39716:5 anybody 39597:18 39616:8 39645:22 39656:4 39657:14,24 39695:23 anymore 39703:9 39714:11 anyway 39606:7 39620:19 39629:19 39641:10 39657:6 39663:16 39668:4 apart 39680:15 39686:1 aplomb 39603:19 appalling 39708:11,17 apparently 39654:18 39661:9 39704:24 39709:13 appears 39599:22 39704:12 applause 39662:6 applicable 39716:10 applied 39696:1 applies 39609:18,19	39647:5 apply 39595:17,18 39609:20 39650:4,5 39663:16 appreciate 39612:7 39629:8,21 appreciated 39616:16 appreciates 39627:4 appreciating 39627:16 appreciation 39631:23 39637:21 39640:16 approach 39613:4,24 39613:25 39654:10 39655:13 39682:11 approached 39593:25 39624:24 appropriate 39595:5 39596:21 39614:1 39671:24 39694:8,10 39699:18 39701:20 39715:18 appropriately 39700:11,12 39701:2 39701:5,6,14 appropriateness 39702:16 approval 39667:23 apropos 39648:12 39668:21 area 39602:2 39605:24 39609:22 39633:2 areas 39602:25 aren't 39600:18 39604:23 arguable 39696:3 argue 39598:3,8 39629:6,6 39716:20 argued 39593:4 39595:16 39665:12 39709:24 argument 39591:3 39592:9,14 39593:10 39594:2,24 39595:6 39596:22 39601:22 39611:11 39612:21 39616:4,6,9,13 39617:23,25 39628:7 39630:23 39637:20 39650:11 39672:16 39675:20 39677:17 39678:7,12,13,14,18 39681:4,5 39686:15 39691:6,8,15,16 39692:25 39694:16 39695:19 39697:3 39698:23 39699:23 39702:6 39709:21 arguments 39612:3 39621:9 39692:13 39719:5 argument's 39649:12 arisen 39641:18 39700:4 arises 39608:2 39701:11,12 arithmetic 39678:7
----------	--	--	---	---

<p>arm 39665:1 armaments 39646:11 armed 39591:16,23 39592:21 39594:5 39603:9 39610:25 39611:8 39630:9 39632:1 39645:10 39663:24 39664:6 39665:5,9 39684:6,18 39684:23,24 39685:17 39686:13 arms 39613:14 39618:20,22 39633:17,21 39646:13 army 39644:10 arm's 39593:5 arranged 39661:7 arrest 39595:3 39630:9 39646:7 39654:12 arrested 39629:15 39656:15 39658:2 arresting 39686:2 arrests 39685:9,11 arrived 39705:6 arrow 39600:25 39653:22,24 ashamed 39712:1 asked 39600:12 39601:17 39612:22 39613:10 39614:10 39614:18 39660:16 39660:19,25 39661:5 39662:11,13 39668:6 39677:13 39680:10 39695:21 39701:10 39713:5 asking 39649:22 39650:24 asks 39674:21 aspect 39614:25 39622:1 39635:3 39714:17 assaulting 39664:22 assegais 39683:22 assemble 39680:24 assemblies 39625:25 39684:6,23,24 39686:13 assembly 39625:20 39684:18 39685:17 39686:3 assess 39685:12 assigned 39677:10 assistance 39610:4,5 39629:9 39672:4 39718:17 associated 39593:11 39636:11 assume 39677:20,21 assumed 39650:3 assumes 39716:4 assuming 39635:1 39642:9 39716:6 astonishing 39697:3 attach 39719:3</p>	<p>attached 39620:4 attack 39603:7 39604:19 39609:7 39622:22,23,24 39631:11 39635:19 39635:21 39665:18 39665:18,22 39666:4 39674:1 39684:12 39689:11,16,18,21 39690:20,25 39691:2 39691:3,4,5,8,9,10,10 39691:15,19,23,25 39692:2 39708:3 attacked 39595:15 39603:13 39656:8 39711:19 attacks 39672:19 attainment 39625:25 39661:25 attempt 39602:22 39614:5,23 39622:18 39639:22 39698:12 attempted 39620:3 39698:3 attempting 39602:12 39608:24 39619:10 39711:16 attempts 39614:19 39716:19 attend 39631:8,12 attention 39618:17 39632:6 39682:25 39683:2 attitude 39601:25 39697:24 attorney 39717:3 audible 39687:14 auditorium 39660:18 August 39593:21 39594:17 39670:16 39671:14 39672:18 39673:5 39680:20 39683:14 39684:6,8 39684:11 39685:10 39699:8 39709:10,12 39709:20,24 39711:17 authorised 39696:25 39697:1 authorises 39610:12 39640:12 authority 39644:2,9 39696:18 automatic 39645:11 available 39603:16 39617:22 39672:3 39678:25 39679:5 39680:17 39715:15 39718:3 avenue 39603:23 avert 39639:9 avoid 39612:9 39675:21 39699:20 39704:20 39707:8 avoided 39625:10 aware 39597:10</p>	<p>39630:25 39681:25 39686:17,21 39688:23 39695:20 awkward 39600:17,18 awry 39636:7 axe 39613:2</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>b 39603:2,21 39604:25 39638:2 39652:25 39705:3 Ba 39620:1 back 39592:12 39603:5 39603:7 39604:3,20 39604:21 39605:18 39605:19 39607:1 39608:18,18 39612:22 39628:10 39660:25 39661:4 39666:9 39678:12 39685:1 39697:18 39707:4,23 39710:25 backlog 39675:5 backpack 39593:3 backwards 39604:10 39604:16 bad 39658:10 39678:19 39678:20 39687:9,10 39687:16 badly 39713:17 balls 39595:14 39604:13 Baloyi 39638:8 Bapo 39620:1 barbed 39591:19 39598:24 39599:3 39635:25 39645:6 barely 39593:5 bargaining 39710:9 39711:7 Barnes 39709:24 barring 39628:15 based 39617:9 39681:6 39691:15 basic 39608:12 39647:2 basis 39598:4 39624:10 39665:10 39676:9 39679:6 39681:17 39685:11,18,19 39689:23 39690:24 39691:22 39697:11 39703:6 39708:21 bear 39612:17 39625:2 39635:15 39638:24 bearers 39613:14 bearing 39626:3 39646:12 bears 39614:9 39635:6 bedevilled 39684:25 beg 39631:2 begged 39630:15,16 begging 39630:17 beginning 39624:10 39644:13 39719:11 begins 39596:22 39624:6</p>	<p>behalf 39655:15 39661:23 39709:20 39709:24 39710:4 39717:3,5 belated 39618:21 belief 39622:11 39623:13,16 39649:1 39684:22 beliefs 39668:22 believable 39622:7 believe 39623:7,15,22 39624:1,1 39634:17 39634:20 39666:2,5 39668:23 39704:9 believed 39623:1 belong 39639:21 belonging 39683:20 benefit 39711:17,18 bent 39626:4 39632:1 Benz 39665:3 Bermuda 39682:18 best 39612:11 39614:13 39628:19 39646:5 39662:2 39682:10 39689:11,19 39698:10 39700:3,8 39700:25 39701:7,8,9 39712:2,9,16 39717:8 best-selling 39596:23 better 39603:22 39617:21 39621:2 39649:6 39653:22 39685:21 beyond 39608:7 39609:12,24 39631:2 39631:8 39718:22 biblical 39658:13 big 39696:9 Bill 39699:17 billion 39682:17 binding 39682:9 binds 39699:19 birthday 39662:1,8 bit 39591:3 39597:11 39605:18 39641:7 39649:17 39702:6 Bizos 39661:18 Bizos's 39662:8 Black 39623:21 39624:4 Blacks 39623:22,22 blades 39683:23 blame 39614:9 blatant 39653:6 bleed 39669:19 block 39595:2,24 39603:21,25 39604:25 39606:14 39606:25 39607:5,5,7 39607:18,21 39608:12,25 39644:24 39645:2,6,8 39645:9,10 blocked 39603:2,4 39604:2,5,16 39606:11 39607:1</p>	<p>39608:25 blood 39670:7 bloodcurdling 39640:4 bloodshed 39612:3,5 39612:10,14,15,16 39613:3 39614:23 blotted 39713:16 board 39676:10 bodies 39687:9 39688:16 body 39619:17,18 39623:9 39692:24 39693:5 book 39602:5 boot 39645:5 borders 39718:22 born 39623:8 Botes 39687:14 brass 39599:12 39601:8 breach 39699:21 break 39591:5,6 39621:24 39628:2 39640:25 39641:5,6,9 39641:11,19 39642:17,18 39651:12 39655:15 39659:11 39698:22 breakdowns 39673:25 breaking 39651:25 39653:2 breaks 39591:4 39641:4 breathtaking 39678:13 bricks 39656:24 brief 39699:9,10 39713:20 briefly 39670:13 Brigadier 39602:7 39603:23 39606:1 39628:23 39630:6 39636:25 39638:1 39648:11 39662:12 39665:17 39670:15 39670:21 39672:10 39672:17 39673:15 39674:8 39687:7,15 39688:3,11 39715:21 bring 39623:23 39625:11 39660:25 39661:4 brings 39654:3 39683:3 39691:4 39709:18 broad 39659:12 broke 39595:7 39673:12 broken 39654:22 39655:2 brought 39606:23 39608:19 39667:18 39682:24 39683:2 brush 39664:1 budge 39703:14 39704:1,1 budget 39682:13 Budlender 39609:17</p>
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39621:4 39659:25 39660:10 39670:12 39698:23 39699:1,2 39702:1,10 39703:7 39703:10 39704:18 39706:7 39707:24 39712:14,17,22 39713:3 39714:2,12 39714:20 Budlender's 39671:11 39698:18 build 39679:16 39681:24 39682:2 building 39682:3 built 39675:3 39677:24 39678:5 bullet 39617:18 bullets 39595:13 Burger 39604:23 39631:25 39678:20 39679:9 39701:10 39710:22,24 39711:3 39711:5 Burger's 39677:17 burnt 39709:13 business 39602:6 39627:7 39644:14 39654:6 39655:18 busy 39660:7 buy 39709:3	39617:21 39646:12 39649:5,18 39650:25 39652:15 39664:1,9 39671:17 39674:12 39680:23 39702:16 39704:21 39705:7 39708:24 39714:13 39714:13,15 capable 39591:24 capital 39626:9,24,25 39627:3,6,16 Captain 39617:24 39618:3 39637:16 39638:8 39646:1 39651:21 39687:14 39687:17 care 39599:17 39704:17 careful 39619:7 39691:14 carefully 39601:23 carried 39606:6 39665:6 39667:13 carry 39606:7 39639:16 39640:12 39654:12 39661:17 39718:11 carrying 39683:4,9,24 cars 39603:25 case 39597:19 39598:20 39618:15 39627:5 39639:16 39656:21,21 39666:10 39674:20 39696:19 39704:9 39706:11 Cassim 39664:2 casual 39597:4 catastrophe 39711:24 39715:19,20 categories 39678:23 category 39678:25 39679:8 39683:10,11 cater 39609:11 caters 39609:24 causation 39676:4 cause 39597:21 39624:6 caused 39654:8 39700:20 39714:9 ceases 39691:21 cell 39687:7 central 39710:4 centrality 39640:19 century 39597:8 certain 39596:1 39597:14 39624:4 39638:12 39694:12 39704:22 certainly 39597:4,13 39629:8 39633:18,25 39634:6 39650:15,18 39655:11 39656:8 39695:20 39712:22 39713:4,6,13 39715:25	chain 39653:3 39673:12 Chair's 39675:24 challenge 39643:25 39644:2 challenged 39664:7,7 39664:20,21 challenging 39614:8 chamber 39660:20 39661:3 39686:1 chance 39613:18 39662:16 change 39623:25 39668:9 39675:4 39716:25,25 changed 39644:14 39676:22 39679:17 changer 39644:12 39665:11,12 39666:8 39667:6 changers 39659:11 changes 39663:21 39695:14,19,20 changing 39677:1 channel 39616:15 39617:1 channelled 39616:14 channelling 39616:5,7 39616:12,22,24 charge 39638:4 39658:7,10,12 39673:22 39714:10 39717:21 39718:3 Charter 39627:11 Chaskalson 39641:3 39660:9 39670:10,11 39670:19,23 39671:22 39672:8,11 39672:14 39673:16 39673:24 39674:3 39677:8 39680:13,16 39681:12 39683:15 39684:16 39686:7 39691:21 39692:4,10 39693:14,16,20 39695:17 39696:4,7 39697:2,12 39707:24 39717:14,19,23 check 39659:18 Chicago 39597:8,8 chief 39667:3 choice 39680:8,12 choose 39617:3 chopper 39619:3 chose 39645:7 39675:15 Christ 39623:7 Christians 39623:7 39624:1 circulate 39672:2 circulated 39679:4 circumstances 39595:16,21 39596:6 39599:18 39608:19 39609:20 39610:13 39628:19 39640:3	39688:24 39706:10 39707:25 cited 39689:2 civil 39626:16 39639:10 claim 39635:7 39674:23,24 39675:2 39675:5,9,11,13 claimed 39648:24 claims 39672:23 clarified 39664:15 clarify 39609:23 39671:6 clarity 39609:18 39704:16 class 39683:20 clause 39694:7,18 clear 39594:13 39596:2 39609:19,24 39614:2 39632:11 39638:22 39648:7,19 39653:4,9 39675:24 39681:23 39682:23 39686:19 39688:5,13 39694:22 39708:23 clearer 39610:6 clearly 39593:10 39609:10 39610:2,22 39611:20 39613:25 39622:22 39630:25 39631:20 39632:22 39634:6 39637:22 39638:3,8 clients 39643:20 39657:9 clip 39652:5 clips 39599:5 clock 39605:18 39643:6 close 39605:3 39619:21 39699:6 39704:13,16 39704:22 39706:16 39706:20,21 39707:2 39707:7,19 39708:20 39715:19 closed 39605:3 39707:8 closer 39647:1 39652:18 39654:4 closing 39699:10 39704:20 39707:1,10 39714:6 39715:14 cogency 39616:6 cohort 39594:13 Coin 39709:7,12,14 coincidence 39690:9 coincides 39662:8 cold 39670:7 39708:5 coldblooded 39648:25 39649:8 colleague 39662:19 39663:22 39665:15 colleagues 39620:10 39630:7 39632:5 39667:1 39689:17 collected 39660:21 collecting 39693:12 collective 39624:24	39625:3 39670:3,4 collectively 39669:23 39669:24 Colonel 39609:8 39619:2,8 39636:19 39637:2 39638:7,11 39643:21 39644:1 39654:13 column 39690:4 combination 39595:21 come 39603:7 39604:5 39608:8 39613:6,15 39627:22 39638:10 39677:16 39686:12 39690:9 39692:10 39704:18 39706:9 39708:7,14,25 39714:3,21 comes 39619:12 39667:16 comfort 39591:5 39621:24 39628:2 39698:22 39708:12 coming 39622:4 39649:20 39705:17 39707:14 command 39593:19 39637:7,12 39638:4 commanded 39593:24 commander 39618:13 39638:1 39713:9,23 commanders 39594:20 39607:12 39618:10 commendable 39712:13 commented 39614:14 commercial 39626:10 commission 39591:2 39617:20 39620:24 39621:10 39628:11 39628:11,12 39632:6 39639:1 39641:25,25 39642:1 39649:20 39653:1,16 39657:22 39660:3,14,14,15 39661:6,7,15 39662:9 39664:8 39665:7 39667:21 39668:8 39669:20 39671:25 39672:7 39674:13 39675:21 39676:18 39677:9,23 39682:22 39685:14 39686:12 39689:22 39694:8,21 39694:23 39695:5,8 39697:14,25 39698:24,24,25 39715:15,17 39716:11,13,20 39717:1 39718:3,7,8 39718:11,14,23 39719:10,12,16,17 Commissioner 39599:21,21 39600:7 39601:6 39623:19 39651:20 39652:3,18
C				
c 39638:2 39652:25 Calitz 39603:24 39606:1 39607:11,23 39608:3 39628:23 39630:6 39636:25 39638:1 39648:11 39665:17 39715:21 Calitz's 39662:12 call 39607:25 39613:4 39643:10 39644:11 39644:15 39648:20 39666:6 39668:9 39706:10 39713:8 called 39598:23 39607:22 39645:8 39654:5 39659:10 calling 39644:12 39687:8 calls 39604:23 39672:24 39687:17 calm 39610:17 Canada 39715:16 cancelled 39611:23 candid 39614:16 cannon 39595:4,13 39604:9,10,11,17 39688:6,9 cannons 39592:2 canvassed 39663:22 39664:18 canvassing 39593:17 can't 39600:8,12 39602:17 39603:13 39604:5 39606:5				

<p>39653:7 39655:5 39662:11,21 39665:15,20 39671:11 39693:22 39694:2,15 39695:7 39715:21 commissioners 39591:9 39601:21 39602:23 39628:16 39635:9 39641:21 39648:22 39655:23 39661:9 39672:3 39679:5 39688:2 39700:21 39713:19 39717:5 39719:4 Commissioner's 39698:6 Commission's 39618:17 39699:24 39718:4,21 commit 39594:21 commitment 39717:7 committed 39659:5 39682:2 committing 39632:25 common 39592:18 39594:6 39597:21 39624:6 39625:14,24 communicated 39601:9 39620:22 39673:18 communication 39612:2 39673:12 communications 39612:13 39688:4,12 company 39607:24 39704:8 comparative 39656:1 comparing 39665:3 comparison 39665:2 complain 39680:23 39694:23 complaint 39675:23 39676:15,17 39680:18,25 39681:20 39696:22 39702:11 complaints 39670:24 39675:23 39678:9 39682:5,7 39716:8 completely 39663:8,9 39702:19 complex 39684:10 39707:5 complicated 39684:21 complicit 39626:6 compliment 39660:6 comply 39627:10 39709:1 compounded 39680:3 compromised 39611:22 comrades 39645:9 concatenation 39608:19 conceal 39600:17,21 concealed 39600:16 39651:10 39652:14</p>	<p>39653:1 39668:18 concealing 39653:25 concealment 39601:1 39716:19 conceals 39600:23 concede 39655:12 39694:3 conceded 39595:1,24 39605:16 39652:7 39669:3 39711:11 concern 39685:7 39714:9 concerned 39612:25 39636:24 39660:25 39666:14 39681:2 39690:25 39696:23 39719:15 concerning 39700:1 concerns 39695:18 concert 39592:17 39593:10 39594:6 concession 39595:11,18 39596:3 39644:5,20 39650:12,14,18 39678:3 concessions 39598:4 39643:8,11 39645:13 39645:18 39669:5 conclude 39677:19 concludes 39691:18 39694:23 concluding 39636:17 39693:2 conclusion 39594:19 39596:18 39617:7,9 39617:16,19 39618:1 39689:23 39691:22 conclusions 39715:17 39719:6,7 conclusive 39671:17 condemn 39668:19 condition 39627:13 conditions 39626:11 39627:13 39655:23 39665:22 39680:1 conduce 39619:1 conductive 39676:2,6 conduct 39593:11 39626:7,22 39627:6 39637:23 39639:8 39640:15 39643:16 39647:17 39676:4 39694:12,16 39711:25 39712:6 conference 39617:13 39652:4 confess 39654:8 confident 39633:23,23 39634:1 conflate 39678:21 conflict 39610:20 39617:11 39626:4 39627:18 confluence 39596:5 39625:9 confront 39713:15</p>	<p>confrontation 39594:11 congratulated 39711:22 congratulations 39661:22,24 congruence 39623:5 conjecture 39601:3 39602:10 39603:9 consequence 39708:22 consequences 39607:20 39636:3 39647:18 39673:5 consider 39681:15 39701:4 39707:17 39719:5 considerable 39711:21 considerably 39682:20 consideration 39691:14 39707:7 39708:10 considerations 39667:10 39698:4 considered 39692:3 39706:16 39707:10 39718:25 consistent 39710:2 39714:21 consistently 39690:10 consolidated 39687:1 39693:2 conspectus 39624:13 constituted 39666:4 constitutes 39625:15 Constitution 39603:15 39623:14,16 39625:22 39627:7 39640:1 39663:11 39699:14,17 constitutional 39603:14,20 39625:19 39640:20 39699:21 39718:6 constraints 39625:20 39631:20 39640:13 consultations 39648:6 contain 39610:23 contained 39609:10 39610:11 39611:6,10 39673:14 contemplated 39628:25 39637:25 contemplates 39610:10 contend 39594:23 39598:9 contended 39597:18 39599:10 contending 39591:14 39592:19 content 39601:7 contention 39596:3 39598:14,15,17 39633:15 39671:1 contentious 39599:7 contest 39598:5 39643:11 context 39614:24</p>	<p>39638:5 39696:15 contextually 39612:18 continue 39607:2 39675:20 39685:4 39705:5 39707:2 continued 39704:23 continues 39660:16 continuing 39671:2 39688:5,13,20,23,24 continuum 39604:8 contract 39678:1,2 contractor 39660:21 contradicts 39637:20 contrary 39597:23 39638:15 contravention 39685:17 contribute 39718:16 39719:14 contributes 39716:7 contribution 39660:1,2 39660:2 39661:20 39718:4 contributions 39661:7 39661:15 control 39673:15 39714:4 controversy 39635:5 39638:24 controverted 39635:18 39635:24 convenience 39630:4 convenient 39628:1,5 39698:22 convening 39694:10 conversation 39601:7 conversion 39679:1 conversions 39679:15 convey 39618:1 39661:22,24 39662:4 conveyed 39633:23 cooperate 39614:19 copies 39717:17 copybook 39713:17 corner 39632:15 correct 39596:8 39597:17 39598:17 39609:6 39610:20 39617:16 39619:22 39620:7 39629:17 39651:14 39652:8,9 39655:20 39663:7 39679:6 39686:18 39689:7,7,23 39690:18 39691:16 39693:24 39700:18 39705:16,16,19,20 39706:4 39711:4,12 39712:10 corrected 39595:22 39596:9 correctly 39617:10 39645:15 39651:9 39700:18 39715:22 39715:23 cost 39682:20</p>	<p>Costa 39702:18,22 costs 39646:8 39653:1 39669:8 couldn't 39602:15 39607:22 39613:18 39675:25 39703:1 39709:25 39714:3 counsel 39661:8 counterfactual 39677:20,22 counterfactuals 39604:23 countries 39597:16 country 39594:12 39622:10 39623:6 39626:13,25 39631:23 39639:20 39640:6 39644:8 39658:24 39659:3 39684:22,25 39716:23 39718:19 39718:22 coupled 39698:3 courage 39711:15,21 course 39594:12 39596:25 39606:4 39609:6 39611:6,11 39613:18 39622:2 39635:12 39652:6 39657:9 39664:24 39673:19 39685:23 39687:12 39691:4 39695:24 39697:6 39702:2 39706:5 cover 39697:21 39698:3,12 coverage 39718:20 covered 39618:7 39668:19 co-workers 39636:12 create 39591:3 39604:19 39607:6 39678:10 created 39595:14 39597:4 39607:18,19 39676:1 39679:14 39688:25 creating 39668:24 creation 39676:2,5,6 credibility 39639:5,10 credible 39639:13 credit 39613:23 39713:2 39714:13 crime 39594:21 39647:15 criminal 39626:6 39629:14 39639:10 39670:25 39683:5 39692:12 39693:8 39694:17 criteria 39632:3 critical 39634:24 39635:1 39676:12 39705:10 criticise 39597:16 39711:24 39712:6</p>
---	---	--	--	---

<p>criticised 39677:22 criticising 39714:1 criticism 39631:15 cross-examined 39665:7 39710:22 cross-examining 39649:19 crouching 39665:19 39666:3 crowd 39688:8 crucial 39644:4,4,17 39663:23 39686:24 39687:2 39691:7 cryptic 39643:14 culpable 39647:15 39694:22 curtain 39622:21 39669:1 curtains 39668:25 CVs 39620:4,9 39622:5 cynical 39702:19,21 39708:11,16 C05 39619:19</p> <hr/> <p style="text-align: center;">D</p> <p>Da 39702:18,22 damage 39611:2 39631:7 39700:20 39707:8 danger 39705:14,25 39706:1 dangerous 39629:12,15 39670:25 39683:3,5,8 39683:9,12 39684:10 39686:3,3 39692:21 39716:13 dangers 39686:5 dare 39597:15 dastardly 39658:8 date 39706:6 day 39599:6,11 39600:9 39601:10 39602:16 39612:15 39619:25 39620:9 39633:12,14 39634:2 39635:2 39636:1 39651:1,2 39652:20 39662:2,8,15 39671:25 39673:1 39676:14 39677:18 39691:12 39697:24 39704:14,19 39705:11 39710:23 days 39593:2 daytime 39613:14,14 de 39610:19 39640:4 39667:11,11,16,16 dead 39697:24 39698:12 deal 39592:4 39598:7 39614:13 39621:20 39628:21 39636:18 39636:21 39637:14 39642:2 39643:7 39645:15 39650:16 39663:20,21</p>	<p>39685:25 dealing 39591:10 39594:10 39631:13 39675:2 dealt 39613:21 39628:18 39642:3 39673:21 39714:5 death 39611:1 39617:5 39658:25 39659:2 39663:2,5 39666:9 39669:3,6 deaths 39611:5 39626:19 39636:12 39656:16,18,19 39657:10 39658:1 39676:5 39685:2,3,5 39701:15,17,17,18 39708:18 39717:12 debate 39599:15 39619:14 39649:25 39652:12 39703:17 39707:18 debated 39665:14 39707:11 debunked 39654:1 decade 39680:3 decent 39676:12 39679:10,12,18,18,19 39679:20,23 decide 39677:13 39682:25 39702:15 39719:2 decided 39594:14 39602:4 39603:7 39607:24,25 39658:24 39691:10 39708:13 decision 39596:15 39599:10 39601:5,13 39601:15 39607:11 39610:21 39611:1 39616:14 39651:12 39651:13 39697:22 39697:23 39698:1,3,8 39698:11,13 39699:6 39704:13 39705:5,7 39706:12,13,15 39707:15 39708:6,8 39708:11,16,20,23 39709:6 39712:24 39713:15 39714:7 decisions 39685:15,18 declaration 39668:5 declare 39644:10 decoded 39654:1 dedicated 39718:10 deep 39640:15 39715:12 default 39682:23 defence 39595:17 39622:23 39656:5,6 39666:2,6 39675:15 39699:4,11 defend 39639:24 39684:12 defending 39640:17,17</p>	<p>defensive 39622:19,20 39635:25 39668:24 39668:25,25 definite 39633:16,20 definitely 39599:16 39633:20 39648:20 defusing 39591:24 defy 39594:15 delays 39682:5 deleted 39677:5 deliberate 39596:4 39655:23 39708:5,6 deliberated 39706:17 39708:12 deliberately 39595:19 deliver 39634:5 delivered 39679:14 demand 39703:14 39710:8 demanded 39710:11 demands 39702:12 39703:24 39704:5,5 democracy 39603:14 39669:12 democratic 39627:4 demonstration 39604:9 denial 39716:17 denies 39714:12 denounce 39632:24,25 39633:5 department 39661:1 39682:11 39694:11 39718:6 depend 39607:4 39681:16 depending 39642:15 39643:5 depict 39599:5 Deputy 39624:12,22 39669:22 describe 39609:7 39634:12 described 39595:2 39596:6 39615:6 39661:18 describes 39710:6 describing 39635:16 description 39609:8 39649:6 deserve 39626:5 39649:5 39659:7 deserves 39613:23 design 39616:7,13 designed 39626:10 desperate 39646:11 desperately 39716:15 despite 39684:22 detail 39600:13 39610:14 39652:17 39681:22 39710:7 detailed 39710:1,20 details 39597:10 39689:8 detectives 39613:6 determine 39706:24 determined 39611:8</p>	<p>detracts 39711:15 39713:25 develop 39643:12 Development 39681:8 39718:7 developments 39679:2 dialogue 39612:7,11 39626:8 39627:17 didn't 39596:21 39600:20 39604:18 39605:9,20 39608:12 39608:14 39614:19 39620:14 39631:4 39633:19 39635:14 39638:21 39646:22 39647:14 39648:17 39660:23 39664:3 39671:1 39680:8,24 39681:13,14 39682:10 39695:22 39695:22,23 39701:4 39701:6,8 39702:25 39704:8 39707:16,16 39709:6,14 39710:13 39710:21 39713:8 39714:14 39717:11 die 39649:5 39657:7 died 39625:6 39671:14 39671:16 difference 39591:17 39645:11 39648:5,5 39675:4 39677:17 39679:22 39680:6 39696:6,8,9 differences 39591:13 different 39608:23 39609:5 39612:18 39615:25 39617:7 39618:14 39625:12 39630:3,3 39636:9 39639:2,14,17,18 39712:25 differentiated 39647:23 differently 39625:11 39639:14 difficult 39599:19 39601:12 39602:13 39614:14,15,16 39634:24,25 39640:3 39654:23 39696:10 39696:11,12 39706:24 39716:13 difficulty 39603:2 39620:16 39696:23 dignity 39627:14 39716:2 digressing 39649:17 diligently 39719:4 dip 39625:4 direct 39597:3 39637:19 39708:19 39708:19,21 directed 39616:4 direction 39594:7 39600:25 39601:1</p>	<p>39611:21 39615:15 39616:18 39617:2 39633:7 directions 39611:16 directly 39605:17 39627:9 39700:19 39718:18 directs 39617:10 disaffection 39626:12 disappeared 39677:6 disarm 39595:3 39599:10 39613:2 39630:16 39631:4 39633:9 39654:16 disarmament 39602:20 39630:9 disarmed 39654:21 disarming 39634:8 disastrous 39613:22 disbelieve 39636:15 discharge 39674:22 discharged 39619:4 discharging 39618:8 disciplinary 39674:15 39674:16 disclosures 39638:13 discourse 39625:15 39627:4 discretion 39685:13 discriminating 39593:8 discuss 39606:9 39640:25 39641:11 39641:19 39644:25 discussed 39600:3,12 39601:9 39602:14 39650:24,25 39651:3 39692:22 39706:20 discussion 39594:24 39600:10 39612:15 39648:18 39667:9 39710:20 39711:1,2 discussions 39641:13 39652:14 dislocate 39612:12 dismissal 39695:1 disowned 39645:14 disparate 39638:18 Dispelled 39598:1 dispersal 39629:4,11 39629:17 39630:8 disperse 39595:3 39599:1 39605:5 39616:22 39629:12 39629:18 39630:16 39631:4 39632:21 39633:7 39635:13 39654:17 dispersed 39591:21 39616:20 39654:21 39688:8 dispersing 39591:25 display 39594:14 39626:6 dispute 39689:13 39700:8 disputes 39626:7</p>
---	--	--	--	---

<p>39700:3 disregarded 39626:17 dissent 39626:2 distance 39605:6 39615:22 39665:25 distant 39705:18 distinct 39591:14,16 distinguish 39615:4 39630:2 39690:10,15 distinguished 39690:1 disturbance 39636:4 disturbed 39685:9 disunity 39676:3 divided 39649:12 dividends 39682:16 diving 39675:20 division 39715:5 DMR 39681:5,10 39682:25,25 39683:2 doctor 39675:18 doctors 39690:10,14 doctrine 39635:18 document 39620:14,24 39621:13 39681:8,10 39681:15 documents 39634:15 39645:23 39679:7 39681:7,19 doesn't 39597:3 39600:2 39607:4 39609:20 39610:13 39615:23 39636:24 39646:18 39650:3,4 39652:23 39653:20 39657:17 39659:5 39690:6 39696:21 39705:3,6 39710:8 39714:25 dogged 39716:17 doing 39614:13 39636:23 39672:1 39711:21 dollars 39682:15 dolus 39647:10,15 39650:11 don't 39595:17,18 39596:6,10 39598:3 39600:17 39601:11 39603:21 39606:9 39607:16 39609:2,20 39613:22 39621:9,21 39623:11 39624:25 39628:6 39629:20 39631:9,12 39638:19 39639:2,4 39641:4 39644:15 39646:13 39647:10,25 39651:9 39654:15,20 39656:13 39661:5 39665:20 39668:10 39669:7,7 39675:9,11 39676:20 39681:16 39683:25 39685:24 39688:1 39689:21 39690:10,12,14 39693:3 39694:15,20</p>	<p>39697:25 39698:2 39704:9 39707:12,13 39711:6,6 39712:8 39713:11,24 39714:17 39717:16 doubt 39658:4 39659:6 39675:25 39676:7 39695:6 39699:18 doyen 39661:19 Dr 39617:5,6 39620:5,9 39680:20 39681:16 dramatically 39600:9 draw 39618:16 39632:6 drawn 39671:6 drive 39604:18,20 driving 39604:14 drop 39618:22 39678:17 drove 39697:25 ducking 39675:20 due 39708:10 duty 39603:20 39627:1 39640:6 39646:15,17 39646:24 39677:10 39699:4,5,12 39700:7 39701:10,11,12,12,15 39702:25 D-day 39651:22,23</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier 39596:20 39597:7,11 39605:13 39606:8 39608:15 39622:4 39633:15 39656:11 39663:2 39685:25 39691:20 39713:5 earliest 39687:10,11 earth 39648:15 ease 39626:20 easier 39630:5 39643:10 39707:22 easily 39680:18 eastern 39606:24 39611:19 economic 39626:2 economist 39596:23 economy 39626:24 39627:1 effect 39595:6,11,12 39604:14 39616:12 39631:21 39634:4 39669:12 39673:8 39677:24 effected 39685:11 effective 39616:25 effectively 39597:12 39605:18 39607:23 39633:11 efficacies 39607:15 efficacy 39611:22 effort 39719:1 efforts 39716:20 egos 39646:23 either 39597:24 39605:18 39668:24</p>	<p>39672:25 39674:10 39679:1 39681:7 39698:8 elaborate 39596:7 element 39617:24 39636:8 elements 39594:18 39599:9 email 39679:4 emanated 39695:19 embark 39629:4 embrace 39694:13 emotions 39636:6 emphasis 39639:12 39692:11 emphasise 39594:8 39682:15 39685:15 39688:17 39689:8,20 39690:18 39693:3 emphasized 39697:19 employ 39677:25 employed 39678:5 39700:14 employee 39655:18 39678:10 employees 39626:12 39627:13 39675:5 39676:3,12 39678:1 39679:8 39699:21 39700:16 39705:15 39706:18 39708:13 39708:25 employer 39655:18 39678:10 39679:25 39699:19 39701:13 39701:20 39702:23 39704:3 employers 39678:5 empowered 39683:8 enable 39718:11 39719:1 enabled 39718:21 eNCA 39651:20 39652:5 encouraged 39634:19 endeavours 39700:3,8 39700:25 39701:7,8,9 39712:3,9,16 endorse 39601:13 endorsed 39601:16 enemy 39644:7 enforce 39654:24 enforced 39684:19,20 enforcement 39626:19 39694:11 enforcing 39643:25 engage 39636:22,23 39637:1,1,12,12,17 39637:18 39718:24 engaged 39629:10 engaging 39688:14 Engelbrecht 39672:16 39672:17 39673:10 39674:8 Engelbrecht's 39670:15,21</p>	<p>England 39663:6 English 39597:11 39663:19 enormous 39611:2 enquiry 39630:1 ensure 39700:15 enter 39606:17 39682:10 entire 39619:13 39682:13 entirely 39689:5 39714:20 entitled 39649:9,13 39667:22 entries 39690:5,16 environment 39638:6 39676:2,6 envisaged 39606:14 39629:4 equally 39623:14 39647:5 eroded 39627:15 errant 39639:21 error 39600:1 escalate 39610:19,20 escalation 39611:4,5 escape 39616:17 espouses 39643:19 essential 39704:22 39707:16,17,21 39708:1 establishment 39673:20 ETV 39687:5 evaluate 39719:2 evasive 39600:6 39652:16 39675:22 39697:24 evening 39613:16,25 event 39599:22 39635:4,6 39638:3 39639:1 39682:12 39699:23 39704:12 39710:2 39715:1 events 39594:12 39598:21 39599:5 39609:8 39610:11 39619:2 39636:4 39638:22,23 39676:11 39703:13 39710:14 39718:18 eventualis 39647:10,15 39650:11 even-handed 39685:18 39685:19 everybody 39591:7 39603:18,24 39614:14 39620:22 39638:10 39704:4 evidence-in-chief 39710:19 evident 39599:5 ex 39703:5,22 exact 39665:21 39671:13,18 exactly 39592:5</p>	<p>39622:20 39630:20 39644:3,5 39646:24 39650:7 39702:7 examination 39618:3 example 39658:14 exception 39663:12,13 39663:15 39681:3 exchange 39607:10 39616:19 exchanges 39697:16 excluded 39647:7 excluding 39650:7,10 exclusion 39612:17 exclusively 39681:6,18 excuse 39649:21 execute 39596:15 executed 39659:2 39670:7 execution 39649:6,14 39649:14 39666:9 executions 39594:17 39648:4,19 39649:1,9 39650:9 39659:3,5 executive 39667:24 exemplary 39646:25 exemplified 39644:14 exercise 39621:19 39625:19,21 39629:17 39701:2 exercised 39680:12 39700:2,25 exhibit 39620:3,21 39622:2 39632:6,7,9 39647:22 39684:7 39689:3,7 39709:9 39710:6 39717:20 exhibits 39616:24 existing 39686:3 exit 39616:17 expect 39610:14 39611:4 39615:24 39646:15,17 39647:3 39647:5 39669:1 39678:17 39704:6 39710:15 expectation 39634:7 expected 39600:13 39709:25 experience 39601:17 39601:18 experienced 39601:20 39608:3,4,6 expert 39617:11 39667:12,17,17 experts 39617:20 explain 39598:21 39614:19 39622:18 39624:7 39627:24 39638:22 39644:6 39645:20 39680:12 39696:10,11 39706:12 explained 39647:3 39664:18 explanation 39612:9 39622:4 39623:4</p>
---	--	--	---	---

<p>39637:8 39692:18 39702:4 39707:15 39709:14 express 39626:17 39718:5,12 expressed 39614:3 39626:3 39643:23 39713:1 expressions 39612:12 extend 39649:10 extensively 39706:17 39706:20 extent 39624:5 39654:25 extract 39643:21 39695:15 extracted 39686:25 extrajudicial 39648:4 39659:4 extraordinary 39599:8 39697:20 39698:2 extravagant 39600:21 ex-NUM 39634:14 ex-perception 39657:20 eye 39650:5 eyes 39597:4 39646:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 39622:22 39705:23 faced 39592:6 39675:5 39706:3 facie 39614:20 39648:23 39649:7 39713:1 facie4 39600:14 facilitate 39718:8 fact 39596:16 39597:7 39599:20 39600:2 39601:4 39602:5 39603:22 39605:13 39608:20 39611:7 39623:25 39630:1 39637:9 39638:20 39644:23 39646:4 39648:8,9 39649:11 39650:8 39651:15 39664:4,7 39666:8 39667:16 39670:14 39670:20 39675:18 39677:15 39680:3 39687:17 39688:9,22 39690:11,14 39691:12,14 39699:16 39703:3,12 39703:12 39705:7 39708:11 39709:8 39711:4 39715:12 facto 39703:6,22 factors 39600:14 39625:9 39667:8 facts 39618:14 39689:24 39690:18 39690:19 39697:19 39714:21 factual 39713:22</p>	<p>factually 39703:21 fail 39625:4,6 failed 39673:13 39674:16 39709:1 39716:20 failure 39624:24 39647:2 39674:4,5,6 39674:7,22 39676:1 39682:3 failures 39676:18,21 fair 39623:6 39633:25 39634:2 39676:16 39694:1,14 39695:22 fairness 39598:3 39676:24 39680:18 39681:3 faith 39623:6 fall 39686:6 falls 39674:23 39693:23 false 39709:22 familiar 39653:19 families 39625:5 far 39602:3 39633:13 39636:24 39638:13 39638:14,16 39643:10 39653:3 39666:14 39686:2 39696:23 39702:8 39719:15 fashion 39613:22 39636:6 fast 39646:2 fatal 39671:21,23 fate 39706:3 fault 39674:11 favour 39615:16 39634:10 39668:16 fear 39668:16 feared 39603:6,12 fears 39596:1 feasible 39607:13 feat 39594:20 fed 39652:16 feed 39623:9 feelings 39667:4 fell 39694:24 fellow 39601:21 39641:21 39659:1 felt 39618:7 39659:1 fenced-off 39605:24 fester 39626:8 field 39602:2 39617:2 39628:16,18 fifth 39671:3 fight 39605:21 figures 39678:20 39679:6 39682:20 filed 39680:22 filtering 39611:12,18 39611:21,22 final 39627:23 39639:19 39668:7 39691:18 finally 39661:17 39675:14 39715:14</p>	<p>39717:2 financial 39601:18 39708:9,13 find 39613:9 39638:17 39643:22 39655:6 39671:17 39674:18 39677:17 39682:22 39705:18 39712:4 39714:16 finding 39665:8 39667:9 39677:21 39682:24 39717:7 findings 39674:21,25 39699:25 39716:21 fine 39629:22 finger 39711:24 finish 39622:1 finished 39642:24 39657:3 fire 39617:24 39618:11 firearms 39610:11 39618:8 39632:4 39640:12 fired 39594:3 39595:16 39618:5,6 39637:10 firepower 39610:13 firing 39618:14 39659:7 firm 39685:6 firmly 39698:13 first 39596:24 39601:16 39608:24 39621:24 39628:2 39629:16 39631:16 39643:9,15 39650:19 39655:12 39660:18 39663:21 39670:13 39670:18 39678:21 39680:19 39684:5 39687:2,20,22 39692:11,16 39693:25 39699:3 39704:13 firstly 39598:5 39635:8 39643:7 39645:18 39646:9 39665:22 39699:11 39703:3 39709:25 39710:5 fish 39623:9 fit 39650:3 fitness 39662:20 39671:10 five 39628:3,10 39640:4 39641:22 39659:16,16 39665:22 39666:17 39678:6 39699:3 five-minute 39591:5 flag 39685:7 flaw 39594:4 flexible 39701:17,18,19 flow 39628:6 flowing 39626:21 fluidity 39636:8 flying 39648:16 focused 39697:20</p>	<p>follow 39604:1 39668:13 39718:23 followed 39593:22 39613:20 39644:16 39654:22 39710:14 following 39592:15 39599:11 39601:9 39602:16 39612:15 39651:1,2 39666:8,15 39666:20 39668:8 39700:1 follows 39665:11 footage 39613:7 force 39604:8 39607:19 39608:15,20,22 39647:4,5 39655:14 39700:5,6 forced 39626:18 foresaw 39669:5 foresee 39612:4 39647:16 39669:2 foreseeability 39612:14 foreseeable 39708:22 foreseen 39636:2 39647:12,14,14 forever 39669:19 39677:7 forget 39678:2 form 39601:24 39625:2 39677:4 39714:23 formed 39644:24 forming 39595:1 formulation 39651:5 Forrest's 39680:20 39681:16 forth 39597:2 39604:17 39605:22 39613:10 39691:1 39695:24 fortified 39649:1 fortify 39622:14 fortunate 39620:18 forum 39695:3,4 39710:4 forward 39595:12 39603:9 39604:6,18 39607:20 39681:1 39686:13 found 39600:1 39658:2 39681:17 39718:24 founded 39703:3,11,12 four 39693:23 fourth 39671:1 39699:8 fractions 39607:12 fragile 39685:8 frame 39593:5 frames 39593:1 France 39597:9 frankly 39703:4 free 39608:9 39718:3 freeze 39616:9 French 39596:23 frenzy 39644:16 fresh 39615:6 39622:4 39689:4,9,20,24 39690:4,10,12,13 friend 39631:25</p>	<p>39657:22 front 39592:10 39595:12 39604:15 39607:20 39608:17 39615:10,11,20 39616:1 39646:19,25 39647:25 39661:10 39665:23 fulfilled 39675:10 full 39636:23 39704:10 fully 39689:8 39694:15 39695:5 full-on 39702:13 39705:6 function 39596:14 39599:8 39677:10,12 functions 39668:16 39718:11 funded 39682:13 Fundi 39673:6,9 39715:7 further 39596:19 39602:3 39608:17 39617:15 39631:7 39634:9 39645:5 39674:14,15 39694:9 39694:18 39704:21 39707:1,8 futile 39716:9 future 39669:12</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>Gaffley 39638:4 gained 39645:22 game 39644:12 39659:10 39663:21 39665:11,12 39666:8 39667:5 gap 39606:16 39645:3 gathered 39629:11 gathering 39629:18 39683:4,5,19,25 gatherings 39629:3 39630:14 39683:7,9 39683:10 39685:10 Gauteng 39613:7 geen 39662:16 Gegeleza 39665:2 general 39605:15 39612:1,1,21 39613:23 39619:10 39619:11 39632:18 39633:8,18 39645:24 39650:21 39651:1,2 39652:1 39654:10 39666:22,24 39667:2 39667:2 39672:23 39673:18 39712:12 39712:19,19 39713:3 39713:11 39714:10 generally 39700:5 getting 39652:18 GGG4 39632:7,12 give 39605:21 39606:2 39617:16 39620:3,21 39629:7,18,19,21,22</p>
---	--	--	--	---

39632:11 39633:6 39641:22 39662:5 39672:25 39676:9 39685:13 39691:13 39701:18,18 39710:1 39710:18 39711:9 39714:13 39717:17 39717:19,22 given 39599:1 39605:25 39613:18 39614:12 39619:25 39620:8 39628:23 39629:2 39634:25 39648:9 39679:4 39690:15 39705:9 39718:21 gives 39600:11 39650:16 giving 39638:1 39649:21 39667:7 39668:9 glad 39650:15 39657:22 39662:8 go 39600:21 39604:3 39605:19,22,23 39606:11 39607:3 39611:21 39612:10 39613:15,15 39614:5 39617:3 39621:1 39623:12 39626:18 39630:18 39632:14 39633:17 39636:6,7 39642:11,23 39643:4 39643:10 39644:15 39647:10 39648:17 39653:3 39667:5 39670:5 39672:9 39702:8 39705:24 39707:4 39710:25 39713:18,24 39717:14 39719:12 goes 39609:12 39617:23 39633:11 39644:5,25 39652:17 39654:7 39666:8 39700:21 39706:12 39710:9 good 39591:8 39662:3 39664:6 39701:15 Googled 39663:4 Gotz 39664:2 39669:4 Govender 39673:21,22 government 39639:7 39675:2 39676:16,19 39676:21 39677:15 39678:3,4 39683:17 39694:11 governmental 39704:4 grateful 39637:13,15 39718:9 gratefully 39610:7 39629:23 gratitude 39718:5,12 gravity 39599:13 great 39662:2 grenade 39592:2	grenades 39604:12 grey 39609:22 grievances 39626:16 39627:2 Grobler 39708:18 grossly 39680:19 ground 39618:18 39648:15 39667:21 grounds 39694:2 39697:15 39698:8 group 39591:11,15,16 39592:10,13,16,20 39593:17,19,20 39594:6,14 39595:8,8 39595:9,10,12 39615:11,20,20,23 39616:1 39618:5 39646:7 39673:7 39684:9 39692:22 groups 39626:3 gruesome 39658:1,8,10 39658:23 39672:12 guarantee 39633:20 guilty 39653:21 39658:6,11,15,17 39669:23 39683:25 Gwelani 39615:8	39715:2 happening 39633:1 39657:21 39718:23 happens 39642:13 39644:7 Happily 39594:15 happy 39634:3 39635:2 39662:1,3 hard 39709:3 39712:5 39717:7 hardcopy 39679:4 hard-headed 39710:18 hard-skin 39709:7,8,11 hard-won 39621:20 harm 39662:25 harmonious 39719:10 39719:13 haven't 39607:8 39641:17 39664:12 39664:17 39676:20 39692:7 39693:1 head 39595:9 39620:20 heads 39596:24 39610:5 39624:21 39625:4 39676:14 39681:4,5,17,21,21 39684:2 39692:13,14 39692:24 39693:5 39695:18 39709:21 headset 39660:22,23 39661:4 headsets 39660:19 39661:2 health 39662:3 hear 39603:10 39632:25 39633:4 heard 39593:24 39606:5 39649:4 39688:15 39696:21 39719:6 hearing 39597:22 39622:17 39693:19 39697:4,5,5,6,7,10,13 39713:5 heavily 39592:21 39610:25 39632:1 heckling 39601:12 heighten 39612:13 held 39599:23 39696:17,19 helicopters 39648:16 help 39610:6 39614:17 39615:23 39632:12 39639:7 39642:24,24 39701:23 helped 39643:22 helpful 39693:11 39715:24 Hemraj 39595:23 39662:11 Hendrickx 39667:18 here's 39648:21,21 herring 39675:24 he'd 39612:23 39637:3 39714:3,3 he's 39613:2 39632:18	39633:11,12,13 39660:9 39661:21 39667:17 39668:2 hide 39695:23 higher 39599:4 39628:23 39651:10 39652:15 39656:9 39657:10 highest 39599:12 39692:9 highlights 39665:5 hindsight 39633:24 history 39597:11 39635:23 hoc 39710:3 hold 39626:14 39638:18 39691:12 holding 39645:9 39696:24 Holmes 39658:16 holy 39668:22 holy-holy 39658:17 home 39613:15,15,16 homicide 39647:15 39648:1 39694:22 hoodwink 39653:16 hope 39608:7 39626:12 39628:3 39655:22 39661:12 39662:2 39718:17 hopefully 39610:4 hoping 39667:8 horizontally 39699:18 hospital 39671:16 host 39623:11 hostel 39679:1,15 39680:4 39684:10 hostels 39613:12 39627:15 39684:14 39684:16 hour 39640:23 39641:13 hour's 39641:16 house 39619:19 houses 39675:3 39677:24 39678:6,16 39678:24 39679:15 39681:24 39682:2 housing 39674:23 39675:1,5,10 39676:1 39676:12 39678:4,15 39679:2,10,12,18,19 39679:19,20,23 39680:17 39682:23 human 39595:1,24 39607:7,18,21 39608:12,25 39620:23 39644:24 39645:2,8,8,10 39661:6,15,19 39701:14 humanity 39669:22,25 39670:2	ideal 39676:17 ideas 39610:6 identified 39690:2 39692:25 identifies 39671:13 identify 39593:2 39594:19 39613:8 39685:14 identifying 39715:10 IFP 39669:16 ignore 39626:10 39668:17 39678:24 39681:14 illogical 39646:10 illustrate 39623:13 illustrates 39607:10 illustration 39602:24 images 39616:9 imagined 39667:4 imagined 39600:10 immediate 39703:14 immediately 39638:23 39715:19,20 imminent 39672:19 impartial 39668:15 impedes 39625:16 impi-like 39609:9 implement 39607:14 39673:4 39674:4,5 implemented 39613:18 39673:20 implicated 39658:1 implicit 39609:15 implied 39669:4 importance 39640:19 39667:15 important 39614:5 39626:24 39627:23 39631:23 39639:20 39639:24 39644:20 39645:12 39656:17 39663:25 39665:14 39674:17 39684:4,24 39715:7 39717:9 39718:20 importantly 39627:9 39627:22 39666:1,7 imposed 39627:5 impress 39612:6 impression 39595:14 39597:3,9,24 39598:5 39604:19 improper 39651:13 39698:4 inability 39710:13 inadvertence 39660:24 inadvertent 39599:25 inaudible 39594:22 39615:14 39632:22 39633:2,4,10 39676:3 39714:8 incentive 39708:2 incident 39591:22 39597:10 39631:10 39633:1,1 39638:20 39664:17 39691:16
	H		I	
			idea 39596:4	

<p>39691:17 39696:13 incidentally 39663:5 incidents 39597:7 39631:19 39638:21 39696:10 include 39620:25 39621:3 39623:16 included 39667:9 includes 39683:22 inclusive 39715:11 incongruent 39602:17 inconsistent 39602:15 39650:25 incorrect 39678:21 39683:7 incorrectly 39595:21 Incwala 39682:16 indebted 39717:6 independently 39681:13 indicate 39677:2 39689:25 indicated 39668:1 39688:20 indication 39690:13 indications 39604:13 indirectly 39700:20 individual 39593:3 39594:4 individuals 39594:2,10 39622:5 39632:1 39636:10 39640:17 industrial 39626:7 39627:2,18 39689:13 39700:4 inevitable 39626:9 inexplicable 39624:8 infer 39600:15 39656:8 39671:3 39688:7 39689:10 inferences 39671:5 inflexible 39703:1 informal 39613:12 39619:21 39680:5 39710:1 information 39605:20 39613:5,11 39696:1,2 39703:13,19 informed 39632:5 39673:23 informing 39706:8 inherent 39606:17 39624:4 initially 39620:4 39709:9,22 39711:12 39713:15 injured 39656:15 39706:4 injuries 39626:19 39671:21,23 innocent 39658:9 innocently 39593:7 innocuous 39601:6 inputs 39718:15 inquire 39699:25 inquiry 39596:9</p>	<p>39662:20,24 39671:9 39678:23 39693:21 39694:2,10,13,18 39695:2,12 39696:17 39696:19,24,25 39697:7 39698:9,14 39715:16 insinuation 39638:25 insofar 39664:3,20 instalments 39642:12 39642:19 instance 39594:2 39630:15 instances 39618:13 39622:14 39692:25 instigated 39670:6 instigates 39633:3 instigating 39632:23 institution 39640:17 39674:7 instruct 39646:12 39708:6,13 instructed 39693:9 instruction 39593:23 39610:9 39616:7 39634:23 39637:18 instructions 39637:24 39638:2 39639:23 instrument 39640:1 instruments 39681:6 39681:18 insult 39668:12,20 intelligence 39668:12 39670:16,21 39672:15 39673:18 39673:25 39674:6,8 intended 39596:20 39607:1 39610:22 39618:1 39622:23 39627:12,14 39630:25 39654:16 39689:16 intending 39637:1 39689:18 39691:9 intensively 39707:11 39708:12 intention 39595:2,19 39650:13 39653:15 39689:11,21 39690:20 39691:3,19 39691:23 interchangeably 39634:15 interest 39708:9 39716:23 interested 39639:5,6,9 39657:9 interesting 39664:8 39715:16 interests 39716:22 internal 39699:15 international 39596:17 internationally 39597:14 interrupt 39623:20 39627:25 39628:6</p>	<p>interrupted 39598:22 interrupting 39698:17 intervention 39626:9 39626:13 interview 39651:20 39652:5 intimidating 39709:11 intimidation 39654:25 intransigent 39703:25 invention 39716:18 investigate 39676:18 39677:13,14,14 39693:10 investigated 39674:13 39693:6 39694:20 investigation 39674:15 39677:4 39692:16,20 39693:8 39694:9,25 39695:10 investigations 39692:12,15 invisible 39623:1 invite 39592:4,7 39615:12 39681:13 39688:1,2 invited 39701:22 invites 39622:25 involved 39630:6,7,8 39718:18 involvement 39698:13 involves 39704:24 invulnerable 39691:1 IPID 39687:8 39688:4 irrelevant 39682:8 irresponsible 39706:11 isn't 39602:20 39608:22 39668:3 39672:2 39686:16 39697:11 39703:5 isolate 39659:12 issue 39599:24 39629:7 39629:20 39643:7 39647:7 39652:22 39656:3 39658:19 39663:19,22,25 39666:9 39671:7 39672:15 39674:13 39674:23 39675:7 39676:1 39677:19 39683:3 39693:21 39702:12 39704:20 39707:2,5 issues 39624:13 39639:7,11 39670:13 39677:5 39686:11 39693:24 39695:2 39719:11 item 39687:4 items 39655:3 I'd 39637:13,14 39677:18 39705:9 I'll 39595:22 39596:9 39655:21 39660:5 39667:1 39668:9 39704:18 39710:23 I'm 39596:9,10</p>	<p>39597:9 39598:2,5,7 39601:6 39602:8,10 39606:25 39607:16 39608:25 39612:25 39614:7 39620:19,24 39627:25 39628:14 39630:23,24 39632:5 39632:7 39634:4 39636:17,23,23,24 39640:16,17,18 39655:8,13,24 39657:2,16,22 39660:19,24,24 39661:5,17 39662:7 39662:10 39663:3,4 39664:19 39667:8,23 39668:10 39670:12 39673:7,16 39681:21 39702:5,7 39705:11 39711:3 39712:9 39713:10,17 39714:10 39717:3,4 39717:17 39718:15 I've 39595:21 39653:5 39654:2 39655:2 39657:1 39659:10 39660:16 39661:14 39665:11 39667:15 39692:22 39698:16 39719:8,8</p>	<p>kept 39664:25 39707:20 kicks 39606:8 Kidd 39687:14 kill 39593:15 39650:13 39666:22,24 39667:2 killed 39597:6,19 39603:10 39611:3,4 39616:1 39617:18 39619:23 39643:23 39650:17 39659:2 39671:19 39687:24 39688:18 39689:17 39690:4 39708:7 killling 39610:18 39643:24 39648:8 39656:5 kind 39606:16 39610:2 39618:10 39621:10 39646:12 39649:16 39650:1 39661:11 39667:12 39677:4 39703:15 kinds 39646:13 KK 39710:6 KKK10 39689:3 knees 39630:19 knew 39653:12 39687:16 39704:7,9,9 39710:16 knives 39683:23 knobkieries 39683:22 knocks 39604:10 know 39591:6,25 39596:6 39598:22 39599:2 39600:4 39602:3 39604:8 39607:21 39613:5,22 39615:9 39617:6 39621:9,22,23 39629:20 39631:9 39632:10 39633:24 39644:7 39645:9 39646:22 39648:8 39649:23 39651:6 39653:3 39656:13,13 39656:20 39658:4,10 39658:14 39669:7 39671:2 39673:3 39685:24 39694:20 39697:25 39698:2 39702:21 39703:24 39704:3,8 39712:24 knowing 39656:7 39708:7,14 knowledge 39675:16 39676:10 known 39653:12 39675:13 39687:11 39694:16 39705:13 39705:14,25 39706:1 39714:21 knows 39703:23 39704:4 koppie 39591:12,15,16 39604:21 39605:19</p>
			J	
			<p>ja 39641:2 39657:12,15 39658:16 39669:7 jail 39658:3 Jamieson 39669:3 Jesus 39623:7 job 39643:10 39655:19 39668:14 39669:21 39674:17,17 39704:8 JOE 39601:9 39602:3 39603:5,8 39604:3 39667:3 39671:1 39673:20 39686:14 39686:16,20 39687:11 39688:9,15 39688:20,21,23 JOCCOM 39602:4 39604:3 joined 39657:23 judge 39640:15 judgment 39708:17 judicially 39659:4 judiciary 39667:24 justice 39611:14 39636:23 39696:15 39696:21 39697:3 39718:6 justify 39694:24 39695:1</p>	
			K	
			<p>kans 39662:16 keep 39642:7 39707:17 39708:1 keeping 39708:1</p>	

39605:21 39606:12 39611:16 39612:10 39613:2 39614:5 39619:16 39628:24 39629:12 39631:5,6,8 39686:23 39688:10 39688:14,17,17 39711:8,17,20 kraal 39592:11,12,17 39593:22 39594:1 39595:8 39603:1 39605:1,3,4,17 39606:15,22,24 39609:3 39616:5 39638:24 Kwadi 39699:8 39709:19,23 39710:7 39710:21 KwaZulu-Natal 39685:2 K4 39631:11 39672:19 39674:1	39609:14 39617:4,17 39641:11 39662:23 39668:14 39689:9 39712:24 39718:9 leadership 39594:7 39626:21 learned 39631:25 39632:5 39657:22 39662:19 39663:22 39665:15 leave 39609:21 39643:2 39643:14 39660:20 39661:2 39667:1 39672:21 39673:6 39698:20 39711:16 39711:20 39713:21 leaves 39676:23 39680:18 39693:21 led 39634:17 39698:10 39702:18 Ledingoane 39592:24 39615:7 left 39605:13 39626:8 39666:18 39687:5 39697:23 39698:11 39714:24 legal 39626:10 39627:10 39639:23 39661:8 39676:4 39677:10 39681:6,18 39682:9 39699:5,11 39700:7 39701:12 39702:25 39709:1 39718:13 legality 39700:13,18 legally 39700:24 39701:5,7 39704:12 legislation 39627:8 legislative 39610:9 length 39593:6 39674:5 lengths 39600:21 Lepaaku 39619:18,23 39671:16 lethal 39604:8 let's 39604:24 39609:23 39612:9 39643:2 39645:17 39647:9 39659:16,18 39660:8 39667:5 39678:2,12 39706:20 level 39612:13 39649:7 leverage 39627:16 liability 39694:17 liable 39700:24 39704:12 liberty 39717:2,5 lie 39646:18 39650:1 39711:23 lies 39646:18 Lieutenant 39654:12 life 39618:2 39684:25 39699:19,20 39700:20 39701:15 39704:21 lift 39711:24 light 39603:7 39696:2	likelihood 39707:3 limit 39698:16 limitations 39602:2 limited 39611:17 39662:10 39675:7 line 39593:18 39594:5 39607:7 39608:12 39609:1,2,7 39611:12 39611:18,21,22 39615:10 39618:4 39632:14 39640:5 39647:2 39662:15 39664:25 39673:1,1,2 39673:2 39686:23 39687:2,18,23 39705:11,13 39710:23 lined 39609:2 lines 39676:14 39677:18 lingering 39665:16 link 39654:3 linked 39596:20 39676:11 list 39683:23 39692:14 listening 39686:20 literally 39685:1 39712:3 little 39599:7 39618:14 39649:17 live 39678:18 lives 39599:14 39658:3 39674:18 39708:14 living 39626:11 39627:12 39679:25 39680:2 living-out 39680:8,15 location 39715:6,8 locked 39658:2 Loest 39617:24 39618:3 39637:16 39687:18 Loest's 39646:2 logic 39649:17 long 39605:10,22 39632:8 39649:25 39655:2 39659:14 39661:13 39683:23 39684:11 39685:1,1 39717:12 longer 39643:24 39644:17 39657:18 39657:19 39677:14 39683:23 Lonmin 39612:2,7 39613:8 39614:2,9,18 39614:18,18 39627:10 39634:17 39635:8,10,10 39636:13 39655:15 39658:7,7,9 39666:13 39674:20,21 39676:10 39677:13 39678:14,14,19 39679:2,4,14 39680:2 39680:10,19 39681:9	39681:20,23,24 39682:16,18,23 39684:7 39698:6 39700:2,4,10,23 39703:13 39704:12 39705:14 39708:6,20 39708:23 39709:1,4,6 39709:14 39710:8,18 39711:12 39715:14 Lonmin's 39670:16,23 39678:25 39679:7 39681:6,18 39699:4,6 39699:11,12 39702:4 39702:24 39704:13 39708:9 look 39592:7 39593:5 39598:22 39599:13 39601:23 39607:13 39611:25 39619:17 39624:9 39634:11 39645:25 39647:21 39648:13 39649:20 39658:10,23,23 39662:22 39664:10 39676:16 39678:12 39679:13 39688:2 39705:21 39709:9 looked 39706:17 39707:1 looking 39617:9 39662:25 39718:18 looks 39609:1 39615:2 39618:18 39626:5 lose 39640:5,18,19 loss 39699:20 39700:20 39701:14 39704:21 lost 39693:4 lot 39629:11 39635:5 39654:8 39703:17 39712:10 loudhailer 39631:3 lower 39649:2 lowest 39647:9,9 lunch 39613:16 lying 39618:18 39638:25 39653:20 39653:21	Major-General 39602:6 39672:18,21 39672:22,24 39673:11,11 39674:10,10 makarapa 39615:11 makarapas 39615:21 making 39596:12,25 39598:20 39614:20 39616:4 39624:8 39638:12 39645:18 39663:2 39666:13 39693:19 39694:19 39719:6 Malema 39652:22 man 39593:6 39608:4 39669:17,18 managed 39679:16 39682:1 management 39695:3,4 39704:6 39710:24 39711:5 managers 39708:11 managing 39704:8 mandate 39603:20 39633:6 mandated 39701:3 manifest 39676:21 manifestly 39675:12 manner 39604:18 39719:1 marauding 39631:25 marching 39684:9 Marikana 39596:25 39597:5 39599:14 39624:15,24 39625:5 39625:9 39631:24 39635:4,7,10,10 39636:9 39639:9 39670:3 39673:14 39676:11 39683:25 39685:8,20 39686:4 39718:18 mark 39690:6 marked 39687:3,23,25 marker 39687:18 marketing 39682:19 marks 39615:4,24 39616:1 39671:4 39689:2,4,10,20,24 39690:4,11,12,13,22 39690:23,23 Mary 39623:8 mass 39685:9 massacre 39596:4 material 39672:9 39675:4 39679:22 39702:2,2 39710:11 39710:14 Mathunjwa 39630:18 39632:19,21 39633:16,19,22 39634:1 39635:1 39709:22,25 39710:6 39710:11,20 39711:2 39711:4,8,10,15,25	
L					
labour 39626:3 39627:11 39674:22 39676:2 39685:3 39699:14 39700:5,6 laboured 39634:11 lack 39606:8 39609:18 land 39644:18 Langa 39673:6 39706:1 39706:9 39708:19 language 39616:11 large 39591:14 39638:17 39699:12 39703:24 39705:17 39709:11 39719:12 largest 39704:7 late 39592:1 39619:25 laughable 39656:4 laundry 39692:14 law 39603:15,20 39611:9 39625:22 39626:17,19 39627:5 39630:24 39631:20 39631:24 39640:2,12 39640:13,14 39653:18 39655:19 39671:1 39694:10 39699:13 39708:23 39716:3 lawful 39599:12 39602:18 laws 39684:18 39685:17 lawyers 39661:19 lay 39633:17,21 39654:11 39711:20 LE 39620:23 lead 39600:14 leader 39667:3 leaders 39592:23 39593:19 39594:16 39594:19 39595:7 39596:12 39602:25					
			M		
			Mabebe 39673:6,9 39708:19 Mabelane 39673:6,9 Mabuyakhulu 39664:5 39664:20 39665:2,8 Magidiwana 39618:19 magnitude 39594:21 main 39622:13 39624:21 39692:24 39693:5 maintain 39603:15,20 39655:19 maintenance 39640:2 39704:17,23 39708:21 Major 39672:22 39673:20,21		

39712:3,5 39714:10 39714:14,17 Mathunjwa's 39699:7 39709:19 39714:18 Mati 39617:5,18 matter 39591:25 39601:3 39606:4 39611:23,25 39613:21 39614:3,14 39621:20 39623:25 39635:12 39636:4,25 39638:19 39639:2,12 39639:15 39642:2 39652:23 39654:8 39655:17 39657:17 39658:20,21 39663:23 39664:3 39672:22 39674:9,14 39691:11,13,24 39694:9 39700:13,23 39702:14 39704:13 39706:20 39709:18 matters 39601:18 39642:9 39643:24 39644:18 39663:21 39685:13,20 39699:3 39700:2 39704:11 mayhap 39603:18 mayhem 39626:4 39632:1 Mbombo 39598:12 39612:1 39650:21 39651:1,2 39652:2 39714:10 McIntosh 39654:13 mean 39600:8 39603:5 39604:1,22 39607:23 39612:4 39631:19 39632:21 39647:11 39653:15,20 39704:16 39706:17 meaning 39612:18 39711:6 meaningful 39716:21 means 39606:10 39616:16 39633:5 39645:4 39646:8 39653:12 39663:18 39683:9 39702:7,14 meant 39641:10 measure 39591:18 39635:25 measures 39618:21 39700:15 media 39596:17 39597:13 39695:15 39718:21 Media24 39708:18 medicines 39622:12 medics 39649:22,24 meet 39599:13 39706:2 meeting 39599:23 39607:24 39668:18 39698:6 39699:8 39709:19,23 39710:1 39710:7	meetings 39713:14 member 39657:24 39693:5,8 members 39592:16 39593:20 39626:22 39637:19 39640:5 39660:17 39666:21 39669:15 39673:12 39687:9 39693:1 39716:1,4,12 39717:1 memorial 39699:9 39714:22,24 39715:3 39715:3,6,8,10,10 memorialising 39715:1 39715:2 mention 39599:22 39690:12 39693:4 39710:21 mentioned 39692:12 39719:9 Merafe 39608:5,5 Mercedes 39665:3 mere 39683:4 merely 39623:12 39630:24 39685:14 39693:3 merit 39625:8 merits 39675:15,21 39709:5 message 39661:22 39662:4 39668:7 met 39632:3 meted 39659:8 39666:10 method 39616:24 methods 39604:8,14,17 39605:1 39654:17 metres 39665:25 Microphone 39594:22 39633:10 39714:8 middle 39596:17 39632:17 migrant 39678:22,23 39678:25 39679:23 39680:1 militant 39646:7 39654:24 militarised 39636:10 militates 39625:24 million 39682:14 mind 39651:23 39692:15 39696:2 39712:11 minded 39690:25 minds 39595:14 mindset 39634:25 mine 39704:20 39706:16,21,21 39707:1,2,7 39708:20 miner 39704:7 Mineral 39681:7 miners 39703:1 minimising 39653:16 mining 39627:5,11 39699:6 39704:14,16 39705:6	Minister 39652:22 39653:7,11 39683:8 39697:13 39715:20 minus 39679:16 minute 39669:7 39676:20 minutes 39628:3,10 39641:22 39642:10 39653:9 39659:17 39660:3,9 39666:17 39717:15 mirroring 39666:6 misapprehension 39634:12 misconduct 39671:10 39693:1,6,9 39694:5 39694:24,25 39698:9 misinterpretation 39619:1 misses 39699:23 mission 39603:24 39604:4 mitigation 39600:1 Mkhonjwa 39687:20 Mkonjwa 39688:10,15 moderate 39704:5 Mogale 39620:1 Mokwena 39705:9,12 39705:15,24 39706:4 39706:11 39708:15 moment 39607:17 39617:17 39632:11 39637:14 39673:17 39677:20,21 39691:7 moments 39664:8 money 39666:13 39682:21 month 39680:21 39703:21 months 39680:22 39681:15 Morad 39615:3 moral 39659:6 39711:15 morally 39658:21 morning 39602:18 39608:1 39613:15 39644:22 39652:13 39669:9 39684:13 39695:15 39711:5 mortem 39615:2 39617:7,8,9,14 mortems 39671:4 motive 39666:12,14 39667:6 motives 39666:11 Motswele 39690:17 mountain 39710:9 mouth 39604:25 39605:4 39609:3 39652:10 39657:1 mouths 39711:23 move 39603:25 39606:21 39617:17 39618:22 39655:21 39674:20 39702:6	moved 39592:17 movement 39645:5 moving 39592:20 39593:19 mow 39595:19,20 39596:4 mowed 39670:6 Mpembe 39612:1,21 39613:4,17,17,20,23 39619:10,11 39632:18 39633:8 39654:10 39672:18 39672:21,24 39673:11,18 39674:10 39686:1 39712:13,19,20 39713:3,11 Mpofu 39594:23 39596:22 39598:2,11 39620:13,18 39621:12,16 39622:25 39623:21 39624:2 39636:21 39637:5 39640:23,24 39641:9,14,17,22,24 39642:3,4,8,14,17,21 39643:1,4 39647:19 39651:14,18,21,24 39652:1,9 39653:24 39655:7,10,16,20 39656:25 39657:7,12 39657:15,19,21 39659:16 39660:5,12 39660:16 39661:17 39662:6,7 39663:10 39663:14,17 39664:14,19 39666:19 39667:18 39667:25 39668:4 39670:9 39712:25 39713:22 Mpofu's 39660:1 Mpumza 39687:23 39688:18 39689:14 Mufamadi 39620:6,10 multi 39638:6 multitudes 39623:10 municipalities 39718:2 murder 39645:18 39647:8 39648:1,2 39650:7 39666:22 39667:3 39694:20,25 murdered 39666:25 murdering 39658:6 mustn't 39601:23 muti 39620:2 39622:19 39622:21 39623:1,17 39623:22 39624:10 39668:20 39671:4 39689:2,4,10,11,12 39689:20,24 39690:22,23 39691:20,24 39692:2 39692:5 Myburgh 39649:2 mysteries 39655:5	mystery 39655:8,22 <hr/> N Naidoo 39617:5,6 39645:24 39672:22 39672:23 39673:11 39674:11 naked 39650:5 name 39669:17 names 39613:9 Naren 39669:16 NATCOM 39599:24 nation 39625:3,10 39639:25 39669:19 National 39599:20 39600:7 39652:18 39653:7 39662:20 39671:10 39693:22 39694:1,15 39695:3,4 39695:7 39715:21 nativity 39661:25 natural 39696:15,21 39697:3 nature 39591:11 39592:5 39607:5 39609:7 39626:3 39696:1 near 39615:10 39664:25 necessarily 39653:20 39677:6 necessary 39596:7 39624:3 39646:8 39674:19 39677:3 39702:8 39718:24 need 39594:8 39599:4 39618:25 39631:21 39631:22 39658:15 39672:20 39681:16 39683:1,2 39684:3,12 39709:20 39710:13 39716:15,16 needed 39614:17 39688:7,9 39709:15 39709:16,17 39710:12 needs 39617:15 39678:15 negative 39638:9 39669:12 neglectful 39678:15 negotiate 39699:5,12 39699:13 39701:16 39701:24 39702:3,7,9 39703:1,18 39710:3 negotiated 39654:14 negotiation 39626:8 39627:2 39702:13 negotiations 39627:17 39704:2 neighbouring 39705:19 neither 39649:12 Netherlands 39668:3 neutral 39689:12,19 39690:20 never 39623:3 39635:9
--	---	---	---	---

39635:19,25 39636:14 39637:18 39638:13,14,15 39651:23 39656:14 39656:20,21,23 39667:13 39695:6 39712:11 new 39615:5 39715:5 Ngude 39615:4 nice 39632:10 night 39612:23 39713:1 nine 39688:19 NIU 39637:23,24 Nkaneng 39595:25 39596:2 39605:10,12 39605:14,17,23 NMF 39599:8,8,11,20 39650:24 39651:4,11 39652:15 39667:9 39668:18 39697:20 nodding 39620:20 Noki 39593:14,23 39594:7 39595:9 non 39604:7 39643:24 39704:3 39707:13 nonsense 39662:16 non-applicability 39650:4 non-issue 39693:24 39694:3 non-lethal 39604:14,17 39605:1 39607:19 39608:15,20,22 39618:21 39654:17 non-partisan 39668:15 non-starter 39676:17 non-striker 39656:19 non-violent 39622:13 normal 39591:21,23 normally 39600:22 39635:12 northern 39611:20 note 39621:1,3 39629:7 39637:15 39645:13 39693:12 39719:16 notes 39621:5 39643:14 notice 39683:10,16,17 notion 39647:3 NOVEMBER 39591:1 no-one 39712:3 39714:6 NPA 39685:14 Ntsebeza 39615:1 39689:2 Ntsenyane 39592:25 Ntsenyeho 39592:25 39593:1 Ntsoele 39671:17 nuanced 39639:14 NUM 39613:10 39634:13,14 39657:24 39663:24 39664:11,14,22 39665:5 39666:14 39672:19 39674:1 39684:9,20 39692:21	39713:14 number 39616:20,21 39619:19 39620:21 39622:12 39640:6 39647:22 39678:22 39679:8,9 39705:17 39717:20 numbers 39679:11 Nyala 39605:2,3 39606:20,22,23 39607:5 Nyalas 39619:12 39637:6 39645:7 39646:21 Nzuza 39689:14 <hr/> O <hr/> oath 39663:3 obdurate 39614:10 obedience 39631:24 obeying 39637:12 object 39620:14 39621:13,17 39683:20 objections 39620:24 objective 39692:19 objects 39683:11,24 obligation 39614:11 39656:12 39681:23 39681:25 39682:4,8,9 39709:2 obligations 39626:10 39627:10,12 39674:23 39675:10 39675:17 39682:23 39699:22 oblige 39699:15 obliged 39627:10 39701:5,6,7 obliges 39699:19 observation 39619:4 39716:10 observe 39716:2 observed 39636:1 obtain 39631:20 39710:14 39711:17 39711:18 obtained 39614:24 39617:4 obvious 39668:18 39693:7 obviously 39598:14 39600:15 39602:1,13 39618:13 39620:16 39621:16 39642:24 39643:6 39652:13 39691:13 39692:2 occasion 39718:24 occupy 39640:16 occur 39636:4 occurred 39624:14,23 39656:16 39700:12 occurrence 39602:5 occurring 39612:14 ocean 39678:17 October 39683:17,18	offence 39683:5,25 offensive 39610:18,21 offer 39623:3 39625:19 39631:17 offered 39611:11 offers 39622:21 office 39662:20 39671:10 39674:1 39695:20 Officer 39619:17,23 39671:16 officers 39594:11,13 39611:3 39639:21 offices 39663:24 39708:12 official 39673:22 officials 39612:2 39718:6 oh 39601:25 39603:11 39642:16 39653:5 39667:25 Okay 39651:24 old 39615:5 39690:11 39715:12 ominous 39600:2 omission 39599:25 39700:19 omnibus 39693:12 once 39604:2,5 39605:24 39616:9 39643:23 39658:16 39704:1 ones 39595:10 39608:16,17 39658:18 39666:4,25 39689:24 oneself 39622:14 onus-bearing 39639:15 onwards 39644:17 OO13 39711:10 opacity 39609:25 open 39605:7 39609:21 39617:2 39714:24 opening 39647:21 39648:25 39669:18 operate 39638:6 operates 39699:17 operating 39655:24 operation 39607:2,25 39618:10 39629:11 39630:8 39631:6,13 39637:21 39649:11 39667:12,19 39671:2 39683:14,16 39686:15,17,21 39687:8 39688:5,12 39688:20,23 39708:5 39713:9 operational 39601:18 39601:20 39638:1 39673:12 operations 39630:3,3 39699:6 39704:14 39705:6 opinion 39617:5,11 39667:13 39711:3	opportunity 39599:1 39650:16 39675:14 39680:24 39682:10 39696:17 39697:10 oppose 39641:5 opposed 39601:5 39605:11 39607:15 39610:19 opposite 39605:17 option 39643:4 options 39607:13 39706:15 oral 39664:5 39692:12 order 39591:3,19,21,24 39600:19 39603:16 39603:21 39609:12 39610:14 39611:9 39613:19 39616:23 39625:15 39626:17 39626:18 39628:25 39629:10 39631:16 39631:18 39635:19 39636:5 39640:2,14 39640:20 39655:19 orders 39618:13 ordinary 39594:11 organisation 39638:17 39640:20 39704:4 original 39606:13 39682:4 39691:3 originally 39606:20 ostensibly 39682:19 ought 39628:23 39711:22 outbreak 39700:11,16 outcome 39702:19 outrage 39626:17 outset 39700:22 outside 39674:24 39701:16 outstanding 39679:15 overall 39713:9,23 overconfident 39633:25 overcrowded 39627:15 overlooking 39602:9 overly 39634:24 39635:1 oversight 39626:14 39675:11 overstated 39680:19 overwhelmingly 39592:16 owned 39709:12 oxymoron 39668:22 o'clock 39641:7 <hr/> P <hr/> page 39592:7,8,8 39596:24 39624:16 39624:17,18 39632:7 39632:7,13,15,16 39662:14 39676:14 39677:18 39690:15 39705:1,11 39710:23 39715:24	paid 39682:15 39703:21 39706:22 39707:4 pangas 39683:23 para 39632:12,13 paragraph 39592:8 39625:13 39626:23 39681:4,14 39682:4,7 39682:12 39683:21 39683:22 39684:1 39697:16 39705:22 paragraphs 39681:22 39682:1 39710:7 paramount 39666:11 paraphrasing 39647:24 39648:11 parliament 39669:13 39669:15 part 39598:21 39601:3 39602:20 39611:1 39614:23 39615:10 39615:19,20,23 39629:25 39637:8 39639:23 39675:11 39676:21 39693:1 39695:6 39698:5 39699:12 39701:24 39707:7 39711:2 39715:4,11 39719:13 participate 39627:1 participated 39684:5 39698:12 39718:14 particular 39595:20 39596:5 39610:13 39616:9 39617:2 39636:6 39638:6,18 39639:12,16 39694:7 particularly 39625:5 39662:13 39672:12 39685:10 parties 39591:13 39656:15 39672:3 39694:19 39700:17 39700:24 39718:13 partisan 39685:11 39716:6 party 39639:15 39658:15 39697:22 39698:1,11 pass 39646:7 passage 39632:11 39633:21 39705:10 39715:23 passages 39633:14,17 passed 39608:21 passive 39698:1 patently 39609:23 path 39603:2,2 39604:25 39605:2 pathologist 39617:8,13 Pathologists 39615:3 patience 39717:6 pay 39661:1,5 39706:18,25 39707:12,13 paying 39707:2
---	--	---	--	---

<p>payment 39703:14 payments 39682:17 PC 39599:24 39602:15 39602:17 39603:6 39610:21 peace 39685:8 peaceful 39625:17,25 pedantic 39600:13 39652:17 people's 39674:17 perceived 39610:23 39622:15 39685:11 perception 39657:6,13 39657:14,17 39716:7 perfectly 39599:12 39600:19 perform 39617:6 39677:10 performed 39617:8 period 39652:8 39682:16,19 39685:4 permitted 39648:22 person 39593:2 39623:21 39660:25 39661:3 39674:18 39683:24 personal 39675:16 39676:10 personally 39642:22 personnel 39611:3 39636:13 persons 39612:16 39626:3,20 39683:18 39689:10 39694:12 39700:20 persuade 39594:20 39622:6 39710:10 39711:16 persuaded 39712:12 persuading 39710:16 pertinently 39618:4 Peterloo 39597:11 Petroleum 39681:8 phase 39646:10 39670:24 39674:20 39675:7 phone 39687:7 photograph 39661:8,11 photographer 39661:11 photographic 39671:18 photographs 39617:10 39661:12,13 39671:13 physical 39645:6 39715:6 picture 39658:11 pictures 39658:23 39672:11 pie 39618:17 39676:8 pieces 39623:9 Piketty 39596:24 39597:2,7 Pillay 39620:19 39621:23 39672:17 39717:21</p>	<p>place 39600:10 39614:23 39625:13 39626:24 39639:3 39640:14,16 39670:15,20 39671:13 39673:19 39683:20 39684:13 39684:15,17 39687:4 39688:22 39690:17 39704:2 39708:4 placed 39622:3 39625:21 39662:24 places 39705:18 plain 39625:16 plan 39598:22,23,23 39604:21 39605:9,23 39606:2,5,6,8,13,18 39606:21 39609:6,11 39613:4,17,17,20 39616:7 39627:11 39654:14 39673:19 39673:23 39674:4,5 39674:23 39686:1 planned 39636:9 planting 39649:18 platinum 39682:15,18 39704:7 play 39625:1 39666:11 played 39653:17 39664:9 player 39698:7 players 39669:2 playing 39658:17 plea 39669:19,20 pleading 39630:18 pleas 39668:10 please 39612:9,10,11 39615:13 39628:9 39631:4 39632:25 39633:3 39660:20,25 39661:4,22 39662:4 39668:11,13,17,19 39669:1,6 39687:9 39702:2 39709:3,7 pleased 39719:11 plinth 39622:19 plus 39661:8 point 39593:21 39596:2 39596:7,13,19,25 39598:20 39599:4 39601:1,16,16 39602:3,23 39606:8 39607:10 39608:16 39608:21,23 39614:20 39615:15 39615:15,16,25 39616:10 39617:21 39618:19,24 39619:14,22 39625:7 39631:2 39633:7 39634:9,10 39637:17 39644:11,13,16,17 39647:6,20 39648:19 39651:6 39653:23,24 39655:3 39662:17 39663:1,2 39665:14</p>	<p>39667:8 39671:18 39672:17 39681:3 39687:11,15,21 39690:8 39693:7 39696:14 39699:23 39700:22 39702:5 39703:2,9,11,25 39713:22 39715:7 pointed 39596:16 39622:3 39631:5 39636:17 pointing 39600:25 points 39595:23 39600:24 39621:7 39643:13 39647:23 39653:22 39659:12 39659:13 39661:2 39665:14 39674:2 39686:25 39687:2 39707:25 policemen 39636:12 39659:1 39665:23 39666:2 policing 39591:19,24 39616:23 39631:16 39631:19 39635:19 39670:14,20 39672:20 39673:4,8 39673:21 39716:12 policy 39639:8 political 39626:2,14,16 39652:21,24 39653:4 39653:17 39654:3 39667:6,10,14,20 39668:2 39684:25 39698:4 politicians 39669:8 POP 39608:4 39609:2,9 39637:2,6,18,22,23 39646:19,19,24 39647:1,5 39669:13 population 39623:7 populations 39624:4 portrayed 39632:22 pose 39592:13 39611:9 posed 39592:10 39594:2 position 39615:25 39620:18 39658:5 39668:10 39690:2 39717:11 positioned 39606:20 39616:10 positions 39638:18 possession 39605:21 39629:15 39683:19 39685:9 39686:4 possibilities 39692:6,6 possibility 39608:1 39634:8 39669:3,6 possible 39603:23 39605:25 39680:17 39686:8 possibly 39593:20 39662:5 39691:4 39692:6 39696:24</p>	<p>post 39615:2 39617:7,8 39617:9,13 39671:3 39703:5,22 postulate 39602:14 39631:9 postulating 39607:17 postulation 39647:7 posture 39636:19 post-Marikana 39683:6 post-mortem 39689:1,6 potential 39694:17 power 39717:3 powerful 39604:9 39669:8 powers 39629:18 practical 39593:8 39607:14 39631:13 39631:22 practice 39622:11 39680:11 practices 39627:15 practitioners 39718:13 prayer 39668:25 preceded 39656:19 39658:1 precipitating 39638:23 precisely 39611:7 39622:14 39703:10 precluded 39638:12 predictable 39591:20 39708:15,22 prefer 39627:17 39642:20,22 prejudice 39668:17 preliminary 39680:20 39680:23 premeditated 39594:17 39596:14 39645:17 39647:8 39648:3,20 39648:25 39650:7 premise 39617:18 premises 39700:12 prepare 39687:9 prepared 39641:15 39650:10 39666:22 39666:24 39667:2,3 39671:13 39679:3 39686:23 39689:5 39698:19 preparing 39672:4 prescripts 39627:7 presence 39671:4 39689:3 present 39596:17 39660:18 presentation 39671:12 39671:24,24 39698:19 presented 39601:24 resident 39624:12,23 39632:19 39634:20 39634:23 39639:4,6,9 39669:23 39676:25 39695:14,25 39696:18 39697:13</p>	<p>39701:3 press 39652:4 39697:17 pressure 39591:6 39652:21 39654:4 pressured 39655:23 presumably 39604:6 39604:20 39605:25 39608:16 39686:5 39707:20 pretence 39654:20 pretend 39695:22 Pretorius 39602:7 39687:7,16 39688:3 Pretorius's 39688:11 prevails 39685:8 prevent 39595:25 39605:9 39645:5 39709:6 39711:24 prevented 39605:14 prevention 39700:16 previous 39593:1 prima 39600:14 39614:20 39648:23 39649:7 39712:25 primarily 39639:11 primary 39672:16 39690:19 39698:7 principally 39627:3 principle 39686:12 39702:18 principles 39595:17 prior 39636:10 39664:17 39679:2 39683:6 probability 39706:2 probably 39594:25 39595:1 39596:21 39662:24 39669:11 problem 39605:12 39607:8,18 39608:19 39675:1,1 39680:4 39696:20 39705:2 problems 39601:12 39602:9 39649:2 procedural 39680:18 39681:2 39716:2 procedurally 39675:6 Procedure 39629:14 proceeded 39647:17 39719:12 proceeding 39686:15 39686:17,22 proceedings 39591:1 39661:16,20 39674:15,16 39718:14 process 39613:5 39639:17 39679:1,25 39702:13 39715:4,9 39715:11 proclamation 39681:7 39682:5 produced 39608:12 39625:9 39691:18 39715:15 producing 39717:9</p>
---	--	---	--	--

<p>product 39682:3 production 39708:3 professor 39596:23 39597:2,7 39623:24 programme 39682:13 prohibit 39683:8 prohibited 39683:18 promise 39633:16 39634:6 proper 39617:11 39631:19,19 39638:5 39654:10 39655:13 39680:24 properly 39654:5 39665:21 property 39611:2 39631:7 39700:16,21 proposal 39601:14,14 39601:15,24 39714:22 propose 39642:10 proposed 39613:3 proposing 39642:18 proposition 39603:3,22 39633:22 prosecution 39694:9 39695:9,10 prosecutions 39685:16 39685:16 Protea 39709:7,12,14 protect 39646:16,17 39707:22 protected 39623:15 protecting 39646:23 39669:17,18 protection 39689:13,15 39689:19 39709:2 protections 39716:3 protest 39625:17,25 protests 39626:15 protocol 39699:15 provide 39610:15 39613:11 39678:4 39689:21 39692:17 39693:12 39708:24 39709:2,4,7 provided 39605:10 39655:14 39664:7 39673:19 39680:10 39692:17 provider 39709:7 provides 39656:2 39715:17 provincial 39599:21 39601:5,21 39651:20 39652:3 39655:4 39698:6 provision 39693:25 provoked 39636:1 public 39591:8,19,21 39591:23 39616:23 39625:15 39626:2,6 39626:18 39631:16 39631:18 39635:19 39636:4 39660:17 39683:19,24</p>	<p>39684:14,17 39716:6 39716:7 39718:22 publicly 39711:13,14 punitive 39671:6 39692:11 39693:2 purely 39624:8 39705:3 purpose 39592:18 39594:6 39685:12 39704:16 39715:9 purposes 39612:20 39622:13,20 39684:17 pushed 39595:12 39607:20 39712:5 pushing 39680:4 put 39591:6 39601:13 39602:8,10,13 39611:17 39615:15 39618:4 39620:25 39631:9 39645:21 39648:10 39649:7 39651:9 39652:15 39653:21 39656:9 39664:3 39665:17,20 39665:24 39669:4,20 39670:15,20 39672:6 39675:8,14 39681:1 39704:16 39708:14 39708:21 putative 39595:17 39656:3,4,6,9 39666:1,6 puts 39673:17 39710:24 putting 39605:18 39611:12 39692:8 39711:3 puzzlement 39654:9 puzzling 39655:2</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified 39622:5 39676:9 question 39593:7 39599:16 39602:13 39609:5 39610:17 39620:2 39621:1 39622:2 39633:8 39636:18 39638:19 39641:19 39645:17 39645:19 39648:12 39650:6 39665:16,16 39666:16,21 39690:6 39691:5 39692:1 39694:6,14 39697:14 39699:9 39700:6,17 39700:18,23 39705:4 39706:21 39713:20 39714:22 questionable 39714:18 questioning 39705:12 questionnaire 39600:6 questions 39612:22 39628:15,17 39639:5 quick 39640:8</p>	<p>39662:17 quickly 39662:11 39663:20 39690:1 39717:14 quite 39594:20 39596:2 39607:16 39614:16 39622:4 39649:9,13 39660:24 39678:13 39696:10,11 39697:3 39708:23 39716:14 quotation 39596:22 quote 39624:13 39625:6 39676:25 39677:19 quoted 39678:20 39679:9 quotes 39596:24 quoting 39669:15</p> <hr/> <p style="text-align: center;">R</p> <p>racing 39643:6 radar 39677:6 radio 39686:19,20 39687:1,14 39688:4 railway 39593:18 39664:25 raise 39596:21 raised 39629:8 39672:16 39677:5 raising 39596:20 Ramaphosa 39669:5 Ramaphosa's 39704:2 Ramphelo 39705:12,16 39705:20,25 39706:7 ran 39595:10 rands 39682:15 range 39692:25 ranks 39714:6 39715:19 rational 39623:2,4,11 39624:9 rationalisation 39703:22 reach 39689:22,23 reached 39698:16 reaching 39719:6 read 39597:13 39609:13,16 39620:15,17,17 39621:18 39624:3 39626:15 39632:10 39633:13 39643:21 39653:5 39681:17 39695:24 39708:17 39710:23 reader 39597:4 reading 39622:5 39645:22 39662:25 reads 39620:18 ready 39629:6 real 39610:23,24 39643:8 39647:6 39678:23 39688:25 realise 39591:12,18 realised 39623:2 39691:11 39697:18</p>	<p>39706:23 reality 39592:22 39677:24 really 39591:14 39594:12 39611:16 39628:2 39634:13,14 39634:18 39641:4 39652:15 39685:19 39712:4 reason 39600:24 39603:12 39619:3 39623:6 39635:21 39636:2,15 39648:5 39649:21,25 39665:1 39701:16,18,19 39702:3 39707:14 39708:8 reasonable 39649:3 39675:25 reasonably 39699:20 39704:6 reasons 39592:15 39614:18 39617:15 39623:23 39626:10 39653:4 39664:13 39678:21 39704:24 39708:13 rebuttal 39680:24 recall 39596:16 39602:23 39618:3 39622:17 39628:22 39635:5 recalled 39685:25 receive 39637:15 received 39610:7 39632:9 39639:24 39681:16 39687:17 receiving 39672:23 reckless 39647:16,17 39697:23 39698:1,11 reckoning 39673:17 recognise 39611:14 39676:11 recognised 39710:8 recommend 39674:13 39693:9 recommendation 39631:21 39686:8 39695:11 recommendations 39609:16 39610:3 39671:7 39676:19 39692:11 39693:3 39700:1,10 39716:21 recommended 39693:8 reconciled 39592:21 39655:4 reconciliation 39715:5 39715:11 reconsider 39677:3 record 39591:25 39619:7 39620:25 39621:15 39711:13 39711:14 recorded 39602:5,7 recruit 39705:17</p>	<p>recruitment 39705:17 red 39675:24 39687:3 39687:18,23 reduced 39677:11 reduction 39682:14,17 refer 39624:11 39668:22 39694:8 39710:8 39711:6 reference 39593:16 39612:16 39615:5 39619:22 39634:16 39645:24 39646:1 39662:12 39671:8 39674:24 39675:23 39676:13,15,22 39677:2,11 39689:6 39693:23 39694:1,6 39694:19 39699:24 39701:1,3 referenced 39689:8 references 39673:1 39690:15 39693:13 referred 39592:24,24 39592:25 39633:15 39636:25 39695:9,11 referring 39601:7 39619:9 39712:18 refers 39597:7 39644:23 39681:4 reflect 39692:5 reflected 39633:2 39698:5 reflection 39690:14 refusal 39702:19 refuse 39702:17 refused 39703:18,19 regard 39610:3 39614:1,2 39629:25 39631:17 39633:19 39672:24 39674:11 39676:19 39684:1,24 39686:8 39689:12 39690:8 39709:21 39711:14 39716:14 regarded 39644:7 regarding 39650:2 39694:12 regulation 39629:3 39630:10,14 39683:6 regulations 39645:4 regulator 39694:11 reject 39669:23 39670:4 related 39636:22 39696:23 relates 39599:20 39615:1 39644:21 39660:18,22 relating 39685:17 relation 39598:20 39611:13,24 39617:5 39619:2 39622:15 39624:12 39631:5 39638:2,18 39639:11 39644:24 39651:11 39656:5 39671:4,8</p>
---	--	--	---	--

39674:1,6,22 39676:4 39684:18 39685:16 39686:2 39689:3,24 39690:1,20 39693:22 39695:2 39696:21 39697:17 39698:8 39700:2 Relations 39699:15 relative 39610:17 relatively 39608:9 relevance 39691:22 relevant 39627:8 39675:17 39686:24 39690:3 39691:20 39692:3 39696:18 39701:21,24 religions 39668:23,24 rely 39639:16 39716:16 remained 39591:22 remaining 39679:24 remark 39651:19 39699:9 remarks 39639:19 39699:10 remember 39592:23 39594:23 39595:6 39600:8,13 39601:17 39604:9 39605:9,15 39605:20,23 39606:14,19 39643:20 39646:9 39647:21 39649:16 39649:19 39661:20 39666:10 39670:1 39672:23 39677:25 remembered 39600:11 39637:3 remind 39632:9 39671:25 remove 39624:9 39686:22 removed 39610:1 39649:23 39676:8 removing 39649:21 render 39623:1 reopen 39715:12,12 repeated 39631:3 39637:2 39652:13 repeatedly 39701:10 repented 39691:10 reply 39621:20 39624:18 39670:12 39680:22 39709:20 replying 39645:16 report 39617:9,14 39619:25 39620:4,5 39639:6 39672:5 39676:25 39680:20 39680:23 39681:5,16 39685:15 39688:15 39688:18 39690:6 39695:14,25 39699:25 39700:9 39705:15 39715:16 39715:24,25 39717:9 39718:16	reported 39672:18 reports 39615:2 39670:16,21 39672:15,20 39688:19,21 39689:6 reprehensibility 39659:6 reprehensible 39658:21 represent 39656:15 39668:7 representations 39696:18 representatives 39661:8 represented 39718:13 represents 39643:18 repudiation 39682:4 request 39614:12 39634:23 39640:24 39641:5 39660:22 requested 39701:22 requests 39660:17 require 39699:24 required 39599:17 39629:2 39631:1 39699:13 39700:9 requirements 39668:13 requires 39630:11,14 39630:24 39695:1 rereading 39645:23 researchers 39718:10 resemblance 39635:7 reserved 39663:6 residents 39680:4 resolution 39617:11 resolve 39627:2 39700:3,8 39702:12 resolved 39621:18 39626:7 39655:22 resolving 39612:11 39627:18 resources 39611:17 39681:8 respect 39593:16 39602:8,10 39617:23 39623:14 39671:15 39673:2,3 39686:18 39690:16 39692:19 39699:16 39712:6,10 39716:1 respected 39712:7 respectful 39594:9 39624:7 39625:8 39627:21 39648:23 respective 39668:16 respects 39684:4,4 39713:17 respond 39671:7 responded 39637:18 39700:10 responding 39637:4 response 39591:20 39617:13 39631:17 39636:1 39670:15,21 39695:4 39701:20	39709:24 39715:18 39716:10 responses 39600:6 39662:12 responsibilities 39627:5 responsibility 39625:2 39625:3 39626:21 39627:6 39640:2 39670:4,5 39695:24 39716:5 responsible 39610:25 39637:23 39685:1,3,5 39701:13,13,19 39702:23 rest 39597:24 39602:16 39602:17 39603:11 39606:2 39658:3 39660:10 39664:3 restoration 39715:4 restore 39627:14 rests 39640:11 39670:5 result 39592:2 39608:13 39625:12 39708:19,20 39719:15 resulted 39595:20 resulting 39626:19 results 39596:5 39708:15 resumed 39604:22 39606:3 resumes 39591:2 39628:11,12 39641:25 39642:1 39660:14,15 39698:24,25 retain 39605:22 retreat 39603:5,17 39646:3,13,17,24 39647:2 39653:9,14 39684:1 39685:5 retreated 39603:12 39646:19,20 return 39686:10 39710:10 returned 39660:21 returns 39662:3 revealed 39651:16 revenge 39666:12,14 revised 39693:18 revulsion 39597:2 re-strategise 39603:8 re-traverse 39713:11 rhetorical 39666:15 rhetorically 39666:21 rifle 39613:3 rifles 39645:11 right 39603:15 39610:1 39614:22 39623:15 39624:2 39625:19,21 39626:25 39635:2 39685:3 39687:6 39699:19 39700:13 39712:23 39713:4,6,6 39713:13 39716:14	rights 39620:23 39621:20 39661:6,15 39661:19 39699:17 right-hand 39632:14 risk 39600:12 39608:9 39685:7,12,15 39701:14 39708:15 risked 39711:19 risks 39601:22 39688:25 risky 39613:21 river 39619:9 road 39605:10,11 39619:12,18,20 39623:12 39646:4 robust 39718:25 role 39599:7 39625:1 39626:24 39627:3 39639:20 39653:16 39697:19,22 39698:3 39716:5 role-players 39624:25 rolled 39598:24 room 39658:5 Roots 39599:22 round 39662:5 39663:2 39669:9 ROUX 39620:23 Rover 39640:4 39667:11,12,16,16 rubber 39595:13,13 39604:13 rule 39716:6 rules 39595:18 ruling 39675:24 run 39593:23 39603:18 39646:15 running 39603:19 rush 39664:2 Rustenburg 39653:14 39718:2 ruthlessly 39686:14 R1.3 39682:17 R12 39703:15,21	39689:3,5,11,15,16 39689:17,18,22 39692:16 39693:1,5,8 39693:9,25 39694:14 39695:4 39698:9 39715:18 SAPS's 39671:1 39673:7 Saskatoon 39715:25 39716:3,6 satisfactory 39692:17 39719:15 save 39692:4 39693:15 saved 39673:9 39674:17 saving 39666:13 39673:8 saw 39604:9 39652:5 39659:7 39669:9 saying 39606:25 39609:1 39612:25 39616:5 39624:2 39630:24 39632:20 39633:8,11 39636:25 39638:21 39640:18 39642:14 39645:19 39649:5 39654:10 39657:24 39658:12 39658:12 39664:19 39664:25 39668:21 39687:8 39695:9,10 39696:16 39709:6 39711:20 39714:14 says 39600:12,23 39603:11 39609:23 39611:25 39612:1 39616:13 39617:18 39619:3 39622:19 39623:15 39624:14 39624:23 39625:1 39632:15,18,21 39633:9 39636:14 39638:8 39640:4 39653:18 39658:7,9 39667:19 39670:2 39672:21 39690:4 39694:8 39699:14 39705:12 39707:9 39711:2,3,5 39715:25 SCA 39708:18 scale 39649:3 39655:14 39657:10 scarcely 39656:22 scarification 39615:4 39615:24 39616:1 39690:11,12,13,23 scarifications 39615:1 39615:6,8 scene 39592:10 39593:20 39615:7 39618:19 39630:2,2 39631:10 39644:21 39647:9,24,24,25 39648:3,7,7,20,24 39649:8,14,15,23 39650:2,8,9,10
S				
			sacrifice 39591:7 safe 39708:24 safeguards 39700:15 safety 39640:11 39700:15 39704:24 39708:5 Sagalala 39671:17 sage 39624:11 sake 39649:12 39650:11 sanction 39667:14 sanctioned 39659:4 SAPS 39591:13,14 39598:20 39636:18 39638:9 39658:7,9,11 39666:21 39667:17 39667:19 39671:9 39673:3,13 39674:7 39674:14,18 39686:22 39688:14	

<p>39656:1,1,1,5,8 39662:14,14,16 39671:2,3 39686:17 39686:18,20 39687:3 39687:8,21,22,24,24 39688:25 39689:1,4 39690:2,2,3,3 39705:5 39713:9 scenes 39630:7 39666:7 39669:11 39692:18 schedule 39683:21,21 Scott 39643:21 39644:1 Scott's 39598:23 39609:6,11 screen 39646:20 39677:7 39705:10 scroll 39687:19 scrutinised 39694:17 scrutiny 39619:7 seat 39711:8 second 39601:16 39617:12 39644:20 39670:16,23 39674:4 39678:24 39684:21 39687:15 39688:17 39688:17 39692:20 39699:5 secondly 39668:17 39700:9 39703:4,23 39710:2,19 seconds 39607:12 39687:19 Secretariat 39718:7 section 39604:15 39606:1 39629:3,5 39630:12,13 39632:2 39645:24 39646:1,1 39662:22,23,24,25 39663:1 39683:7,13 39683:15 39693:2 39694:3,3,4,4,13 39695:2,12 39698:15 security 39611:3 39635:8,12 39636:13 39684:8 39709:2,3 see 39598:13 39602:6 39609:2 39611:20 39616:8,10 39618:19 39619:3 39621:19 39623:2,3 39630:18 39632:18 39647:22 39648:22 39664:23 39665:24 39670:22 39672:10,13 39679:7 39681:19,21 39690:5 39719:11 Seedat 39675:16 39676:9 39680:11,21 39681:19 39704:20 39707:9 Seedat's 39676:13 39705:2 39706:14 39707:15 seek 39622:8,9 seeking 39613:8 seen 39635:9 39669:11</p>	<p>39679:24 39689:16 39692:21 39696:5,8 39719:14 sees 39634:15 Segalala 39690:17 seized 39629:13 39686:5 selectively 39620:19 self 39656:4 39666:2,6 self-defence 39637:10 39637:11 39656:3,9 sell-out 39711:19 Semenya 39591:8,9 39596:11 39597:21 39598:1,3,19 39601:2 39602:12 39604:24 39606:10,19 39607:9 39608:10,23 39609:22 39610:8,16 39614:4,22 39615:12 39615:17 39616:3 39618:12 39620:7,11 39621:21,25 39624:5 39624:17,19,22 39628:1,4,8,13,14,20 39629:24 39630:13 39630:22 39632:13 39632:17 39634:3 39635:3 39637:16 39640:10,22 39643:9 39643:15,18 39644:3 39644:21 39645:7 39646:14 39649:10 39650:23 39655:12 39656:18 39657:5,16 39662:18 39664:9 39665:15,20 39668:21 39686:16 39716:14 Semenya's 39644:1 39651:4 semi-automatic 39645:11 sends 39687:7 senior 39653:17 sense 39647:11 sensible 39613:24 39678:2 39713:14,16 sent 39600:6 39682:21 39688:3 39695:14,25 sentence 39657:3 39658:25 39663:3,5 39666:9 sentenced 39659:2 sentiment 39643:22 separate 39630:4 39672:20 39673:25 39674:3 39694:10 39696:9 separated 39619:12 separately 39630:5 separating 39619:19 separator 39635:22,23 39636:13 serious 39640:6 39664:10 39674:9</p>	<p>39691:11 seriously 39695:8 serve 39610:19 39715:9 service 39599:17 39603:11 39639:22 39640:5,18 39709:7 39716:1,4,7,15,16,22 services 39643:19 39663:18 39682:19 39704:23,23 39707:16,17,21 39708:1 39716:17 session 39599:8 39697:20 sessions 39698:2 set 39627:11 39668:2 39689:25 39695:12 settings 39616:25 settlement 39603:10 39613:13 39619:6,8 39619:13,13,16,21,21 settlements 39680:5 seven 39656:19 39665:22 39670:13 39690:5,9 seventh 39671:7 shape 39639:8 shared 39623:13 sharp 39591:13 she'd 39695:24 She'll 39717:22 She's 39694:16 shift 39704:10 shock 39597:1 39697:18 shoot 39597:16 shooters 39692:16 shooting 39593:6,9 39616:21 39638:24 39687:12 39688:22 39692:18,20 shootings 39686:21 39687:4,12,13 shop 39717:4 short 39591:5 39605:11 39640:25 39660:23 39694:24 39698:22 39698:22 shortage 39676:12 shortly 39593:25 39688:14 shot 39597:12 39598:6 39598:10 39615:22 39656:7 39687:21,22 39687:24 39688:10 39688:15 shoulders 39625:11 39627:22 shouldn't 39618:11 39696:19 39697:10 39712:20 39714:18 show 39593:3,15 39601:4 39616:25 39619:8 39671:12 39681:23 39682:1,20 39684:8 39690:19</p>	<p>39717:11 showed 39688:12 39711:16,21 shown 39711:10 shows 39592:16 39593:18 39663:17 39671:18 39679:6 39682:5,7,12 side 39595:8 39605:3,4 39605:12 39606:15 39606:22,24 39611:18,19,19,20 39619:9,20 39621:11 39630:17 39657:23 significance 39591:17 39625:7 39690:22 significant 39618:16 39718:4 significantly 39718:16 similar 39635:7 39643:22 39654:13 similarly 39591:15 39609:2 simple 39645:3 39708:25 simply 39602:4 39645:19 39704:21 sincere 39661:24 Singh 39669:16 singing 39665:19 39666:3 single-sex 39627:15 Sir 39711:9 sitting 39660:10 situation 39594:10 39599:14 39607:17 39607:19 39610:3 39614:15,16 39645:3 39673:14 39677:9 39679:17 situational 39702:15 situations 39591:21 six 39623:9 sixth 39671:6 slightly 39608:15,17 39639:14,14,17 slip 39652:6 slogan 39670:2 SLP 39675:10,17 39678:16 39682:8,24 small 39643:24 39644:18 39704:3 smaller 39591:16 39707:21 smoke 39708:4 SMSs 39672:23 sniper 39594:4 social 39626:2,11 39627:11 39674:22 society 39626:16 soft-skin 39709:5 solace 39609:13 solid 39617:1 Solomon 39658:14 Solomonic 39658:16 somebody 39631:11</p>	<p>39674:16 somewhat 39599:7 39630:1 39643:9 sorry 39598:2 39607:16 39624:16 39627:25 39641:3 39651:7 39667:23 39673:16 39689:14 39702:5 39703:8 39704:15 39712:14 sort 39595:12 39633:13 39645:6 39672:9 39686:9 39695:1 sought 39609:11 39711:11 sound 39614:20 39631:21 source 39614:11 39715:5 sources 39679:7 South 39597:5,15,15,24 39599:13 39603:11 39623:21 39625:15 39625:18 39626:1,5 39627:19 39639:8,22 39643:18 39661:19 39663:7,18 39668:12 39669:22,25 39716:15,17,22 southern 39611:19 so-called 39646:6 39652:17 space 39607:6 spark 39645:23 spawned 39626:16 spawns 39616:8 speak 39612:10 39622:6 39637:1 39661:23 39664:2 39675:15 speaking 39623:20,23 39632:19 39717:2 speaks 39696:9,13 spear 39665:6 spears 39683:22 special 39640:16 specialised 39631:16 specific 39673:25 specified 39683:21 specify 39683:10 39690:7 spectrum 39630:17 speculated 39652:20 speech 39633:12 spell 39610:2 spend 39688:1 spin 39675:18 39706:14 split 39659:13 39670:12 spoken 39643:8 39666:12 spontaneity 39636:5,8 spring 39692:15 spun 39673:14 spurious 39682:6</p>
---	--	---	---	--

<p>squad 39659:7 squalor 39678:17 39680:2 SS 39610:8 stacks 39708:4 staff 39709:3,3 stage 39595:5 39596:8 39628:1 39634:15 39641:4,5 39646:4 39653:8,11,13,13 39687:15 39698:23 stages 39653:12 stakeholders 39624:25 stamp 39684:23 stamped 39685:6 stance 39712:11,12 stand 39605:6 39617:19 39635:8 39642:9 39646:2 39693:6 39697:15 39698:13 standing 39609:12 39610:14 39628:25 39629:10 39665:23 stands 39615:3 39617:14 standstill 39607:23 start 39591:10 39625:14 39636:6 39645:17 39672:14 started 39591:19 starting 39703:25 39705:11 state 39597:3 39638:15 39644:2,9 39646:16 39646:18 39655:14 stated 39594:8 39595:21 39683:1 statement 39645:12 39647:21 39648:25 39653:5 39655:4 39696:2 39697:17 39710:2,6,15 statements 39692:17 statistics 39689:2,7 statue 39714:25 statute 39610:10 stay 39605:19 stayed 39604:6 step 39678:12 steward 39717:4 STF 39637:24,25 39638:2,4 stick 39664:23,24 39665:6 sticks 39665:10 Stonechild 39715:16,24 stood 39602:7 39635:13 stop 39599:15 39631:6 39634:21 39641:7 39714:3 stopped 39605:16 39609:3 39631:10,12 stopwatch 39666:19 storming 39669:13,13</p>	<p>straddled 39646:4 strange 39656:2 strategy 39673:4,8 stretched 39712:4 strict 39621:10 strike 39598:12 39634:19,21,21 39643:25 39650:22 39650:22 39651:3,6 39651:12,25 39653:2 39654:5,22,23 39655:1,15 39699:7 39706:19,22,23,25,25 39707:5 striker 39619:23 39657:25 strikers 39591:16 39592:11,12 39595:25 39597:6,17 39597:19 39598:25 39599:3,10 39603:1,9 39604:15,18 39605:9 39607:20 39608:16 39608:21 39612:5 39613:14 39614:12 39619:15 39630:9 39634:13,16,17 39635:20 39643:16 39643:25 39645:5 39647:1 39654:13,24 39656:20 39658:22 39663:24 39664:24 39666:1,10 39667:5 39684:5,19 39686:23 39688:14 39690:24 39690:25 39699:5,14 39703:13 39706:2 39707:13,14 39710:4 39710:12,17 39711:16,20 39713:15 strikes 39635:11 striking 39597:6,13,17 39597:20 39598:6,10 39650:18 39707:3 striving 39627:20 strong 39622:16 strongly 39614:9 structures 39617:1 39701:16 39711:7 stun 39592:1 39604:12 subdue 39626:12 subject 39599:19 39600:15 39609:5 39610:17 submission 39591:17 39592:14 39594:1,9 39596:12 39610:9 39611:7,13,24 39614:8,21 39616:2,3 39619:1 39624:7,8,12 39625:8,23 39626:23 39627:21 39631:17 39632:2 39636:21,24 39639:4 39645:1 39646:22 39648:23</p>	<p>39650:6 39669:10 39671:8 39673:15 39674:8 39679:21 39680:6 39681:5 39684:21,23 39685:6 39689:20 39690:19 39691:2 39692:5 39693:6 39695:18 39697:23 39698:9,14 39699:12 39713:24 39713:25 39715:1 submissions 39592:7 39594:15 39609:13 39614:25 39624:11 39624:20 39625:13 39627:23 39628:15 39629:21,25 39636:17 39640:21 39654:1 39662:21 39670:25 39671:12 39681:18 39684:1,3 39693:18 39694:19 39694:22 39700:22 39709:20 39714:23 39717:1 39718:15 submit 39599:11 39603:15 39611:10 39627:19,20 39635:15 39637:9 39638:16 39684:17 39684:18 39688:22 39694:6,13 39696:7 39710:5 39715:18 39716:9 submitted 39683:4 39709:21 39713:7,22 subsequent 39706:14 subsequently 39703:16 39703:17 subsidiary 39682:18 substance 39713:25 substantially 39613:20 39634:18 substantive 39716:2 substantively 39674:25 subtle 39648:5 successful 39606:3 successfully 39642:3 suffers 39594:4 suffice 39629:25 sufficient 39700:14 sufficiently 39593:11 39618:7 suggest 39606:6 39634:4 39638:14 39642:25 39654:19 39656:4 39676:20 39696:15,16 39698:7 39714:17 suggested 39606:25 39654:16,20 39656:18 39657:2,5 39662:22 39686:16 39688:6 39703:19 suggesting 39602:25 39612:13 39690:24</p>	<p>suggestion 39594:1 39606:15 39607:6 39618:10 39628:22 39629:2 39656:14 39680:7 39685:22 39686:9,14 39696:22 39697:4 suggestions 39698:4 suggests 39596:9 39616:6 39674:12 39689:14,14 summary 39634:2 39640:8 superseded 39713:23 support 39594:19 39622:8,9 39633:15 39633:22 39691:2 supporters 39684:9,20 39692:21 suppose 39597:11 39621:8 39634:17 39713:23 supposed 39653:1 39668:14 sure 39602:8,10 39609:23 39620:19 39620:24 39636:23 39643:11,16,19 39655:13 39657:2,16 39660:24 39669:21 39670:6 39673:7 39702:7 39712:9 39718:16 surely 39649:24 39652:19,20 surrender 39686:9,10 surrounded 39648:10 39648:13,14 suspended 39663:11 suspicion 39649:3 sustain 39640:6 39671:23 sustained 39671:20 switch 39704:21 system 39623:13 39663:19</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table 39601:20 39679:3 39679:6 39689:3,5,6 39689:25 39690:1 39711:8 tackle 39602:22 39622:1 tactical 39653:13 tail-end 39628:15 take 39603:8 39609:12 39621:24 39626:14 39628:1 39629:14 39640:25 39641:6,15 39642:6,15,23 39647:7 39657:1 39658:5,13 39659:11 39659:23 39660:8 39661:11,13,23 39664:4 39673:13</p>	<p>39674:19 39675:22 39678:9 39680:8 39681:22 39687:4 39690:23 39704:2 39710:12,17 39712:24 39717:2,4 39717:12,15 taken 39601:5,13 39610:21,22 39618:22 39636:18 39660:24 39661:9,14 39664:23 39680:9 39684:7,13 39685:16 39685:18,19 39706:13,14,15 39714:4,4 39719:13 takes 39645:13 39651:6 39691:24 39712:25 talk 39614:6,11 39669:14 39702:9,11 39702:17,17,19,20 39703:19 39704:5,10 39714:10 talking 39593:14 39594:12 39631:18 39645:15 39649:18 39703:2,20 39704:1 task 39693:15 39716:14 39717:8 tea 39591:4,6 39641:6 39641:11 39642:16 39642:17 team 39613:6 39639:23 39713:12 teargas 39592:1 39595:4,13 39604:7 39604:12 39619:4 39635:18,21 technical 39711:6 technique 39591:20 techniques 39591:24 39609:9 39616:23 telephone 39672:24 39687:17 television 39669:10 tell 39600:5,20 39603:18 39632:3 39651:2 39677:1 39708:24 telling 39612:24 39716:9 tells 39602:16,17 39635:8,12 39646:14 temptation 39624:9 ten 39688:4 tend 39655:3 39691:1 tension 39676:2,6 terms 39591:11 39597:3 39671:8 39674:24 39675:23 39676:15,22 39677:2 39677:11 39693:23 39694:1,6,7,18,18 39695:2 39698:15 39699:24 39701:1,2 39702:15</p>
---	---	---	---	---

<p>terrain 39611:14 territory 39644:18 test 39604:24 39676:4,5 testified 39637:17 39680:21 testimony 39681:19 39710:3 text 39687:7 39688:3 39688:11 thank 39591:10 39621:25 39624:21 39628:20 39640:22 39641:24 39642:4 39643:1,5 39655:20 39660:4,12 39662:7 39670:7,9,11,22 39699:2 39704:19 39717:9,24,24 39718:14 39719:8 thanking 39717:5 39718:1 thanks 39632:19 39643:2 39647:19 that's 39591:6 39595:15 39596:20 39597:25 39598:12 39598:13 39601:16 39608:1,23 39610:14 39611:9 39614:20,22 39616:2,3 39622:7 39624:3 39629:8,19 39632:16 39634:2 39635:22 39636:13 39639:9 39641:9,18 39644:11,24 39645:11 39648:4 39650:6,12 39651:14 39651:16 39652:9 39653:13 39654:19 39654:19 39655:17 39655:20 39657:13 39662:14 39668:4 39674:11 39676:14 39678:18 39679:16 39680:21 39683:7 39684:11 39686:25 39687:21 39697:12 39701:3,19 39702:1 39702:22 39703:7,10 39704:9 39707:14,15 39709:14 39710:5 39711:2 39712:10 39714:2 theoretical 39705:3,4 theories 39645:20,25 39646:5 39668:20 theory 39645:21 39652:17 39656:10 39668:21 there'd 39601:22 there's 39596:19 39598:5 39600:24 39609:17 39613:1 39617:21 39620:15 39629:1 39632:10 39634:9 39635:17</p>	<p>39638:9 39641:20 39656:3 39657:6,17 39660:23 39662:19 39662:25 39664:5 39667:21 39671:11 39677:20 39685:22 39687:4 39690:11 39692:1,19 39703:17 39709:10,13 39711:1 39712:10 they'd 39604:2,16 39635:2 39680:3 39706:18 they're 39597:17 39605:18,22 39658:11 39684:4 39685:10,19 39703:20 39706:23 39707:4 they've 39604:5 39635:9 39685:3 39718:8 thing 39604:4 39629:16 39633:3 39636:14 39644:3 39648:21,22 39649:16 39650:1 39657:2 39659:9 39666:5 39675:9 39685:23 39700:13 39702:16 things 39596:1 39600:8 39600:17 39601:11 39608:2,10,11 39609:24 39622:12 39623:11 39624:3 39631:14 39636:7 39638:9 39641:18 39644:15 39649:7 39667:10 39704:10 39708:2 39712:11,20 39713:4,6,7,8,13 39714:9 39718:1 think 39592:24 39595:24 39596:2,10 39597:4 39598:16 39599:25 39603:22 39609:14 39610:1 39612:19 39614:14 39616:8 39620:9 39621:2 39623:17 39624:25 39625:2 39626:15 39628:19 39633:21 39634:2,12 39637:9 39639:4,12 39639:17 39640:8 39643:2 39645:20,24 39648:1,10 39651:9 39652:4,12 39654:12 39654:15,20 39655:11 39660:4 39661:18,23 39662:5 39664:18 39665:17 39665:21,24 39668:10 39669:3 39678:3 39698:16,21 39712:8,10 39713:12</p>	<p>39715:24 39717:16 39719:14 thinking 39597:18 39614:2 thinks 39634:20 third 39595:10 39670:24 39699:7 39704:7 39709:18 thirdly 39700:14 39710:22 Thomas 39596:23 thought 39591:10 39601:4 39608:3 39637:11,13 39664:1 39666:25 39671:23 39678:11 39692:7 39696:20 39712:15 39719:10 thousand 39678:6,7,8 thousands 39685:2 threat 39592:6,9,13 39594:2,5 39609:10 39610:23,24 39611:6 39611:9 39618:2 39622:15 39700:11 threaten 39644:9 threats 39593:13 39691:6,7 three 39595:8 39620:1 39656:20 39659:10 39659:12,12 39671:15 39679:16 39682:2 39692:5 39710:7 three-quarters 39679:12 39680:1 throw 39655:14 throwing 39635:21 Thursday 39613:19 time 39591:3 39600:13 39611:1,5 39618:8 39619:15 39620:20 39632:8 39636:4 39637:6 39641:4,19 39641:20 39643:12 39645:4 39655:2 39659:19 39662:10 39662:16 39671:11 39672:1 39675:7 39681:1,14 39683:19 39684:11 39685:1 39686:23 39687:2,13 39687:18,23 39688:1 39688:3 39698:18,18 39703:12,18 39705:5 39709:15 39711:20 39716:23,24,25 39717:13,25 39719:16 timekeeper 39642:7 times 39656:13 39663:11 39681:25 39687:5,5,5,6,6 Tip 39657:23 39663:23 today 39591:4 39593:16 39598:11</p>	<p>39629:7 39650:21,22 39651:2 39660:19 39661:3,21 39662:1 39670:2 Tokota 39623:19 39665:16,20 39713:4 told 39602:3,4 39603:3 39622:20 39631:11 39632:7 39634:1 39635:6 39641:12 39643:15 39646:2,6 39651:1 39653:8,11 39661:18 39663:3,4 39702:2 39715:22 39717:4 tomorrow 39632:20 39633:9 39634:4 tongue 39652:7 tonne 39656:24 tool 39616:25 39627:17 39707:8 tools 39626:19 top 39599:12 39601:7 39632:14 39648:15 39687:3 39716:25 topic 39592:5 topics 39630:4 total 39654:19,19 39678:22 39679:8,9 39679:11 touch 39655:25 39659:9 39662:10 trade 39626:20 traditional 39622:11 39622:11 tragedy 39624:14,23 39625:8 39677:25 tragic 39673:5 39676:11 trailer 39633:13 trampoline 39636:16 transaction 39649:11 39649:16 39656:10 transcript 39686:25 39687:1 39698:5 39711:10 transcripts 39686:19 transmissions 39686:19,24 39687:1 39687:25 trap 39654:15 trapped 39648:10 traverse 39713:11 treason 39643:17,18 39644:19,23 39663:6 treasonable 39643:17 39644:8 treasonous 39643:16 treat 39716:1 treated 39683:11 39686:13 39692:14 trial 39639:10 trick 39646:14 tried 39645:20 39658:2 39710:17 39712:5 triggered 39635:19</p>	<p>triggers 39630:1 triumphantly 39684:9 trouble 39710:16 TRT 39595:1,15,24 39607:7 39608:11 39609:1 39637:7,10 39637:19 39644:23 39645:2,3 39646:21 true 39665:19 39705:25 truly 39622:25 trust 39678:10 39716:17 truth 39600:25 39717:7 try 39612:6 39622:1 39628:9 39669:7,7 39670:13 39702:12 39710:9 trying 39604:19 39623:12 39630:2 39644:6 39686:22 Tshwane 39718:2 turned 39595:10 39608:18 39623:10 39664:10,21 turning 39644:17 turns 39638:21 Twala 39610:18 two 39591:4 39597:7 39597:10 39599:8 39602:25 39608:10 39608:11 39615:8 39620:6 39621:7 39630:6,7 39640:9 39642:11,19 39644:6 39660:17 39661:2,3 39665:12,14,25 39666:7,8 39672:1,20 39673:24 39674:2 39678:21 39680:22 39681:15 39684:4,4 39688:8,16 39690:9 39690:14,16,16 39692:15 39696:9 39704:11 type 39591:19 39616:8 39634:6 39636:14 39667:20 39683:20</p> <hr/> <p style="text-align: center;">U</p> <p>UK 39623:24 ulterior 39685:12 ultimate 39697:6 ultimately 39719:9 unaware 39686:14 unblock 39606:11 39607:2 undermined 39611:23 underneath 39648:14 understand 39594:15 39594:23 39595:11 39604:2 39607:17 39612:3 39616:23 39620:13 39621:6,8 39625:16 39637:5 39639:20,25 39642:2</p>
---	---	--	---	---

<p>39646:22 39647:11 39651:8 39672:13 39694:15 39719:2 understandable 39600:20 39618:6 understanding 39594:25 39625:14 39625:24 39639:7 understandings 39598:4 understood 39595:18 39612:23 39617:25 39637:7,17 39638:5 undertake 39717:8 undertaken 39679:2 undertaking 39633:20 39634:5 39710:25 39711:11 underway 39613:6 underwent 39622:21 unequivocal 39634:5 unexpected 39638:16 unfair 39606:6 39674:25 39675:6 unfairness 39681:20 unfolding 39599:14 unfortunately 39615:22 39617:20 39661:21 39664:12 39689:4 39713:16 unfounded 39703:22 unfurling 39591:18 39599:3 39635:25 unilateral 39682:3 union 39632:23 39634:23 unions 39626:20 unique 39660:1,2 unison 39593:19 units 39631:16 39638:6 unjustifiable 39648:1 unjustified 39692:20 unlawful 39646:9 39652:25 39677:12 39677:15 39708:17 39708:22 unprecedented 39635:4 unprotected 39635:11 39707:5 unrest 39676:3 39685:3 unrolled 39598:24 unsatisfactory 39665:4 unsustainable 39675:12,13 untrue 39600:23 untruth 39612:24 39638:15 untruthful 39653:6 uphold 39598:17 urban 39616:25 urge 39641:22 39675:21 39682:22 urged 39701:24 urgency 39612:7 use 39605:1 39606:23</p>	<p>39610:10,12 39616:11 39617:1 39622:12,18 39623:22 39624:10 39631:15 39632:3 39635:18,20 39636:3 39636:22 39644:1 39654:25 39668:23 39671:24 39700:25 39701:2,7,8,8 useless 39703:20 utterances 39614:24 uttered 39593:13 utterly 39702:21</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacuum 39677:22 value 39620:15 variation 39682:11 various 39593:1 39608:2 39623:23 39718:13 vehicle 39709:8,10,12 39709:13 vehicles 39709:4,5,8 veld 39619:12,19 ventilated 39695:5 venues 39718:3 verbal 39593:13 Vermaak 39619:8 39636:19 39637:3 39638:7,11 Vermaak's 39609:8 39619:2 version 39698:10 versus 39708:18 vicinity 39688:10 victim 39687:20,22,24 39690:3 victimhood 39670:3 victims 39656:16 39668:20 39669:24 39669:25 39670:1 39671:5,14,16 39689:4 39690:16 video 39599:5 39652:5 39664:9,10,11,13,17 39664:22 39665:24 39671:18 39687:6 39691:18 videos 39684:7 view 39643:19,20 39689:9 39694:17 39695:10 39712:25 39712:25 39713:2,23 viewed 39597:1 villages 39705:19 vindicates 39619:14 violence 39632:23,24 39633:5 39654:25 39700:11,17 violent 39631:7 39636:12 39705:23 Virgin 39623:8 virtually 39611:15 visible 39670:14,20</p>	<p>39672:20 39673:4,7 39673:21 Volkswagen 39665:4 voluntarily 39634:8 voluntary 39602:19</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wages 39707:13 39711:1 wait 39602:19 wake 39610:24 walked 39623:8 walking 39664:15 want 39598:3 39601:11 39605:20 39623:12 39625:18,19 39626:1 39628:6 39632:25 39633:4 39642:15 39647:20 39654:11 39658:20 39659:9,25 39662:9 39663:1,20 39667:6,10 39668:6 39669:14,14 39686:12 39688:1 39689:8,20 39690:18 39692:13 39693:4 39704:11,15 39705:24 39707:6,12 39707:13 39709:15 39711:1,8,13,14,22 39713:11 39717:11 39718:1,1,5,12 39719:8 wanted 39606:7 39619:11,11 39629:12,16 39641:18 39642:2 39662:17 39689:19 39690:21 39691:1 39710:3,24 wanting 39689:13,15 wants 39643:17 war 39644:10,14,19 39663:10,11 39668:5 39668:22 39702:21 warned 39648:12 warning 39605:25 39606:1 39628:23,24 39629:2,18,19 39630:14 39648:9 39669:20 warnings 39662:13 39668:9,11 Warrant 39619:17,23 39671:16 wash 39693:4 wasn't 39595:19 39596:3 39605:12 39608:5 39612:24 39618:9 39620:14,15 39630:20,23 39673:20,23 39678:19 39680:11 39680:16,17 39691:3 39691:8,14,16,17,19 39691:23 39701:5,6,7</p>	<p>39705:4 waste 39620:20 watched 39669:10 water 39592:2 39595:4 39595:13 39604:8,10 39604:11,17 39623:8 39623:10 39688:6,9 way 39605:23 39606:20 39611:12 39612:11 39613:1 39614:7 39616:10,16 39630:25 39631:13 39633:18 39642:25 39646:25,25 39648:10 39655:3 39656:2 39663:24 39665:9 39667:19 39686:11 39698:8 39706:1 39707:22,23 39710:21 39711:15 39719:13 ways 39593:8 39631:3 39714:13,25 wayward 39636:7 weapons 39592:18 39593:4 39605:14 39610:10 39613:9,12 39613:12,13 39626:4 39629:13,16 39632:4 39632:20 39633:5,6 39634:21 39640:13 39649:18,22,23 39654:11,11 39670:25 39683:3,5,8 39683:9,12 39684:10 39685:9 39686:3,4,10 39692:21 39711:21 website 39672:7,9 Wednesday 39612:23 39613:25 39645:1 39648:18 39650:19 39652:12 week 39640:9 39684:6 weekend 39673:4 weight 39621:1,8,9,17 39622:3 39635:15 39639:3 39685:13 39719:3 Weldon 39661:22 39662:5 went 39593:22 39596:1 39597:1 39599:3 39607:1 39613:16 39619:4 39631:2,8 39637:9 39638:13,14 39638:15 39665:1 39697:17 weren't 39605:14 39615:9,10,19,20,22 39637:4 39686:1 39690:13 39701:17 Wesley 39642:6,8 39659:19,19,20,22 39666:20 west 39605:11 western 39606:22</p>	<p>39611:18 39682:15 39682:17 westwards 39616:20,22 we'd 39603:10 39620:11 39632:9 39639:2 39671:12 39675:21 39681:3,13 39687:25 39688:1 39693:3,9 we'll 39591:4,5 39598:16,17 39610:4 39621:4 39632:10 39634:3 39641:6 39655:5 39659:23 39675:22 39676:25 39698:19 39702:20 we're 39602:20 39607:17 39616:4 39620:17 39641:7 39654:11 39660:7 39661:10 39662:1 39677:21 39703:25 39709:4 39717:6 39718:9 we've 39591:3 39614:2 39621:17 39664:16 39668:19 39671:12 39672:1 39674:4 39678:1,5,5 39679:3 39686:23 39687:25 39690:1,2,4,15 39694:3 39697:16 39698:19 39702:6 39713:7 39717:16 39719:6 whatsoever 39675:17 what's 39654:9 39677:22 39693:24 wheel 39625:12 39627:22 wherewithal 39645:4 White 39614:15 39667:17 whitewash 39669:8 who'd 39613:6 who's 39593:6,9 39620:20 who've 39718:21 wild 39630:17 wine 39623:10 wire 39591:19 39598:24 39599:4 39607:5 39635:25 39645:6 wisdom 39606:8 39658:14,16 wise 39713:14,16 wish 39662:2 39699:3 39699:10 39717:8 witness 39600:22 39622:7 39639:13,16 39649:19,20 39664:6 39665:3,4 39675:8,14 39675:18 witnesses 39703:16 39718:25</p>
--	--	--	--	--

<p>wonderful 39662:3 Wonderkop 39684:10 39687:9 won't 39591:4 39598:18 39600:5 39620:20 39656:9 39661:12 39663:3 39677:13 39694:21 39702:3,17 39703:9 39704:1 39707:19 39719:11 word 39610:1 39636:22 words 39612:6 39624:11 39629:9 39634:4 39644:1 39648:2 39650:19,20 39652:10 39657:1 39665:9 39701:1 work 39596:23 39602:11 39603:13 39608:12,14 39631:4 39658:16 39660:2 39661:7 39677:3 39680:11 39705:15 39705:21,22,24 39706:1,9 39707:4,14 39707:22 39708:7,14 39708:25 39710:10 39710:25 39717:7 39718:4,10,21 39719:15 worked 39608:8 workers 39625:5 39627:14 39672:19 39678:1,2,18,22,24 39679:1,10,18,23 39706:22 39708:3 39710:10,25 workforce 39626:12 39678:15,22 39680:2 39704:25 39707:22 working 39626:11 39627:13 39718:8 workplace 39708:24 world 39593:15 39597:1,25 39602:16 39602:18 39632:24 39650:21 39651:1,2 39659:7 39668:13 39676:17 world's 39704:7 worse 39685:20 worst 39650:3 39690:24 worth 39641:16 wouldn't 39607:22 39609:2 39615:24 39654:21,24 39655:1 39655:13 39657:3 39663:15 39675:3 39677:16 39678:11 39696:20 39710:18 wound 39617:18 39669:18 wounds 39715:12,13 writing 39629:22</p>	<p>written 39592:7 39624:11,19 39625:13 39652:16 39657:1 39714:23 wrong 39592:14,15 39596:9,10 39600:9 39600:19 39609:10 39612:8,8 39615:14 39638:9 39657:14,15 39664:21 39678:8 39694:4 39699:16 39706:6 39713:7,8 39716:18 wrongful 39626:21 wrote 39602:8 39620:1 39677:1 <hr/> <p style="text-align: center;">X</p> <hr/> <p>X 39622:7 <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 39640:9 39662:3 years 39640:5 39644:6 39663:6 39672:1 yellow 39593:2 39687:4 yesterday 39594:9 39620:9 39641:12 39643:15 39644:22 39644:23 39656:13 39656:18 39660:23 39661:4 39669:10 39686:15 you'd 39592:23 39602:23 39607:2 39620:25 39621:2 39628:22 39635:5 39705:21 39717:17 39717:17 you'll 39605:6 39681:19,21 you're 39594:12 39598:15,16,17 39600:15 39605:2,17 39612:20 39614:20 39629:6,21 39637:14 39677:13 39681:2 39700:9 39702:21 39703:8 you've 39601:24 39610:5 39613:2,19 39614:8 39621:14 39628:18,18 39640:23 39641:15 39666:17 39691:13 <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zeffert's 39653:18 Zokwana 39612:25 39613:1,1,10 39614:3 zone 39648:8 39656:5 ZZZZ-something 39621:22 ZZZZ49 39717:23 ZZZZ6.23.068 39709:9 ZZZZ6.27 39684:7</p> </p></p></p>	<hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$607 39682:14 <hr/> <p style="text-align: center;">0</p> <hr/> <p>08:45 39591:2 09:05 39601:2 09:25 39612:12 09:45 39622:25 <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 39592:10 39593:20 39615:7 39618:19 39624:17,18 39630:2 39631:10 39638:12 39638:20 39641:7 39644:21 39647:9,24 39647:25 39648:7 39649:15,23 39650:9 39650:10 39656:1,8 39662:16 39671:2 39679:6,11 39683:17 39683:17 39686:18 39686:20 39687:4 39688:25 39689:4 39690:2,3 39691:16 39692:18 39713:9 1.1.1 39700:2 1.1.2 39700:10 1.1.4 39700:14 1.1.6 39700:19 1.5 39677:2,5 10 39599:14 39611:1,5 39641:8 39647:22 39656:18 39701:17 39701:17 10th 39665:9 39706:4,5 10% 39704:25 10-minute 39591:6 39659:24 39660:8 10:04 39628:12 10:24 39638:14 10:37 39642:1 10:57 39652:25 10000 39678:1 101 39592:7,8 11 39632:7 39642:11,11 39642:13,18 39659:20,22,23 39660:7,9 39670:16 39672:18 39673:4 39684:11 39710:23 11th 39663:25 39672:25 39673:2 39684:8 39692:23 11:22 39660:15 11:42 39671:22 1130 39679:14 12 39632:7,12,13,13,16 39671:14 39672:18 39673:5 39688:11 39703:2 39717:15 12th 39635:14 39672:25 39673:3 12:02 39685:22 12:22 39698:16</p> </p></p>	<p>12:27 39698:25 12:46 39713:10 120 39640:9 13 39593:21 39660:3 13th 39593:18 39613:24 39619:3 39637:3 39644:12 39654:10 39665:13 39666:23 39689:17 39712:24 39713:15 13.36 39684:2 1302 39697:16,18 14 39591:1 39632:14 39662:15 39673:1 39681:22 14th 39698:6 14:30 39594:20 15 39659:17 39680:20 15th 39610:21 39713:1 15:30 39594:21 15:53:50 39687:2 16 39671:14 39684:6 16th 39591:12 39592:6 39593:3,5 39594:14 39594:17 39596:14 39598:21 39610:24 39617:24 39636:11 39654:4 39656:17 39658:1 39659:5,8 39666:4 39671:5 39699:8 39709:19,23 39711:6,17 16:04:04 39687:5,15 16:08:15 39687:19 16:09:17 39687:20 16:19:47 39687:23 1633 39683:17,17 17 39660:4 39677:18 39705:12,13 17th 39695:16 17161 39679:12 173 39662:15 18 39660:3 19th 39597:8 198 39673:1 1996 39683:17,18 <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 39630:2 39638:20 39639:9 39647:24 39648:3,7,20,24 39649:8,14 39650:8,9 39656:1,1,5 39662:14 39670:24 39671:3 39674:20 39675:7 39683:21 39686:17 39686:24 39687:21 39687:22,24,24 39689:1 39690:2,3 39691:17 39692:18 2(2) 39683:7 2/3000 39591:21 20 39611:5 39642:10 39673:2 39678:7 20% 39682:14 20/20 39633:24</p> </p>	<p>2000 39679:2 2007 39681:24 2011 39681:24 2012 39593:21 39594:17 39635:6 39679:10,12 39683:14 39684:6 39685:10 39709:11 2014 39591:1 20534 39662:14 207 39715:24 21 39676:14 22 39678:8 39681:23 23 39682:1 23044 39679:9 24 39710:23 24274 39673:2 24275 39673:2 24278 39673:1 24279 39673:1 25 39662:15 39673:3 25% 39679:11,17 2551 39710:23 26 39681:4,14 262 39609:12,14 39610:1,1 39628:25 27 39682:1 39687:19 28000 39678:1,5 39679:9 289 39704:14,19 28993 39677:18 29 39682:4 292 39676:14 39705:11 296 39677:18 <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 39594:10,11,14 39625:13 39628:24 39631:5,6,8 39653:8 39653:11,13 39662:14 39677:18 3/400 39591:23 30 39682:7 300 39662:8 31 39682:12 34 39697:23 39698:11 37794 39705:1 37796 39705:1 38211 39705:11 38355 39676:14 <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 39594:10,11 39605:2 39606:22 39676:14 39678:23,25 39679:8 39679:11 40 39642:9 39663:6 400 39594:14 41 39592:8,8 39671:14 39671:15 42 39660:4 44 39671:14,15 39701:15,18 45% 39679:19,24 49 39645:24 39646:1,1</p> </p></p>
---	--	--	---	--

<p style="text-align: center;">5</p> <p>5 39626:23 39694:7,18 50 39645:10 500 39703:2,15,21 54% 39679:19 5497 39679:15 5500 39675:3 39677:24 39678:16 39679:16 39681:24 39682:2 5883 39679:11</p> <hr/> <p style="text-align: center;">6</p> <p>6 39605:3 39606:20,23 39607:5 39646:10 39673:1 681 39632:15,15</p> <hr/> <p style="text-align: center;">7</p> <p>7 39680:4 700-odd 39594:13 74% 39679:18 74.47 39679:12</p> <hr/> <p style="text-align: center;">8</p> <p>8 39662:22,25 39680:4 39694:3 80s 39685:2,4 87th 39661:25 39662:1 880 39640:5</p> <hr/> <p style="text-align: center;">9</p> <p>9 39662:23,24 39663:1 39678:23,25 39679:8 39684:6 39694:3,4,4 39694:13 39695:2,12 39698:15 9th 39610:24 39709:10 39709:12 9(2) 39606:1 39629:3 39630:10 39632:2 9(2)(d) 39610:10 9:30 39602:16,18 90s 39685:2,4</p>				
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