

# 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 54    26 FEBRUARY 2013    PAGES 5770 TO 5877

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 26 FEBRUARY 2013]  
 2 [09:32] CHAIRPERSON: The commission resumes. Mr  
 3 Phatsha you're still under oath. I think the cross-  
 4 examination from -  
 5 MR PHATSHA: Yes.  
 6 CHAIRPERSON: From AMCU, are there any  
 7 questions from, cross-examination?  
 8 MS DE VOS: There are Chair.  
 9 CHAIRPERSON: Yes please proceed.  
 10 MR SEMENYA SC: Mr Chair?  
 11 CHAIRPERSON: Yes Mr Semanya.  
 12 MR SEMENYA SC: Might I be indulged to  
 13 put to the one proposition to the witness, if I may.  
 14 CHAIRPERSON: I'm sure the  
 15 representatives of AMCU won't object. So please do so.  
 16 MR SEMENYA SC: Thank you Chair. We are  
 17 going to argue that the Mambush group to which you were  
 18 part went around the crawl with an intention to attack the  
 19 police.  
 20 MR PHATSHA: No, it was not so.  
 21 MR SEMENYA SC: Thank you Chair.  
 22 CROSS-EXAMINATION BY MS DE VOS: Mr  
 23 Phatsha I represent AMCU.  
 24 MR PHATSHA: Thank you.  
 25 MS DE VOS: I would like to ask you some

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1 questions about what happened after you went through the  
 2 crawl.  
 3 CHAIRPERSON: Sorry to get my [inaudible]  
 4 information on record.  
 5 MS DE VOS: I'll do so chair. I'm De  
 6 Vos. D-E V-O-S.  
 7 CHAIRPERSON: [inaudible].  
 8 MS DE VOS: I'm an advocate Chairperson.  
 9 CHAIRPERSON: [inaudible].  
 10 MS DE VOS: Thank you Chair. Mr Phatsha  
 11 I'm going to ask you some questions about what happened  
 12 after you went through the kraal on the 16th of August. You  
 13 gave evidence yesterday that there was a Hippo in front  
 14 causing a lot of damage, I was scared of being run over by  
 15 that Hippo. Mr Phatsha where was that Hippo?  
 16 MR PHATSHA: As I went out of the crawl  
 17 running the Hippo was, he indicates on my right hand side  
 18 running parallel to how I was running.  
 19 MS DE VOS: Why were you scared of that  
 20 Hippo?  
 21 MR PHATSHA: When people were going  
 22 passed it it would bump them.  
 23 MS DE VOS: In which direct, apologies  
 24 can you go to slide 194 of exhibit L.  
 25 MR PHATSHA: I'm looking at it, yes.

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1 MS DE VOS: Can you try and indicate for  
 2 us on that, on that map where the Nyala came from?  
 3 CHAIRPERSON: It's not a map, it's a  
 4 photograph isn't it?  
 5 MR PHATSHA: The Hippo was driving from  
 6 the direction of the kraal towards the koppie.  
 7 MS DE VOS: When you say it was bumping  
 8 people what does that mean?  
 9 MR PHATSHA: As a person is walking and  
 10 he goes pass him it bumps him to an extent that some of  
 11 them fell.  
 12 MS DE VOS: What were you doing at the  
 13 stage when the Hippo was bumping people?  
 14 MR PHATSHA: I was running towards them,  
 15 the hill to hide because I had the difficulty in running  
 16 with my, with the piece of flesh hanging from the wound.  
 17 MS DE VOS: Thank you Chair. Those are  
 18 our questions.  
 19 CHAIRPERSON: Now who is going to cross-  
 20 examine on behalf of the families?  
 21 MR NTSEBEZA SC: Good morning, Chairman.  
 22 CHAIRPERSON: You're back with us after  
 23 various other commitments. But we're not concerned with  
 24 that, you have questions for the witness, do you?  
 25 MR NTSEBEZA SC: There are just a couple

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1 of questions. Can I get indulge Chair to introduce myself  
 2 in a language that I think this gentleman will understand.  
 3 MR PHATSHA: I am from that area, a young  
 4 man from Naleni area, yes I am from Naleni, Sir. My clan  
 5 name is Nsangwe, I'm from the village, in other words the  
 6 son of Phalo.  
 7 MR NTSEBEZA SC: Yes now I just want to  
 8 establish that.  
 9 MR PHATSHA: Thank you.  
 10 MR NTSEBEZA SC: Now you, there's just a  
 11 couple of questions that I want to ask you about your  
 12 evidence when you were answering to questions put by my  
 13 colleague, Mr Semanya, and those questions were around the  
 14 identity of a person who has come to be known as Mambush.  
 15 Do you follow?  
 16 MR PHATSHA: I'm listening, yes.  
 17 MR NTSEBEZA SC: Ja and just for you to  
 18 know, I represent the families of those people who were  
 19 miners whose relatives got killed on that day, on the 16th  
 20 and Mambush has come to be known, it is common cause that  
 21 he's one of the people who died on that day. You know that  
 22 don't you?  
 23 MR PHATSHA: Yes.  
 24 MR NTSEBEZA SC: Now I understand that  
 25 Mambush was a [African language] he came from Nkanduli.

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1 MR PHATSHA: I did not know him, Sir, but  
 2 I came to know, to hear that he was a man from Nkanduli.  
 3 MR NTSEBEZA SC: Yes I thought so but  
 4 you, do you agree with me that with the passage of time he  
 5 has come to be known more by what he was wearing then to  
 6 some people knowing him by sight, he was referred to as the  
 7 man with the green blanket.  
 8 MR PHATSHA: It is so, yes.  
 9 MR NTSEBEZA SC: Yes, and if that was the  
 10 only thing to anyone like you who heard about it for the  
 11 first time in a certain place that that man is Mambush you  
 12 would associate anything green with him, sometimes  
 13 mistakenly so.  
 14 MR PHATSHA: That is correct.  
 15 MR NTSEBEZA SC: Now I want to show you  
 16 the picture that was shown by Adv Semanya to you. I'm  
 17 told, Commissioner that it's, what, exhibit L26, slide 26.  
 18 CHAIRPERSON: 26 of Exhibit LL?  
 19 MR NTSEBEZA SC: Now there is a green,  
 20 there's somebody wearing green there.  
 21 MR PHATSHA: That is the kind of clothing  
 22 he was wearing.  
 23 MR NTSEBEZA SC: Now I'll get to that  
 24 question. I just want you to take one step at a time.  
 25 MR PHATSHA: Yes sir.

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1 MR NTSEBEZA SC: Just look at the picture  
 2 very closely. Now I want to suggest to you that that green  
 3 garment is not a blanket, it is a sweater. Just take your  
 4 time, it is a sweater.  
 5 MR PHATSHA: Now that you are drawing my  
 6 attention to it, yes it is only now that I see it.  
 7 MR NTSEBEZA SC: Yes and it's not though  
 8 that he doesn't have a blanket, there is a blanket to that  
 9 green garment.  
 10 MR PHATSHA: Above the green yes he has  
 11 got a blanket.  
 12 MR NTSEBEZA SC: And it is not green?  
 13 MR PHATSHA: It's like what he is wearing  
 14 that has got the sleeves.  
 15 MR NTSEBEZA SC: What colour do you think  
 16 the blanket is?  
 17 MR PHATSHA: I have a difficulty with -  
 18 MR NTSEBEZA SC: Yes.  
 19 MR PHATSHA: I have a difficulties with  
 20 colours Mr Chairperson because of the fact that I haven't  
 21 been to school. Colours like green and the others I cannot  
 22 really say.  
 23 MR NTSEBEZA SC: Yes. Now if you look  
 24 around the -  
 25 CHAIRPERSON: To be fair to him, he may

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1 be colour blind you know.  
 2 MR NTSEBEZA SC: No I -  
 3 CHAIRPERSON: There are people who are  
 4 colour blind.  
 5 MR NTSEBEZA SC: No, no, no.  
 6 CHAIRPERSON: Can't tell difference in  
 7 colours. I don't think you have to go to school to be able  
 8 to identify colours. But if you're colour blind there's  
 9 not much you can do about it. I don't think he is colour  
 10 blind and maybe we should investigate that.  
 11 MR NTSEBEZA SC: No, yes, Chair, I  
 12 appreciate that.  
 13 MR PHATSHA: If you look around the chest  
 14 area. There is a colour there that will be, again that  
 15 [African language] is to me in English yellow oak.  
 16 MR NTSEBEZA SC: And at the back,  
 17 backside on his -  
 18 MR PHATSHA: That is a different colour.  
 19 The answer is that it is a different colour yes.  
 20 MR NTSEBEZA SC: Yes. Now what I wanted  
 21 to suggest to you is that that colour, the red colour, if  
 22 you look at it on his back and on his front and on his  
 23 chest that's a blanket that he has wrapped over the green  
 24 sweater that he wears. Can we agree on that?  
 25 MR PHATSHA: I see it yes.

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1 MR NTSEBEZA SC: Yes. Now let's go to  
 2 slide 1, what's this, L192. L192. Do you see that?  
 3 MR PHATSHA: I see it, yes.  
 4 MR NTSEBEZA SC: Now you'll notice there,  
 5 now everybody's agreed that that is Mambush, I also agree.  
 6 MR PHATSHA: It is so, yes.  
 7 MR NTSEBEZA SC: Now you will notice  
 8 there, I suggest to you that the sweater that that person  
 9 is wearing, that person is wearing a white sweater.  
 10 MR PHATSHA: I can see it, yes.  
 11 MR NTSEBEZA SC: And the green is the  
 12 blanket around his neck.  
 13 MR PHATSHA: I can see it, yes.  
 14 MR NTSEBEZA SC: Now everybody agrees  
 15 that that is Mambush.  
 16 MR PHATSHA: I understand, yes.  
 17 MR NTSEBEZA SC: Now let us look at them  
 18 when they are all dead, or as they are lying there after  
 19 they had been shot and that would be L208.  
 20 MR PHATSHA: I'm looking at it.  
 21 MR NTSEBEZA SC: Yes. You see there that  
 22 there is the person whose wearing an all green top, it's a  
 23 sweater not a blanket, where number 1 is pointing to. You  
 24 see that?  
 25 MR PHATSHA: Yes, I see it.

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1 MR NTSEBEZA SC: And that red blanket is  
2 beneath him, under his right arm.  
3 MR PHATSHA: I can see it yes.  
4 MR NTSEBEZA SC: Yes. Now next to him  
5 you see that same man you saw with a pair of dungarees and  
6 a white sweater and a green blanket.  
7 MR PHATSHA: I can see that, yes.  
8 MR NTSEBEZA SC: Now if there was any  
9 doubt that Mambush was wearing a white shirt or white  
10 sweater on that day there is, I'm told by my juniors  
11 exhibit DDD 6.4.  
12 CHAIRPERSON: DDD6.4 is the one you're  
13 referring.  
14 MR NTSEBEZA SC: Thank you Chair. Now  
15 that is a post-mortem photo of Mambush. You remember even  
16 yesterday -  
17 [09:52] MR PHATSHA: I can see it, yes.  
18 MR NTSEBEZA SC: - Mr Semenya presented  
19 to you as an indication of that person being Mambush. Do  
20 you recall that?  
21 MR PHATSHA: I remember that, yes.  
22 MR NTSEBEZA SC: Now, you can see, even  
23 colour blind as you may be and I am also guilty of that,  
24 that the sweater or shirt that he is wearing is a white  
25 shirt.

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1 MR PHATSHA: Yes, it's of a white colour.  
2 MR NTSEBEZA SC: So if we now went to  
3 where you were started to identify Mambush, and that is  
4 L206, it seems to me, and I would suggest to you and I  
5 would argue this, that the person whom you had initially  
6 identified as Mambush, for the reasons I've indicated, is  
7 in fact not Mambush, the one in the photograph 206.  
8 MR PHATSHA: Yes, Sir, I agree but it's  
9 because what he was wearing, what this person on 206 is  
10 wearing, is the similar colour to that one on the other  
11 side, though not exactly.  
12 MR NTSEBEZA SC: Yes. No, no, we are  
13 agreed about that, I mean it's a mistake that is common,  
14 that you would make.  
15 CHAIRPERSON: I think, you are not the  
16 only person who made that mistake, you don't have to be  
17 ashamed.  
18 MR NTSEBEZA SC: We had a duty to unravel  
19 the common mistake to everybody. Now, just to round off  
20 this little point, without suggesting anything else, but  
21 that photograph and I am talking about that photograph  
22 alone, there isn't anybody there who is wearing a white  
23 sweater and a green blanket.  
24 MR PHATSHA: No, nobody is wearing white  
25 there.

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1 MR NTSEBEZA SC: Now, I - to go to  
2 another point, I believe that, I don't know whether you are  
3 currently a member of the NUM or you were a member of the  
4 NUM.  
5 MR PHATSHA: I am no more a member of the  
6 NUM.  
7 MR NTSEBEZA SC: But around the - when  
8 you got injured, you were still a member of NUM.  
9 MR PHATSHA: I was until December last  
10 year all along been a member of the NUM, since I started -  
11 since my arrival around Gauteng.  
12 MR NTSEBEZA SC: Which was when?  
13 MR PHATSHA: It was in 1982.  
14 MR NTSEBEZA SC: So you have been  
15 virtually as long a member of NUM as the organisation  
16 itself, that's just about 30 years, isn't it?  
17 MR PHATSHA: It is so.  
18 MR NTSEBEZA SC: So for 30 years, you  
19 owed your loyalty to NUM.  
20 MR MAHLANGU: He said, "yes, I loved the  
21 NUM. The reason I left was," and then he was stopped by  
22 counsel.  
23 MR NTSEBEZA SC: Yes, because the  
24 question I was simply asking is, you agree then that you  
25 have been a loyal member of the NUM for 30 years.

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1 MR PHATSHA: It is so.  
2 MR NTSEBEZA SC: And your, out of your  
3 salary there was an amount that was deducted as for  
4 subscription for membership of the NUM, for that number of  
5 years.  
6 MR PHATSHA: Yes, totally yes, for all  
7 the years deduction was made from my salary for membership.  
8 MR NTSEBEZA SC: Now, when you got  
9 injured in the manner in which you have told the Chairman  
10 and the Commissioners, did you get hospitalised?  
11 MR PHATSHA: Yes, I was admitted in the  
12 hospital.  
13 MR NTSEBEZA SC: Do you know if anybody  
14 from the NUM visited you in the hospital?  
15 MR PHATSHA: Nobody came.  
16 MR NTSEBEZA SC: Have they ever contacted  
17 you in any way, NUM members?  
18 MR PHATSHA: Not a single person.  
19 MR NTSEBEZA SC: I can tell you as a  
20 fact, that in this Commission my learned brother, Karel  
21 Tip, is a lawyer from NUM. Have you ever been offered any  
22 legal assistance by NUM, as a loyal card carrying member of  
23 30 years?  
24 MR PHATSHA: Not at all.  
25 MR NTSEBEZA SC: Thank you very much, Mr

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1 Chairman, Commissioners, that's our cross.  
 2 CHAIRPERSON: Thank you. Anyone else  
 3 wish to ask anything in cross-examination of the witness,  
 4 before I ask Mr Mpfu, if he wishes to re-examine?  
 5 MR MOTAU SC: Chair, perhaps just to go  
 6 back to the issue that was outstanding at the time when I  
 7 finished my cross-examination.  
 8 CHAIRPERSON: You reserve your rights to  
 9 start cross-examination again.  
 10 MR MOTAU SC: I am advised -  
 11 CHAIRPERSON: You may do so.  
 12 MR MOTAU SC: No, Chair, I am advised by  
 13 the evidence leaders that they have not been able to locate  
 14 the video, which they call the – Mr Chaskalson's videos,  
 15 and they are still looking for it, so we haven't made much  
 16 progress, Chair. I will probably advise the Commission at  
 17 a later stage, what is to occur.  
 18 CHAIRPERSON: You are still reserving  
 19 your rights, that is duly recorded.  
 20 MS PILLAY: Chair, just to clarify the  
 21 position. We have established that the video clip that Mr  
 22 Motau was looking for is not one of the exhibits that were  
 23 on Mr Chaskalson's compilation, but I did have a word with  
 24 Mr Chaskalson, and he recalls having seen the video on one  
 25 of the hard drives, he just couldn't find it at that

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1 particular time and he said he will revert once he finds  
 2 the particular video clip we are referring to.  
 3 CHAIRPERSON: You will have to be content  
 4 with that, Mr Motau.  
 5 MR SEMENYA SC: Chair –  
 6 CHAIRPERSON: Yes?  
 7 MR SEMENYA SC: Chair, just for the  
 8 record, we placed on record that there are 19 Nyalas on the  
 9 day of the 16th, so we should not be assumed to accept as  
 10 correct the evidence that there was a Nyala bumping people  
 11 around, it is just that I can't cross-examine without  
 12 consulting 19 drivers of Nyalas to see if that is factually  
 13 accurate. We just place it on record.  
 14 CHAIRPERSON: Yes, I understand. You can  
 15 of course consult them or have someone consult them, a team  
 16 of people consulting them, if necessary you could recall  
 17 the witness to deal with this issue, if you consider it  
 18 important enough. So, no further cross-examination.  
 19 Before Mr Mpfu re-examines, Adv Hemraj, would like to ask  
 20 some questions.  
 21 COMMISSIONER HEMRAJ: The informal  
 22 settlement Nkaneng, there are other points of access to the  
 23 settlement, apart from the one directly behind the police  
 24 line.  
 25 MR PHATSHA: There was only one visible

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1 entrance at the time. As one goes towards the kraal, the  
 2 kraal is surrounded by wire, and there was no entrance  
 3 there, except the road that we intended taking.  
 4 COMMISSIONER HEMRAJ: I understand that,  
 5 but apart from that entrance, are there other entrances to  
 6 the settlement at other points, around the settlement?  
 7 MR PHATSHA: There was one straight way  
 8 past the kraal into the road that leads Nkaneng. The one  
 9 next to the kraal, that was surrounded by wire and one  
 10 could not go through there.  
 11 COMMISSIONER HEMRAJ: Apart from that  
 12 entrance, are there other entrances, other points of  
 13 access, any other place around the settlement?  
 14 MR PHATSHA: There was no other way  
 15 because the place had been surrounded by the police.  
 16 COMMISSIONER HEMRAJ: Is the settlement  
 17 surrounded by a fence or a wall at all?  
 18 MR PHATSHA: It's the kraal that is  
 19 surrounded by a fence, and then next to it there is a road  
 20 which leads straight to the shack settlement.  
 21 COMMISSIONER HEMRAJ: Is the shack  
 22 settlement surrounded by a wall or a fence at all?  
 23 MR PHATSHA: Each and every shack is  
 24 surrounded by its own fence.  
 25 COMMISSIONER HEMRAJ: The entire

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1 settlement, has that got a wall or a fence around it?  
 2 MR PHATSHA: There is no such a fence.  
 3 COMMISSIONER HEMRAJ: Now from where you  
 4 were on the mountain, the police line up, was that clearly  
 5 visible to you?  
 6 MR PHATSHA: Yes, very clear.  
 7 COMMISSIONER HEMRAJ: And you could see  
 8 the number of policemen standing very close together in a  
 9 line.  
 10 MR PHATSHA: They stood in that one line  
 11 after closing up with the barbed wire.  
 12 COMMISSIONER HEMRAJ: And you could also  
 13 see from where you were on the mountain all the police  
 14 vehicles lined up there as well.  
 15 MR PHATSHA: Yes, they were visible.  
 16 COMMISSIONER HEMRAJ: Now, if you'd be so  
 17 kind as to look at slide L206 please. You've told that you  
 18 were part of that group.  
 19 MR PHATSHA: Yes.  
 20 COMMISSIONER HEMRAJ: And at that stage,  
 21 that's depicted on that slide, you were trying to get to  
 22 the settlement, to the entrance to the settlement.  
 23 MR PHATSHA: It is so.  
 24 COMMISSIONER HEMRAJ: And when we looked  
 25 at the video yesterday, that group, all of you were walking

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1 very closely together, slightly bent over.  
 2 MR PHATSHA: A person walks away in a  
 3 manner in which he deems fit, the way he thinks.  
 4 COMMISSIONER HEMRAJ: Yes, I appreciate  
 5 that. I am just saying to you that when we were here  
 6 yesterday, showing that scene up there n that slide 206,  
 7 the group of which you were part of were all walking  
 8 together, slightly bent over, but walking, walking at that  
 9 stage.  
 10 MR PHATSHA: I agree.  
 11 COMMISSIONER HEMRAJ: And from that  
 12 point, you were even closer to that line up of policemen  
 13 and police vehicles, that you were able to see from your  
 14 spot on the mountain.  
 15 MR PHATSHA: The police were there.  
 16 COMMISSIONER HEMRAJ: And it would have  
 17 been clearer to you from this closer position there on the  
 18 mountain, how many policemen and how many vehicles were  
 19 lined up there in front of you.  
 20 MR PHATSHA: You could see them, yes.  
 21 COMMISSIONER HEMRAJ: And you told us  
 22 yesterday that you intended to go through that police line  
 23 towards the entrance to the settlement.  
 24 MR PHATSHA: No, I did not say that. I  
 25 said, we were on our way to the road that would lead us to

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1 the settlement.  
 2 COMMISSIONER HEMRAJ: And that road, Sir,  
 3 was behind the police line.  
 4 MR PHATSHA: In what way?  
 5 COMMISSIONER HEMRAJ: The entrance to  
 6 that road was behind where the police were standing.  
 7 MR PHATSHA: No, that I did not observe.  
 8 COMMISSIONER HEMRAJ: Thank you.  
 9 CHAIRPERSON: My colleague, Adv Tokota,  
 10 also wishes to ask some questions.  
 11 COMMISSIONER TOKOTA: Mr Mambush, I got  
 12 the impression yesterday that – I am sorry, Mr Phasha, I am  
 13 very sorry, I got the impression yesterday that in order  
 14 for you to get into the informal settlement, you would have  
 15 to go through the line of police.  
 16 [10:12] MR PHATSHA: We had no way of going  
 17 through the police because our way was blocked and turned  
 18 away and ran towards the kraal.  
 19 COMMISSIONER TOKOTO: So the road to the  
 20 informal settlement was clear. There was no impediment in  
 21 other words for you to get there.  
 22 MR PHATSHA: I'm sorry, Sir?  
 23 COMMISSIONER TOKOTO: There was no  
 24 impediment for you to get to the informal settlement after  
 25 you had gone around -

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1 MR PHATSHA: Mr Chairperson, we left the  
 2 idea of getting to that road because of the blockage, it  
 3 was closed we could not go through and that is the reason  
 4 we turned towards the kraal.  
 5 COMMISSIONER TOKOTO: So if you had had  
 6 to turn around the kraal there was no blockage whatsoever  
 7 for you to get to the informal settlement?  
 8 MR PHATSHA: The police were the only  
 9 blockage there. When we turned around the kraal the police  
 10 were there and then they started firing.  
 11 CHAIRPERSON: Would you please look at  
 12 slide 198 in the exhibit bundle? That could be shown to  
 13 you.  
 14 MR PHATSHA: 198?  
 15 CHAIRPERSON: Yes 198.  
 16 MR PHATSHA: I can see it there.  
 17 CHAIRPERSON: Do you see Mr Nortje or  
 18 Mambush on that slide?  
 19 MR PHATSHA: I see a blanket similar to  
 20 the one that he was wearing.  
 21 CHAIRPERSON: Where is that?  
 22 MR PHATSHA: He is walking next to the  
 23 Hippo. Next to the Nyala.  
 24 CHAIRPERSON: Where do we see him, where  
 25 on the Hippo where in line with the Hippo.

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1 MR PHATSHA: He is in front but not much  
 2 he's in front of the people but not much.  
 3 CHAIRPERSON: He's the person walking in  
 4 front of the Hippo, the person on the extreme left of the  
 5 photograph.  
 6 MR PHATSHA: It looks like him.  
 7 CHAIRPERSON: There's someone else who  
 8 might be, Mr Noki and that's if you look at the coils of  
 9 barbed wire just at the rear section of the, Nyala the rear  
 10 section just behind or in line with a point behind the  
 11 coils of barbed wire there's someone with dungarees and a  
 12 white sweat shirt and what looks like a green blanket over  
 13 his left arm in the forefront of the picture.  
 14 MR PHATSHA: I'm look at it yes, Sir.  
 15 CHAIRPERSON: Could that also be Mr Noki?  
 16 MR PHATSHA: I cannot only recognise the  
 17 man who is wearing the blanket, there he is not wearing it.  
 18 COMMISSIONER HEMRAJ: Would you just stay  
 19 at that same slide please at slide L198. You told us  
 20 yesterday that the group were singing and chanting when you  
 21 were walking alongside the Nyala.  
 22 MR PHATSHA: It is so yes.  
 23 COMMISSIONER HEMRAJ: And that you were  
 24 waiting for the employer to arrive.  
 25 MR PHATSHA: I'm still saying that.

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1 COMMISSIONER HEMRAJ: At that stage it  
 2 would have been easy for the group to access the entrance  
 3 to the settlement?  
 4 MR PHATSHA: We were waiting for the  
 5 employer.  
 6 COMMISSIONER HEMRAJ: I understand that,  
 7 but at that stage, before all the barbed wire had been  
 8 deployed it would have been easy for that group to access  
 9 the settlement.  
 10 MR PHATSHA: We would have done that if  
 11 the employer had come and responded to our demands.  
 12 COMMISSIONER HEMRAJ: Does that mean yes  
 13 it would have been easier at that stage to access the  
 14 settlement?  
 15 MR PHATSHA: Maybe I'm not understood.  
 16 COMMISSIONER HEMRAJ: At that point when  
 17 your group was next to the Nyala all the barbed wire had  
 18 not been deployed. Had the group wished at that stage to  
 19 proceed towards the settlement it would have been easier to  
 20 do so.  
 21 MR PHATSHA: It wouldn't have been easier  
 22 for us to do so, this is before the employer came to  
 23 respond to our demands.  
 24 COMMISSIONER HEMRAJ: Thank you Mr  
 25 Phasha.

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1 MR PHATSHA: Thank you.  
 2 CHAIRPERSON: While we're still looking  
 3 at that slide 198, you are obviously part of that group  
 4 depicted on the slide although I take it it's not possible  
 5 for us to identify you, is that correct? See if you can  
 6 see yourself on the photograph.  
 7 MR PHATSHA: I am in the group, yes.  
 8 CHAIRPERSON: Can you see yourself in the  
 9 picture?  
 10 MR PHATSHA: I would not be able to  
 11 identify because of the number.  
 12 CHAIRPERSON: Now according to what the  
 13 police have told us just after that photograph was taken  
 14 water canons started spraying the strikers who were coming  
 15 forward and stun and tear grenades were fired, rubber  
 16 rounds were fired as well. Can you confirm that that's  
 17 what happened to the people who were there, depicted in  
 18 that photograph?  
 19 MR PHATSHA: No it's not true.  
 20 CHAIRPERSON: Not true. You see because  
 21 what the police say and I'm checking whether that's correct  
 22 by asking you these questions is that - I'll read you the  
 23 relevant paragraphs from slide 199. "Water canons started  
 24 spraying the attacking protestors" they say you were  
 25 attacking, you deny that but "water canons started spraying

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1 the attacking protestors to prevent them from entering the  
 2 police enclosure, this action had no effect on the  
 3 protestors and kept," I take it that to be "they kept on  
 4 coming forward. Public order policing members applied the  
 5 less lethal methods including stun and tear grenades,  
 6 firing of rubber rounds within the force continuum in an  
 7 effort to stop and disburse the group of attacking  
 8 protestors. This gave Nyala 4, that's the Nyala on the  
 9 photograph time to close the gap with the remaining barbed  
 10 wire." Now I take it that you say that that's not correct.  
 11 MR PHATSHA: We did not attack the  
 12 police, we did not start attacking. They were standing  
 13 quite a distance away from us with the Nyalas there. The  
 14 police only started shooting after they had enclosed the  
 15 place with the barbed wire.  
 16 CHAIRPERSON: No but the passage I read  
 17 you didn't relate to the police shooting you. It related  
 18 to stun and tear grenades being fired, rubber bullets being  
 19 fired and water canons being used - did that happen while  
 20 you people were at the place which we see depicted on slide  
 21 198.  
 22 MR PHATSHA: No it is not so, Mr Chair.  
 23 CHAIRPERSON: I got the impression that  
 24 you said yesterday that it was at that point that the  
 25 police started spraying you with water and subjecting you

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1 to tear gas.  
 2 MR PHATSHA: No that I did not say.  
 3 CHAIRPERSON: I see alright. If I  
 4 understood you to say that then I have misunderstood you.  
 5 MR PHATSHA: I would not know that.  
 6 CHAIRPERSON: Then I must put you for the  
 7 sake of completeness - in slide 199 that you said that  
 8 during this incident, the incident which I have - the  
 9 description which I have read to you, he said in this  
 10 incident various shots were fired from the protestors at  
 11 the police Nyala. Is it possible that one or some of the  
 12 strikers may have fired shots at the police Nyala at that  
 13 stage?  
 14 MR PHATSHA: That I did not observe.  
 15 CHAIRPERSON: Thank you. Mr Mpofo are  
 16 you now ready to proceed with your re-examination?  
 17 RE-EXAMINATION BY MR MPOFU: Thank you  
 18 Chairperson. Good morning Mr Phasha.  
 19 MR PHATSHA: Morning Sir.  
 20 MR MPOFU: How are you today?  
 21 MR PHATSHA: I'm healthy, no problems and  
 22 how are you.  
 23 MR MPOFU: No we're all right thank you.  
 24 CHAIRPERSON: Now that we have had the  
 25 medical bulletins for the day are over can we carry on

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1 with the evidence?

2 MR MPOFU: I'm fine thank you, I'm also

3 fine Mr Chairperson, I'm also going to ask you a few

4 questions. Let's start with the issue that was dealt with

5 just now. On the 16th this process of people singing and

6 moving up and down which you described, going back to the

7 koppie singing and so on, for how long did that take place?

8 MR PHATSHA: I would not be with precise

9 with the time Sir, but it happened several times, the

10 singing, going and going back to the mountain and singing

11 again all the time waiting for our employer.

12 MR MPOFU: There is footage which I

13 cannot access now which shows that happening around about

14 11:00 in the morning. Could it have started that long

15 back?

16 MR PHATSHA: It could be so, yes.

17 MR MPOFU: So if that happened so many

18 times over so many hours would it be possible for you from

19 one still frame to identify which of those several times

20 you are going up and down?

21 MR PHATSHA: No, I would not be because I

22 was one of those people going up and down so I would not be

23 able to say who of the group went up and down all the time.

24 MR MPOFU: Thank you. Then you have been

25 questioned about this so called police lying. Can you go

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1 to slide number 191?

2 MR PHATSHA: I'm looking at it, yes.

3 MR MPOFU: Now can you see between the

4 Nyala, there's one, two, three, four, five Nyalas with a

5 yellow line between the kraal and the those five Nyalas

6 which is marked 50 metres? Can you see that?

7 MR PHATSHA: I can see it.

8 MR MPOFU: Right. Now -

9 CHAIRPERSON: That one on the screen

10 hasn't got the yellow lines there.

11 MR MPOFU: Oh of course, the one that you

12 have in front of you.

13 MR MPOFU: For other people yes. Okay.

14 CHAIRPERSON: He must obviously look at

15 the hard copy, the slide doesn't show what -

16 MR MPOFU: I see, Chairperson. Alright

17 for the benefit of those people who don't have this copy

18 you'll the Nyalas, there's a first line of Nyalas and I

19 should have seen these are the barbed wire Nyalas, then

20 there's another - behind that there's a kind of a semi

21 circle of Nyalas. Can you see that?

22 MR PHATSHA: I can see that, yes.

23 MR MPOFU: Now the 50 metres I'm talking

24 about is between the kraal and the foot of the horseshoe so

25 to speak. No if you look at this one. If you look at the

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1 one in front of you you'll see the yellow line is between

2 the kraal and that foot of the horseshoe. Do you see that

3 yellow line?

4 MR PHATSHA: I can see it yes.

5 MR MPOFU: Right. Now at that stage can

6 you see that there are many people on the road that you

7 have testified about?

8 [10:32] MR PHATSHA: Yes, these are people

9 walking from the shack settlement towards Marikana. That's

10 the road they use.

11 MR MPOFU: No, Mr Phasha, can you see

12 that there are many people on that road, now? In front of

13 the kraal. I know they are too small, you can look

14 carefully.

15 MR PHATSHA: There are people visible in

16 the slide, yes but people who were walking from the shack

17 settlement going past there.

18 MR MPOFU: Okay, let me put it this way,

19 Mr Phasha. It is common cause - it will be common cause,

20 that at that stage, the barbed wire was in the process of

21 being pulled. In fact, if you go to slide 197, that

22 becomes clearer. That picture at 197 is exactly the same

23 one, at exactly the same time as the one at 191. The time

24 on both pictures is exactly 15:40 and on the one at 197,

25 you can see 1, 2, 3, 4 arrows of the Nyalas which were

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1 pulling the barbed wire.

2 MR PHATSHA: I can see it.

3 MR MPOFU: So we can accept that it will

4 be common cause that when that picture was taken, the

5 barbed wire was more than, it was in fact, I think three or

6 four of the Nyalas had pulled the barbed wire, and I would

7 assume people had started running away.

8 MR PHATSHA: It is so, yes.

9 MR MPOFU: Now, if - now that I've given

10 you that information, what would you think the direction of

11 the people that you see running on that road in front of

12 the kraal, which way would they be running to?

13 MR PHATSHA: They would run towards, back

14 towards the settlement.

15 MR MPOFU: Thank you. And so we know

16 that by 15:40 that road was not, was accessible to

17 everybody, it was not part of any so-called police line.

18 MR MAHLANGU: Was not accessible? Was?

19 MR MPOFU: Was accessible, and people

20 were using it actually.

21 MR PHATSHA: Yes, it was.

22 MR MPOFU: And from the people who were

23 still at the koppie all this was visible because it's

24 elevated, you could see these people using that road.

25 MR PHATSHA: It is so.



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1 MR MPOFU: Thank you. Now, let's go to  
 2 the – let's still talk about that road, from the questions  
 3 that you were asked by Commissioner Tokota. Can you help  
 4 the Commission with this, when the police shot at the group  
 5 for the – I am talking about the rain of fire, the volley  
 6 of fire that was directed towards the strikers, were the  
 7 police on the kraal side of that road, or over that road?  
 8 MR PHATSHA: They were on the other side  
 9 of the wire.  
 10 MR MPOFU: Of the road? I am asking in  
 11 relation to the road, sorry. Were they over the road, the  
 12 people were coming behind the kraal, or were they on the  
 13 nearer side of the road? In other words, okay, let me put  
 14 it this way, if you had to go and greet one of them, would  
 15 you have had to cross the road?  
 16 MR PHATSHA: They were on the other side  
 17 of the wire.  
 18 MR MPOFU: Okay. I am asking about the  
 19 road, Mr Phasha.  
 20 MR PHATSHA: They were on our side of the  
 21 road. The wire was drawn up to the beginning of the kraal.  
 22 MR MPOFU: Okay, I am sorry, maybe it's  
 23 my mistake, yes. Alright, let's then start there, you are  
 24 saying that when you were accessing the road for the first  
 25 time, was the wire, the wire was in front of you, is that

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1 what you have been saying?  
 2 MR PHATSHA: Yes.  
 3 MR MPOFU: Right, okay. Now let's leave  
 4 that part. Then after that, you then go around the kraal,  
 5 correct?  
 6 MR PHATSHA: It is so.  
 7 MR MPOFU: And then which one was nearer  
 8 to you, the police who were shooting in the line, or the  
 9 road, after you went behind the kraal?  
 10 MR PHATSHA: Immediately we came from  
 11 behind the kraal, the police immediately shot at us.  
 12 MR MPOFU: Yes, and were they standing –  
 13 where were they standing? Was the road before them or was  
 14 the police before the road?  
 15 MR PHATSHA: They were on the other side  
 16 of the road.  
 17 MR MPOFU: Thank you. Now, the – you've  
 18 also been questioned, I think by Commissioner Hemraj, and  
 19 Mr Semenya, about why effectively, you did not take the  
 20 option of going towards the other kraals. Remember that?  
 21 MR PHATSHA: Just repeat that, I don't  
 22 clearly understand.  
 23 MR MPOFU: Okay, ja that's because I have  
 24 not yet asked the question. I was simply saying, you have  
 25 been questioned in general about why you did not take the

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1 option of running in the direction of the other kraals, by  
 2 Commissioner Hemraj, by Mr Mojapelo and by Mr Semenya in  
 3 different forms. Now, the question that I wanted you to  
 4 clarify is whether according to your knowledge of the  
 5 geography of the place, you could have run freely towards  
 6 the other kraals.  
 7 MR PHATSHA: There was an opening as to  
 8 run in that direction, but we wanted to run towards the  
 9 road that would lead us in the direction in which we wanted  
 10 to go.  
 11 MR MPOFU: No, Sir, you've left all the  
 12 evidence about [African language]. The witness said -  
 13 MR MAHLANGU: I am still coming to that,  
 14 Sir.  
 15 MR MPOFU: Oh.  
 16 MR PHATSHA: But then, we were stopped by  
 17 the wire whilst proceeding in that direction.  
 18 MR MPOFU: Thank you. Maybe this will be  
 19 cleared up if we go for another inspection there.  
 20 Actually, no, I will clear that with another witness who is  
 21 more familiar with that place, but anyway you said that  
 22 there was something. Now, this –  
 23 MR PHATSHA: Yes.  
 24 MR MPOFU: So was the – apart from the  
 25 gap, or let me put it this way, between the kraal, excuse

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1 me Chairperson, I am trying to find an appropriate slide.  
 2 Let's look at 209. You see that on the northern side or on  
 3 the side closer to Nkaneng, there is a kind of stand alone  
 4 shack, which you can see in front of the road.  
 5 CHAIRPERSON: The shack we can see on 208.  
 6 MR MPOFU: Oh, yes, thank you,  
 7 Chairperson. Exactly. And yes, is that the same shack  
 8 that you can see on 208, actually 208 is a better position.  
 9 MR PHATSHA: Yes, it's the same shack.  
 10 MR MPOFU: Yes, and in fact – thank you,  
 11 Chairperson, 208 covers, my next question was whether that  
 12 area is also fenced in, which is much clearer in 208.  
 13 MR PHATSHA: The place is fenced off,  
 14 yes.  
 15 MR MPOFU: Yes. Now, between the corner  
 16 of that fence, and the kraal, is about 20 metres, according  
 17 to my unscientific measurement, I measured it there, you  
 18 were there as well.  
 19 MR PHATSHA: It is so, yes.  
 20 MR MPOFU: Now, apart from that gap was  
 21 there any other way for you to access the road to Nkaneng?  
 22 MR PHATSHA: There was none.  
 23 MR MPOFU: Right. And is it true that  
 24 when the shots started, the volley of shots was sprayed on  
 25 the protesters, was it before or after you had reached that

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1 road?

2 MR PHATSHA: We had already turned around

3 the kraal, then the firing started.

4 MR MPOFU: Had you reached the road?

5 MR PHATSHA: Before reaching the road.

6 MR MPOFU: Thank you. And if you had

7 reached the road, what would you have done once you got

8 there?

9 MR PHATSHA: There was nothing we were

10 going to do, save to say we were running away towards the

11 settlement. That's all.

12 MR MPOFU: Okay, maybe I put it different

13 – in a difficult way by saying what would you have done?

14 Let me just say, when you had reached the road, what would

15 have been your movement into what direction?

16 MR PHATSHA: Straight towards the shack

17 settlement.

18 MR MPOFU: Thank you. Now, whilst you

19 are there, just a quick one, there was an issue about your

20 evidence, using – of using the bush knife to cut wood,

21 remember that?

22 MR PHATSHA: It is so, yes.

23 MR MPOFU: Yes. Now, the – we see just

24 here, in these pictures that we have dealt with you see

25 three kraals, at least. Those kraals, do you know where

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1 there – and they are all bush kraals, is that correct?

2 MR PHATSHA: We cut those thorn trees

3 with our bush knives, build the kraals for our cattle.

4 [10:52] MR MPOFU: Thank you, Chairperson.

5 CHAIRPERSON: - bush kraal, but I think

6 the answer is, is it's a kraal made from thorn bushes that

7 have been cut with the knives. I think the answer came out

8 before I had a chance to put my problem.

9 MR MPOFU: Thank you, Chairperson, thank

10 you very much. And those people who would be in those

11 kraals do you know where they get their wood, the bushes?

12 MR PHATSHA: It's in the vicinity of the

13 picket.

14 MR MPOFU: Alright. Then there was from

15 Mr Motau's cross examination, there was an issue about

16 whether or not you were present, I think the word was

17 present because that's the word you used in your statement

18 during the march of the 11th August. Do you remember that?

19 MR PHATSHA: I remember that, yes.

20 MR MPOFU: Now without picking words and

21 semantics one thing that is not defeated is that you heard

22 shots being fired on that day.

23 MR PHATSHA: I heard that, yes.

24 MR MPOFU: Yes, now can you then explain

25 to the Commission when you heard those shots all we can

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1 know is that you were within earshot of hearing shots of

2 the gunshots but can you explain to the Commission where

3 you were in relation to the area that was discussed? I

4 don't want to suggest the answer.

5 MR PHATSHA: I was quite far.

6 MR MPOFU: Okay let me put it this way -

7 all right and when using the NUM office, okay let me say

8 between the stadium and the taxi rank where would you have

9 been?

10 MR PHATSHA: Between the stadium and the

11 taxi ranks?

12 MR MPOFU: The taxi rank which is the end

13 of the road.

14 MR PHATSHA: It was before I reached the

15 side of the compound in the stadium, I'm still proceeding

16 in that direction.

17 MR MPOFU: I'm sure he didn't say he was

18 in the stadium but -

19 CHAIRPERSON: Were you at some point

20 between the stadium and taxi rank, had you not reached the

21 taxi rank?

22 MR PHATSHA: Mr Chairperson, the stadium

23 was on the other side, I went past the stadium but before I

24 reached the taxi rank.

25 MR MPOFU: Thank you very much.

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1 CHAIRPERSON: Thank you.

2 MR MPOFU: Then there was quite an issue,

3 to say the least, about there being two groupings sitting

4 at the koppies and me being the only person who didn't

5 think so. Can we go to slide number 188?

6 MR PHATSHA: 188.

7 MR MPOFU: Now would you agree that if

8 one is going to talk about distinct groupings can you see

9 that there was at least a grouping that is koppie one and

10 another grouping on koppie two? It's just for starters.

11 Let me explain first, let's just explain this Chairperson.

12 There are according to the evidence three koppies there,

13 one is the big one and then the one - there's a small one

14 next to it and then there's the one where you said there

15 was a spraying of water and so on behind both. Do you

16 understand?

17 MR PHATSHA: I understand, yes.

18 MR MPOFU: And all I'm asking at this

19 stage is can you see that the grouping of people on 188,

20 the picture is cut obviously, but who seem to be on the big

21 koppie and another group is on the smaller koppie next to

22 it? Can you see that?

23 MR PHATSHA: Depending on the

24 availability of rocks there.

25 MR MPOFU: Yes, yes and then as if that

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1 is not enough let's leave those two groupings on those two  
 2 koppies and just deal with the people who are on the ground  
 3 so to speak. Can you see that there are two groups in  
 4 front of the big koppie and maybe another two groups, if  
 5 you use the gap of the separators, in front of the small  
 6 koppies?  
 7 MR PHATSHA: People sat differently. One  
 8 would elect to sit with that group and one would select to  
 9 sit with the other.  
 10 MR MPOFU: Ja look anyway look I don't  
 11 want to belabour this but the point I'm making is that just  
 12 a casual look at that you can separate something like six  
 13 different groupings, not the two that was -  
 14 MR SEMENYA SC: - have the witness tell  
 15 us and himself tell us.  
 16 MR MPOFU: Okay fair enough. In fact to  
 17 make it - well now that -  
 18 CHAIRPERSON: Sorry, Mr Mpofo, it's  
 19 really - I don't want to stop you because I see the point  
 20 you're endeavouring to make but it's really largely a  
 21 matter of observation you know. We can observe it as well  
 22 as the witness can really by looking at the photograph.  
 23 MR MPOFU: Fair enough.  
 24 CHAIRPERSON: But there may be some extra  
 25 points you wanted to get from him seeing he was there -

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1 MR MPOFU: I have one more question,  
 2 Chair.  
 3 CHAIRPERSON: So I won't stop you.  
 4 MR MPOFU: Thank you Chairperson.  
 5 CHAIRPERSON: It's really - you know you  
 6 don't have to ask what he sees in the photograph if we can  
 7 all see it.  
 8 MR MPOFU: No, Chairperson, thank you.  
 9 I'll only ask one more question on this. Of the people  
 10 that I've called on the ground are you able to see that one  
 11 of the things that separate the sections is the road that  
 12 you say comes from Marikana to Nkaneng?  
 13 MR PHATSHA: Yes that's so.  
 14 MR MPOFU: And the situation is also the  
 15 same if you look at picture 190 which apparently is when Mr  
 16 Mathunjwa was addressing the group, the strikers.  
 17 MR PHATSHA: Yes, it is so.  
 18 CHAIRPERSON: I think we've reached a  
 19 suitable to take the adjournment will you -  
 20 MR MPOFU: Yes I think this is, I'm going  
 21 to another topic, Chairperson. Thank you very much.  
 22 CHAIRPERSON: The commission will take  
 23 the tea adjournment.  
 24 [ARBITRATION ADJOURNS ARBITRATION RESUMES]  
 25 [11:39] CHAIRPERSON: The commission resumes,

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1 you're still under oath. Mr Mpofo, you still had some  
 2 questions for the witness.  
 3 MR MPOFU: Thank you, Mr Chair.  
 4 MR PHATSHA: I was still under oath.  
 5 SIPETE PHATSHA: s.u.o.  
 6 MR MPOFU: Mr Phasha, you were also  
 7 questioned about the people that you said were washing at  
 8 the koppie, you remember that?  
 9 MR PHATSHA: Yes.  
 10 MR MPOFU: And you said something about  
 11 people who were sent to fetch the water. Where were these  
 12 people fetching the water?  
 13 MR PHATSHA: From the shanties, from the  
 14 shack settlement.  
 15 MR MPOFU: And who are these people who  
 16 were fetching the water and I think you were saying that in  
 17 relation to the question whether there were buckets there,  
 18 which you said there were.  
 19 MR PHATSHA: Anybody available there to,  
 20 would be sent to go and get water.  
 21 MR MPOFU: And then you were also asked  
 22 about the time of washing, are you able to say whether at  
 23 that time which was sort of early August, mid August what  
 24 the weather was like? Can you still remember, was it still  
 25 winter, was it already spring, was it warm, was it cold?

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1 MR PHATSHA: I'm not very certain of what  
 2 the weather conditions were.  
 3 MR MPOFU: Yes. If you consider what you  
 4 were wearing on, the top that you were wearing that assist  
 5 you in remembering whether it was cold or hot?  
 6 CHAIRPERSON: Mr Mpofo, I don't want to  
 7 interrupt unduly. What, what the weather conditions were  
 8 we can easily ascertain from the weather bureau. So you  
 9 may have a reason for asking this witness questions about  
 10 it. But if it's an issue as to whether it was cold or hot  
 11 or whatever it was on that particular day we can find out  
 12 from the weather bureau, we don't have to have a week of  
 13 conflicting evidence from a whole lot of different  
 14 witnesses as to what the weather conditions were. So you  
 15 might bear that in mind for future questions you're going  
 16 to ask this witness on this point.  
 17 MR MPOFU: Ja well, Chairperson, I will  
 18 bear it in mind but I'm not asking about weather conditions  
 19 per se in that fashion. I'm asking about the experience of  
 20 the witness.  
 21 CHAIRPERSON: Well he said he wasn't  
 22 quite sure, he couldn't remember.  
 23 MR MPOFU: Well -  
 24 CHAIRPERSON: But that being so, if  
 25 certainty is required we can get it elsewhere. I

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1 understand your point.  
 2 MR MPOFU: No, I accept that Chair, thank  
 3 you very much.  
 4 CHAIRPERSON: Mr Semenya wants to say  
 5 something, either that he's turned his microphone on by  
 6 mistake. Mr Semenya.  
 7 MR MPOFU: Mistake.  
 8 MR SEMENYA SC: Chair, the record will  
 9 show there are people with heavy blankets, it has  
 10 absolutely nothing to do with the condition of the weather.  
 11 CHAIRPERSON: But if the weather shows  
 12 that it was warm, you may be right, if the weather shows it  
 13 was bitterly cold it may, but that's a matter we can decide  
 14 on later.  
 15 MR MPOFU: Okay I think let's get  
 16 straight to the issue. You know that, it has been  
 17 suggested, it has been, the real issue, Mr Phasha, it has  
 18 been suggested that people were dressed in a particular way  
 19 in order to stave off rubber bullets, do you remember that?  
 20 MR PHATSHA: A person dresses the way he  
 21 feels like, he does the thinking for himself.  
 22 MR MPOFU: Yes I accept that, well the  
 23 question really that I wanted to ask you is, does it make  
 24 sense to you that the same person would use blankets for  
 25 rubber bullets and muti for live ammunition?

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1 MR PHATSHA: That I don't know, Sir.  
 2 MR MPOFU: Thank you. Now the, you've  
 3 also said that the, and I think this was quite an important  
 4 answer that you gave, I'd like you to just elaborate for  
 5 the commission. You were asked by Mr Semenya that if the  
 6 police had asked you to disarm before the shooting what  
 7 would you have done and you said you would have considered  
 8 and disarmed. Can you explain that in more detail?  
 9 MR PHATSHA: If you could repeat the  
 10 question, Sir.  
 11 MR MPOFU: You were asked by my learned  
 12 colleague Mr Semenya what you would have done if the police  
 13 had asked you to disarm and he specifically said if that  
 14 had happened before the shooting incident, you in plural  
 15 and you said we would have considered and disarmed. Can  
 16 you explain that answer to the commission.  
 17 MR PHATSHA: Because we did not fight  
 18 them.  
 19 MR MPOFU: Because you were not fighting  
 20 with them, is that what you?  
 21 MR PHATSHA: Yes.  
 22 MR MPOFU: Now, thank you Chairperson.  
 23 Now you were also asked about the fact that some people may  
 24 not necessarily have been from Nkaneng, can you tell us  
 25 from where you were gathering at the mountain which was the

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1 nearest residential area?  
 2 MR PHATSHA: Nkaneng settlement is the  
 3 nearest.  
 4 MR MPOFU: I'm now going to ask you a set  
 5 of questions which is effectively the last group of issues  
 6 that I want to deal with you and I'm going to seek and  
 7 indulgence from the Chairperson because where I'm going  
 8 with this will become after a few questions and maybe let  
 9 me prefix it like this. Do you think it is possible, you  
 10 know that one of the key issues or objectives of this  
 11 commission is to establish the truth and go beyond the,  
 12 what the eye can see and try and get to the root causes.  
 13 Do you appreciate that?  
 14 MR PHATSHA: I understand that, yes.  
 15 MR MPOFU: Now do you think that for  
 16 people like us sitting on the podium who are learned people  
 17 you know with many degrees, for us to be able to understand  
 18 the truth, it might be important to put ourselves in the  
 19 shoes of somebody like you.  
 20 MR PHATSHA: The question is not clear.  
 21 MR MPOFU: Do you accept that for us to  
 22 get to the truth, to the real truth one of the things we  
 23 have to do is to try and understand these events from the  
 24 point of view of somebody like you.  
 25 MR PHATSHA: Yes.

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1 MR MPOFU: Now you've already testified  
 2 that you only have effectively one year of schooling.  
 3 MR PHATSHA: Yes, Sir.  
 4 MR MPOFU: And that you've been a rock  
 5 driller for 30 years.  
 6 MR PHATSHA: Yes.  
 7 MR MPOFU: One of the things that some of  
 8 us here might have found to be even irritating is the fact  
 9 that you wanted questions to be repeated, can you explain  
 10 how your, what your sense of hearing is like from the 30  
 11 years of working as rock drill operator?  
 12 MR PHATSHA: I am quite hard of hearing,  
 13 Sir, presently.  
 14 MR MPOFU: Yes and Mr Zokwana I think it  
 15 was, I think it was Mr Zokwana who gave us an example of an  
 16 old man that he knows who was also a rock driller for a  
 17 long time and Zokwana said that old man told him, Mr  
 18 Zokwana that he now has to read the lips of his wife at  
 19 home instead of listening to her.  
 20 MR PHATSHA: It is so, yes.  
 21 MR MPOFU: Now the gist of what I'm  
 22 asking you and I'm only a few questions away, is whether  
 23 you would agree with me that in examining this issue of the  
 24 Marikana massacre would you agree with me that we don't  
 25 have a right to judge you by our own middle class

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1 standards.

2 MR SEMENYA SC: Chair, I don't understand

3 the relevance.

4 CHAIRPERSON: Mr Mpofo, I don't want to

5 stop you. Whether he thinks that or not is with respect

6 neither here nor there. It's certainly a point you can

7 make in argument.

8 MR MPOFU: Thank you.

9 CHAIRPERSON: The point you've made about

10 he's been hard of hearing after 30 years of rock drilling

11 is a factor we have to bear in mind as well.

12 MR MPOFU: Thank you, Chairperson.

13 CHAIRPERSON: With respect to him his

14 answer to the question you want to ask him, if this is

15 going to help, it may well be we come to a similar

16 conclusion ourselves, assisted thereto by argument from

17 you.

18 MR MPOFU: Thank you.

19 CHAIRPERSON: I don't think it's

20 necessary to ask him.

21 MR MPOFU: I accept that, Chairperson.

22 Yes okay I'll ask specific questions and maybe I'll just

23 use myself. Look for somebody like me it might be a

24 strange thing for people to be washing in a group, a large

25 group. What is the normal method by which people wash in

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1 the compounds?

2 MR PHATSHA: What happens is in the

3 compounds people actually queue, they stand in a queue to

4 go and wash in the change house, it is the washing room

5 because some of them are very small.

6 MR MPOFU: Again for somebody like me who

7 has high walls and alarm systems I might find it strange

8 that you keep sharp weapons in your shack for protection,

9 but what are the dangers that one might face in the

10 conditions where you live?

11 MR PHATSHA: The position is, Mr

12 Chairperson, in the shack settlement where we stay

13 sometimes a whistle is blown and the blowing of a whistle

14 indicates something has happened, either there's a theft

15 taking place or some other crimes is being committed and we

16 keep these weapons because we do not know what it is that

17 the perpetrator or the other person has.

18 MR MPOFU: And also you might want to

19 tell the commission how it feels for you, following from

20 the question you were asked by Mr Ntsebenza under cross-

21 examination to have, to abandon an organisation to which

22 you have contributed part of your salary for 30 years?

23 MR PHATSHA: I feel very much hurt, Sir,

24 because all the money that I've contributed towards this

25 organisation hasn't benefited me in any way.

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1 MR MPOFU: Finally in that line of

2 questioning. I think on two occasions you in explaining

3 the, your change of unions. You said that it is because

4 the NUM had shot at you and there were, it was explained to

5 you by us that you were not shot. You remember that?

6 [11:59] MR PHATSHA: I remember that, yes.

7 MR MPOFU: And yesterday, in the same

8 vein, you said that you had, after the kraal incident you

9 had to go to die where the others were dying.

10 MR PHATSHA: I remember that.

11 MR MPOFU: And once again, it was

12 explained to you that you are alive.

13 MR PHATSHA: I remember that, yes.

14 MR MPOFU: Can you explain to the

15 Commission why it is that you felt that if one of your

16 colleagues was shot, if the other one had died, that it was

17 you who was being shot and who had died.

18 MR PHATSHA: If the question would be

19 repeated.

20 MR MPOFU: Can you explain to the

21 Commission why it is that on those two occasions, let's

22 start with the one where, of the shooting, why you said, I

23 left the NUM because they shot at me, meaning you, Mr

24 Phasha, and why you felt that they were shooting at you

25 when we know that the bullets went through somebody else's

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1 flesh.

2 MR PHATSHA: It's because the place, the

3 direction in which I was running, was closed, I had to turn

4 back, and I was then injured. I then decided I would run

5 to the place where the others are dying, in order to go and

6 die there, but I did not die, Mr Chairperson, through the

7 grace of the Almighty, I was saved.

8 CHAIRPERSON: That's not really an answer

9 to the question, but I think what counsel is trying to make

10 to you, is it's a basic principle of trade unionism, and

11 various other forms of activity, than an injury to one is

12 an injury to all. So I take it that you felt your

13 colleagues were killed, while engaging in the enterprise in

14 which you were engaged, it was as if you had been killed as

15 well, and if your colleagues were attacked in similar

16 circumstances, it was in effect an attack on you, in

17 accordance with this basic principle, an injury to one is

18 an injury to all. Is that the point you were trying to

19 make, Mr Mpofo?

20 MR MPOFU: Chair, yes, you stole the

21 words right from my mouth. That was exactly the next

22 proposition, thank you, Chairperson.

23 MR PHATSHA: That is exactly what I am

24 saying.

25 MR MPOFU: Thank you, I am indebted to Mr

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1 Chairperson. Now, I put something to Mr Zokwana about a  
 2 tendency maybe to take people like you or other RDOs for  
 3 granted or to undermine their intelligence, and I want to  
 4 ask you about two answers that you gave yesterday, or  
 5 rather to clarify. Did –

6 MR TIP SC: Sorry, Mr Chair, this must be  
 7 put properly, the questions were raised with Mr Zokwana,  
 8 and Mr Zokwana entirely distanced himself from the idea  
 9 that –

10 MR MPOFU: Yes.

11 MR TIP SC: - NUM was an organisation in  
 12 fact belittles people in the –

13 MR MPOFU: Absolutely.

14 MR TIP SC: - the position of RDOs. So  
 15 that must be put before questions about it are raised.

16 CHAIRPERSON: You've now put that on  
 17 record. He says he is going to ask the witness about, to  
 18 answers he gave, to clarify the answers he gave. That  
 19 clearly is something that can appropriately be done in re-  
 20 examination, once the introductory remarks that you  
 21 disagree with, have been rectified. Please carry on, Mr  
 22 Mpofo.

23 MR MPOFU: Thank you. In fairness to Mr  
 24 Tip and Mr Zokwana, Mr Zokwana did agree with me and did  
 25 not associate himself with that conduct. But the issue

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1 really I want to ask you, Mr Phasha, is that you know, we  
 2 know that the employer, that is to say you were waiting  
 3 for, had taken the attitude that they were not going to  
 4 speak to you, to your group, unless, if you had disarmed.  
 5 We know that. But the question is, did the employer ever  
 6 convey that message to you, to the group?

7 MR PHATSHA: Never heard that.

8 MR MPOFU: Secondly –

9 MR MOTAU SC: Chairperson, it should be  
 10 borne in mind various communiqué were distributed even up  
 11 to the 16th of August. I will deal with it at the relevant  
 12 point.

13 CHAIRPERSON: You can deal with it, as  
 14 part of your case, but I mean I am not sure whether any  
 15 communiqués were ever distributed by carrier pigeon or  
 16 anything else on the koppie, and the point being made I  
 17 think, is that on the koppie didn't know that. And he says  
 18 they didn't. You obviously may wish to challenge that. If  
 19 you want to ask further questions following on the re-  
 20 examination on this point, I will allow you to do so.  
 21 Alternatively, you may wish to lead evidence on it, but  
 22 it's a perfectly permissible question and so I shall allow  
 23 Mr Mpofo to proceed.

24 MR MPOFU: Mr Phasha, do you know what a  
 25 communiqué is, and if you do, did you ever receive it?

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1 MR PHATSHA: I never received any such.

2 MR MPOFU: Thank you. Now, similarly we  
 3 know that the police had taken the attitude that they were  
 4 going to move to the so-called technical phase which meant  
 5 unsettling and disarming and arresting some of the people  
 6 in your group, but did anybody from the police ever care to  
 7 say that to you, as a group, before the barbed wire was  
 8 pulled?

9 MR PHATSHA: Nobody, I never heard that.

10 MR MPOFU: When the barbed wire was being  
 11 pulled, would it have been clear to you what was going to  
 12 happen next, whether you were going to be shot at,  
 13 arrested, assaulted, or given food?

14 MR PHATSHA: Just repeat the question,  
 15 Sir.

16 MR MPOFU: Okay, I will simplify it.  
 17 When the barbed wire as being pulled –

18 COURT: Or just to put the question on  
 19 the basis, when the barbed wire was pulled, what did you  
 20 think was going to happen? What did you think the police  
 21 were going to do? Previously you gave a whole series of  
 22 alternatives, which might well be regarded as leading, but  
 23 it's better to put it in the way I suggest, I would say.

24 MR MPOFU: Thank you, Chairperson. I am  
 25 indebted to the Chairperson. Okay, I will ask it in even a

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1 more open-ended way. When the barbed wire was being pulled  
 2 by the Nyalas, did you have any idea what the intention of  
 3 the police was? No, no, sorry, that's not the question.

4 MR MAHLANGU: The question is?

5 MR MPOFU: The question is not what did  
 6 he think was going to happen, the question is whether did  
 7 he know or not know what the intention of the police was?

8 MR PHATSHA: I did not know what was  
 9 intended by these people.

10 MR MPOFU: Okay, now, finally, I know  
 11 that you don't want us to talk about Mr X.

12 MR PHATSHA: Even now, Sir.

13 MR MPOFU: Yes, but please forgive me,  
 14 you've already testified that the things that Mr X is going  
 15 to say are things that you either don't know or you deny.

16 MR PHATSHA: Even now, yes.

17 MR MPOFU: But there is something that I  
 18 think is important which you said, your evidence – or  
 19 rather, you were asked about, you were told that the so-  
 20 called group of warriors called itself "Makaraba." Do you  
 21 remember that?

22 MR PHATSHA: I remember that, yes.

23 MR MPOFU: And you said more than once to  
 24 the Commission that the only Makaraba you know is a  
 25 protective hat that you wear in the mine, is that correct?

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1 MR PHATSHA: It is so, yes.

2 MR MPOFU: So if Mr X, the off chance

3 that Mr X is correct on at least one thing, would you

4 describe the Makaraba that you know, as a tool of attack or

5 a tool of defence?

6 MR PHATSHA: The Makaraba we use, this

7 protective helmet, is actually intended as an instrument to

8 use so that the rocks don't cause us injuries when they

9 fall on our heads.

10 MR MPOFU: Thank you, Chairperson. I

11 have nothing further.

12 CHAIRPERSON: You indicated that you had

13 a difficulty in relation to the point about communiqué.

14 Did you want to ask any further questions on that limited

15 point?

16 MR MOTAU SC: No, Chair, I will deal with

17 it together with the other outstanding aspects, thanks.

18 CHAIRPERSON: Thank you, Mr Phatsha, you

19 are excused.

20 MR PHATSHA: I thank you, Mr Chairperson,

21 thank you very much.

22 [NO FURTHER QUESTIONS – WITNESS EXCUSED]

23 CHAIRPERSON: You can go, Ms Barnes.

24 MS BARNES: Just before the next witness

25 is called, I was hoping for permission to place something

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1 on record.

2 CHAIRPERSON: Well, it depends what it

3 is, I suppose, but you better wait until the – sorry, Ms

4 Barnes, you were going to say something before that

5 handshake ceremony took place.

6 MS BARNES: Chair, it relates to Mr Gavin

7 Hartford, and an incorrect impression that appears to have

8 been created in the Commission regarding his relationship

9 with certain of the parties. I just need to explain what

10 happened and correct it, and I would like to do that by

11 reading a very short statement into the record, if I may.

12 CHAIRPERSON: Please proceed.

13 MS BARNES: Thank you, Chair. "The AMCU

14 team wishes to make this statement in order to correct an

15 erroneous impression that has been created in the

16 Commission regarding Mr Gavin Hartford. On the 24th of

17 January 2013 in the course of cross-examining Mr Eric

18 Gcilitshana, Adv Barnes, who is myself, on behalf of the

19 AMCU team introduced as an exhibit an article Mr Gavin

20 Hartford entitled "The Mining Industry Strike, what are the

21 causes and what are the resolutions?" In the course of

22 introducing the article, there was an exchange between

23 myself and the Chairperson of the Commission in terms of

24 which the Chairperson asked where the article came from,

25 and I then answered as follows, this appears from the

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1 transcript, "Chair, I am afraid I am not entirely sure

2 where this article was published. We are planning to call

3 Mr Gavin Hartford as a witness in phase 2 so I am sure he

4 will tell us. He will then be able to confirm the contents

5 of the article." Mr Gavin Hartford is an independent

6 expert witness whose paper was submitted in order to

7 provide analytical context for understanding the events

8 that led up to the Marikana shooting. He specifically does

9 not represent any organisations involved in the proceedings

10 of the Farlam Commission. He was in fact never intended to

11 be called as a witness for the AMCU team and was only

12 intended to be called as a witness for the families team if

13 required. This was stated by the families team in its

14 opening statement.

15 [12:19] I did not intend to convey in my exchange with

16 the chairperson, that has been referred to earlier, that Mr

17 Hartford was to be called by the AMCU team or that he was

18 working in any way for AMCU. I intended to convey that Mr

19 Hartford was to be called as a witness for the families

20 team and that I would, if necessary, ask him about the

21 authenticity of his article." Thank you, Chairperson.

22 CHAIRPERSON: Thank you, that then makes

23 clear what you intended, I take it from the beginning to

24 make clear. Mr Mpofo.

25 MR MPOFU: Thank you, Chairperson.

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1 Chairperson, I am ready to call my next witness, however as

2 I indicated on Friday between the two witnesses I was

3 intending to move a certain application. I see that it's a

4 little bit too early even for an early lunch because I

5 would have suggested just to use that natural break to get

6 my ducks in a row, but also to confer with Mr Ntsebeza on

7 the issue of the application. If the chairperson is so

8 inclined, could we just ask for a – maybe a longish break

9 which may incorporate a lunch. It is just so that we don't

10 waste too much time.

11 CHAIRPERSON: I was intending – we will

12 take a half hour lunch adjournment.

13 MR MPOFU: Can we make it an hour,

14 Chairperson, please. I know you are trying to make up the

15 time for Friday.

16 CHAIRPERSON: Yes, I am. Alright, well

17 we will take the – we will adjourn now until half past one.

18 MR MPOFU: Thank you, very much.

19 CHAIRPERSON: The commission will now

20 adjourn.

21 [COMMISSION ADJOURNS COMMISSION RESUMES]

22 [13:35] CHAIRPERSON: Commission resumes. Mr

23 Mpofo, are you going to address us?

24 MR MPOFU: Yes thank you very much,

25 Chairperson, and I'm indebted to the Chairperson and the

1 Commission for the extra time. Chairperson, as indicated  
 2 last week I am going to be moving an application to the  
 3 Commission in terms of the amended regulations in respect  
 4 of the issue of the venue of the Commission. Just to put  
 5 the landscape, Chairperson, I'm bringing this application  
 6 essentially the applicants are the law firms which have  
 7 instructed me which I spelt out at the beginning of the  
 8 Commission and if one likes the second applicant would be  
 9 the Social Economic Rights Institute, SERI which supports  
 10 the application and Mr Ntsebeza will address some of the  
 11 issues once I've finished. But essentially, Chairperson,  
 12 the application is not opposed so the other parties would  
 13 range from - these are parties who support or parties who  
 14 are indifferent and that was a specific condition that we  
 15 put for ourselves when we dealt with this. It's quite a  
 16 very difficult and tricky situation and I'll explain it now  
 17 Chairperson. The issue really was that we agreed that we  
 18 would only move this application if it got the support of  
 19 all the parties to different degrees.

20 CHAIRPERSON: I understand you to say  
 21 that some of the parties support the application, others  
 22 effectively abide but they don't depose. Can you perhaps  
 23 tell us firstly who are the applicants? Let's get that on  
 24 record. Who are those who support the application and who  
 25 are those who abide? Perhaps I should say at this point as

1 you know from the regulations any decision to move the  
 2 venue of the Commission has to be made by the Minister of  
 3 Justice and myself in consultation with each other.

4 MR MPOFU: That's correct.  
 5 CHAIRPERSON: On I think the phrase is  
 6 "reasonable grounds shown" and I think that's the phrase of  
 7 the regulation. But clearly when you've finished the  
 8 application and some of your colleagues may also wish to  
 9 comment, they may wish to say something the proceedings  
 10 will be - what you say will be transcribed and I will then  
 11 have to arrange a meeting with the Minister and he and I  
 12 will then have to go through it together and see if can  
 13 come to a common mind on what should be done. But it's  
 14 important that what is said be as full as possible because  
 15 that's what the Minister is really going to see.

16 MR MPOFU: That will be the application.  
 17 Thank you, yes Chairperson. Chairperson unfortunately I'm  
 18 not in a position readily, I will do so to give you a full  
 19 list but what I will do before the ruling is out is to do a  
 20 kind of roll call or alternatively the parties will  
 21 indicate their positions. But what I know -

22 CHAIRPERSON: What we should do, we will  
 23 get the transcript ready tomorrow morning I think so what  
 24 you can do is you could write a letter to the Secretary of  
 25 the Commission which can then be annexed to the transcript

1 so that that'll be among the documents which will be put  
 2 before the Minister and which he and I will consider in due  
 3 course.

4 MR MPOFU: Thank you Chairperson. Thank  
 5 you Chairperson but what I can say positively is that the  
 6 main applicants are the parties represented by myself and  
 7 Mr Ntsebeza and we will address you directly. And I think  
 8 what I can also say Chair is that the - what we broadly  
 9 refer to as the "victim parties" are bringing this  
 10 application and the common thing between them is not so  
 11 much the victimhood as such more than - the real basis of  
 12 the application are economic factors which I will outline  
 13 which are common to both. And that, Chairperson, is  
 14 exactly where the paradox of the application lies because  
 15 after all we would have understood that this venue among  
 16 other things would have been chosen to benefit what we  
 17 would call the victim parties. But it was a question of  
 18 weighing the one advantage over the other and that enabled  
 19 us to get the instructions to make application for the  
 20 relocation.

21 Chairperson and Commission, you will recall that  
 22 last year I think in October the applicant parties raised  
 23 repeatedly in this forum the issue of the lack of funding  
 24 for what I will broadly term the "victim parties." This of  
 25 course was at the time when we all thought the Commission

1 would finish in January. As matters stand now there has  
 2 already been one extension of the Commission, currently to  
 3 the end of May 2013 and I should think that those of us who  
 4 are now participating in the Commission I would quite  
 5 frankly not be optimistic that we will even meet that  
 6 second deadline. So that even the current extension to May  
 7 looks like - it's clear, more than probable that a further  
 8 extension, at least one more will be necessitated. And  
 9 that, Chairperson and Commissioners, is not without the  
 10 constant urging on from the bench and making sure that time  
 11 is not wasted. It just so happens that something of this  
 12 magnitude invariably develops a life of its own and I've no  
 13 doubt that considerations of fairness and other positive  
 14 issues like that are what really drives the Commissioners  
 15 you know allowing for time, sometimes reluctantly so. And  
 16 I think this is one of the things that you yourself  
 17 Chairperson said from day one which was the balance between  
 18 giving the parties the opportunity to ventilate and achieve  
 19 the objectives of the Commission on the one hand. And on  
 20 the other acting with the requisite expeditiousness. Now  
 21 against that background Chairperson we are then faced with  
 22 the reality of a Commission which might run well into the  
 23 second half of the year. And the ability of the victim  
 24 parties to be represented and we would like to assume that  
 25 everyone agrees that those parties are essential to the



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1 quest for truth that this Commission is all about because  
 2 after all without the voice of the victims then we would  
 3 have only one version and that would be unlikely to extract  
 4 the truth that the country needs.  
 5 Now then comes the issue of the hard economy.  
 6 This venue is, apart from the fees that the lawyers have to  
 7 forego, those who are not getting paid, the venue itself  
 8 lends itself to extra costs on top of that cost of foregone  
 9 fees. And some of the costs are even less tangible, just  
 10 the travelling time you know the ability to be able to use  
 11 some of that time for consultation and to use the scarce  
 12 resources that the lawyers are using effectively to  
 13 subsidise their participation here and if those resources  
 14 are also going to be depleted by travelling, accommodation  
 15 and all the other intangible costs that I've made mention  
 16 of then of course what that means in pure economic terms is  
 17 that the point at which those resources will run out will  
 18 happen much faster than if those costs were less than they  
 19 are. As it is, Chairperson, I can hazard an unscientific  
 20 guess that says even for the team which I represent which  
 21 is probably of the main team, the cheapest team so to speak  
 22 to run because it is understaffed already but the cost can  
 23 - and not less in the order of R50 000 per day, a very  
 24 conservative estimate. And again I'm not sure but some of  
 25 the teams that have almost an equal or even a less

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1 responsibility you know who probably go four or five times  
 2 of that amount and I don't have to tell the Chairperson  
 3 about the amount of work that is involved in dealing with  
 4 hundreds and hundreds of victims. I think that kind of  
 5 requirement has been amply demonstrated just by what we've  
 6 been required and have been able to do up to now. I think  
 7 I can safely say that we have probably or arguably one of  
 8 the hardest jobs to do with the least resources.  
 9 Now we understand, Chair, and of course parties  
 10 will speak for themselves, but for all the parties and even  
 11 including the evidence leaders some of the other costs that  
 12 I've mentioned apart from the issue of foregoing fees and  
 13 so on are applicable across the board and eventually those  
 14 costs will be borne by the tax payers generally. To sum up  
 15 those costs. And therefore, Chairperson, this is where we  
 16 have this issue of wanting to go along with the good  
 17 intention of being within the proximity of the communities  
 18 that are directly affected but when they were faced with  
 19 the Hobson's choice obviously their choice is to continue  
 20 with the representation and maybe make their own  
 21 contribution by going quietly to rally the extra mile. And  
 22 that's why, Chairperson, we would like to move the  
 23 application for - given the pre-conditions that you've  
 24 mentioned of you yourself as Chairperson and the Minister  
 25 having to consult each other in terms of the regulations,

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1 to move the application that this Commission be moved to a  
 2 venue that is closer to the Pretoria/Johannesburg area. We  
 3 do understand that our learned colleagues in the evidence  
 4 leaders team have want to inform them of the application  
 5 made, thankfully some pre-emptive practical arrangements or  
 6 at least investigations around some of the practical issues  
 7 that will ensue should the application be successful. I  
 8 can just say that the preference of the parties on this  
 9 side of the table would be obviously a venue in the centre  
 10 of town so that it might be easier for free movement and  
 11 more repeat movement and cheaper movement, but obviously  
 12 that's a matter that we cannot be too prescriptive about.  
 13 I can mention that some of my colleagues have made specific  
 14 suggestions and that's a matter that we could - that might  
 15 be dealt with between ourselves as colleagues with the  
 16 evidence leaders.  
 17 [13:55] Then, Chairperson, finally if I can mention the  
 18 issue, there are certain conditions that apply to what I've  
 19 referred to generally as the victim parties. Which we also  
 20 think might be resolved in the period between now and the  
 21 conclusion of the consultations that I've referred to.  
 22 Pertaining the Chairperson and the Minister and once again  
 23 we've managed to whittle down those conditions to really  
 24 one issue. Which is the issue of transportation and the  
 25 mobility of the affected parties or interested parties

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1 between now, rather between here or where they currently  
 2 live and the new venue, should there be one.  
 3 We would like, Mr Chairperson, we'll speak for  
 4 the families that come far away, obviously would simply  
 5 like their status to be maintained wherever the venue is.  
 6 But for the parties that I represent which include the,  
 7 some of the injured people, the arrested people and  
 8 obviously the broader community that has an interest in  
 9 this matter which has been attending any way, the issue of  
 10 the provision of transport would become quite important.  
 11 As matters stand already people have to travel from the  
 12 kind of greater Wonderkop area to Rustenburg.  
 13 So what would happen is that the travelling time  
 14 would simply be increased and as matters stand,  
 15 Chairperson, we are engaging particularly with our  
 16 colleagues from Lonmin because currently Lonmin kindly  
 17 offers a bus service between that area and the venue of  
 18 this commission now. So we'd like, what I would broadly  
 19 define as the state parties which would include the  
 20 department and various role-players maybe to come to the  
 21 parties by supplementing the Lonmin transport and Lonmin  
 22 has not, I must put on record yet committed that if the  
 23 venue had changed they would extend the current transport  
 24 service but I'm, having had dealings with them I'd be very  
 25 surprised if that is not extended and then so in the same

<p style="text-align: right;">Page 5834</p> <p>1 spirit we will, we would and in the letter that the 2 Chairperson has referred to be maybe more specific about 3 what kind of supplementary transport the state parties 4 might provide in order to meet this condition of 5 transporting the people. 6 Thank you, Chairperson, the only issue really 7 that I'd like to end is that we make this application as I 8 say almost reluctantly because we know it was meant to 9 serve our, the constituencies that we represent. But the 10 reality is that if we are going to achieve the higher goal 11 of running a commission that is likely to achieve it's 12 intended results then we have no option but to take this 13 move and we hope that the Chairperson will in the same 14 spirit receive a sympathetic ear should the Chairperson be 15 inclined to initiate the consultations with the Minister 16 and that in due course would then be told of the outcome. 17 Thank you, Chairperson. 18 CHAIRPERSON: Thank you, Mr Mpfu. Mr 19 Ntsebeza, I understand you're also going to make 20 submissions in regard to this application? 21 MR NTSEBEZA SC: Yes that is so, Mr 22 Chairman. 23 CHAIRPERSON: Proceed. 24 MR NTSEBEZA SC: Mr Chairman, our 25 position is as the representatives of the families and</p>	<p style="text-align: right;">Page 5836</p> <p>1 we were at the commission. 2 Which was a bit of an iron glove because unless 3 one has no serious consideration for one's reputation you 4 can't be here if you have not an enormous amount of work in 5 preparation. So a lot of work as the commission knows from 6 the commission's own preparations for this matter to be on 7 top of the thing one has to be putting a lot of preparation 8 and that is why as I submitted in previous occasions, when 9 I was raising this question Tim Bruinders whose senior 10 counsel for AMCU and I and all the other counsel spent 11 virtually the whole of September donating our time pro bono 12 because that was preparation that we were doing for a full 13 month, a number of hours without being here and therefore 14 it was unpaid work. 15 Our own view Chairman and members of the 16 commission had always been that this be a commission of 17 inquiry and one therefore that had been established at the 18 State President's instance and not being a litigation. 19 There would be a budget for the commission and out of that 20 budget there would be provision made for legal costs of the 21 commission and we cited at the beginning for instance 22 precedence in the United Kingdom, like when there was a 23 commission of inquiry of this nature in the Bloody Sunday 24 Commission in the Northern Ireland, into events in Northern 25 Ireland where all the parties that participated in that</p>
<p style="text-align: right;">Page 5835</p> <p>1 especially now that Chair is going to be approaching the 2 Minister of Justice it is important for us to let even the 3 ministry of justice and constitutional development 4 appreciate where we come from so that the commission also 5 is assisted in articulating the reasons that should be 6 persuasive to the minister giving his consent in 7 consultation with the Chair for the venue to be moved from 8 where it is and in our humble and respectful submission the 9 point to start at would be to say who is it that are 10 instructing the families team. 11 Counsel, representing the family and there are 12 only three of us, Adv Nicole Lewis, Adv Motloeny, Tholoana 13 Motloeny and I. I'm instructed by a non governmental 14 organisation called the Socio Economic Rights Institute, 15 SERI for short. In the nature of things even as we were 16 instructed this NGO told us in specific terms that it was 17 going to fundraise in order for us to be able to be paid 18 for our services. We were told also in very, in no 19 uncertain terms that we may never even be paid because the 20 pertinent question of getting paid would depend on whether 21 or not they have fundraised sufficiently and properly and 22 one of the conditions was that even if they do raise 23 resources sufficient to engage us as counsel we would be 24 paid for appearances at a commission and would not be paid 25 for preparations and anything else other than for days that</p>	<p style="text-align: right;">Page 5837</p> <p>1 commission were funded at taxpayer's expense as is the case 2 here with some parties. 3 So our sense was that and it is important that 4 the Chairman is going to be meeting with the Minister of 5 Justice and Constitutional Development. Our sense 6 therefore is that this is something that should be funded 7 by the state because it is done at its instance and the 8 state should in fact be very keen on the equality of arms 9 principle. If it is good enough for the state to make sure 10 that some of the state parties, as my learned friend 11 indicates, are able to be afforded representation at senior 12 counsel level, junior counsel level, senior junior counsel 13 level all around then on the principle of equality of arms 14 that kind of representation should also be extended to the 15 families as what we sought to convey through the Ministry 16 of Justice. 17 Now that having been said, when we were indicated 18 to that endeavours would be made for the Legal Aid Board to 19 support us our stance was that, we are sitting so that no 20 one wants to look a gift horse in the mouth. It is, it was 21 a misunderstanding of the principle on which we were 22 proceeding and that is why whilst we were not and when I 23 say we, I am talking about those who are instructed by 24 SERI, whilst we were not going to close our eyes to an 25 offer from the Legal Aid Board and we were quite grateful</p>

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1 for that from what I'm told by those who run SERI we were  
 2 still of the view that the principal is being missed here.  
 3 We would like you, Chair, to convey to the  
 4 Ministry and the State that it's unfortunate that the  
 5 configuration of the support for the families and what my  
 6 learned friend calls the victim parties here seems to be  
 7 dealing with them as though they were Cinderellas and they  
 8 were not entitled to the same benefits and those that are  
 9 here who are funded by the state at state expense and it is  
 10 very unfortunate and if it assists for the Ministry to  
 11 reconsider their position with respect to funding then it  
 12 will all go well because I can promise you now at the end  
 13 of these proceedings I will come back to this issue that  
 14 the victims in this commission, the commissioners were  
 15 being made to undertake in the very difficult task of  
 16 presiding in a commission where there clearly was no  
 17 equality of arms.  
 18 What is now the position with the families, the  
 19 families are still represented by SERI but SERI was given  
 20 some funding by the Legal Aid Board and as I said I don't  
 21 want to give, look a gift horse in the mouth, and that  
 22 funding was up to only January this year which was the time  
 23 that was originally intended with the time during which the  
 24 commission would be sitting. The distance of where the  
 25 commission was sitting from where SERI's head office is,

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1 being Johannesburg, is not an important Chair, it is quite  
 2 a significant distance, it's no less than two hours drive  
 3 and it's not a kind of distance that you want to commuting  
 4 to and fro the scene of venue and therefore even in the  
 5 first period as early as November we were being  
 6 communicated to by those who instruct us that it might be  
 7 difficult for them to stay the course on the basis on which  
 8 they had engaged us.  
 9 So we always be reminded that we are engaged here  
 10 on a basis where we may not be able to be kept to represent  
 11 the families for as long as it would be ideal for us to do  
 12 so. For instance, I was told that the Legal Aid Board, the  
 13 main funder for SERI for this matter was only going to be  
 14 able to pay for my fees on a basis which is two thirds what  
 15 I usually charge but it could also be happening for only 30  
 16 days of the commission. So I had to cut my costs, I mean  
 17 according to the cloth that we have, on a daily basis I  
 18 count okay how many times have I been to the commission,  
 19 it's getting closer to thirty, do I need to be there and  
 20 that's the basis on which I've been here having to make a  
 21 choice as to whether it is absolutely necessary when there  
 22 are transcripts and all those things for me to be here  
 23 because each day I'm here is eroding into the 30 days that  
 24 the Legal Aid Board was prepared to fund the case.  
 25 [14:15] We were quite concerned when even last year in

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1 consultation with the arrested and injured It was the view  
 2 that the venue must move closer to where counsel and legal  
 3 representatives are. When that was put to us and we  
 4 consulted with our clients our clients were disinclined to  
 5 accept that on the basis that the venue of where the  
 6 happenings, I mean the venue is where everything happened,  
 7 the families were staying here and a whole range of other  
 8 things and the commission recalls at that stage there was  
 9 not even support for them to be here from wherever they are  
 10 in the far flung areas of our country and beyond and there  
 11 have been no arrangements for transportation and for their  
 12 boarding and lodging. Fortunately we are now past that  
 13 kind of hurdle.  
 14 So we are now in a position, Chair, happily where  
 15 the stability at the level at which the Ministry is  
 16 supporting us and I wouldn't like to be tripping in my own  
 17 ankles by making a submission that we should suggest that  
 18 we are not cognisant of the fact that a lot of support has  
 19 come. We are now in a situation where the families from  
 20 wherever they are from the far flung areas of the country  
 21 stay here at reasonably good accommodation, they stay at a  
 22 hotel and only two families stay in the informal  
 23 settlements because that's where they are settled.  
 24 So the position would be that those families  
 25 would remain where they are except that the two families

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1 who are, who stay in the settlements would as the families  
 2 who in any event are staying at a hotel here in Rustenburg  
 3 there would have to be an arrangement for their  
 4 transportation to and from the venue which is going to be  
 5 nearer to Johannesburg or which is going to be as near to  
 6 Pretoria as I understand the proposition is.  
 7 So that's, the families once it was explained to  
 8 them that for those kinds of economic reasons, not only  
 9 from the point of view of trying to keep the legal team as  
 10 long as it is possible to do so in the circumstances of  
 11 their funding, but that there would be no transportation  
 12 costs for the legal team, there would be no boarding and  
 13 lodging costs for the legal team, we'll stay at our homes,  
 14 it then made sense to them if we said we are going to  
 15 engage the Ministry of Justice for purposes only of making  
 16 sure that the transportation which they are being afforded  
 17 from where they are, the hotel and the informal settlement  
 18 to this venue would continue as before accept as my learned  
 19 friend it would now be over a longer distance. But if it  
 20 can be guaranteed then they are quite happy to persuade, to  
 21 be persuaded that it is in their interests that the venue  
 22 must be shifted. Chair, I'm having -  
 23 CHAIRPERSON: Sorry, if I can just  
 24 understand you. I understand those people who live at  
 25 Marikana, live in the informal settlement? What you're

<p style="text-align: right;">Page 5842</p> <p>1 suggesting is instead of being transported either the 2 assistance of Lonmin or some other way to Rustenburg they 3 would then be, they would, if the application succeeds be 4 transported to Johannesburg or Pretoria or wherever, 5 whatever the other venue would be. I take it that the 6 families who come from places such as Pondoland and so 7 forth would then, instead of be coming from Pondoland to OR 8 Tambo and then onto Rustenburg would instead be 9 accommodated in Johannesburg or Pretoria, is that correct? 10 MR NTSEBEZA SC: Chair I misrepresented 11 the position. I've just been instructed that actually all 12 families other than the two who are in the, two families in 13 the informal settlements, the remainder of them would be 14 going to hotel accommodation closer to the venue if the 15 application succeeds. 16 CHAIRPERSON: Transport costs would be in 17 effect be reduced because presumably the distance they'd 18 have to transported from OR Tambo to a hotel in the 19 vicinity of the new venue would obviously be substantially 20 less than the distance between OR Tambo and Rustenburg? 21 MR NTSEBEZA SC: Indeed, Chair. 22 CHAIRPERSON: So in actual fact there 23 would be a saving? 24 MR NTSEBEZA SC: Yes. We would like the 25 commission, Chair, to the extent that the Commission Chair</p>	<p style="text-align: right;">Page 5844</p> <p>1 MR NTSEBEZA SC: To Pretoria. Ja, well 2 not to make a fine point of it I'm told by my instructing 3 attorney here that we have no instructions to talk about 4 Johannesburg, we've got instructions to talk about 5 Pretoria. There are no objection to the commission moving 6 to Gauteng, whether it's the south or the north of Gauteng. 7 CHAIRPERSON: Anything further you wish 8 to say? 9 MR NTSEBEZA SC: No nothing, Mr Chair. 10 CHAIRPERSON: Mr Mpfu, you want to add 11 something before the - 12 MR MPOFU: Yes Chair - 13 CHAIRPERSON: Other representatives of 14 the other parties to say whatever they wish to say? 15 MR MPOFU: Yes, yes before they do, 16 Chair. If I may just for the record since this is an oral 17 application to place certain matters on the record. 18 Firstly very briefly, Chair, is that the, some of the 19 things that you might have to convey include the fact that 20 the timing of this application is deliberately made at 21 least on our part at this stage when at least the first 22 batch of the victim witnesses have testified and at the 23 point at which we are just about to call the last of that 24 first batch. So there's some of the measures that we have 25 deliberately taken to try and ameliorate any negative</p>
<p style="text-align: right;">Page 5843</p> <p>1 will be consulting with the Minister of Justice to also be 2 aware that when once the commission sought an extension of 3 their life, if I may call it that, to May this year SERI 4 began almost immediately to engage the Legal Aid Board to 5 find out if they are quite ready to give support of the 6 nature that they had given to this point to the families, 7 for the representation of the families and my instruction 8 is that that engagement has started but whether it is going 9 to bear any successful result is going to be a matter of 10 time. 11 It might be important for the Ministry to get 12 that information. So whilst we were quite happy to 13 associate ourselves with the other victims who was getting 14 even the Legal Aid Board funding that our lawyers are 15 getting we do make the point, Chair and Commissioners, that 16 we are quite happy with the efforts that the department has 17 done but we still say it would still be better if they 18 apply their minds properly to the equality of arms 19 principle that I articulated. But then so far as the 20 application, this application is concerned, even in the 21 interim, if the conditions for the families remain and it 22 is just a question of changing venues the families no 23 longer oppose a move from Pretoria to Johannesburg. 24 CHAIRPERSON: You mean a move to Pretoria 25 or Johannesburg.</p>	<p style="text-align: right;">Page 5845</p> <p>1 effects of such a move. 2 Secondly Chair, I was reminded by my learned 3 colleague Mr Ntsebeza on the issue of fundraising we are 4 indeed pursuing alternatives, we're not just sitting on our 5 laurels and indeed on our part for the first part of the, 6 of the original segment we did manage to get some funding 7 which was not advocate but as Mr Ntsebeza said you don't 8 look a gift horse in the mouth which has since dried up. 9 So since the beginning of this year we are back to square 10 one. I think it's important that we do disclose that and 11 we just haven't had the permission to get, to name the 12 funder but it's not a big success. 13 The third issue Chair, is also to just to place 14 on record that on least on our team we are now down to one 15 advocate and so one doesn't even have the latitude to take 16 days off and on a serious note, Chairperson, all of us, as 17 former practitioners I'm sure that I don't have to bore you 18 but what that would entail - 19 CHAIRPERSON: Not a former practitioner 20 but my two colleagues are still very much practitioners. 21 MR MPOFU: They are still - 22 CHAIRPERSON: Least the wrong impression 23 be created by what you're saying. 24 MR MPOFU: Just so long as the commission 25 has been going, Chair, we become former practitioners and</p>

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1 I'm sure any practitioner current or former would  
 2 appreciate the difficulties of being in that situation.  
 3 The fourth or rather the third issue is, was about the  
 4 practical considerations, I think it's the fourth. On top  
 5 of everything that we have said, Chair, to be quite frank  
 6 this venue has also added to the woes of, and the costs in  
 7 the sense that one has had all, some of these unfortunate  
 8 stop starts, if it's not the plumbing, it's the electricity  
 9 and so on.  
 10 So those are some of the considerations that we,  
 11 we don't want to belabour but which we hope the  
 12 Chairperson, might mention as impeding in any event the  
 13 fast progress of the commission and that I can say,  
 14 Chairperson, speaking for myself and I'm sure also from my  
 15 other colleagues that despite all these problems at this  
 16 stage of the commission for us, you know pulling out is not  
 17 an option.  
 18 We have come this far so we need really is just  
 19 assistance to be met halfway so that we can complete the  
 20 mission because we are at this stage you know  
 21 professionally and maybe even emotionally invested in the  
 22 commission and we are going to see it through. Either the  
 23 hard way or if at least some of the issues we have raised  
 24 and some of the issues raised by my learned colleague, Mr  
 25 Ntsebeza can be attended to hopefully in not such a hard

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1 way.  
 2 And therefore, Chairperson, in closing all I'm  
 3 saying is that the, just going back to the, what I've  
 4 called the paradox of the application it is that the people  
 5 that we represent effectively have taken the stance that  
 6 the pursuit of the truth is paramount and whether that  
 7 truth is going to be pursued here or in Jo'burg or in  
 8 Pretoria, the pursuit of the truth is what we, given this  
 9 difficult trench is what we would hope to facilitate and we  
 10 hope that this move will broadly speaking, for the reasons  
 11 that I've mentioned earlier, facilitate that objective.  
 12 Thank you Chairperson.  
 13 CHAIRPERSON: Thank you, Mr Mpofu.  
 14 Before I ask the leader, the evidence leaders to make such  
 15 comments as he wishes to make. Are there any of the  
 16 representatives of the parties who wish to say something in  
 17 regards to the application? I see Mr Semenya is moving his  
 18 finger to his microphone button as was Mr Tip. But he got  
 19 in first. Mr Tip first then Mr Semenya then whoever else  
 20 wishes to say something.  
 21 MR TIP SC: Chairperson, Commissioners,  
 22 the National Union of Mine Workers supports the  
 23 application. It does so as one of the principal parties  
 24 identified in the terms of reference and that position has  
 25 been taken up pursuant to a concerted number of

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1 consultations with the management structures of the NUM  
 2 nationally, regionally and here in Rustenburg and it is the  
 3 joint view of all those parties.  
 4 The essence of the support lies in this that as  
 5 the duration of this commission and it's hearings has been  
 6 extended and we'll continue to run for some time, the  
 7 question of costs has become of great concern to the NUM  
 8 and any arrangement that can significantly reduce those  
 9 costs will be greatly welcomed by them and it is for that  
 10 reason that it supports this move.  
 11 Essentially the question of costs arises in this  
 12 that having a team based, having to travel to Rustenburg  
 13 involves principally accommodation costs. Travel costs are  
 14 not of great consequence but to accommodate us here is a  
 15 cost. In order for essential administrative matters to be  
 16 attended properly it has been necessary to make an  
 17 arrangement of the correspondent firm of attorneys in  
 18 Rustenburg to have dedicated space made available to us for  
 19 the purpose of consultations, for storage of materials and  
 20 the like and that too has turned out to be a significant  
 21 cost.  
 22 If we were to relocate to Johannesburg or  
 23 Pretoria as the case may be, then that sort of cost will  
 24 disappear instantly. The NUM is mindful also of a slightly  
 25 less direct but no less important area where costs and

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1 convenience intersect and it has regard thereto the fact  
 2 that it's team will be, especially its counsel and of  
 3 course its attorneys, all of whom are based in Johannesburg  
 4 will have considerably more flexibility in the arrangement  
 5 of their time if they, if the hearing is in the region of  
 6 Pretoria or Johannesburg and with that will come the  
 7 capacity to deal with matters that really need to be dealt  
 8 with on an ongoing basis such as administration and even  
 9 the possibility of trying to resurrect a few briefs which  
 10 otherwise remain entirely dormant for so long as I am in  
 11 Rustenburg.  
 12 [14:35] That is, it's not unimportant to the NUM because  
 13 it does also take some pressure off its team in that way,  
 14 and more importantly perhaps, it adds an important element  
 15 of convenience and flexibility in terms of the management  
 16 of information and we are very mindful here of the fact  
 17 that the number of topics that are scheduled to fall within  
 18 phase 2 will require attention very shortly and in a fairly  
 19 demanding way. There will be a taxing programme, a vast  
 20 amount of information to be process, and doing that sort of  
 21 work from offices that are located in Johannesburg or  
 22 Pretoria, rather than trying to straddle those offices and  
 23 one in Rustenburg, will make a very large difference to the  
 24 way it can be done, and that inevitably will translate also  
 25 into a more effective cost component.

<p style="text-align: right;">Page 5850</p> <p>1 So we have of course discussed with our clients 2 the question of participation as observers of the persons 3 who presently come and attend here, as well as the access 4 to members of the structures and the leadership of the NUM. 5 Those matters will all be managed with great comfort, and 6 of course the head office and the important structures are 7 in Johannesburg and Pretoria, or rather in Johannesburg, 8 and there too in respect of phase 2 matters that will 9 facilitate interaction between us and our clients in a very 10 significant way. So for all those reasons we are happy to 11 support what we consider to be a timely application. 12 CHAIRPERSON: Mr Semenya? 13 MR SEMENYA SC: Chair, subject to a 14 conversation about the modalities of timing, etcetera, we 15 abide the decision of the Commission. Mr Mpofo, however, 16 predictably on a matter quite tangential and not germane to 17 this application, is hinting that he's not calling the 18 fourth witness. It's a matter we'll discuss – 19 CHAIRPERSON: He said of the first batch; 20 he said the last witness of the first batch. 21 MR SEMENYA SC: Yes, there was – 22 CHAIRPERSON: There is, of course, a 23 hint, I suppose, but it's no more than that. 24 MR SEMENYA SC: I don't want him to go as 25 though I didn't hear him.</p>	<p style="text-align: right;">Page 5852</p> <p>1 a collusion of some sort. 2 CHAIRPERSON: Any other party 3 representative wish to say something, apart from Ms Barnes 4 who's turned her microphone on? 5 MS BARNES: Yes, thank you, Chair. We'd 6 also like to as the AMCU team express our support for the 7 application. We understand the reasons for it, which I 8 think has been well articulated here today, but provided of 9 course that the conditions are met and those are 10 essentially that there is sufficient transport to transport 11 community members from here to presumably Pretoria, and 12 I'll get to that further in a moment, and however much 13 transportation is required needs to be provided. Just to 14 indicate that we have taken instructions on a move to 15 Pretoria, because we understood that that is what is 16 mooted, and it may be that if it is a move to Johannesburg 17 that is contemplated, then that may well change. I have 18 indications that my instructions may well be different if 19 it were to be a move to Johannesburg, but certainly – 20 CHAIRPERSON: Yes, you support an 21 application for a removal to Pretoria – 22 MS BARNES: We do support it. 23 CHAIRPERSON: But you don't express any 24 opinion, certainly don't provide any support for an 25 application for removal to Johannesburg. Would that be a</p>
<p style="text-align: right;">Page 5851</p> <p>1 CHAIRPERSON: I think he knows that you 2 hear him. 3 MR MPOFU: Chairperson, no thank you. Mr 4 Semenya and I have worked together for such a long time, he 5 thinks I'm dropping hints when I'm not. Chair, while I'm 6 on the podium, I might as well mention that the, like Mr 7 Ntsebeza has also been slipped a note from his attorneys 8 that indicates that Pretoria would be the first choice for 9 various reasons, including the shorter distance obviously 10 that the people would have to travel. 11 CHAIRPERSON: Mr Motau, you wish to say 12 something on behalf of Lonmin? 13 MR MOTAU SC: Yes, Chair and members of 14 the Commission, we also abide the decision. What I need to 15 add is I only learned for the first time today from my 16 learned friend Mr Mpofo that there were discussions between 17 himself and my leader, Adv Burger, regarding 18 transportation. I haven't had an opportunity to follow 19 that up, but I will liaise with him in that respect. 20 CHAIRPERSON: Those altruistic remarks 21 that he made regarding the possibility or probability of 22 Lonmin continuing to assist as far as transportation is 23 concerned, is something that we can bear in mind. 24 MR MOTAU SC: Yes, Chair, and I'm quite 25 happy that Mr Mpofo did not allude to that as constitution</p>	<p style="text-align: right;">Page 5853</p> <p>1 fair summary of what you're saying? 2 MS BARNES: That's right, Chair. That's 3 it, Chair, provided the conditions are met. 4 MS MAITE: Yes, Chair, I'm representing 5 the Department of Minerals in this regard. I would just 6 like to mention that the Department, I've taken 7 instructions that we'll be abiding by the decision of the 8 Commission. Thank you, Chair. 9 CHAIRPERSON: At least you must put your 10 name on record because I don't if the transcribers know 11 you. 12 MS MAITE: Thank you, Chair. It is my 13 first time. I'm Lerato Maite, surname is M-A-I-T-E. 14 CHAIRPERSON: Thank you. 15 MS MASEVHE: Well, Chairperson, on behalf 16 of the Monene Family, Takalani Masevhe, we will be abiding 17 the decision of the Commission. 18 CHAIRPERSON: Thank you very much. 19 MR GUMBI: Yes, Chairperson, on behalf of 20 POPCRU, Lepaaku and Lieutenant Baloyi, we'll abide by the 21 decision of the Commission. 22 CHAIRPERSON: Thank you. Mr Power, I see 23 you've turned your microphone on. 24 MR POWER: Thank you, Chairperson, 25 Commissioners, on behalf of the Legal Resources Centre we</p>

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1 would like to support the application, as long as the  
 2 relevant arrangements are made for transportation.  
 3 CHAIRPERSON: Adv Nkosi Thomas, your  
 4 client has his office in Pretoria, but –  
 5 MS THOMAS SC: Indeed, Chairperson.  
 6 CHAIRPERSON: What is his attitude to the  
 7 application?  
 8 MS THOMAS SC: I associate myself with  
 9 what my learned friend Mr Semenya has said in relation to  
 10 the position of the police.  
 11 CHAIRPERSON: Mr Madlanga, as the chief  
 12 evidence leader, do you wish to say anything about the  
 13 application?  
 14 MR BUDLENDER SC: Chair, I've been  
 15 deputed to deal with this. The evidence leaders support  
 16 this application. As the Commissioners will know, during  
 17 December last year we submitted a memorandum to the  
 18 Commission in which we set out why in our view the  
 19 Commission should move from Rustenburg to a venue, a  
 20 suitable venue in Gauteng. I'm not going to repeat all of  
 21 that now; the Commissioners have the memorandum. I do wish  
 22 and need to say that it's not a matter of lawyers' fees.  
 23 Lawyers' fees have to be paid or foregone wherever the  
 24 Commission sits. The move of the Commission, as Mr Tip has  
 25 pointed out, may generate some flexibility which will

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1 result in some saving of costs, but the lawyers' fees for  
 2 the main part, whether, as I say, whether paid or foregone,  
 3 are paid or foregone whether the Commission sits here, in  
 4 Gauteng, or anywhere else.  
 5 But the reasons why we, in brief the reasons why  
 6 we support the application are the following. Firstly, a  
 7 move will increase the efficiency of the Commission, which  
 8 will as a result of the saving of the extensive travelling  
 9 time which is involved, will be able to sit more effective  
 10 hours. The Commission is under severe time restraints and  
 11 anything which will increase the efficiency of the  
 12 Commission, we submit should be very seriously considered.  
 13 Secondly, the moving of the Commission will  
 14 result in the saving of a significant amount of public  
 15 money with regard to the accommodation of the team for the  
 16 evidence leaders, with the accommodation of staff members  
 17 of the department who are out there, and with travel costs  
 18 and subsistence costs which are involved in members of the  
 19 department working out of Rustenburg. So there will be a  
 20 significant saving of public money if the Commission moves  
 21 its venue.  
 22 Thirdly, as has been pointed out by some of the  
 23 parties, the present location has the result that some of  
 24 the parties are incurring very substantial expenses through  
 25 the Commission sitting in Rustenburg, and that is an

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1 obstacle to the effective participation of all of the  
 2 parties. It's obviously in the public interest that all of  
 3 the parties should be able to participate as effectively as  
 4 possible and anything which removes constraints should be,  
 5 in our view, supported.  
 6 Finally, we submit that it is possible to achieve  
 7 all of this without compromising the ability of the members  
 8 of the Marikana community who wish to observe the  
 9 proceedings, to do so, and a move can be achieved without a  
 10 compromise, or a material compromise of that principle. So  
 11 in short we say that a move will improve the efficiency of  
 12 the Commission; it will save significant public money, and  
 13 it will make it more effective for non-State parties to  
 14 participate effectively, which is necessary in the  
 15 interests of justice and the interests of the Commission  
 16 doing its work effectively, and for those reasons we  
 17 support the application.  
 18 CHAIRPERSON: Yes, thank you, Mr  
 19 Budlender. Once the proceedings of this afternoon have  
 20 been transcribed, I shall arrange a meeting with the  
 21 Minister so that we can consider the application. One  
 22 aspect that will require consideration will be the  
 23 availability of suitable premises in Pretoria. I  
 24 understand that officials in the Department of Justice, in  
 25 collaboration with officials in the Department of Public

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1 Works, are already engaged on that exercise, and I'm  
 2 assured that the results of their investigations will be  
 3 available fairly soon, and as soon as that information is  
 4 to hand I will then, as I say, arrange a meeting with the  
 5 Minister and we will consider all the points that have been  
 6 raised, and he will be provided with a transcript of  
 7 everything that's been said this afternoon, together with  
 8 the extra letters, or letter that Mr Mpofo has promised.  
 9 So thank you very much for the submission that's been made,  
 10 and I assure you the matter will be dealt with in the  
 11 manner that I've explained.  
 12 MR MPOFU: Thank you very much,  
 13 Chairperson and Commissioners, on behalf of all my  
 14 colleagues.  
 15 CHAIRPERSON: Mr Ntsebeza, I understand  
 16 you also wish to say something.  
 17 MR NTSEBEZA SC: Not very much, Chair.  
 18 It's just that, you know, these things go into posterity  
 19 and I would like to place myself on record on this aspect,  
 20 and it's in reaction to what my learned friend Adv  
 21 Budlender has said. I'm not supporting this application  
 22 because I'm concerned about lawyers' fees. I just want, if  
 23 that remark is intended to convey that, I want this record  
 24 to be clear about that. I am in this thing for the number  
 25 of days that I have been in it, and that is the extent to

<p style="text-align: right;">Page 5858</p> <p>1 which I have been paid, and that's all that I wanted to 2 say, and I was also mentioning it in the context of 3 emphasising what I consider is a constitutional principle 4 of the equality of arms. The snide remark that this is not 5 about lawyers' fees is inappropriate in the context of this 6 application. I just wanted to make that very clear. 7 MR BUDLENDER SC: Chair, I'd like to 8 clarify. It was not intended as a snide remark, and if it 9 was taken as such I apologise for it, but there was a good 10 deal of discussion of the problem of lawyers' fees, which 11 is a real problem, and I wouldn't for a moment deny that. 12 All I'm saying is that a move or no move will not address 13 the problem of a lawyer's fees. It doesn't really arise as 14 a matter for consideration. It was not intended as a snide 15 remark. 16 CHAIRPERSON: I can see from his reaction 17 that Mr Ntsebeza accepts that what you intended on the one 18 hand, and what you did not intend on the other. So as far 19 as posterity is concerned, there will be no problem on that 20 score. 21 MR NTSEBEZA SC: Mr Chairman, I'm - the 22 democrat and I accept the debate. 23 MR BUDLENDER SC: Chair, the problem is 24 that for some of us posterity comes closer and closer at an 25 alarming rate.</p>	<p style="text-align: right;">Page 5860</p> <p>1 CHAIRPERSON: If it is to suggest that we 2 take the tea adjournment now – 3 MR MPOFU: That is – 4 CHAIRPERSON: And that you call your 5 witness next, but presumably you'd like to gather your 6 thoughts and have a cup of tea before we start. I think 7 it's going to be Mr Mzoxolo Magidiwana, is that correct? 8 MR MPOFU: That is correct, Chairperson. 9 CHAIRPERSON: Well, you can get him in 10 position at the witness table when we resume after the tea 11 adjournment has been taken. 12 MR MPOFU: Thank you, Chair. 13 CHAIRPERSON: The Commission will now 14 adjourn for tea. 15 [COMMISSION ADJOURNS COMMISSION RESUMES] 16 [15:15] CHAIRPERSON: Mr Mpofu, I take it the 17 gentleman who's now at the witness table is Mr Mzoxolo - 18 MR MPOFU: That's correct – 19 CHAIRPERSON: - Magidiwana. Is that 20 correct? 21 MR MPOFU: That's more than correct, 22 Chair. 23 CHAIRPERSON: Mr Magidiwana, would you 24 stand up, please? Are you prepared to take the oath, or do 25 you wish to affirm?</p>
<p style="text-align: right;">Page 5859</p> <p>1 CHAIRPERSON: Yes, that's true. One 2 other thing I think we should say, and that is I'm, I don't 3 want to prejudge the application, I'm endeavouring to keep 4 an open mind and as I'm sure the Minister will, in the 5 light of what's put before us, but if the application is 6 successful, I think it's only appropriate to say that the 7 Municipality of Rustenburg have treated us very well. 8 They've made these facilities available to us. They've 9 gone out of their way to assist us in all sorts of ways. 10 It wasn't their fault there's a problem with the 11 electricity and the water, but they've given us these 12 facilities free of charge and it's a tremendous 13 contribution that the municipality has made, obviously in 14 the interests of, the international interests and the 15 interests of the achieving of the Terms of Reference of the 16 Commission, and the desire that as a result of its work 17 there will be truth, restoration and justice, and I could 18 see from the way some people reacted they weren't aware of 19 the magnificent gesture which the Municipality of 20 Rustenburg has made, and I'm sure you'll all agree with me 21 that whatever may happen to the application, already 22 there's a tremendous debt of gratitude that we owe to them. 23 MR MPOFU: Thank you, Chairperson. I'm 24 sure all of us would agree with you, Chairperson. Can I 25 just make a request that –</p>	<p style="text-align: right;">Page 5861</p> <p>1 MR MAGIDIWANA: I will take an oath. 2 CHAIRPERSON: Would you swear that the 3 evidence you'll give before this Commission will be the 4 truth, the whole truth, and nothing but the truth? Please 5 raise your right hand and say, "I swear, so help me God." 6 MZOXOLO MAGIDIWANA: [The witness is 7 sworn in]. 8 CHAIRPERSON: Thank you, Mr Magidiwana, 9 you may be seated. I see there's a statement that you have 10 put before us. I take it, it will be exhibit EEE1. Is 11 that correct, Ms Pillay? 12 MS PILLAY: That's correct, Chair. 13 CHAIRPERSON: And we also have what looks 14 like a, or what is a criminal docket and it's pages 1547 15 to, I don't know what the last number is, but presumably it 16 comes from IPID, does it? 17 MR MPOFU: Yes. 18 CHAIRPERSON: So presumably this will be 19 exhibit EEE2. 20 MR MPOFU: EEE2, Chairperson. 21 CHAIRPERSON: Yes, thank you. Please 22 proceed, Mr Mpofu. 23 EXAMINATION BY MR MPOFU: Thank you very 24 much, Chairperson and Commissioners. This, Mr Magidiwana 25 would, for the record, be our fourth witness. Good</p>



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1 afternoon, Mr Magidiwana.  
 2 MR MAGIDIWANA: Good afternoon, Sir.  
 3 MR MPOFU: Right, as the Chairperson has  
 4 already indicated, we are going to be dealing mainly with  
 5 EEE1, which is the statement that you made to your lawyers.  
 6 Have you got it in front of you?  
 7 MR MAGIDIWANA: Yes, Sir, I have it.  
 8 MR MPOFU: Right, I'll take you through  
 9 the statement. Some of the parts I will read and get you  
 10 to confirm, and some of the parts I might ask you to put  
 11 things in your own words.  
 12 MR MAGIDIWANA: It is fine, Sir.  
 13 MR MPOFU: According to your statement  
 14 you are 24 years old; you were born in Kanya Village,  
 15 Elliotdale in the Eastern Cape.  
 16 MR MAGIDIWANA: That is so, Sir.  
 17 MR MPOFU: Okay, and what is not in your  
 18 statement is you were born on the 3rd of September 1988,  
 19 which means that during the time of the incident that you  
 20 are about to testify about of the 16th of August, you were  
 21 23?  
 22 MR MAGIDIWANA: It is so.  
 23 MR MPOFU: Right, you obtained employment  
 24 at Lonmin in 2011, and you indicate in your statement that  
 25 you got that employment through the TEBA Recruitment

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1 outlet, which is situated in Wonderkop. Is that so?  
 2 MR MAGIDIWANA: It is so, Sir.  
 3 MR MPOFU: And at that time you were  
 4 staying with a relative in Nkaneng settlement, looking for  
 5 work, and this current employment is your first job. Is  
 6 that so?  
 7 MR MAGIDIWANA: Exactly, Sir.  
 8 MR MPOFU: Okay, and at Lonmin you work  
 9 in the engineering department, but more specifically the  
 10 area is called general tramming and transport. Is that  
 11 correct?  
 12 MR MAGIDIWANA: Yes, general tramming and  
 13 transport.  
 14 MR MPOFU: And your salary is about R4  
 15 000 a month, and if you include the sleep-out allowance  
 16 which is over 1 000, you said the total is over 5 000 but  
 17 less than R6 000. Is that the position?  
 18 MR MAGIDIWANA: Exactly, Sir.  
 19 MR MPOFU: And that is your net salary?  
 20 MR MAGIDIWANA: Yes, it is my net salary.  
 21 MR MPOFU: Okay, then you said that on or  
 22 about the 10th or 11th of August you got wind of the fact  
 23 that the RDOs had taken a decision to down tools and to go  
 24 on strike.  
 25 MR MAGIDIWANA: It is so, Sir.

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1 MR MPOFU: Where did you hear about this?  
 2 MR MAGIDIWANA: I heard about that at  
 3 Nkaneng as I was from my place of employment.  
 4 MR MPOFU: Right, then you say that  
 5 although this was according to your information essentially  
 6 an RDO strike, they had asked other workers to join the  
 7 strike, presumably in sympathy with them.  
 8 MR MAGIDIWANA: Yes, I heard that they  
 9 asked other employees to also join in the strike.  
 10 MR MPOFU: You've also indicated that you  
 11 also heard from some of the workers who said they had been  
 12 stopped from going to work.  
 13 MR MAGIDIWANA: I heard about that, Sir,  
 14 but I don't know who stopped them from going to work.  
 15 MR MPOFU: Right, in any event, after  
 16 getting those messages you decided to stop going to work.  
 17 MR MAGIDIWANA: It is so, Sir.  
 18 MR MPOFU: And at this point can I ask  
 19 you whether you yourself supported the action of the RDOs?  
 20 MR MAGIDIWANA: I supported very much the  
 21 actions of the RDOs because those people work very hard.  
 22 MR MPOFU: Right. Well, although you  
 23 yourself are not an RDO, what can you tell the Commission  
 24 about your own experience of the hard work that they do, as  
 25 you have just said?

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1 MR MAGIDIWANA: Thank you, Sir, for that.  
 2 I will tell you, Sir, because you are here, you don't know  
 3 about this. You are an advocate; you are too far.  
 4 MR MPOFU: True.  
 5 MR MAGIDIWANA: We look at those people  
 6 who are RDO as though they are fools. Even there at the  
 7 station they are clumsy, filled with the machine oil, or he  
 8 gets wet. Perhaps he finished working at about 10 o'clock  
 9 and he knocks off at 1 o'clock, half past 1, being  
 10 completely wet even in his body. Tell me then, Sir, if a  
 11 person works like that day after day, is he healthy?  
 12 MR MPOFU: So as you supported the strike  
 13 – well, firstly, we've already established that this is  
 14 your first job. Had you ever experienced a strike in your  
 15 life, or been part of one?  
 16 MR MAGIDIWANA: I never, Sir.  
 17 MR MPOFU: Right, you say that at some  
 18 stage you wanted to go to the Eastern Cape, but you decided  
 19 rather to stay at home in case the strike could be resolved  
 20 sooner rather than later. What were you fearing would  
 21 happen if you had taken that step and the strike was  
 22 resolved sooner or later?  
 23 MR MAGIDIWANA: It was to lose my first  
 24 job.  
 25 MR MPOFU: Right, so when you say you

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1 stayed at home, because your next statement then talks  
2 about the 15th when you heard something, can we then assume  
3 that that includes the subsequent days, 11, 12, 13, 14 and  
4 15?  
5 MR MAGIDIWANA: Can you repeat, Sir?  
6 MR MPOFU: Yes, I'm saying did you stay  
7 at home until a certain message was passed to you on the  
8 15th of August?  
9 MR MAGIDIWANA: Yes, Sir, I asked from a  
10 passerby whose name was Lucky, but I do not see him  
11 anymore.  
12 MR MPOFU: Yes, what did Lucky tell you?  
13 Sorry, is this now on the evening of the 15th?  
14 MR MAGIDIWANA: Ja, the 15th.  
15 MR MPOFU: And what did Lucky tell you?  
16 MR MAGIDIWANA: He said to me, when I  
17 asked him as to what was happening there, he said, "Mr  
18 Mathunjwa arrived there in a Nyala and so as employees we  
19 told him to come back tomorrow in the morning." It is at  
20 that time that I said I personally will wake up tomorrow  
21 and go there and find out what is happening.  
22 MR MPOFU: Alright, and when you say  
23 waking up and finding out what is happening, that would be  
24 the following day, the 16th. What did you do then on the  
25 16th? What's the first thing you did in the morning in line

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1 with that decision?  
2 MR MAGIDIWANA: When I woke up in the  
3 morning on the 16th I first proceeded to the kraal.  
4 MR MPOFU: What was the purpose of that?  
5 MR MAGIDIWANA: I went to check the cow.  
6 MR MPOFU: Okay, and according to your  
7 statement thereafter – sorry, where is your cow being kept?  
8 You know there are kraals that we have dealt with here.  
9 Can you explain to the Commission in which kraal your cow  
10 is kept?  
11 MR MAGIDIWANA: The one that has a shanty  
12 which is surrounded by a fence, the shanty which is  
13 surrounded by a wire fence.  
14 MR MPOFU: Sorry, Chairperson, if you go  
15 to exhibit L208 and 205 – no sorry, I think I'm going to  
16 confuse you. Let's go to 208. Is that the shack that you  
17 refer to, the one in L208 in front of which one can see a  
18 part of a kraal?  
19 MR MAGIDIWANA: This is exactly the one,  
20 Sir.  
21 MR MPOFU: Okay, now after the kraal,  
22 according to your statement you then proceeded to the  
23 koppie and joined the crowd. Before this, had you been  
24 part of that crowd at all?  
25 MR MAGIDIWANA: It was my first day there

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1 on that day.  
2 MR MPOFU: And in relation to the number  
3 of people, we know that eventually there were about 3000  
4 people there. When you arrived in the morning, just to  
5 check how early it might have been, were there already that  
6 number of people or were there fewer at that stage?  
7 [15:35] MR MAGIDIWANA: They were many, but not  
8 too many, because I woke up early in the morning and went  
9 there.  
10 MR MPOFU: Right, now we know that you  
11 spent, or rather, according to your instructions to us you  
12 spent the rest of the morning there, and the next thing  
13 that you deal with in your statement is that after Mr  
14 Mathunjwa's first address – and once again we know the time  
15 for that – you felt hungry and went home to eat.  
16 MR MAGIDIWANA: It is so, Sir.  
17 MR MPOFU: And shortly after you  
18 returned, Mr Mathunjwa also returned to give his second  
19 address. Is that correct?  
20 MR MAGIDIWANA: It is so, Sir, and  
21 further, I was also there.  
22 MR MPOFU: If the Commission can just  
23 bear with me. Okay, I don't know if – I thought my  
24 attorney was up there – if you'd be able to display number  
25 4, the picture in number 4. Item number 4. We had pre-

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1 arranged certain things to be shown. It's exhibit GG2, I  
2 think. Okay, we'll move on to something, we'll come back  
3 to that, but essentially the – oh, it is there. No, I  
4 didn't think it was there, thank you. Thank you,  
5 Chairperson. Yes, no sorry, I didn't realise it had been  
6 put – I think the people are more efficient than – you see  
7 in that picture that Bishop Seoka is talking to the  
8 leadership of the people at the koppie. Is that correct?  
9 MR MAGIDIWANA: I see it, Sir.  
10 MR MPOFU: Yes, now in relation to that,  
11 when did you go to have your lunch?  
12 MR MAGIDIWANA: I left whilst he was  
13 still talking to them, and when I left I went towards the  
14 direction of the police officers and there were many of  
15 them, and at that time I was carrying the stick.  
16 MR MPOFU: Yes, Chairperson, I'm sorry,  
17 this is my fault. Having intended to use this as a  
18 reference point, I've now misplaced – there is some  
19 independent confirmation of when the bishop got there.  
20 I'll deal with it tomorrow, just to link the two points.  
21 Okay, Mr Magidiwana, Mr Mathunjwa's second address, in  
22 general what did it entail as far as you remember?  
23 MR MAGIDIWANA: He said, "Employees,  
24 where I am coming from it's very tough. No attention is  
25 paid to me and it has been decided that you are going to be

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1 killed. The situation is not good. I'm asking you to go  
2 to your places of residence." By then he was kneeling  
3 down.  
4 MR MPOFU: Right, and what was the  
5 response of the workforce, or rather, the protesters?  
6 MR MAGIDIWANA: They said, "Here we are  
7 not going to leave before the employer comes and gives us  
8 an answer, because all we want is money and further that we  
9 are not fighting."  
10 MR MPOFU: Okay, before we go on, can I  
11 just ask you, starting – I'm sorry to take you back.  
12 Starting with the time you spent there before you went to  
13 lunch, where were you sitting within the crowd that was at  
14 the koppie or koppies?  
15 MR MAGIDIWANA: I was sitting in front,  
16 Sir.  
17 MR MPOFU: Yes, and when Mr Mathunjwa's  
18 second address occurred after you had come back from lunch,  
19 where did you sit?  
20 MR MAGIDIWANA: Even at that time I was  
21 still sitting in front.  
22 MR MPOFU: Yes, when you got there did  
23 anyone tell you where to sit or where not to sit?  
24 MR MAGIDIWANA: No, Sir, there's no such  
25 a thing.

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1 MR MPOFU: And your own observation in  
2 relation to where people sat, was it regulated in any  
3 manner?  
4 MR MAGIDIWANA: No, no person was  
5 regulating. A person sat wherever he felt he should sit.  
6 MR MPOFU: Right, now according to your  
7 statement then within a few minutes of Mr Mathunjwa's  
8 departure you noticed that the police were quickly, as you  
9 put it, rapidly fencing you in from the direction of the  
10 residential area. Did you observe this while you were  
11 seated there?  
12 MR MAGIDIWANA: It is so, Sir, I observed  
13 it whilst I was still sitting.  
14 MR MPOFU: And you say that since you  
15 were sitting in the front, you then dashed in the direction  
16 of Nkaneng. What did you intend to do by doing that?  
17 MR MAGIDIWANA: My intention was to go  
18 home where I am staying.  
19 MR MPOFU: Well, why did you suddenly  
20 want to go home? Why did you want to do that at that  
21 particular time?  
22 MR MAGIDIWANA: It was because of seeing  
23 that we were being surrounded by wire.  
24 MR MPOFU: Right, then you say that at  
25 some stage you were close to one of the Nyalas that was

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1 dragging the barbed wire, which outpaced you and you were  
2 not able to access the road to Nkaneng just in front of the  
3 small kraal. Can you explain to the Commission just that  
4 particular episode about trying to go to Nkaneng near the  
5 kraal, the small kraal?  
6 MR MAGIDIWANA: Whilst the other  
7 employees were standing and singing a song, and not in a  
8 hurry, and they were walking towards the road, there were  
9 others who had already passed. They had already reached  
10 that road and were walking towards Nkaneng. When we  
11 arrived near the kraal the Nyala was deploying the barbed  
12 wire. When it realised that we were about to pass there,  
13 then it moved quicker so that it could close that gap  
14 because it realised that we wanted to pass there. We then  
15 turned around the kraal and I was in front. Then when I  
16 appeared, it was at that time that the teargas was  
17 released. They were released. Even before reaching the  
18 road, then the shots were fired.  
19 MR MPOFU: Okay, right, we'll get there,  
20 but when you say you went around the kraal, what was your  
21 intention?  
22 MR MAGIDIWANA: It was at the time we  
23 wanted to run to Nkaneng and we realised that it was indeed  
24 very bad.  
25 MR MPOFU: And how were you going to go

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1 to Nkaneng?  
2 MR MAGIDIWANA: We were going to go to  
3 Nkaneng. There is the path that comes from Marikana which  
4 leads to that place. That is the path, the road on which  
5 we were going to go down.  
6 MR MPOFU: Yes, and is that the same road  
7 that had been blocked by the hippo that had the fence that  
8 you testified about?  
9 MR MAGIDIWANA: Yes, it was that road  
10 which was blocked by an Nyala with the barbed wire.  
11 MR MPOFU: Okay, now you've already  
12 testified about the next step. You heard bullets. Were  
13 you yourself hit?  
14 MR MAGIDIWANA: I was not hit, Sir.  
15 MR MPOFU: No, that's not what he said.  
16 MR HANABE: Oh, I'm sorry.  
17 MR MAGIDIWANA: I was hit.  
18 MR MPOFU: Yes, thank you. And sorry,  
19 according to paragraph 15 of your statement you say that  
20 the gap that you took between the, or rather that you've  
21 just described, was the only gap open to you, to that  
22 group. Is that correct?  
23 MR MAGIDIWANA: That is the only one,  
24 Sir.  
25 MR MPOFU: Right, and then you say that

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1 as soon as the group emerged from the other side of the  
 2 kraal, you were met with more rapid gunfire and you were  
 3 hit on your leg and you stumbled and fell behind the other  
 4 workers who had been shot, including Mr Noki.  
 5 MR MAGIDIWANA: It is so, Sir. I fell  
 6 alongside Noki.  
 7 MR MPOFU: Okay, we will come back and  
 8 I'll take you through some pictures and some footage, but I  
 9 want us to just do the broad landscape of the statement  
 10 first. Is that okay?  
 11 MR MAGIDIWANA: It is okay, Sir.  
 12 MR MPOFU: Yes, according to your  
 13 statement you then, the gunfire stopped for a while and you  
 14 say, this part I'd like you to say in your own words.  
 15 Between that what you've described as the first gunfire and  
 16 when you testify that you were shot again, can you explain  
 17 in your own words to the Commission what happened?  
 18 MR MAGIDIWANA: As we were lying there  
 19 after being shot and there was this thing which was blue  
 20 smoke, called the blue smoke, I heard that there were  
 21 footsteps, or strikes of something approaching. They were  
 22 talking whilst they were shooting. As they were shooting,  
 23 all the people were lying down, all of them. It was then  
 24 that I was hit by then a second one on my left side.  
 25 MR HANABE: He's pointing to the rib cage

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1 on his left side.  
 2 [15:55] MR MPOFU: And sorry, Mr Magidiwana, it's  
 3 my fault. When you say the second one, can we assume that  
 4 the first one is the one you referred to in paragraph 16,  
 5 which had hit your leg?  
 6 MR MAGIDIWANA: It hit me on my thigh.  
 7 MR MPOFU: Yes, okay. So you were still  
 8 telling us that the second one got in on your body.  
 9 MR MAGIDIWANA: Yes.  
 10 MR MPOFU: Yes, and can you tell us what,  
 11 if any other bullets hit you, where they hit you?  
 12 MR MAGIDIWANA: I was hit with several  
 13 bullets.  
 14 MR MPOFU: Yes, can you explain, describe  
 15 to the Commission where all the bullets hit you.  
 16 MR MAGIDIWANA: The other one hit me on  
 17 my left arm.  
 18 MR HANABE: But with a hand,  
 19 Commissioner, he's pointing at the left elbow, the side of  
 20 the elbow.  
 21 MR MAGIDIWANA: And after that they  
 22 passed and hit the others. When they came back, they  
 23 realised I was still alive. The other one asked a  
 24 question, "Why are you still alive?" It was then that that  
 25 other one then hit me with the other two on my right thigh

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1 and then he hit me again on my right side on the rib cage.  
 2 He then asked me about things I did not know. He asked,  
 3 "Where are those firearms which were taken on the 13th?  
 4 Where is the 'inyanga'?" I said I know nothing about those  
 5 things. It was then that I made myself to a bad luck and  
 6 that was a reason for me to be hit. He was saying, "You  
 7 are lying. You are going to tell the truth." He was  
 8 saying that, hitting me on my lower part, and the other one  
 9 hit me then on my testicles. It was then that I said, "It  
 10 is better then you finish me off and just kill me," but the  
 11 other one who was speaking in isiZulu stopped him.  
 12 MR MPOFU: Thank you for that. Yes,  
 13 before that you said in your statement that one of the  
 14 policemen said, when you asked to be finished, to be  
 15 killed, that there would be no further need to do that  
 16 because you were going to die anyway. Can you testify  
 17 about that?  
 18 MR MAGIDIWANA: He said it doesn't make  
 19 any difference, I'm going to die on the way.  
 20 MR MPOFU: Yes, and then can you tell the  
 21 Commission about your evidence, or rather your statement  
 22 that the policemen there were busy laughing or joking  
 23 around and taking pictures with their cell phones, and you  
 24 say that others were kicking the bodies. Did you observe  
 25 this yourself?

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1 MR MAGIDIWANA: It is so, Sir, I observed  
 2 it.  
 3 MR MPOFU: Jumping to paragraph 22, and I  
 4 think you've already, you said one policeman showed you  
 5 some mercy and said to the others, "This is a child," and  
 6 then he made a telephone call and thereafter three  
 7 ambulances arrived. Is that the policeman that you had  
 8 referred to who was Zulu-speaking?  
 9 MR MAGIDIWANA: It is so, Sir.  
 10 MR MPOFU: And then according to your  
 11 statement, the last thing you remember was being carried to  
 12 one of those ambulances, after which you lost  
 13 consciousness.  
 14 MR MAGIDIWANA: It is so, Sir.  
 15 MR MPOFU: And before we get to the stage  
 16 where you regained your consciousness, Chairperson, could  
 17 we start on that point tomorrow?  
 18 CHAIRPERSON: The Commission will adjourn  
 19 until 9:30 tomorrow morning.  
 20 [COMMISSION ADJOURNED]  
 21 .  
 22 .  
 23 .  
 24 .  
 25 .

<b>A</b>				
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