

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 60 06 MARCH 2013 PAGES 6331 TO 6411

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 6 MARCH 2013]
 2 [09:33] CHAIRPERSON: The Commission resumes. Mr
 3 Magidiwana, you're still under oath.
 4 MZOXOLO MAGIDIWANA: s.u.o.
 5 CHAIRPERSON: Mr Ngalwana, I understand
 6 you still have questions to ask in cross-examination.
 7 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 8 Yes, Chairperson, thank you. Mr Magidiwana, you'll recall
 9 that yesterday as we parted you were disputing whether
 10 there was a road on the, shall we say the northern side of
 11 the big kraal, on the other side of the big kraal. You
 12 maintained there was a fence there, not a path on exhibit
 13 EEE8.3, which you can also see at EEE8.2. Do you still
 14 dispute that there is a path running on the top side of
 15 that big kraal in that photograph?
 16 MR MAGIDIWANA: Sir, as I've already
 17 mentioned, there's a fence. I know that fence very well, I
 18 know which direction it takes, how it is, in what condition
 19 it is.
 20 MR NGALWANA: Are you saying there is no
 21 path that is capable of being passable, in other words that
 22 there is no path on which people can walk at the top end of
 23 that big kraal?
 24 MR MAGIDIWANA: People who want to go to
 25 the shack place, settlement goes through a path that goes

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1 past that red shack and then joins the other road that
 2 leads to the shack settlement.
 3 MR NGALWANA: Perhaps if the picture is
 4 ready that shows a vehicle on that path, which will be a
 5 new exhibit, may I ask that it be shown so that we can zoom
 6 in?
 7 CHAIRPERSON: We're in trouble this
 8 morning because we haven't got Ms Pillay here, but
 9 hopefully Mr Madlanga could deputise for her.
 10 MS LUPUWANA: Chairperson, I think it
 11 will be EEE12.
 12 CHAIRPERSON: E12?
 13 MS LUPUWANA: EEE12, yes.
 14 CHAIRPERSON: No, that can't be right.
 15 We've just finished 11, that's the photograph of the 13th
 16 of August, so this is EE12, EEE12. Is that right?
 17 MS LUPUWANA: Yes, Chairperson.
 18 CHAIRPERSON: How do we describe it, Mr
 19 Ngalwana?
 20 MR NGALWANA: It will be a photograph
 21 showing numerous paths that lead to Nkaneng, other than the
 22 one that the witness says is the only path to Nkaneng.
 23 CHAIRPERSON: When was it taken?
 24 MR NGALWANA: That I'm not sure about,
 25 but it would have been - I don't know, Chairperson, I don't

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1 have an answer.
 2 CHAIRPERSON: Mr Ngalwana, is it a new
 3 photograph that's been taken or is it one that's part of
 4 the hard drive?
 5 MR NGALWANA: No, it's part of the hard
 6 drive, Chair.
 7 CHAIRPERSON: So you owe us, I think you
 8 still owe us some pathways, don't you?
 9 MR NGALWANA: Yes.
 10 CHAIRPERSON: So you're going to add this
 11 one to the missing pathways that are still owed, is that
 12 right?
 13 MR NGALWANA: Yes, I will, and in fact
 14 the reason why one of the juniors, fellow juniors are not
 15 here is because that is what's being sorted out with Ms
 16 Pillay, as I understand it.
 17 MR MADLANGA SC: Mr Chairman,
 18 Commissioners, may I also just make a request to my learned
 19 friend, slide 198 that he referred to quite a number of
 20 times, we are not able to locate that photograph in the
 21 photographs that were provided to us by SAPS. Can my
 22 learned friend also please assist us with the source of
 23 that one? Who's photo, or rather who took the photograph
 24 exactly?
 25 CHAIRPERSON: The other question is

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1 whether it's a photograph or whether it's a still from a
 2 video?
 3 MR MPOFU: Yes.
 4 MR MADLANGA SC: Yes, yes, yes, is it a
 5 photograph or is it a video still or from a video? Thank
 6 you, thank you, Chair.
 7 MR MPOFU: Chairperson, just to remind,
 8 while we are talking about 198, which is something I wanted
 9 to also place on the record yesterday, that just to remind
 10 Mr Ngalwana that that photograph was specifically disputed,
 11 the time that the police have allocated to it. If you
 12 remember there was that debate with Mr Phatsha as to
 13 whether it's the singing up and down or whether it's 15:47,
 14 as it says in 198, so it's just - so it's even more so if
 15 it cannot be located.
 16 CHAIRPERSON: It should be located,
 17 otherwise if it's not located I don't know what value we
 18 can give it, but presumably it's somewhere so it will be
 19 capable of being found if diligent enough search is
 20 conducted and when we find it we will be perhaps on the way
 21 to finding out what time it was.
 22 MR NGALWANA: Chair, I've also asked that
 23 this exhibit EEE12 be printed so that they can be
 24 distributed instead of simply being shown to us.
 25 CHAIRPERSON: Oh yes, no, certainly we

<p style="text-align: right;">Page 6335</p> <p>1 need it, a hard copy of it. Is this now EEE12 that's being 2 shown?</p> <p>3 MR NGALWANA: Correct, Chair. 4 CHAIRPERSON: Are you now going to zoom 5 in on the fence?</p> <p>6 MR NGALWANA: Yes. Well, on what is 7 alleged to be the fence, which we maintain is a road. 8 CHAIRPERSON: Or what you say is a fence? 9 MR NGALWANA: Well, the witness - 10 CHAIRPERSON: Or you say this is the 11 scene -</p> <p>12 MR NGALWANA: The witness says it's a 13 fence which is not capable of being walked on by people, as 14 I understand it.</p> <p>15 CHAIRPERSON: Oh, alright. 16 MR NGALWANA: May I ask that we zoom into 17 that road, and showing where the red vehicle is, can you 18 put a cursor there maybe?</p> <p>19 CHAIRPERSON: And the witness said that 20 there is an entrance through the fence in line with the red 21 shack and I see two red shacks on the photograph. In fact, 22 even on EEE8.1 one can see what looks like a fence and one 23 can see - one can't see a red car because it wasn't taken 24 at that time, but you can see the two red shacks. So even 25 possibly the enlargement of EEE8.1 will help us because it</p>	<p style="text-align: right;">Page 6337</p> <p>1 being used by pedestrians to get to Nkaneng. 2 MR NGALWANA: For the [inaudible] of the 3 path it was wide enough to accommodate that vehicle. May I 4 ask the technician to draw a line in perhaps red from the 5 beginning - there are two parallel paths that run below the 6 small kraal where the witness said the group was initially, 7 where he said the group dashed from A to B, can we start 8 there? On EEE8.12 if you can zoom out, EEE8.12, the one we 9 had just now.</p> <p>10 CHAIRPERSON: No, no, that's not EEE8.12, 11 it's EEE12, as I understand it. 12 MR NGALWANA: Sorry, yes EEE12. 13 CHAIRPERSON: No, no, that's not - well 14 EEE12 -</p> <p>15 MR NGALWANA: Is the picture we just had. 16 Can you give it a definition which will show us the paths, 17 because I want to show where we should start. It should 18 start from where the witness said the group had 19 congregated. You can then run along the path that was in 20 blue, joining the path with the vehicle. No, no, it would 21 be on the other side of that kraal, yes, and then drawing a 22 line right down that path to the right of the screen. Now, 23 Mr Magidiwana, you must accept - can we enlarge that or 24 zoom in? Hopefully the lines will stay where they are. Mr 25 Magidiwana, from where you say your group moved, it was</p>
<p style="text-align: right;">Page 6336</p> <p>1 does look to me as if the fence is visible on EEE8.1. 2 MR MPOFU: And 8.3, Chair, there are even 3 people walking on it, on the road. 4 CHAIRPERSON: And 8.1 as well. 5 MR NGALWANA: Well, I'm grateful to my 6 learned Mr Mpofo for making that clear because the witness 7 doesn't seem to want to admit that. He simply says there 8 is a fence, and I when ask him again, Mr Magidiwana - 9 CHAIRPERSON: No, no, that's not right. 10 He didn't say that. He said there's a fence and he said 11 it's possible to get into Nkaneng through a gap in the 12 fence or an entrance of some kind more or less in the 13 vicinity of the red shacks. That's the evidence he gave, 14 so it wasn't summarised incorrectly, what he said. 15 MR NGALWANA: Well, Chairperson, I'm not 16 talking about a gap; I'm talking about an entire road that 17 would eventually lead to Nkaneng. 18 CHAIRPERSON: My understanding was that 19 he said that there was a path, you asked him about paths to 20 Nkaneng and he said that at that point on the path that 21 runs parallel with the fence there's an entrance of some 22 kind which enables people to get to and from Nkaneng. So 23 whether it's a road you can drive a car down is irrelevant 24 because they weren't driving cars at the time, they were on 25 foot. So all we need is an entrance which was capable of</p>	<p style="text-align: right;">Page 6338</p> <p>1 possible, was it not, for the group to follow the paths now 2 being indicated to you, particularly joining that straight 3 line at the top of the picture on your way to Nkaneng. It 4 may take longer, but it will get you there. 5 MR MAGIDIWANA: Sir, I do not know what 6 you want me to say. Everything that you have indicated 7 there, as I've indicated in my ball pen here, is part of 8 the fence and not the road. 9 MR NGALWANA: Are you saying it is not 10 possible for people to walk on that path at the top of the 11 screen indicated by the straight line that goes to the 12 right? 13 MR MAGIDIWANA: If you wanted to proceed 14 from there to the shack settlement you would have used the 15 road that you saw yesterday being used by many people and 16 thereafter join the other various roads that leads to the 17 settlement. I explained to you yesterday that what you 18 have indicated is a fence, a fence that is built for the 19 stock, the cattle that are being kept there do not get into 20 the settlement. 21 MR NGALWANA: Are you disputing what your 22 lawyer said earlier on that there are in fact people being 23 shown, seemingly walking on that path? If you look at EEE2 24 and EEE3 - 25 MR MAHLANGU: You're referring, Sir, to</p>

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1 EEE8.2?
 2 MR NGALWANA: Yes, EEE8.2 and EEE8.3, and
 3 I believe EEE8.1 as well where you'll see two or three
 4 people there. Are you disputing what your lawyer said
 5 earlier?
 6 MR MPOFU: Okay, Chairperson, honestly,
 7 Mr Ngalwana must not misquote me.
 8 CHAIRPERSON: No, no, no, don't get
 9 excited, people. Just make your objection. It's bad
 10 enough having to deal with objections without having to try
 11 to make peace between warring advocates. I don't like
 12 that.
 13 MR MPOFU: Well, I'd like to define them,
 14 Chairperson.
 15 CHAIRPERSON: I don't like it, I don't
 16 want to encourage that. So just, don't be prosaic. Just
 17 say why he's wrong, why you think he's wrong -
 18 MR MPOFU: Well, that is exactly the
 19 objection, that he's misquoting me, that there are dozens
 20 of roads there, that's not - I thought the issue, his issue
 21 was whether those roads can be accessed. That is the
 22 issue. It's not whether there are roads and there are
 23 people. Of course there are roads and there are people and
 24 there are cars and there are all sorts of things.
 25 CHAIRPERSON: What is important at this

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1 stage, that he said to the witness that the witness was now
 2 contradicting what you had put. So if your objection
 3 relates to a misstatement of what you had put it would be
 4 helpful if you reminded us of what you did put.
 5 MR MPOFU: Okay. What I said,
 6 Chairperson. is when you were explaining the issue about
 7 the red shack was that on EEE8.3 behind, or rather on the
 8 left-hand side of those red shacks you can even see at
 9 least three people walking on the road there. So the road
 10 is there, as the Chairperson was also pointing it out, but
 11 the question is whether the road or all the roads that you
 12 see in Nkaneng could be accessed without going through the
 13 gap. That's the only issue.
 14 CHAIRPERSON: To put the same point
 15 differently, the question is whether those - the path those
 16 people are walking on is on the settlement side of the
 17 fence or on the kraal side of the fence. If it's on the
 18 kraal side of the fence then the point being put by counsel
 19 for the police is correct. If it's on the township side of
 20 the fence then obviously you can't get through there until
 21 you come to a spot where there's a gap in the fence. So
 22 that seems to be the issue. Now you say you were referring
 23 to the people walking on - in effect on the settlement side
 24 of the fence, so the issue, is there a contradiction
 25 between what the witness says and what you say. That's

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1 your point, isn't it? It sounds to me as if he's right, Mr
 2 Ngalwana, unless I'm misunderstanding.
 3 MR NGALWANA: My learned friend is
 4 running way ahead of me. I am simply asking about whether
 5 that path is capable of being walked by human beings.
 6 CHAIRPERSON: I think you're actually
 7 taking a couple of steps backwards, but never mind. Carry
 8 on with this line and we may eventually get to an entry
 9 point to the settlement.
 10 MR NGALWANA: Are you disputing, Mr
 11 Magidiwana, that that road at the top of the kraal is
 12 capable of being walked upon? There is in fact a path
 13 there on which people can walk.
 14 MR MAGIDIWANA: The road that is being
 15 used by the people is the one I told you about. What made
 16 us turn around the kraal in an endeavour to join that road
 17 is because we know that it's the only road that can be
 18 accessed in order to go to the settlement.
 19 [09:53] MR NGALWANA: You're not answering my
 20 question. I'm not talking about access to the road. You
 21 are now on that path, it is possible to walk on that path.
 22 Forget access to it. You're already on that road, it's
 23 possible to walk it.
 24 MR MAGIDIWANA: There is no road there.
 25 The road is on the other side of the fence.

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1 MR NGALWANA: Well, then there is a road
 2 on the other side of the fence on which three people at
 3 least are walking.
 4 MR MAGIDIWANA: That is where the streets
 5 begin, leading to the settlement.
 6 CHAIRPERSON: Excuse me, but do I
 7 understand you correctly? Are you saying there is a path
 8 which is actually a road, but it's on the settlement side
 9 of the fence?
 10 MR MAGIDIWANA: There is a fence, Mr
 11 Chairperson. There is a fence, Mr Chairperson, on the
 12 other side of the fence that is on the settlement side
 13 there is a road which runs parallel to the fence.
 14 CHAIRPERSON: And is that the road that
 15 we see the three people walking on, or standing on, in
 16 exhibit EEE8.3?
 17 MR MAGIDIWANA: That's right.
 18 MR NGALWANA: And that road, as is the
 19 road parallel to it, on top of it, are both accessible on
 20 the left-hand side of the picture. If you can put in that
 21 picture again, EEE, I think it will be 12, and focusing on
 22 the left-hand side of that picture, now it is possible to
 23 access that path which you say there is a wire, or a fence,
 24 through these dark lines, those are paths. Look at the
 25 dark line at the bottom of the screen. Those are paths

<p style="text-align: right;">Page 6343</p> <p>1 that come from where you say your group was, one could have 2 followed any of those paths to access the road that you say 3 is inaccessible and in fact they didn't have to even walk 4 on those paths; they can walk in the open veld to get 5 there, more to the left-hand side, the bottom of the 6 screen. 7 MR MAGIDIWANA: No, it is not so, Sir. 8 This is what I really don't like about what you're saying. 9 MR NGALWANA: Well, that is going to be 10 the evidence - 11 CHAIRPERSON: Don't worry about what you 12 like or don't like. Just answer the question. But do I 13 understand your position to be this, that what we see at 14 the moment is a photograph of the scene which shows far 15 more than we can see on EEE8.3 because it not only shows 16 the two cars that we can see on EEE8.3, but it also shows 17 another car further to the left. Now what counsel, as I 18 understand it, is putting to you is, he appears to be 19 conceding by what he shows on the picture that there isn't 20 a path close to the two cars we can see on EEE8.3 which 21 goes through the fence into the township. But in order to 22 get to the township you've got to go further to the left, 23 it looks like much further to the left from the photograph, 24 beyond the other car that's much further down to the left. 25 That's what counsel is putting, as I understand it. That</p>	<p style="text-align: right;">Page 6345</p> <p>1 indeed on the settlement side of the fence. 2 MR NGALWANA: Chairperson, I'm going to 3 approach it in a different angle, save to say that it's 4 going to be the evidence of the police that there are other 5 ways of accessing Nkaneng other than the one that the 6 witness describes. For now I want to explore again a 7 question I've asked on numerous occasions and to which I'm 8 yet to receive a straight answer. The evidence of the 9 police will be that when Nyala 1 deployed - I'm not talking 10 about Nyala 4 - the first Nyala on slide 193, when the 11 first Nyala deployed numerous people dispersed voluntarily, 12 some of whom took the main path to Nkaneng, the one that 13 the witness said is the only path to Nkaneng. There was no 14 police blocking that path at the time when the first Nyala 15 deployed barbed wire. That is going to be the evidence of 16 the police. I'm asking for your comment. 17 MR MADLANGA SC: Mr Chairman, 18 Commissioners, looking at this picture I see the very last 19 Nyala to the far left already very close to the Nyala in 20 front of it. So I would imagine that that yellow broken 21 line indicates that that Nyala must have moved from where 22 that broken line starts from the far left. If that be so, 23 it means that the deploying started at the beginning of 24 that broken line, the beginning that I've just indicated. 25 Now if that be so, if that be so, this picture shows the</p>
<p style="text-align: right;">Page 6344</p> <p>1 [inaudible] the lines depicted [inaudible] cars. Now he 2 says no, you know, so are those lines wrong or did I 3 misunderstand? 4 MR NGALWANA: No I'm not saying you'll be 5 able to travel that way. I say that is one possible way of 6 accessing that road, it's not the only way. 7 CHAIRPERSON: If there are other paths 8 that are closer, more accessible in the vicinity of the two 9 cars we see on EEE8.3, then I'd expect them to be depicted. 10 I wouldn't think we would waste time by looking at another 11 path much further to the left which goes to the left of 12 another car that isn't even visible on EEE8.3. 13 MR NGALWANA: Well, Chair, the important 14 point that must be kept in mind here is that people who are 15 walking don't have to walk on a path, there is an open veld 16 here, they can access that road through any, it doesn't 17 have to be a path. 18 CHAIRPERSON: Yes, but the next question 19 is, whether you can access that road from the open veld and 20 you can only, in the vicinity of the two kraals we see in 21 EEE8.3, and you can't access that road from the open veld 22 if there isn't a gap in the fence. So the key question is, 23 is there a gap in the fence in the vicinity of the two 24 kraals we see on EEE8.3 which could be used to gain access 25 to that road, because it seems clear that that road is</p>	<p style="text-align: right;">Page 6346</p> <p>1 people that are supposed to have started moving and some of 2 them are way beyond the kraal. They are somewhere in the 3 vicinity of the shack just above 15:43. Now those people, 4 I've not been given an impression that they were running or 5 anything and one assumes that they were walking and look at 6 the distance that they must have walked from the koppie all 7 the way there, and if the suggestion, as my learned 8 friend's question says, is that they only started moving 9 when the deploying of the wire began, it doesn't make sense 10 to me. The simple point I'm making therefore is that the 11 question is misleading, and I would object to it. 12 CHAIRPERSON: Mr Ngalwana, what do you 13 say about that? 14 MR NGALWANA: Well, Chairperson, I'm not 15 saying that we are only concentrating on the people who are 16 near the kraal. There is a whole line of people going 17 back. 18 CHAIRPERSON: No, no, but what you're 19 putting is once the deployment started people moved away 20 and you're using 15:40 - you're using 193 to illustrate 21 that. The truth is that if you look at your own slide 192 22 it seems the deployment of the wire must have started at 23 15:40 which would mean that, it took about three minutes 24 for the, which then brings us to 193, for the wire which is 25 indicated by that dotted yellow line to be deployed, and of</p>

<p style="text-align: right;">Page 6347</p> <p>1 course we've then given the people three minutes to walk 2 from where they were at 15:40, then when we see them at 3 15:43. So I think the whole question is a bit messy. So I 4 think to meet Mr Madlanga's point it would be fair if you 5 reformulated the question to make it clear that your case 6 is that the order to deploy the wire was given at 15:40 7 when I assume, when one can assume the deployment started, 8 and 15:43 shows what happened three minutes later; a 9 substantial amount of wire deployed and a substantial 10 number of people already leaving the scene.</p> <p>11 MR NGALWANA: Well, perhaps - thank you, 12 Chairperson, and thanks to my learned friend - it's the 13 inelegance of the question. Mr Magidiwana, the instruction 14 to deploy the wire was given at around 20 to 4. That is 15 roughly the time during which the first Nyala started 16 deploying the barbed wire. Then people started dispersing 17 when they saw the first Nyala deploying the wire. Your 18 group did not disperse with the people who were dispersing 19 after the first Nyala deployed the wire? Why did your 20 group not disperse at that time?</p> <p>21 MR MAGIDIWANA: Your question, Sir, it's 22 easy, because first of all there, there was some 23 discussions taking place. When these people started 24 encircling us nobody knew what their intention was, whether 25 to arrest us or to kill us. The best was that we should</p>	<p style="text-align: right;">Page 6349</p> <p>1 encircled?</p> <p>2 MR NGALWANA: At the time when the police 3 first deployed the first barbed wire, there was no barbed 4 wire that was closing off the main route going to Nkaneng. 5 In fact, in your own evidence when you were asked in chief 6 was the crowd at, referring to slide 191, the same number 7 as when the barbed wire was deployed, you said there are 8 people who left. Clearly your group could also have left 9 with those people who left at the time the first barbed 10 wire was deployed. You chose not to. Instead you dashed 11 towards the police line when the fourth Nyala was 12 deploying, when the fourth Nyala was deployed.</p> <p>13 MR MAGIDIWANA: You see, Sir, as you say 14 we were just to disperse there, it's very difficult for 15 people who had been staying at that place for a very long 16 time not going to work without a decision whether we are 17 going or not going.</p> <p>18 MR NGALWANA: You must accept - well, let 19 me tell you this. By Thursday the 16th of August, the 20 police knew that a number of people had been killed by the 21 striking workers, including two police officers. 22 [10:13] That happened on Monday the 13th. I'm talking 23 about the incidents of Monday the 13th. The killing 24 happened after General Mpembe and other officers allowed, 25 or permitted your group, the Noki group, the armed group,</p>
<p style="text-align: right;">Page 6348</p> <p>1 leave, to leave that place and go to our residential 2 places. The song then started and the movement commenced. 3 As we were singing and moving, the police must have 4 realised where we wanted to go out and they were closing 5 that place. Even the place that they had left open, that 6 gap, they did that purposely because they knew we would 7 endeavour to go through there and that is where they would 8 close us up and shoot us. As you said, nobody ran in the 9 direction in which you said the people ran back to where 10 they had actually been from. They also had no way of doing 11 it except going through the kraal. Now your question 12 becomes difficult as to why we did not disperse when all 13 endeavours were made to have us encircled there so that we 14 should not go away.</p> <p>15 MR NGALWANA: I notice, Mr Magidiwana, 16 that every time we deal with this question you become 17 agitated and you raise your voice. What particularly irks 18 you about this question?</p> <p>19 MR MAHLANGU: The question again was?</p> <p>20 MR NGALWANA: What particularly annoys 21 you about this question?</p> <p>22 MR MAGIDIWANA: I am supposed to feel 23 that way. People died in the, people died seriously there 24 in, they could not run away. You say we should have run 25 into the open veld. How could we go there when we were</p>	<p style="text-align: right;">Page 6350</p> <p>1 to walk past the police line and said they were going to 2 escort them to the koppie. General Mpembe and the other 3 officers believed Mambush when he said that the group was 4 going to lay down their arms at the koppie. Instead what 5 happened, they assaulted police officers and other persons 6 and killed at least two police officers. Now, with that 7 knowledge in mind, having experienced that as the police, 8 does it make sense to you that they would do the same thing 9 on Thursday to allow an armed group of people to go past 10 the police line, armed with sharp weapons and ammunition?</p> <p>11 MR MAGIDIWANA: Sir, let me tell you 12 again. No workers proceeded to the police. It was the 13 police that proceeded to the workers, encircled them and 14 shot them.</p> <p>15 MR NGALWANA: You had numerous other ways 16 to go. You could walk away from the police line.</p> <p>17 MR MAGIDIWANA: Sir, which person was 18 saved amongst those that ran towards Marikana?</p> <p>19 MR NGALWANA: In your own evidence, I've 20 just related it to you, you said there were fewer number of 21 people remaining on the koppie after the barbed wire was 22 deployed than there were before the barbed wire was 23 deployed, so there are people who walked or ran to their 24 safety, to Nkaneng.</p> <p>25 MR MAGIDIWANA: Sir, I am saying at the</p>

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1 time of the shooting, which person was saved amongst those
 2 who were running towards Marikana?
 3 CHAIRPERSON: I don't know if counsel can
 4 answer that question, but if you do a bit of arithmetic,
 5 there were 2 000 people on the koppie initially and after
 6 Mr Mathunjwa spoke it would seem some people left. We see
 7 pictures of people having left. At the end there were 270-
 8 odd people arrested and there were 34 people dead. It
 9 sounds as if quite a lot of people succeeded in getting
 10 away from the koppie without being hurt, so I don't know
 11 that the question you ask is very helpful, but perhaps Mr
 12 Ngalwana can be able to answer it.
 13 MR MPOFU: No, Chairperson, sorry, I
 14 think either we entertain the witness's question or we
 15 don't. It's obviously a rhetorical question. What he's
 16 saying –
 17 CHAIRPERSON: No, he's asked a question
 18 of counsel. It didn't sound rhetorical to me and normally
 19 I don't allow witnesses to ask counsel questions –
 20 MR MPOFU: Yes.
 21 CHAIRPERSON: But in this particular
 22 occasion he's asking a question, presumably his future
 23 answers may depend upon the question he's asked, so I think
 24 –
 25 MR MPOFU: Ja.

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1 CHAIRPERSON: So I propose allowing Mr
 2 Ngalwana to answer the question.
 3 MR MPOFU: Thank you, Chairperson. No,
 4 all I'm saying is that the question must be then repeated
 5 for what the witness said. What he's saying is which
 6 person survived who was escaping towards Marikana, not of
 7 the 3 000 who was going in all sorts of directions. He
 8 specifically asked the question with regard to the people
 9 who ran, who took the alternative route.
 10 CHAIRPERSON: I'm not going to allow a
 11 lengthy debate on this point, but Mr Ngalwana can deal with
 12 the question and then maybe we move on to another issue.
 13 MR NGALWANA: Well, Chairperson, with
 14 respect, it's quite correct in saying I'm not here to
 15 answer the witness's questions. The question he has posed
 16 to me in my respectful submission has nothing to do with
 17 the point I'm raising with him.
 18 CHAIRPERSON: If you don't propose
 19 answering it, then don't, and let's move on to the next
 20 question.
 21 MR NGALWANA: Thank you, Chairperson.
 22 The witness persists that the armed group – you persist
 23 that the armed group was not running towards the police. I
 24 propose playing a clip, I think it's the Al Jazeera clip,
 25 as my recollection is that that clip shows clearly in what

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1 direction the armed group was charging, or dashing.
 2 CHAIRPERSON: I think we must be very
 3 careful that if a clip is shown it's relevant. My
 4 understanding at the moment - and if I'm wrong you will
 5 correct me, I trust - is that we're busy at the moment with
 6 what is described as approach 1. The way it worked was the
 7 strikers, or some of them, made a first attempt to get past
 8 for whatever reason, it's not necessary to speculate about
 9 it. But when the Nyala came with the wire they then moved
 10 back in an arc, according to your case, and had another
 11 attempt to get through. That's approach 2 and that's close
 12 to the kraal. They were also blocked off by the Nyala,
 13 Nyala 4, I think. They then went round the kraal and on
 14 the other side of the kraal it would appear the shooting
 15 started. There wasn't shooting at the time of either
 16 approach 1 or approach 2, so if you're going to show us a
 17 video clip of what happened at the time of approach 3, when
 18 the firing, it's not going to help us in relation to the
 19 point presently under discussion, so what happens in the
 20 case – firstly, in the time of approach 1, and secondly at
 21 the time of approach 2. So if your clip is relevant for
 22 approach 1, show it. If it's only relevant to show
 23 shooting at approach 3 then, with respect, it's not going
 24 to help us.
 25 MR NGALWANA: Yes, it does relate to

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1 approach 3, Chairperson. I thought it would cover – it
 2 seems to me, perhaps I'm incorrect, that the witness is
 3 saying that they never went towards the police, whether at
 4 1 or 2 or 3, and I wanted to show in 3 that they were in
 5 fact going towards the police, but –
 6 CHAIRPERSON: You can do that, but I
 7 think it might be a little bit unhelpful in this context
 8 where we're busy with approach 1. I don't want to tell you
 9 how to run your cross-examination, but speaking for myself
 10 I'd like it if you were to raise an issue which would be
 11 relevant later with approach 3. Before you can carry on, I
 12 won't stop you, provided that it's made clear to the
 13 witness that what you're showing him is approach 3, not
 14 approach 1.
 15 MR NGALWANA: Mr Magidiwana, you disputed
 16 that you were going towards the police at the first attempt
 17 to breach the police line. That is correct, is it not?
 18 MR MAGIDIWANA: We say we were going
 19 towards the path that leads to Nkaneng.
 20 MR NGALWANA: But that was going to –
 21 MR MAGIDIWANA: Just a minute before the
 22 next question, Sir. You have not answered my question. I
 23 want to give you this question. This question is
 24 problematic to you. It's causing a problem. The people
 25 that were saved were not saved because of the police were

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1 already tired of shooting, they then decided to take the
2 people, put them into the vans and take them to hospital.
3 CHAIRPERSON: Alright, that's not
4 directly relevant to the question you're being asked now.
5 Please confine yourself to answering the questions of
6 counsel.
7 MR MAGIDIWANA: I've answered that
8 question, Sir.
9 CHAIRPERSON: That's for us to judge, but
10 Mr Ngalwana, please put your next question.
11 MR NGALWANA: Thank you, Chairperson. On
12 the second attempt to breach the police line, you were
13 dashing towards the police line. That is why the police
14 used water cannons and teargas to ward you off, away from
15 the police line. You cannot dispute that, can you?
16 MR MAGIDIWANA: I deny that. The reason
17 the police sprayed water and used the teargas on us was an
18 endeavour to stop us from going through that road to
19 Nkaneng which they were busy closing. They didn't want us
20 to go through there.
21 CHAIRPERSON: I noticed that you became
22 very agitated before you gave that answer, raised your
23 voice and waved your arms around. Have you left the first
24 approach? Are we now on the second approach?
25 MR NGALWANA: Yes, Chairperson.

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1 CHAIRPERSON: I'd like to ask a question
2 about the first approach. According to exhibit L, before
3 the first approach, after Brigadier Calitz had given the
4 command to Colonel Makhuvale to start with the deployment
5 of the wire, the barbed wire, and when the first Nyala –
6 this is slide 192 – when the first Nyala started to deploy
7 the barbed wire one of the strikers, one of the
8 representatives of the strikers, came to the front window
9 of the negotiation Nyala and stated, "These hippos would
10 not leave this place and you will all die today, and added
11 that he would not be returning again." Now according to
12 what follows thereafter it appears that the person who it
13 is alleged came to the gate, to the front window of the
14 negotiation Nyala and said that was Mambush. Now, you were
15 a member of the group that we see standing in the red oval
16 on slide 193. Is that right? That's what you admitted
17 yesterday. Now, I take it Mambush was with you, Mr Noki?
18 MR MAGIDIWANA: I was there.
19 CHAIRPERSON: And was Mr Noki there?
20 MR MAGIDIWANA: Mambush was also there,
21 Sir.
22 CHAIRPERSON: Now, is this allegation
23 which the police make that after the command was given for
24 the wire to be deployed and the first Nyala started
25 deploying the wire, Mambush came to the front window, moved

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1 forward from where he was, came to the front window of the
2 negotiation Nyala and said – I read the words before, I'll
3 read them again – "These hippos would not leave this place
4 and you will all die today, and added that he would not be
5 returning again." If that evidence is given by the police,
6 will it be correct?
7 MR MAGIDIWANA: Sir, I am still saying it
8 again, what Mambush said to that policeman did not involve
9 us. The discussion between the two of them pertained only
10 to them. It did not involve us. What really involved us
11 was when they were using the loudhailer where he was asked
12 go and say this, he would go and say it and they would ask
13 him go and say this and then he would say.
14 CHAIRPERSON: No, but my question is
15 this. After the first, or rather when the first Nyala
16 starting deploying the wire, did Mambush go up to the,
17 what's described as the negotiation Nyala and say something
18 to the policeman inside?
19 MR MAGIDIWANA: Why I'm saying we were
20 not involved, Mambush from time to time went to the Nyalas
21 to say something. If indeed he said the words that have
22 been quoted here, this was between him and the person with
23 whom he was talking there.
24 [10:33] CHAIRPERSON: I understand. I take it
25 when he went to the Nyala you didn't hear what he said. Is

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1 that what you're saying?
2 MR MAGIDIWANA: I did not hear.
3 CHAIRPERSON: Yes, no, okay, alright. So
4 you didn't hear what he said, but is it correct that when
5 the first Nyala started deploying the wire Mambush went –
6 Mr Noki went forward from the group, of which you were a
7 member, and spoke to a policeman in the negotiation Nyala?
8 MR MAGIDIWANA: There was a lot of
9 confusion going on then. There was people going up and
10 down. We wanted to move away. If he did go at that time,
11 possibly that I did not see.
12 CHAIRPERSON: Proceed, thank you.
13 MR NGALWANA: Thank you, Chair. Well,
14 let me stay on scene 1 as a question arises - approach 1.
15 The police's evidence, Mr Magidiwana, will be that when the
16 instruction was given to deploy the barbed wire Mr Noki,
17 Mambush, approached the negotiating Nyala and asked them
18 what the police were doing there. In fact, correction, it
19 was before they started deploying, they were positioning
20 themselves to start deploying the barbed wire. He
21 approached the Nyala with McIntosh. I'm looking at slide
22 156 of exhibit L, Chairperson. He was told that the police
23 were there for the safety, for safety and security reasons
24 - I'm looking at the third bullet point - and that
25 Mambush's retort was they did not want the police there.

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1 You cannot dispute that because you say you didn't hear
2 him, or can you?

3 MR MAGIDIWANA: What I am saying, Sir, I
4 am not going to turn away from what I've been saying.

5 MR NGALWANA: Well, the evidence will be
6 further that after Mambush had been told what the purpose
7 of the police's presence was there, for safety and
8 security, he then went back to the group of protestors and
9 addressed them. You were there.

10 MR MAGIDIWANA: What did he say?

11 MR NGALWANA: Presumably he told you what
12 he had been discussing with the people in the Nyala, the
13 negotiating Nyala, which would seem to suggest that the
14 group, including yourself, knew what Mambush was discussing
15 with the people in the Nyala. Would you care to comment?

16 MR MAGIDIWANA: How can I have knowledge
17 of that when Mambush did not meet me?

18 MR NGALWANA: Because he came back and
19 told you what he was discussing with the police.

20 MR MPOFU: Chairperson, is my learned
21 friend now testifying or is that going to be the evidence
22 of what Mambush said?

23 MR NGALWANA: I said presumably -

24 MR MPOFU: Because according to this
25 bullet it just says he spoke to the group. I suppose if

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1 the police knew what he said they would have put it in
2 their so-called presentation.

3 CHAIRPERSON: Perhaps Mr X will be able
4 to help us on this point, or give evidence on the point.
5 Whether it helps us or not depends whether his evidence is
6 true, but I take it we can assume the police didn't have Mr
7 X's statement when this exhibit L was compiled, so -

8 MR MPOFU: Well, if that's the answer
9 we'd like it to be given -

10 CHAIRPERSON: Ja, I mean, Mr -

11 MR MPOFU: - so that we can cross-examine
12 Mr X.

13 CHAIRPERSON: There may well also be
14 [inaudible]. The point is, you can't say because it's not
15 in exhibit L, therefore we must assume it's not correct,
16 because there is another inference which I put to you. But
17 anyway, it's pointless for you and me to debate this at
18 this stage. Let's get Mr Ngalwana in the spotlight to deal
19 with this point.

20 MR NGALWANA: Chairperson, you'll
21 remember - perhaps I should use this word every time I put
22 these propositions to the witness - I said Mr Mambush, or
23 Mambush approached the negotiating Nyala, was told what the
24 purpose of the police presence there was and then he turned
25 around and addressed the crowd, and I said presumably he

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1 told you what he was discussing with them.

2 MR MPOFU: Yes, and I did not object, but
3 now you've just put it to say, but he told you.

4 CHAIRPERSON: Yes, he left out the
5 "presumably" when he put the question to which you
6 objected, but now the "presumably" has been reinserted, we
7 can carry on.

8 MR MPOFU: Ja, it must be made clear to
9 the witness.

10 MR MAGIDIWANA: I don't know that.

11 MR NGALWANA: So you're saying he didn't
12 tell you what he was discussing with the police in the
13 negotiating Nyala?

14 MR MAGIDIWANA: I said earlier to you
15 whenever Mambush went to speak to the police without us
16 asking him to go and say that, I would not know what it is
17 that he said to the police.

18 MR MADLANGA SC: Chairman, Commissioners,
19 I'm quite loathe to keep on interrupting - just a matter of
20 clarity, not so much an objection this time - when my
21 learned friend reverted to this line of cross-examination
22 he said he will go back to approach 1. That's what he
23 said, and then he took Mr Magidiwana to slide 156 and the
24 time reflected there is 10:40. Can my learned friend
25 please clarify the timing? Why I say this is because I

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1 understand approach 1 to have been much, much later in the
2 afternoon.

3 MR NGALWANA: Chair, I understand that.
4 I'm taking my time to get there, which is where I'm going
5 now.

6 CHAIRPERSON: The point is by saying
7 you're going back to approach 1, which is then interpreted
8 to the witness, he then thinks you're talking about
9 something that happened shortly after 20 to 4 in the
10 afternoon. When you then put something to him that
11 happened about 20 to 11 in the morning there is scope for
12 confusion, so in order to get clarity, as Mr Madlanga says,
13 it would be helpful if the earlier time were put to the
14 witness so he knows exactly what you're talking about. If
15 we want to get answers which will be of value to us later
16 on, not answer that can be argued away if they are
17 unfortunate for one side or the other, on the basis there
18 were some elements of confusion.

19 MR NGALWANA: Mr Magidiwana, the
20 propositions I've just put to you relate to 10:40 in the
21 morning, which were events that formed the precursor to the
22 deployment of the barbed wire later that afternoon. It was
23 at that time that the police were setting up to deploy
24 barbed wire. Now, let me take you to 3 in the afternoon.
25 The evidence of the police - I've now left exhibit L - the

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1 evidence of the police will be that Mr Noki, Mambush, was
 2 in fact told what the purpose of the barbed wire was,
 3 because you said earlier that you didn't know whether they
 4 were putting barbed wire in order to kill you or to
 5 encircle you, if I understood you correctly. Mambush knew
 6 what the purpose for the barbed wire was and he was one of
 7 the leaders of the group. The evidence will be that he was
 8 told that the purpose of the barbed wire was to protect the
 9 police, the media and the striking workers. Presumably, as
 10 leader of the group, he would have told you this. What is
 11 your comment?

12 MR MAGIDIWANA: On the side of the
 13 reporters, the media, the reporters were actually being
 14 stopped from going to the strikers by the police. The
 15 strikers were calling them to come and listen to what the
 16 problems were, to be told what it is that the people
 17 wanted. The police were not keen that the reporters should
 18 go to the strikers.

19 MR NGALWANA: You said in your evidence-
 20 in-chief – are you quite done in answering that question,
 21 making that comment?

22 MR MAGIDIWANA: I am that.

23 MR NGALWANA: You said in your evidence-
 24 in-chief, when asked whether –

25 MR MAGIDIWANA: Where?

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1 MR NGALWANA: In your evidence when you
 2 were asked by your lawyer, when asked whether you agreed
 3 with Mr X's version at paragraph 26 of Mr X's statement,
 4 you said you agree with Mr X on – at paragraph 26 of his
 5 statement. Let me read you what Mr X says in paragraph 26.
 6 He says, "While there," he's talking about the koppie on
 7 the 16th, "there came police hippos and they surrounded us
 8 with wire. By then we were singing. Thereafter came
 9 another police vehicle and started to spray us with water.
 10 We started moving to the direction of eastern side, on the
 11 direction of Nkaneng squatter camp. I heard a gunshot" –

12 MR MPOFU: No, Chairperson, once again,
 13 if my learned friend is going to rely on something that I
 14 said he must then say it the way I said it. I stopped that
 15 sentence right where he has just stopped it and I
 16 specifically said do you agree with Mr X on that aspect, in
 17 other words whether they were going towards Nkaneng. I
 18 deliberately left out the rest.

19 MR NGALWANA: Can my learned friend allow
 20 me to ask the question, Chairperson?

21 MR MPOFU: Well, then prefix it on what
 22 actually happened.

23 CHAIRPERSON: Mr Mpofu, just stop. He
 24 was concerned that you were going to go on reading the next
 25 sentence, which was not a portion that he put and with

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1 which the witness had not agreed. So if it's correct that
 2 he stopped at that point, I haven't got a recollection
 3 myself, but if it's correct, you can only put that that's
 4 the passage ending there with which the witness had agreed.

5 MR NGALWANA: I want of ask him if he
 6 agrees with the rest of the paragraph.

7 CHAIRPERSON: Then it's a bit misleading,
 8 with respect, to say a passage was put to you, paragraph so
 9 and so, and you agreed with it, without saying you agreed
 10 with this part but there's another bit that comes that
 11 wasn't put to you, do you also agree with that or do you
 12 disagree with that. That would be, with respect, a fair
 13 way of putting the question and I'm sure that you would
 14 wish to be fair to him.

15 MR NGALWANA: I'm going to read you a
 16 passage, Mr Magidiwana, for what it's worth now, and I want
 17 you to tell us whether you agree or disagree. Mr X says,
 18 "I heard a gunshot being fired from our members and I saw
 19 that," and he mentions one person and leaves a couple of
 20 dashes, "had firearms, pistol, in their possession". Do
 21 you agree with that version?

22 MR MAGIDIWANA: I denied knowing, seeing
 23 anything pertaining to it. I said the people who had guns
 24 and were shooting were the police. I went past the hippo
 25 and when we come on the other side of the hippo they shot

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1 at us.

2 CHAIRPERSON: So you specifically deny
 3 that gunshots were fired by some of your people?

4 MR MAGIDIWANA: I saw the gun for the
 5 first time in the videos in the Commission.

6 CHAIRPERSON: So as far as you're
 7 concerned the allegation that members of your group, a
 8 member or members of your group, fired shots first is not
 9 correct?

10 MR MAGIDIWANA: If he was the first
 11 person to shoot, Mr Chairman, then he would have shot at us
 12 because we are ahead of him. We had already gone past.

13 CHAIRPERSON: Who's the person you're
 14 referring to now?

15 MR MAGIDIWANA: I'm saying the one who
 16 was alleged to have had a gun in our group.

17 CHAIRPERSON: How did you know that you'd
 18 gone past?

19 MR MAGIDIWANA: On the video, and this is
 20 why I could not see him.

21 CHAIRPERSON: I see.

22 MR NGALWANA: The evidence of the police,
 23 Mr Magidiwana, will be that you were one of the group known
 24 as the "makarapa."

25 MR MAGIDIWANA: What is a "makarapa?"

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1 MR NGALWANA: Those are the people who
 2 were chosen for their bravery, their strength – people who
 3 would stand their ground and would not allow anything to
 4 stand in their way.
 5 [10:53] MR MAGIDIWANA: Am I no more a human
 6 being, now I am a “makarapa?”
 7 MR NGALWANA: The armed group, as we have
 8 shown in numerous photos.
 9 MR MAGIDIWANA: Which of people were not
 10 armed there?
 11 CHAIRPERSON: No, no, I don't think you
 12 should ask questions. I allowed you before but strictly
 13 speaking you shouldn't ask questions. You should just
 14 answer questions. If there's something unclear about a
 15 question you can say the question is not clear to me for
 16 this reason, but don't ask questions. Things get totally
 17 out of hand if you ask questions and the advocate answers
 18 questions; things should be the other way around. He
 19 should ask questions and you should answer them.
 20 MR NGALWANA: Do you have, for lack of a
 21 better description, scarification marks on your chest that
 22 were performed on the 14th of August 2012 during the ritual
 23 performance at the koppie?
 24 MR MAGIDIWANA: That is me from the
 25 beginning, nothing like that was ever done for me. What

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1 was ever done on me in that rituals was something that was
 2 done at home.
 3 MR NGALWANA: Can you deny, or do you
 4 deny that you had scarification marks made on you while you
 5 were at the koppie? Whether it was on the 9th or the 10th
 6 or the 12th or the 14th. Any time -
 7 MR MAGIDIWANA: No there's nothing like
 8 that.
 9 MR NGALWANA: At any time during August
 10 2012?
 11 MR MAGIDIWANA: I'm saying no, there's
 12 nothing like that.
 13 MR NGALWANA: At the koppie?
 14 MR MAGIDIWANA: I'm saying nothing,
 15 there's no such a thing.
 16 MR NGALWANA: Are you denying that you
 17 have scarification marks on your chest?
 18 MR MAGIDIWANA: Those which I have were
 19 done at home.
 20 CHAIRPERSON: So does that mean you have
 21 scarification marks on your chest but they were put there
 22 before you started working for Lonmin when you were still
 23 at home?
 24 MR MPOFU: Chairperson, sorry, Mr
 25 Mahlangu, before the witness answers, just to assist, Mr

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1 Mahlangu's interpretation was much broader. The question
 2 was, as the Chairperson put it regarding to the chest and,
 3 Mr Mahlangu, said “imzimbeni” which means on your entire
 4 body. If that can just be corrected.
 5 MR MAHLANGU: Could I correct that?
 6 CHAIRPERSON: Yes.
 7 MR MAHLANGU: Thanks, Chair.
 8 MR MAGIDIWANA: When that is being done
 9 I'm home, but I don't know other homes, I'm referring to my
 10 own home. It's been done from the head throughout the
 11 body, even the back. The only thing that we don't do at my
 12 home is the “nxeti”, that is the cutting off of the finger.
 13 CHAIRPERSON: The question you were asked
 14 specifically was, have you got scarification marks on your
 15 chest. I understand you to say you've got marks on your
 16 head, on your back and so on, you've got all those at home.
 17 Do you have scarification marks on your chest?
 18 MR MAGIDIWANA: Yes, on the chest there
 19 are.
 20 CHAIRPERSON: And do I understand you to
 21 say that all those marks were put there when you were at
 22 Nkanya Village near Elliotdale in the Eastern Cape?
 23 MR MAGIDIWANA: Yes, Sir.
 24 CHAIRPERSON: Yes, and when was that?
 25 MR MAGIDIWANA: In December, in December

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1 of 2011 when I returned home, that was done to me. I will
 2 again go home and this will still be done.
 3 CHAIRPERSON: You mean you're going to
 4 have more done when you go home?
 5 MR MAGIDIWANA: Yes, Sir.
 6 CHAIRPERSON: I see it's 11 o'clock.
 7 Perhaps this an appropriate stage to take the tea
 8 adjournment. Unless there's something you want to ask
 9 before that?
 10 MR NGALWANA: No. On this issue,
 11 Chairperson.
 12 CHAIRPERSON: Ja, but do you want to ask
 13 him before tea or after tea?
 14 MR NGALWANA: We can do it after tea.
 15 It's fine.
 16 CHAIRPERSON: The Commission will take
 17 the tea adjournment. I should announce that this afternoon
 18 we'll be stopping at half past 2. So we'll take the lunch
 19 adjournment at 1, resume at half past 1 and sit for an hour
 20 until half past 2, but now we take the tea adjournment.
 21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 [11:39] CHAIRPERSON: The Commission resumes. Mr
 23 Magidiwana, you're still under oath. Mr Ngalwana, you're
 24 still cross-examining.
 25 MZOXOLO MAGIDIWANA: s.u.o.

<p style="text-align: right;">Page 6371</p> <p>1 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):</p> <p>2 Thank you Chair. Mr Magidiwana, I'll take it you'll have</p> <p>3 no objection to present yourself to a medical practitioner</p> <p>4 with a view to ascertaining the age of your scarification</p> <p>5 marks, if you say they were done in 2011 and the police say</p> <p>6 they were done towards the latter part of 2012.</p> <p>7 CHAIRPERSON: Sorry, it's not the latter</p> <p>8 part August 2012. I take it that it wouldn't be relevant</p> <p>9 if they were done after August 2012 and I don't know</p> <p>10 whether a medical science is able to distinguish between,</p> <p>11 by a test done in March 2013 whether the scarification</p> <p>12 marks were done in August 2012 or December 2011. But</p> <p>13 perhaps that should be a bit clearer.</p> <p>14 MR NGALWANA: Well, I'm not a medical</p> <p>15 scientist, Chair, so I would imagine the doctors will be</p> <p>16 able to tell us whether that is possible or not.</p> <p>17 CHAIRPERSON: Would you be prepared to be</p> <p>18 examined by an expert, a medical expert, in an attempt to</p> <p>19 ascertain whether the scarification marks you have were</p> <p>20 done in about, say December 2011, or whether they're more</p> <p>21 recent than that and about are six or seven months old?</p> <p>22 MR MAGIDIWANA: If I may ask this</p> <p>23 question. What would be the cause of this investigation</p> <p>24 about rituals performed at my home, what is that for?</p> <p>25 Secondly the counsel asking me now himself is a Xhosa, Mr</p>	<p style="text-align: right;">Page 6373</p> <p>1 MR NGALWANA: I'm not an expert. I think</p> <p>2 the experts would possibly be in a position to look at your</p> <p>3 body and tell us when these rituals were performed, whether</p> <p>4 this was in 2011 or recent in 2012, when the scarification</p> <p>5 marks were done, not when the rituals were done.</p> <p>6 MR MAHLANGU: I said the traditional</p> <p>7 scarification.</p> <p>8 MR NGALWANA: Thank you.</p> <p>9 MR MAHLANGU: Insertions.</p> <p>10 CHAIRPERSON: Counsel answered your</p> <p>11 question, can you answer his? He said would you be</p> <p>12 prepared to submit yourself to an examination in order to</p> <p>13 enable a -</p> <p>14 MR MAGIDIWANA: No, he has not answered</p> <p>15 my question. I don't understand him.</p> <p>16 CHAIRPERSON: He did answer the question.</p> <p>17 You asked him why, what would the purpose of the test be.</p> <p>18 The answer he gave was, he says in order to ascertain if</p> <p>19 possible the age of the scarification marks you have,</p> <p>20 whether they date back from 2011 or whether they're more</p> <p>21 recent than that and date back from some time in 2012,</p> <p>22 particularly I take it, in August 2012 when the police</p> <p>23 allege that you were subjected to scarification exercises.</p> <p>24 MR MPOFU: Chairperson, yes I accept</p> <p>25 that, but except that Mr Ngalwana said that perhaps there</p>
<p style="text-align: right;">Page 6372</p> <p>1 Chairperson, I wonder if he does not have this rituals,</p> <p>2 cuttings from his own home.</p> <p>3 MR NGALWANA: I take it the answer to my</p> <p>4 question, Mr Magidiwana, is that you will not be prepared</p> <p>5 to present yourself for medical examination in order to</p> <p>6 ascertain the age, approximate age of your scarification</p> <p>7 marks. Is that correct?</p> <p>8 MR MAGIDIWANA: If you could answer my</p> <p>9 question, please Sir.</p> <p>10 CHAIRPERSON: I don't think you need to</p> <p>11 answer the second question, as to whether you've got</p> <p>12 scarification marks or not is not relevant to our Terms of</p> <p>13 Reference. But he wants to know in respect of his, the</p> <p>14 test you want done on him, what the purpose is, and I think</p> <p>15 in order for him to give an answer it will be help if he</p> <p>16 was told what the purpose of the examination was, or will</p> <p>17 be.</p> <p>18 MR MAGIDIWANA: He confirms, Sir, that</p> <p>19 why he's asking, is what the reason for this kind of</p> <p>20 exercise.</p> <p>21 MR NGALWANA: I thought I've already -</p> <p>22 okay, let me say it again.</p> <p>23 CHAIRPERSON: In case he doesn't</p> <p>24 understand, just repeat the answer, it will be quicker to</p> <p>25 repeat the answer than get involved in an argument.</p>	<p style="text-align: right;">Page 6374</p> <p>1 would be such an expert.</p> <p>2 CHAIRPERSON: I thought I covered that by</p> <p>3 using the word "possibly," but -</p> <p>4 MR MPOFU: Oh, sorry, I didn't hear.</p> <p>5 Sorry, Chairperson.</p> <p>6 MR MAGIDIWANA: That would require, Mr</p> <p>7 Chairperson, the presence of my elders, my grandfathers</p> <p>8 from home to be present there and also in the presence of</p> <p>9 my lawyers.</p> <p>10 MR NGALWANA: So in the presence of all</p> <p>11 the persons you've just mentioned you would have no</p> <p>12 objection to subjecting yourself to a medical test?</p> <p>13 MR MAGIDIWANA: Yes. Yes, but if they</p> <p>14 tell you that this is a tradition that was performed at my</p> <p>15 home and as you are also seated there I believe that as a</p> <p>16 Xhosa you must have undergone some of these traditions.</p> <p>17 MR NGALWANA: Alright, let me just -</p> <p>18 CHAIRPERSON: I take it that if the test,</p> <p>19 if you consented to having the test done and the tests were</p> <p>20 done, as I understand there are three possibilities. One</p> <p>21 is the doctors may say they can't say what the age of the</p> <p>22 marks is. Secondly they could say they were more recent</p> <p>23 than December 2011 and were probably done about August</p> <p>24 2012. Thirdly they could say they could be, they are</p> <p>25 consistent with them having been done in 2011, which would</p>

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1 of course support the evidence you've given. But whatever
 2 conclusion they come to, that would have to be reported
 3 back to the Commission, whether it was in your favour or
 4 against you or neutral.

5 MR MAGIDIWANA: I am saying, Chairperson,
 6 the body is here, I performed these rituals when I went
 7 home in 2011. But if this test has to be done, as I have
 8 said my elders has to be there, my lawyers has to be there.

9 MR NGALWANA: Very well, thank you. Let
 10 me just get this out of the way. Mr Magidiwana, earlier I
 11 suggested to you that the reason your group was dressed in
 12 the manner that they are, or were dressed in thick layers
 13 of clothing and some blankets, I now want to put it to you
 14 what the version of the police is, is that the reason for
 15 that type of dress was to protect themselves from rubber
 16 bullets and from tear smokes used by the police to disperse
 17 the crowd.

18 MR MAGIDIWANA: Can't you feel a gun that
 19 is being shot at you?

20 MR NGALWANA: I'm talking about rubber
 21 rounds.

22 MR MAGIDIWANA: What I know is that that
 23 instrument is a gun. I don't know much about rubber
 24 bullets.

25 MR NGALWANA: And the police evidence

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1 will be that this group of which you were part and of which
 2 Mr Noki, Mambush was part, was intent on a confrontation
 3 with the police and that is why they protected themselves
 4 in the manner that they did against rubber rounds and tear
 5 smoke.

6 MR MAGIDIWANA: There's nothing like
 7 that.

8 MR NGALWANA: The evidence of the police
 9 will be that Mr Noki's threat to the police that they were
 10 going to die there is an indication of what that group
 11 would be about.

12 MR MAGIDIWANA: You know this thing
 13 you're always saying about Mambush, it's the child of
 14 another person who died for no reason. It hurts me because
 15 I know he did nothing wrong. We were killed there like
 16 flies.

17 MR NGALWANA: The evidence of the police
 18 will be that you, among others, were appointed for, were
 19 appointed in a committee of five persons.

20 CHAIRPERSON: Is it suggested he was a
 21 member of the committee or he was appointed by the
 22 committee?

23 MR NGALWANA: No, sorry, let me take that
 24 back, Chair. I've just been corrected. The evidence of
 25 the police - and I think we've raised this point before -

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1 that you were part of the "makarapa" group which was to
 2 confront the police if they stood in your way.

3 MR MAGIDIWANA: I don't know what you're
 4 talking about.

5 MR NGALWANA: That this group underwent a
 6 ritual at which the scarification was made and that the
 7 purpose of this ritual was to make them invisible, strong,
 8 invincible, and that that is why that group advanced or
 9 dashed towards the police line because they believed
 10 themselves to be invincible, invisible, and too strong for
 11 the police.

12 MR MAGIDIWANA: Is it us who went to the
 13 police? It's the police that closed the road on which we
 14 were going to the settlement.

15 MR NGALWANA: The version of the police
 16 will be that that group charged at the police, because
 17 we're talking about scene 1 now.

18 MR MAGIDIWANA: What you are saying is
 19 not so, Sir.

20 MR NGALWANA: The police's version, as
 21 I've indicated before to you, is that you were with the
 22 group along the railway line, led by Mr Noki, among others.

23 MR MAGIDIWANA: That's not true. That's
 24 a lie.

25 MR NGALWANA: Well, one way, we already

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1 have a way of ascertaining that, but one other way of
 2 ascertaining it and putting it beyond doubt is for you to
 3 provide your cell phone number to the police so that they
 4 can do some - I think it's called triangulation - if you
 5 had your cell phone at that time to discover where you
 6 were, whether you were there or not on the 13th of August
 7 2012. Would you be prepared to give the police, in
 8 private, your cell phone number at the time of the 13th of
 9 August 2012 so that they can perform this exercise?

10 MR MPOFU: Chairperson, I would prefer
 11 it, if Mr Ngalwana is serious about this suggestion, that
 12 they approach us so that we can consult with the witness on
 13 that issue.

14 CHAIRPERSON: I understand the purpose of
 15 the comment. He simply asked are you prepared to make your
 16 cell phone number available so that these tests can be
 17 done. The answer to that is either yes or no.

18 MR MPOFU: But he might be entitled to
 19 legal advice on that issue.

20 CHAIRPERSON: Why does he need legal
 21 advice to, the question is whether he's prepared to give
 22 his, he's not suggesting there's any compulsion. He simply
 23 asked, are you prepared to give your cell phone number.
 24 Where does his legal position come in?

25 MR MPOFU: No, that's fine then,

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1 Chairperson.

2 CHAIRPERSON: No, I'm asking -

3 MR MPOFU: No, then let them do it that

4 way and see how far they go.

5 CHAIRPERSON: Thank you. Alright. The

6 offer effectively is that, Mr Ngalwana, that you should

7 raise that with his legal advisors first, and does it imply

8 that there may be a measure of cooperation?

9 MR MPOFU: Yes, Chairperson.

10 MR NGALWANA: Chairperson, I want the

11 witness's reaction. What I'm asking is whether he would be

12 prepared or not, but an answer has already been suggested

13 to him. So for what it's worth I -

14 CHAIRPERSON: He hasn't answered the

15 question yet. Do you have a cell phone, or on the 13th of

16 August did you have a cell phone?

17 [11:59] MR MAGIDIWANA: I had a phone, I was in

18 the house.

19 CHAIRPERSON: Yes, I know that. You deny

20 that you were at the railway line on the 13th. I asked a

21 different question. Did you have a cell phone on the 13th

22 August?

23 MR MAGIDIWANA: I've had a phone for

24 quite some time. I still have it, yes.

25 CHAIRPERSON: So you had it on the 13th?

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1 MR MAGIDIWANA: I had it, that when I

2 started working I had a phone.

3 CHAIRPERSON: You still didn't answer my

4 question. Did you have the phone on the 13th August?

5 MR MAGIDIWANA: It was with me, yes, in

6 the house.

7 CHAIRPERSON: I see, alright, and you've

8 still got that phone?

9 MR MAGIDIWANA: Yes.

10 CHAIRPERSON: Same number?

11 MR MAGIDIWANA: My phone number was

12 changed.

13 CHAIRPERSON: When was it changed?

14 MR MAGIDIWANA: The police came to me

15 whilst I was at hospital and they took it.

16 CHAIRPERSON: If that's so it would

17 appear that the questions you've asked doesn't need to be

18 answered because the police already have the number, if

19 that's correct.

20 MR NGALWANA: There's something called

21 SIM swap. Do you know about that?

22 MR MAGIDIWANA: I know that, yes.

23 MR NGALWANA: So that if you've lost your

24 phone or your phone has been taken from you, you are able

25 to get your number again by going to your service provider.

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1 MR MAGIDIWANA: My phone did not get

2 lost; it was taken by the police. I was expecting that it

3 would be returned.

4 MR NGALWANA: Mr Magidiwana, we don't

5 really need your cell phone, we need your cell phone

6 number. I think you do remember what it was. You do

7 remember what your cell phone number was on the 13th August

8 2012?

9 MR MAGIDIWANA: The phone does not work

10 on its own, it only works when it has got a SIM card.

11 MR NGALWANA: You do remember your cell

12 phone number?

13 MR MAGIDIWANA: I don't remember it

14 anymore.

15 CHAIRPERSON: Your cell phone provider,

16 who was the cell phone provider? Service provider, sorry.

17 Can you remember that?

18 MR MAGIDIWANA: I was with MTN.

19 CHAIRPERSON: And when you came out of

20 hospital did you get another cell phone?

21 MR MAGIDIWANA: Yes, Sir, I bought

22 another phone when I came out of hospital.

23 CHAIRPERSON: Now did you get your old

24 number?

25 MR MAGIDIWANA: No, Sir, I'm not using my

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1 old number because I was expecting my phone to be returned.

2 CHAIRPERSON: Would you object to the

3 service provider providing your number to the police? Your

4 old number?

5 MR MAGIDIWANA: I would have a problem.

6 CHAIRPERSON: Why?

7 MR MAGIDIWANA: What would happen to me

8 as, if I have a problem as they had caused this criminal

9 act against me?

10 CHAIRPERSON: Sorry, I don't understand

11 that answer. Could you repeat it?

12 MR MAGIDIWANA: If my number was to be

13 used with the brutal action they did against me, what would

14 happen?

15 CHAIRPERSON: Sorry, I don't understand

16 that. The purpose of the test apparently would be to

17 ascertain whether your cell phone was in your home at

18 Nkaneng on the 13th of August or near the railway line on

19 that day at the time when the confrontation took place with

20 the police. That would be the purpose of the enquiry. I

21 don't understand the relevance of the answer you gave to

22 that situation.

23 MR MAGIDIWANA: That can be done.

24 CHAIRPERSON: It can be done?

25 MR MAGIDIWANA: That can be done.

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1 CHAIRPERSON: So you wouldn't object then
 2 to the service provider giving details of the number you
 3 had on the 13th of August to the police?
 4 MR MAGIDIWANA: I said I would have a
 5 problem if my number would be used for one or the other
 6 reason and thereafter I have problems pertaining to it.
 7 CHAIRPERSON: I see. You've given your
 8 answer, thank you.
 9 MR NGALWANA: Mr Magidiwana, I take it
 10 you're no longer using the number that you had on the 13th
 11 of August. Is that correct?
 12 MR MAGIDIWANA: That is so.
 13 MR NGALWANA: Yes, I'm not using it
 14 anymore?
 15 MR MAGIDIWANA: What is the meaning of
 16 yes?
 17 MR NGALWANA: Mr Magidiwana, are you
 18 still using the number that you had on the 13th of August
 19 2012, or not?
 20 MR MAGIDIWANA: No.
 21 MR NGALWANA: Thank you. So if the
 22 number is provided to the police and you are no longer
 23 using that number, what possible threat can the police pose
 24 to you, assuming that what you are assuming, that they will
 25 cause you harm? What possible harm can the police cause

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1 you when you give them a number that you no longer use?
 2 MR MAGIDIWANA: Better ask the police.
 3 MR NGALWANA: Would it give you any
 4 comfort if the police were to give you an undertaking under
 5 oath that they will do you no harm if you provide the cell
 6 phone number that you had on the 13th of August 2012?
 7 MR MAGIDIWANA: I had said go ahead, do
 8 it.
 9 MR NGALWANA: Do what exactly?
 10 MR MAGIDIWANA: What you want to do.
 11 MR NGALWANA: So you will give us - you
 12 will give the police your cell phone number that you had or
 13 used on the 13th of August 2012?
 14 MR MAGIDIWANA: It's not me who's going
 15 to give it. I don't know the number but I'm saying they
 16 can go ahead and do whatever they want to do with it.
 17 CHAIRPERSON: Remember he said he doesn't
 18 remember the number, so I take it the police know his ID
 19 number. I take it the police can get the information from
 20 the service provider by using the ID. He's already said he
 21 doesn't object to them doing that. If they -
 22 MR MPOFU: Mr Chairperson, no, he didn't,
 23 he said he had a problem.
 24 CHAIRPERSON: If they refuse to give it
 25 they can be subpoenaed by this Commission to appear and

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1 give that information. So I don't think you need take the
 2 matter with him any further, unless you consider there are
 3 other aspects to this point you want to deal with, with
 4 him.
 5 MR NGALWANA: Let me just make it clear,
 6 Chairperson. I've been referring to the 13th of August.
 7 Of course this is going to cover the entire August to
 8 ascertain where he was all that period, say from the 8th of
 9 August until the 17th of August.
 10 CHAIRPERSON: Where he was when he had
 11 his cell phone with him. Mr Magidiwana, I'm afraid I'm a
 12 little bit confused now. I understood you to say to Mr
 13 Ngalwana, go ahead, do what you want to do, and then I said
 14 that that means that you wouldn't object to your service
 15 provider giving details to the police that are sought by
 16 them in relation to the cell phone that was in the presence
 17 of you, because they had your ID number. I understood your
 18 counsel to say that you have a problem.
 19 MR MPOFU: No, not the counsel, Chair.
 20 The witness said he has a problem because he doesn't know
 21 what the police will do with it.
 22 CHAIRPERSON: Don't interrupt me, let me
 23 carry on. What exactly - can you explain to me what
 24 exactly the problem is?
 25 MR MAGIDIWANA: I said let him go ahead

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1 and do whatever it is that he wants to do.
 2 MR NGALWANA: That doesn't quite answer
 3 the Chairperson's question. What is the problem? What is
 4 the nature of the problem that you have in refusing to
 5 provide your cell phone number?
 6 CHAIRPERSON: No, I think that's a bit
 7 unfair, Mr Ngalwana. That's not what he says. He says he
 8 can't remember the cell phone number. So he's not refusing
 9 to give it, because he can't give it. That's the first
 10 point. In relation to the question of approaching the
 11 service provider, your approaching the service provider and
 12 asking for information in respect of the cell phone issued
 13 to the person with his ID number, which you have, I take
 14 it, I understood his attitude to be that you could go ahead
 15 and do that, but it was suggested by his counsel that he
 16 had a problem, and to be fair to his counsel, a problem had
 17 been mentioned. So I'm not suggesting counsel is saying
 18 something that wasn't correct. So that's why I asked him
 19 what the problem was, but it wasn't a problem in relation
 20 to refusing to give his cell phone number. So if you put
 21 the question, reformulate the question, put it correctly,
 22 then we can get his answer.
 23 MR MAGIDIWANA: If they have anything to
 24 do now with my ID number that does not only affect me
 25 alone, it also affects, my counsellor has got to know about

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1 it.

2 MR NGALWANA: Well, the Chairperson has,

3 as I understand it, already made a ruling about subpoenaing

4 the service providers.

5 CHAIRPERSON: I said it could be done if

6 necessary.

7 MR NGALWANA: It appears this is not

8 taking us far, but let me just put this to the witness. Mr

9 Magidiwana, I take it when you say - and we're really

10 exhausting this point, which really was an insignificant

11 thing when we began, we thought it might be easier to just

12 tell us what we want. I take it when you give a broad

13 brash answer that says the police can do whatever they

14 please, if I'm misquoting you please correct me -

15 MR MAGIDIWANA: I'll speak in Xhosa to

16 you because I want you to understand. I don't know what it

17 is that you want me to say further.

18 MR NGALWANA: I take it when you say the

19 police can do whatever they please, you include your

20 concerns to the police approaching the - I'm putting it to

21 the witness, I'd like him to answer. You say we can do as

22 we please, or the police can do as they please.

23 MR MAGIDIWANA: You were interested in my

24 phone number, now you have gone over to my ID, but I'm

25 saying if you're interested in my ID now my lawyers have

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1 got to be involved.

2 CHAIRPERSON: I suggested to Mr Ngalwana,

3 he's probably got your ID number already and if he hasn't

4 got it, presumably he can get it from Lonmin because Lonmin

5 have it, I assume. So I am not sure that your lawyer's

6 involved in that. In exhibit EEE2 there's an annexure,

7 which is a statement which you signed, in which you denied

8 the allegations against you but stated that your ID number

9 was 8809036254080, and your ID number also appears on a

10 document obtained from Lonmin, which is also a part of that

11 same exhibit, which was handed in by your counsel when he

12 led you in chief. So I don't think we need to spend any

13 more time trying to ascertain your ID number; we have it

14 already.

15 MR MAGIDIWANA: Let them go ahead.

16 MR NGALWANA: Thank you, I'll take that

17 as a consent for us -

18 MR MPOFU: No, you must not take it as

19 consent. Chairperson, you know, honestly this is a

20 monumental waste of time. I made a kind offer to give the

21 witness legal advice on this issue, which would have

22 obviated all this - I don't even know what to call it,

23 that's been going on for the past 20 minutes. You know -

24 CHAIRPERSON: Mr Mpofo, we've heard what

25 you say. It's water under the bridge to some extent.

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1 Let's not waste any more time on an issue which you say in

2 any event is a waste of time. So let Mr Ngalwana proceed.

3 MR NGALWANA: Thank you, Chair. I'll

4 move to the next point. The evidence of the police will be

5 that you obtained a police firearm during the 13th of

6 August attack on the police and that that is the firearm

7 that was found in your possession on the 16th of August

8 2012. There will in fact be an eyewitness account of that,

9 of - sorry, of the firearm being retrieved from you on the

10 16th August of 2012.

11 MR MAHLANGU: If that could be repeated

12 for me, Sir?

13 MR NGALWANA: There will be an eyewitness

14 account of the firearm of the police being retrieved from

15 you. I'm talking about the firearm of one of the policemen

16 who were killed on the 13th of August 2012. Would you care

17 to comment?

18 [12:19] MR MAGIDIWANA: To you, Sir, I look like

19 a criminal. What I did when the police came with this

20 allegation about the firearm, I gave them my fingerprints

21 and said they can go ahead, investigate and whatever they

22 find should please come back to me, but up to today they

23 have not come back. Another thing, they said I appeared

24 shooting on the video and I said to them I would like to

25 see that video. It's up to today that I have not seen that

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1 thing. To be accused of things like this that one hasn't

2 done is really hurting.

3 MR NGALWANA: My instructions are that

4 your fingerprints were never taken from you, because you

5 were continuously in hospital. So there are no fingerprint

6 tests to be brought to you.

7 MR MAGIDIWANA: Go to Pule; he will tell

8 you.

9 MR NGALWANA: In one of the statements

10 you made to the police - there are in fact two cases; in

11 the one you were charged with public violence, illegal

12 gathering, and possession of a dangerous weapon at the

13 koppie. In another case under a different case number you

14 were charged with possession of an unlicensed firearm at

15 Wonderkop Hill. In regard to the first statement - I'm

16 saying first in the sequence in which I have mentioned them

17 - the one in relation to which you were charged with public

18 violence, illegal gathering and possession of a dangerous

19 weapon -

20 MR MPOFU: Sorry, Chairperson, without

21 being pedantic, the witness was not charged with anything

22 at that stage.

23 MR NGALWANA: The offences that were

24 being investigated -

25 CHAIRPERSON: No, that's a different

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1 matter. The point taken, albeit pedantic, sounds correct.
 2 MR NGALWANA: That's why I'm rephrasing
 3 it. The charges that were being investigated against you
 4 were public violence - now if I can go back to my question.
 5 With regard to the investigation of public violence,
 6 illegal gathering, and possession of a dangerous weapon,
 7 you said, among other things, "I don't deny the allegation
 8 put against me." In your evidence-in-chief of course you
 9 denied that you made such a blanket acknowledgement of the
 10 allegations. Do you remember in relation to which
 11 allegations you said you do not deny? Let me give you the
 12 allegations again, just to help you. Public violence, is
 13 that the allegation that you said you did not deny?
 14 MR MAGIDIWANA: No. No, Sir. I will
 15 stop you again. Pule is the person who came to me after I
 16 had regained my conscious, the person who asked if I was
 17 present on the mountain on the 16th and I said, yes, I was
 18 there.
 19 MR NGALWANA: That's not really dealing
 20 with my question.
 21 MR BIZOS SC: Mr Chairman, I do not wish
 22 to intervene. My memory is that the admission is in the
 23 singular and not in the plural.
 24 CHAIRPERSON: Mr Bizos is correct. On
 25 page 1576(B) of exhibit EEE2 he says, "I don't deny the

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1 allegation against me", in the singular. It looks like
 2 singular.
 3 MR BIZOS SC: What is being put to him
 4 that he admitted the allegations. There are three
 5 allegations, but the admission relates to a singular
 6 allegation.
 7 MR NGALWANA: Chairperson, perhaps my
 8 learned friend, Mr Bizos, is hard of hearing. I am
 9 adopting –
 10 CHAIRPERSON: Sorry, don't make personal
 11 remarks about counsel. It doesn't become you. It's not
 12 the behaviour we expect of good counsel, and I'm sure you
 13 strive to be a good counsel, so behave yourself and just
 14 carry on in the normal way.
 15 MR NGALWANA: Yes, no, I apologise. I
 16 apologise.
 17 MR BIZOS SC: It's alright, noted for
 18 [inaudible].
 19 MR NGALWANA: Thank you, Mr Bizos.
 20 Chairperson, clearly the reason I'm taking the witness
 21 through each of the allegations is to ascertain which of
 22 these allegations he says he does not deny in the
 23 statement. I'm not suggesting that he says he did not deny
 24 all three of them. When you said you did not deny the
 25 allegation put against you, were you referring to public

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1 violence?
 2 MR MAGIDIWANA: I was asked one thing,
 3 Sir. I was asked if I was present on the mountain on the
 4 16th of June, and I said yes. Pertaining to the other
 5 things, I said I don't know anything about those.
 6 MR NGALWANA: The police version is that
 7 that gathering was illegal. If that is correct, then it is
 8 reasonable to – well, if that is correct you cannot really
 9 reasonably deny the allegation of illegal gathering, can
 10 you?
 11 CHAIRPERSON: - require legal knowledge
 12 on his part. Doesn't it require even now, but didn't it
 13 require legal knowledge on his part at the time he was at
 14 the koppie for him to have the necessary mens rea? You're
 15 not asking him – well, are you asking him whether he denies
 16 the allegation that he's guilty of attending the illegal
 17 gathering? Because would the question of mens rea not be
 18 relevant? So I'm not sure if you can put to him as boldly
 19 as you do that he can't deny the allegation.
 20 MR NGALWANA: That's fine, Chair. I'll
 21 move on. So if I understand you correctly, you're saying
 22 you were not denying that you were at the koppie on the 16th
 23 of August 2012. Is that correct?
 24 MR MAGIDIWANA: Yes.
 25 MR NGALWANA: Shall I take it then that

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1 you did not deny - and I just want to hear your answer -
 2 you do not deny the allegation of illegal gathering?
 3 CHAIRPERSON: How does he know it was an
 4 illegal gathering or not? He's not a lawyer.
 5 MR NGALWANA: Do you know what the
 6 possession of a dangerous weapon is? Do you know what a
 7 dangerous weapon is?
 8 MR MAGIDIWANA: There Pule questioned me
 9 about a firearm and my response was that I have never had a
 10 firearm. I don't even know how to use it.
 11 MR NGALWANA: No, we're coming to the
 12 firearm. We're not there yet. What I'm asking you, you do
 13 know that "incula" is a dangerous weapon, don't you?
 14 MR MAGIDIWANA: He had also explained
 15 that, yes, and I said to him, I told him what it is that I
 16 was in possession of. This is the one that I've repeatedly
 17 told you about.
 18 MR NGALWANA: You do know that "incula"
 19 is a dangerous weapon, don't you?
 20 MR MAGIDIWANA: Oh.
 21 MR NGALWANA: Do you or don't you?
 22 "Incula" is a dangerous weapon. Do you dispute that?
 23 MR MAGIDIWANA: I have said, oh.
 24 MR NGALWANA: What does that mean? Are
 25 you saying yes or no?

<p style="text-align: right;">Page 6395</p> <p>1 MR MAGIDIWANA: You are saying to me, 2 you're putting it to me that an "incula" is a dangerous 3 weapon, and my response to you is, yes, oh. 4 MR NGALWANA: So you are agreeing with 5 me? 6 MR MAGIDIWANA: Yes. 7 MR NGALWANA: You do not deny that on the 8 16th you had a "incula" at the koppie? 9 MR MAGIDIWANA: I've explained to you. 10 MR NGALWANA: Yes, you said you'd 11 borrowed it from someone who was sitting next to you, but 12 you were in possession of it on the 16th of August at the 13 koppie. 14 MR MAGIDIWANA: Yes. 15 MR NGALWANA: Now, "incula" is a 16 dangerous weapon. You were in possession of it on the 16th. 17 You knew that fact when you made the statement at 1576(A) – 18 MR MPOFU: Chairperson, once again I 19 don't want to be pedantic or argue subtle issues of law, 20 but if the possession that is being discussed here is 21 possession in the legal sense with animus possidendi and 22 what not, then the question must be put clear as to whether 23 he means possession in the legal sense of the word or the 24 mere fact that the thing was physically in his hand. 25 MR NGALWANA: I'm not making any legal</p>	<p style="text-align: right;">Page 6397</p> <p>1 MR NGALWANA: The question is you knew 2 both that you had in your hand on the 16th "incula" and you 3 also knew that it was dangerous. Yes or no? 4 MR MAGIDIWANA: [Inaudible] then. 5 MR NGALWANA: Please answer my question. 6 MR MAGIDIWANA: Yes, I'm answering your 7 question. I say, yes, I had it. 8 [12:39] MR NGALWANA: I know you had it. The 9 question is that you had knowledge of the fact when you did 10 this statement at 1576(A) of exhibit EEE2, you had in your 11 knowledge at that time that in your hand on the 16th of 12 August you had "incula" and you also knew that it was a 13 dangerous weapon. 14 MR MAGIDIWANA: I had said yes to that 15 question. 16 CHAIRPERSON: How long did you have it in 17 your hand? 18 MR MAGIDIWANA: After the song that was 19 being sung at the time, that was when I got rid of it. 20 CHAIRPERSON: Did you give it back to the 21 person from whom you had taken it? 22 MR MAGIDIWANA: Yes, I put it down where 23 he was seated because it belonged to him. 24 CHAIRPERSON: How long did you have it in 25 your hand approximately?</p>
<p style="text-align: right;">Page 6396</p> <p>1 argument, Chair. I'm just going with the facts. I don't 2 understand the objection. 3 CHAIRPERSON: You did use the word 4 "possess" in the legal term of [inaudible] and I'm not sure 5 that the witness knows what the word "possess" in a legal 6 context necessarily means, or not just a legal context, 7 this particular legal context, because it has different 8 meanings depending on the different contexts, so the point, 9 the objection really, I think is that you're putting a 10 question to the witness which is not a fair question 11 because you're assuming knowledge which you can't expect 12 him to have. If you spell it out in detail it might be 13 different, but I think that the point has to be upheld. 14 MR NGALWANA: Mr Magidiwana – I was using 15 shorthand. Mr Magidiwana, you cannot dispute, and you do 16 not, in fact, dispute that you had in your hand on the 16th 17 of August at the koppie at some stage "incula?" 18 MR MAGIDIWANA: Yes. 19 MR NGALWANA: You've already agreed with 20 me that "incula" is a dangerous weapon. 21 MR MAGIDIWANA: Yes. 22 MR NGALWANA: And at the time you made 23 this statement you knew both that you had in your hand on 24 the 16th "incula" and you also knew that it was dangerous. 25 MR MAGIDIWANA: I had it, yes. So what?</p>	<p style="text-align: right;">Page 6398</p> <p>1 MR MAGIDIWANA: I would not know, Sir. I 2 don't know how long the minute is, I did not have a watch. 3 CHAIRPERSON: A few minutes, half an 4 hour, an hour? 5 MR MAGIDIWANA: It depends on how 6 interesting the song is and how long it's extended because 7 of the interest. 8 CHAIRPERSON: Was it less than half an 9 hour, approximately? It would have been a very long song 10 if it went on for half an hour. 11 MR MAGIDIWANA: That's why I'm saying I 12 don't know how long it was. I did not estimate how long 13 the song is going to take. I also did not have a watch. 14 CHAIRPERSON: Did you think that being in 15 possession of a – sorry, did you think that having in your 16 hand an object of this kind for the duration of the song 17 constituted a criminal offence, that you're guilty of 18 possessing of a dangerous weapon? 19 MR MAGIDIWANA: Mr Chairperson, the 20 "incula" is in fact a dangerous weapon but the idea was, I 21 took it there because my hands had been tired, to enjoy the 22 song by clapping this. 23 CHAIRPERSON: You're not answering my 24 question. Did you think that taking a weapon of this kind 25 for the duration of the song and using it for rhythmic</p>

<p style="text-align: right;">Page 6399</p> <p>1 purposes, that that constituted a criminal offence?</p> <p>2 MR MAGIDIWANA: No, no I didn't think of</p> <p>3 it, it never came to me. I never thought about it.</p> <p>4 MR NGALWANA: There is another reason -</p> <p>5 I'm coming to the possession of the firearm in a moment.</p> <p>6 There is another reason that the police will advance for</p> <p>7 you and your front group being dressed in the manner that</p> <p>8 they were on the 16th of August at least, that you were a</p> <p>9 group of both committee members and the "makarapas" who</p> <p>10 were over-nighting on the mountain and that a decision had</p> <p>11 been taken by the strikers that the "makarapas" and the</p> <p>12 committee members would sleep on the mountain overnight</p> <p>13 until their demands were met by the employer. Would you</p> <p>14 care to comment?</p> <p>15 MR MAGIDIWANA: I don't know what you're</p> <p>16 talking about.</p> <p>17 MR NGALWANA: So you're denying it?</p> <p>18 MR MAGIDIWANA: Moreover, there's nothing</p> <p>19 like that.</p> <p>20 MR NGALWANA: You also had allegations of</p> <p>21 possession of unlicensed firearm at Wonderkop Hill</p> <p>22 preferred, or investigated against you. You made a</p> <p>23 statement to the police in that regard in which you denied</p> <p>24 the allegation against you. Now in chief it was suggested</p> <p>25 that the second statement may be a correction of the first</p>	<p style="text-align: right;">Page 6401</p> <p>1 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):</p> <p>2 Mr Magidiwana, let me take you to the second attempt by</p> <p>3 your group to reach what you call the main path that goes</p> <p>4 to Nkaneng. Can I take you to slide 200 of exhibit L? The</p> <p>5 police's version is that that is the formation that your</p> <p>6 group took, and that is the direction in which it was</p> <p>7 going. Are you disputing that?</p> <p>8 MR MAGIDIWANA: That is how we were</p> <p>9 walking.</p> <p>10 MR NGALWANA: Do you see the people</p> <p>11 scattering, it appears, as far as the bottom of the kraal,</p> <p>12 the second kraal, the lower kraal, towards the 1,2,3, there</p> <p>13 are about three or four shacks there, I don't know how</p> <p>14 many, there are a number of shacks at the bottom of the</p> <p>15 page. You see that?</p> <p>16 MR MAGIDIWANA: I don't see them.</p> <p>17 MR NGALWANA: Don't you see the scattered</p> <p>18 people at the bottom of the page, seemingly going towards</p> <p>19 those, going in the direction of the bottom of the page</p> <p>20 towards a, well, towards the bottom of the page?</p> <p>21 MR MAGIDIWANA: No, I cannot see them,</p> <p>22 Sir. Maybe you see them, but I don't see them.</p> <p>23 MR NGALWANA: We're looking at slide 200</p> <p>24 of exhibit L.</p> <p>25 MR MAGIDIWANA: Sir, people who are clear</p>
<p style="text-align: right;">Page 6400</p> <p>1 because they seem to be contradictory, the one talks about</p> <p>2 "I do not deny" and the other one says "I deny."</p> <p>3 CHAIRPERSON: I notice that the witness</p> <p>4 has his head down. Are you tired?</p> <p>5 MR MAGIDIWANA: I am in fact tired, yes,</p> <p>6 because what the counsellor is asking is just not the</p> <p>7 truth.</p> <p>8 CHAIRPERSON: That's not a reason to be</p> <p>9 tired. You've been in the witness box quite a long time.</p> <p>10 If you're tired and you're not able to focus properly on</p> <p>11 the questions and the answers then I can adjourn until 1:30</p> <p>12 to enable you to recover. Alternatively, if your not able</p> <p>13 to answer the questions and you're happy, that you're not</p> <p>14 unable to answer the questions and you're happy to carry</p> <p>15 on, we can carry on until 1 o'clock, but I did notice that</p> <p>16 you hung your head and you looked as if you were not coping</p> <p>17 properly.</p> <p>18 MR MAHLANGU: His response is that "I</p> <p>19 would appreciate it."</p> <p>20 CHAIRPERSON: We'll adjourn until 1:30.</p> <p>21 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>22 [13:33] CHAIRPERSON: The Commission resumes. Mr</p> <p>23 Magidiwana, you're still under oath. Mr Ngalwana, you're</p> <p>24 still cross-examining.</p> <p>25 MZOXOLO MAGIDIWANA: s.u.o.</p>	<p style="text-align: right;">Page 6402</p> <p>1 here that I see are those who are walking towards that</p> <p>2 road.</p> <p>3 MR NGALWANA: When you say "that road,"</p> <p>4 are you talking about the road that runs past the little</p> <p>5 kraal towards the left of the page?</p> <p>6 MR MAGIDIWANA: Yes.</p> <p>7 MR NGALWANA: Do you also see on the</p> <p>8 curve of that sort of horseshoe-shaped arrow, at the bottom</p> <p>9 of it, in other words where the arrow curves, do you see</p> <p>10 that there are people scattered there?</p> <p>11 MR MAGIDIWANA: No, then maybe I don't</p> <p>12 see properly then.</p> <p>13 MR NGALWANA: Would you be in the</p> <p>14 position to dispute, or will you dispute if I say to you</p> <p>15 that the police say that those are people busy dispersing</p> <p>16 in directions other than the direction that your group is</p> <p>17 taking?</p> <p>18 MR MAGIDIWANA: Sir, what I'm saying to</p> <p>19 you is I was going to Nkaneng and there were people who</p> <p>20 were following behind me.</p> <p>21 MR NGALWANA: Yes, you've told us that.</p> <p>22 I'm making a different point. Can you dispute that the</p> <p>23 people on the outside of the U-shaped golden arrow are</p> <p>24 scattering in other directions than the one that your group</p> <p>25 is taking?</p>

<p style="text-align: right;">Page 6403</p> <p>1 MR MAGIDIWANA: Those people who are at 2 the back, they are going to the place where we are going. 3 MR NGALWANA: Will you dispute when the 4 police say those people are not following your group, but 5 are scattering in other directions? 6 MR MAGIDIWANA: Maybe you think, Sir, 7 that now I trust a police officer. 8 MR NGALWANA: Whether you trust the 9 police officer or not is besides the point. They will be 10 making, giving evidence under oath, and if they give 11 evidence under oath and say these people were scattering in 12 other directions than the one that your group is following, 13 would you be able to dispute that? 14 MR MAGIDIWANA: There is no such, Sir. 15 CHAIRPERSON: I take it that means you'll 16 dispute their evidence. 17 MR MAGIDIWANA: Yes. 18 MR NGALWANA: Now when you took that 19 approach, going towards where the police barbed wire was 20 being deployed, is that where the water cannons and tear 21 smoke was used by the police? 22 MR MAGIDIWANA: Yes. 23 MR NGALWANA: When that happened, why did 24 you not change direction and walk away from where the tear 25 smoke and the water cannon was coming?</p>	<p style="text-align: right;">Page 6405</p> <p>1 you – 2 MR MAGIDIWANA: Don't say then that I was 3 in front if that, only to find that you understand it. 4 MR NGALWANA: You were in the front 5 group, were you not? 6 MR MAGIDIWANA: Yes, it is like that. 7 MR NGALWANA: If you are in the front 8 group, how would you know that the people on the outside of 9 the circle towards the bottom of the page and those on the 10 left-hand side of the page were following your direction? 11 MR MAGIDIWANA: We all ran away and we 12 all went back. 13 MR NGALWANA: Come now, Mr Magidiwana. 14 If you are in the front group there is no way of knowing 15 what people behind you are doing. 16 MR MAGIDIWANA: Sir, we all ran away and 17 all returned, which means went back, and our intention was 18 to go back to that road, or the path that we all wanted to 19 access, the one that I also wanted to access so that I 20 could get home. 21 MR NGALWANA: The front group, of which 22 you were one, comprised some 200 people. Will you dispute 23 that? 24 MR MAGIDIWANA: I never counted the 25 people.</p>
<p style="text-align: right;">Page 6404</p> <p>1 MR MAGIDIWANA: We did take another one. 2 MR NGALWANA: Yes, but then you came back 3 in the same direction, as depicted in slide 205. Do you 4 now see a scattering of people outside the circle? Would 5 you still persist that the people on the outside of the 6 circle, more towards the bottom of the page, are following 7 your group in the direction in which you are going? 8 MR MAGIDIWANA: I'm still saying that, 9 Sir. 10 MR NGALWANA: You will see that there are 11 people still outside that U-curve on the left-hand side of 12 that U-curve, further from the kraal. Can you see that? 13 MR MAGIDIWANA: I can see them. 14 MR NGALWANA: You cannot dispute, can 15 you, that those people at the time were headed in a 16 northerly direction, sort of towards the left of the page? 17 MR MAGIDIWANA: Those people ran away and 18 then came back because they wanted to pass through the way 19 in which we also wanted to pass. 20 MR NGALWANA: We know, both because you 21 told us and from slide 206, that you were towards the front 22 of the group. So how would you know what - 23 MR MAGIDIWANA: Sir, I was not in front. 24 There are people who had already passed me. 25 MR NGALWANA: Yes, I understand that, but</p>	<p style="text-align: right;">Page 6406</p> <p>1 MR NGALWANA: Did you know each and every 2 one of those 200-odd people, where they lived? 3 MR MAGIDIWANA: I'm also sure that as we 4 are here, you don't know as to where all of us are staying. 5 MR NGALWANA: So if evidence were led to 6 say that many of the people in that group did not live in 7 Nkaneng, would you be in a position to dispute that? Not 8 the majority, many, or some of them. 9 MR MAGIDIWANA: If you say that people 10 will lose lives and then you have to run away, are you 11 going to run to the veld or are you going to run to a 12 nearer place where other people are staying? 13 MR NGALWANA: You cannot dispute, can 14 you, that some of the people in the front group did not 15 live in Nkaneng, can you? 16 MR MAGIDIWANA: I don't know all those 17 people and even those who stay in Nkaneng, I don't know 18 where exactly they are staying, but what I know is that all 19 those people were on their way to Nkaneng. 20 COMMISSIONER HEMRAJ: And you could see 21 that from where you were? 22 MR MAGIDIWANA: I know that as we were 23 walking that we were on our way to Nkaneng. 24 MR NGALWANA: Can I just take you back to 25 where we were before we adjourned for lunch? You made a</p>

<p style="text-align: right;">Page 6407</p> <p>1 statement to the police in relation to allegations of 2 possession of unlicensed firearm at Wonderkop Hill on 16 3 August 2012.</p> <p>4 MR HANABE: You say he made allegations? 5 MR NGALWANA: No, he made a statement in 6 relation to allegations pertaining to possession of 7 unlicensed firearm at Wonderkop Hill on 16 August 2012. 8 MR MAGIDIWANA: I was never found in 9 possession of a firearm. 10 MR NGALWANA: Yes, in that statement you 11 denied the allegation. 12 MR MAGIDIWANA: And yet I was never found 13 in possession of a firearm. 14 MR NGALWANA: Well, the police will lead 15 evidence that you were indeed found with an unlicensed 16 firearm. 17 MR MAGIDIWANA: They must also show those 18 videos that they say they had. 19 MR NGALWANA: You said in your evidence- 20 in-chief that when you told – if I remember correctly – 21 when you told Captain Pule this, he believed, you got the 22 impression that he believed you. 23 MR MAGIDIWANA: Yes, because what he said 24 was that this was also confusing to him because all these 25 things that are brought by the police in fact are not the</p>	<p style="text-align: right;">Page 6409</p> <p>1 statement, to obtain a statement from me, and I told him 2 that I cannot make a statement to him in the absence of my 3 attorney and he then forced me, or insisted.</p> <p>4 MR NGALWANA: Yes, eventually you did 5 make the statement to Captain Pule, in which you denied the 6 allegation against you regarding the possession of an 7 unlicensed firearm. 8 MR MAGIDIWANA: Yes. 9 MR NGALWANA: And you got the impression 10 – now if you got the impression that he believed you, why 11 would he seek to implicate you? Sorry, that's not a 12 correct question to ask, Chair. I withdraw that. If you 13 got the impression that Captain Pule believed you in 14 relation to the unlicensed firearm, why would he seek to 15 implicate you in relation to the other three allegations? 16 CHAIRPERSON: I don't think that's a 17 question that he can be expected to answer. He doesn't 18 know what motive the captain had for doing what he says the 19 captain did. I don't know that that's an appropriate 20 question to ask the witness. I assume it can be argued 21 obviously at the end of the day, but I don't see how you 22 can expect the witness to answer the question. You'll ask 23 him to speculate. What will the value of his speculation 24 be? 25 MR NGALWANA: Thank you, Chair. Let me</p>
<p style="text-align: right;">Page 6408</p> <p>1 same things. 2 [13:53] MR NGALWANA: Was that in relation to – 3 when you say you got the impression that Captain – is it 4 Captain? - that Pule believed you, that Captain Pule 5 believed you, were you referring to the charge of 6 possession of unlicensed firearm, or were you referring to 7 the allegations in relation to public violence, illegal 8 gathering, and possession of dangerous weapons? 9 MR MAGIDIWANA: He believed after he told 10 me about the firearm and I explained to him that in fact 11 what I was in possession of was a stick. 12 MR NGALWANA: Now we know, as you have 13 conceded, that that was not entirely correct because at 14 some stage you were carrying a – at the koppie – 15 CHAIRPERSON: I thought we had a debate 16 about what "in possession of" means in relation to merely 17 having it, so I'm not sure that you could put it quite as 18 crisply as that to the witness. 19 MR NGALWANA: Alright. If you got the 20 impression that Captain Pule believed you when you told him 21 that you were not carrying a firearm, did he take the 22 statement – let me start that way. You made the statement 23 before Captain Pule, not so, relating to the possession of 24 a firearm, unlicensed firearm, correct? 25 MR MAGIDIWANA: He required in fact a</p>	<p style="text-align: right;">Page 6410</p> <p>1 take you back to the third approach. I believe the footage 2 is EEE3 point something. EEE3.4. Just for certainty, may 3 I ask one of the evidence leaders to confirm whether or not 4 that is the video taken from the Reuters camera, EEE3.4? 5 MS PILLAY: Chair, EEE3.4 is the ENCA 6 footage, "SA seeks to understand Marikana massacre." 7 CHAIRPERSON: I think, as far as I can 8 recall, as Adv Hemraj reminds me, it in fact is a 9 compilation which contains footage from various media 10 houses, I think. Is that correct? 11 MS PILLAY: The Reuters footage is UU3. 12 I don't know if that's the one you wanted. 13 MR NGALWANA: That's the one I'm looking 14 for. Thank you. UU3 footage, may I ask the technicians to 15 play UU3, please? I'm not sure if there needs to be a 16 warning to be issued because certainly the part I want to 17 show does not show any deceased persons. Perhaps as a 18 matter of caution the Chairperson could issue a warning. 19 CHAIRPERSON: I'm told that a video clip 20 is going to be shown which may contain the pictures of the 21 deceased who were killed on the 16th of August, and if there 22 are any people present in the auditorium today who were 23 related to those people or were among their loved ones and 24 they think that looking at the video clip, if the pictures 25 I've referred to are on it, will cause them distress, then</p>

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1 I give them the opportunity to leave the auditorium and I
2 ask that the clip not be shown until two minutes have
3 elapsed after what I've just said has been interpreted.
4 [VIDEO RECORDING PLAYED]
5 MR NGALWANA: Can you dispute - and we'll
6 play it again if we have to - can you dispute that the
7 police who are firing are retreating? Do you want to see
8 the video again?
9 MR MAGIDIWANA: What is the reason for
10 them to retreat, Sir?
11 MR NGALWANA: Well, it appears because
12 the front group is charging at them, is running towards
13 them. Can we play the footage again, please?
14 [VIDEO RECORDING PLAYED]
15 MR MAGIDIWANA: Can I dispute what we are
16 seeing?
17 MR NGALWANA: If you can.
18 MR MAGIDIWANA: Do you see that person
19 who's fallen as to where he's facing?
20 MR NGALWANA: Is the policemen that are
21 shooting at the crowd retreating?
22 MR MAGIDIWANA: Sir, these police
23 officers are shooting and this person is falling and as
24 this person is falling, he is facing towards the road. His
25 head is facing the direction which he intended to take.

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1 CHAIRPERSON: You didn't answer the
2 question. What you were asked was, do you agree that what
3 one can see on the screen is policemen moving backwards and
4 strikers moving forward towards them? Can you see that?
5 That's the question.
6 MR MAGIDIWANA: Sir, that is not true.
7 The police officers, the ones who are shooting and they
8 blocked the road, whereas people wanted to go to Nkaneng.
9 CHAIRPERSON: Do I understand that answer
10 to mean that you do not agree that this clip shows
11 policemen moving backwards and strikers moving forwards
12 towards them?
13 MR MAGIDIWANA: People were not walking
14 towards, to the police.
15 CHAIRPERSON: We have his answer, Mr
16 Ngalwana. It's pointless taking it any further.
17 COMMISSIONER TOKOTA: No, no, no, Mr
18 Interpreter, you must interpret this clip. You didn't
19 interpret that part. I don't agree with that -
20 MR HANABE: Oh, this clip?
21 MR BIZOS SC: Mr Chairperson, may I ask
22 that we take note that there are two policemen behind the
23 car, shooting, and three policemen, at least two car
24 lengths in front of them, also shooting, because we are
25 going to submit that we do not see any protesters coming

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1 towards them, but we see policemen, as far as the two
2 behind are concerned, are shooting without anyone being
3 shown as the victim, or the people -
4 CHAIRPERSON: Mr Bizos, that's a point
5 you can make later in argument. The question asked by Mr
6 Ngalwana is a more focussed question, simply is, do you see
7 policemen moving backwards while they're shooting, and do
8 you see protesters moving forward. That's the question,
9 and do you see it on this clip. Once he's given his
10 answer, which I suspect I know what it will be, then I
11 think Mr Ngalwana must move to the next point because the
12 clip speaks for itself. What one can see on it may be a
13 subject matter for argument, but there's no point in
14 debating the point any further with the witness, but his
15 question at the moment is what I've said it was and the
16 witness I would expect will now be able to answer it.
17 MR MPOFU: Chairperson, not one who wants
18 to split hairs, but that question as posed now by the
19 Chairperson is in this context totally different to the
20 previous question posed by the Chairperson, incidentally,
21 about whether, as reformulated now to say do you see the
22 strikers moving forward, which he was answering to the
23 question earlier posed by the question, do you see them
24 moving towards the police, and -
25 CHAIRPERSON: I thought it was amounting

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1 to the same thing, but I understand your point. It may
2 well be something different, so let's reformulate the
3 question. Let's pose the question the way I put it
4 originally. On the clip, do you see protesters moving
5 towards the police, and do you see policemen moving
6 backwards?
7 MR MAGIDIWANA: In this clip we never
8 even reached the road. If the police then had shot us
9 after in fact we had crossed, or passed that road, then I
10 would say then they are telling the truth. So what this
11 man is saying, I'm still saying it that it is not true.
12 CHAIRPERSON: Mr Magidiwana, do me a
13 favour, don't bang the table in front of you with your
14 hand. That's the first point. The second point is, you
15 still haven't answered the question. The question, it may
16 well be, to be fair, that you don't understand the question
17 as posed, so I'll ask Mr Ngalwana to put it to you again,
18 so please listen carefully to the question. I know you
19 want to make points about what you see on the video.
20 You've already discussed it in your evidence. Your counsel
21 will have an opportunity to argue it later, and he will
22 also have an opportunity to cross-examine the policemen
23 about it, but leave that to your counsel. Just answer the
24 question that Mr Ngalwana is going to ask you, and no more.
25 MR NGALWANA: I'm sorry, Sir, for making

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1 you angry. I'm doing my job. I'm going to ask the
2 technicians to play the clip one last time. What I want
3 you to look out for are three things. The first is a
4 policeman firing at the crowd, back-paddling, moving
5 backwards. The second is a group of people charging
6 towards the police, in other words running towards that
7 policemen. The third is the line of cars, the position of
8 the line of cars in relation to the crowd that is running
9 towards the police. Please, I want to be sure that you
10 understand that.

11 MR MPOFU: Sorry, I'm sorry, sorry.
12 Chairperson, could you please – I see that the witness
13 looks like he's crying. If maybe the Chairperson could
14 enquire if he's okay?

15 CHAIRPERSON: Your counsel says that he
16 thinks that you're crying. Is that correct? Are you
17 crying?

18 [14:13] MR MAGIDIWANA: He must continue talking,
19 the counsel.

20 CHAIRPERSON: Alright, but we don't want
21 to put you under undue stress and reduce you to tears by
22 the questions that you're getting. Anyway, counsel will
23 then proceed, but I'm sure he will do so gently. Mr
24 Ngalwana, you know one can understand this was the incident
25 in which he was very badly injured, nearly died, and his

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1 that in mind for the future.

2 MR NGALWANA: Thank you, Chair, I just
3 have one more –

4 CHAIRPERSON: Perhaps this –

5 MR NGALWANA: I did have one more clip,
6 but –

7 CHAIRPERSON: One more clip? Well, when
8 you say one more clip, is it a clip of things that are
9 likely to cause him distress?

10 MR NGALWANA: Yes, Chair.

11 CHAIRPERSON: Alright. Well, think about
12 it over the adjournment. We'll resume on Monday morning at
13 10 o'clock.

14 [COMMISSION ADJOURNED]

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1 comrades were killed. So it's something that watching it
2 again and again, I'm sure causes him great distress and I
3 can understand him being very moved to see it.

4 MR NGALWANA: I understand that, Chair.
5 Chair, if this is a proper time –

6 CHAIRPERSON: I see he is still crying.
7 I'm sure he's trying to be brave and I don't want to
8 criticise him and suggest that there's anything wrong with
9 his reaction to what he saw. We're not here to inflict
10 torture and pain on people. I would have thought it might
11 be appropriate for us to take the adjournment at this
12 stage.

13 MR NGALWANA: I agree, Chairperson.

14 CHAIRPERSON: I see you're nodding your
15 head, Mr Mpofu?

16 MR MPOFU: Thank you, Chairperson, I'm
17 indebted to the Chairperson and Commissioners.

18 CHAIRPERSON: Mr Ngalwana, I don't know
19 what the future holds as far as your cross-examination is
20 concerned. You've shown the clip to him. With respect,
21 I'm not sure that his reaction, what he sees or doesn't see
22 can help us very much to answer the questions. Do you have
23 any more clips of that kind to show him, because I can
24 understand that it evokes a tremendous emotional turmoil
25 within him when he sees these clips. So I hope you'll bear

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