

# 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

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#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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<p>1 [PROCEEDINGS ON 13 MAY 2013]  2 [10:16] CHAIRPERSON: The Commission resumes. Ms  3 Barnes, I see you're back here this morning, appearing for  4 AMCU. I understand you have something to tell us.  5 MS BARNES: Yes, thank you, Chair. I  6 have a statement by Mr Joseph Mathunjwa, the president of  7 AMCU, which I wish to read out. Mr Mathunjwa had hoped to  8 be able to be here today in order to read the statement  9 himself. He's unable to be here because he is presently  10 meeting with Mr Khulekile's widow and so in the  11 circumstances I'm going to read the statement out on his  12 behalf.  13 "It is with great sadness that I inform the  14 Commission of the death of Steve Khulekile, the regional  15 organiser for AMCU at Lonmin. He was due to give evidence  16 in the Commissioner. Mr Khulekile was shot dead on  17 Saturday, the 11th of May 2013, as he sat watching football  18 on television in a tavern at Khomanani Shaft Number 2. Our  19 prayers and thoughts are with Steve's wife and family. I  20 do not know who is responsible, but I want to take this sad  21 opportunity through the Marikana Commission of Inquiry to  22 plead with all mineworkers to stop these killings. They  23 are destructive of all that we in the mining industry  24 believe in. They leave behind grieving widows, children,  25 mothers, fathers, brothers, and sisters, who are condemned</p>	<p>1 MR MPOFU: That's correct, Chair.  2 CHAIRPERSON: And you're now able to  3 proceed with your cross-examination.  4 MR MPOFU: Yes, and we gave a copy of it  5 to the witness as well. It's only one page that we dealt  6 with, and I've pointed it out to him, Chairperson.  7 CHAIRPERSON: It will have to be given an  8 exhibit number –  9 MR MPOFU: Yes, GGG –  10 CHAIRPERSON: And Ms Pillay will tell us  11 what it must be, how we must describe it.  12 MS PILLAY: Chair, it will be GGG19.  13 CHAIRPERSON: Thank you very much. I've  14 marked it accordingly.  15 CROSS-EXAMINATION BY MR MPOFU (CONTD.):  16 Thank you, Chairperson. Good morning, General.  17 MAJOR-GENERAL ANNANDALE: Good morning,  18 Sir.  19 MR MPOFU: Right, before we proceed on  20 the subject that we were busy with, I will start, as I  21 always do, with asking you whether you have managed to get  22 your hands onto that job description and delegation  23 document in respect of your powers.  24 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  25 inderdaad. Daar's 'n dokument getiteld "Purpose and</p>
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<p>1 to poverty. I beg of you all, there have been too many who  2 have died. I beg of you all to do your utmost to stop  3 these killings." Thank you, Chairperson.  4 CHAIRPERSON: Thank you, Ms Barnes. We  5 on the Commission wish to extend our condolences and  6 sympathy to the family and friends and loved ones of the  7 late Mr Khulekile and please, I ask you please to see to it  8 that they are conveyed, our sympathy and condolences are  9 duly conveyed. We entirely endorse what Mr Mathunjwa has  10 said and we want to add one other factor, and that is that  11 we've had other instances, one in particular where a  12 witness was killed and one potential witness was killed.  13 Both cases appear to have been assassinations. It's  14 important that this Commission gets to the truth of what  15 happened at Marikana, that it's able to carry out its  16 functions with a minimum of interference and disruption,  17 and deaths of this kind can only impact adversely on the  18 work of the Commission, and it's a matter of great concern  19 to us that this has happened and we hope profoundly that  20 there will be no repetitions of this kind of event. Thank  21 you. Generaal-Majoor, u is nog steeds onder eed.  22 CHARL ANNANDALE: s.o.e.  23 CHAIRPERSON: Mr Mpofu, I understand  24 you've distributed now copies of the statement of Mr Botes  25 to which you referred on Thursday –</p>	<p>1 functions, Head Specialised Operations." Aangeheg aan die  2 dokument is daar 'n organisatoriese struktuur. Voorsitter,  3 en dan die relevante bladsye in 'n dokument gemerk  4 "Annexure A" –  5 CHAIRPERSON: We don't have to trouble Ms  6 Pillay this time; this is exhibit GGG20.  7 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  8 die twee bladsye is aanhangsels tot my uitset-ooreenkoms,  9 of my "performance agreement" vir die jaar 2012/2013.  10 MR MPOFU: Okay, thank you.  11 CHAIRPERSON: How must we describe  12 exhibit GGG20 in the exhibit list? "Annandale job  13 description" doesn't sound quite accurate.  14 MAJOR-GENERAL ANNANDALE: Chairperson, if  15 I may, I would propose "Purpose and functions, Head  16 Specialised Operations."  17 CHAIRPERSON: Thank you. Do you have the  18 Afrikaans for us? Seeing the witness gave it in English,  19 mustn't you interpret it in Afrikaans?  20 MR MPOFU: Okay, thanks, General. Now I  21 see the shoe is on the other foot. This is why the  22 Chairperson always says we must get these documents on  23 time. So I'll be able to deal with it after tea, but for  24 now can I just ask you a few things that, from a quick  25 glance that emanates. What is clear from this is that you</p>

<p style="text-align: right;">Page 9504</p> <p>1 don't report directly to the National Commissioner, you 2 report to the Divisional Commissioner ORS who is, I think 3 you said was General Mawela. Is that correct? 4 CHAIRPERSON: Lieutenant-General. 5 MR MPOFU: Lieutenant-General Mawela. 6 GENERAAL-MAJOOR ANNANDALE: Dis korrek, 7 Voorsitter. 8 MR MPOFU: And you are not the section 9 head of the NIU or STF. Those are other people. Or rather 10 let me put it this way. Who are those people? Who is the 11 section head of STF and NIU? 12 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 13 die Seksiehoof Spesiale Taakmag is Brigadier Fritz, en vir 14 NIU is Brigadier Tsiloane, beide seksies wat rapporteer aan 15 my. 16 CHAIRPERSON: While we're about it, we 17 may as well find out about the Section Head Tactical 18 Operations, that's the third brown box – 19 MR MPOFU: Yes, that is right. 20 CHAIRPERSON: - brown box under your 21 name. 22 MR MPOFU: Yes, please, General. 23 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 24 die betrokke pos is vakant. Dit word op 'n rotasie basis 25 word dit gevul deur Brigadier Fritz, Brigadier Tsiloane, en</p>	<p style="text-align: right;">Page 9506</p> <p>1 bulky and unnumbered. Unfortunately, Chairperson, I had 2 actually thought I would do some voluntary service and 3 paginate it, but that document and SS3 in particular I'll 4 deal with in – 5 CHAIRPERSON: Well, let's do that 6 quickly. 7 MR MPOFU: Yes, mine is – 8 CHAIRPERSON: The first page we don't 9 have to number, but the second page "Head, Specialised 10 Operations, Purpose" we'll call page 2. The chart SS3 – 11 MR MPOFU: Sorry Chair, can we start from 12 the first page, just for that – 13 CHAIRPERSON: The first page is 1. 14 MR MPOFU: Let's make it 1, yes. 15 CHAIRPERSON: Alright, that's a good 16 number, it's for the first page. The second page, "Head, 17 Specialised Operations, Purpose," etcetera, that's page 2. 18 The box are page 3. The component, the annexure A is page 19 4. Weight 20% is page 5. 20 MR MPOFU: Ja, and the next one. 21 CHAIRPERSON: Key performance area 2, 22 it's also called weight 20%. 23 MR MPOFU: Yes, and so on. 24 CHAIRPERSON: So we've numbered the 25 pages, now you can refer to them conveniently.</p>
<p style="text-align: right;">Page 9505</p> <p>1 'n Brigadier Gibson. 2 MR MPOFU: And just for the sake of 3 completion, we established last week that the people who 4 are entitled to deploy the NIU are the Divisional 5 Commissioner, your immediate boss, and the National 6 Commissioner. Is that correct? 7 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 8 uiteraard die Nasionale Kommissaris het altyd die gesag, en 9 dan ook myself in terme van my verantwoordelikhede as die 10 komponentshoof. 11 MR MPOFU: Yes, no, I'm just saying in 12 terms of exhibit Q the two people who are empowered to do 13 that are the National Commissioner and the Divisional 14 Commissioner. If you have those powers then hopefully this 15 document will then explain, once we've read it, how those 16 powers are devolved to you, but as far as exhibit Q is 17 concerned it's those two, or that's the primary powers, 18 let's call it that. 19 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 20 soos ek hier kan onthou in so ver dit NIU aangaan is dit 21 vermelding gemaak van die "Divisional Commissioner 22 Operational Response Services." Daar is nie pertinente 23 vermelding van die Nasionale Kommissaris nie. 24 MR MPOFU: Okay, that's fine. We'll find 25 it when we – just a minute. Unfortunately that exhibit is</p>	<p style="text-align: right;">Page 9507</p> <p>1 MR MPOFU: Thank you, Chairperson. 2 General, on this pagination then I'm referring you to page 3 70. So the easiest, the shorthand is the section just 4 before the STF, which we dealt with, and the page that I'm 5 referring you to is headed "Deployment" under NIU. 6 MR MAHLANGU: You referred to 70? 7 MR MPOFU: Ja, under NIU, is a slide 8 under NIU headed "Deployment" and you can number – 9 MS PILLAY: Chair, just for the purposes 10 of the record, exhibit Q is a PowerPoint presentation and 11 each slide has a number, and the slide that Mr MPOFU is 12 referring to is slide 71 of exhibit Q. 13 MR MPOFU: Yes, it was also 71. 14 Chairperson, the way we can cure that is to make the cover 15 page, page 1. Then it will coincide with Ms Pillay's – 16 CHAIRPERSON: We'll do that. 17 MR MPOFU: Yes, thank you. So the 18 covering page is page 1, everybody. So it's 71 rather. 19 Are you there? Okay. 20 MAJOR-GENERAL ANNANDALE: Yes. 21 MR MPOFU: The second bullet, it says, 22 "The Divisional Commissioner of Operational Response 23 Services," who is General Mawela, "will prioritise and 24 approve the deployment of the unit to other provinces. The 25 National Commissioner can, however, deploy the NIU to any</p>

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1 province should she or he so desire." That's what I'm  
2 referring you to. It's just to remind you. Can you see it  
3 now?  
4 GENERAAL-MAJOOR ANNANDALE: Ek sien dit,  
5 dis reg, Voorsitter.  
6 MR MPOFU: Ja, so all I'm saying is that  
7 the primary repositories of that power of deployment are  
8 General Mawela and General Phiyega. If you have those  
9 powers they will come from GGG20. Correct?  
10 [10:36] GENERAAL-MAJOOR ANNANDALE: Dit is  
11 korrek, Voorsitter.  
12 MR MPOFU: And do you know who has the  
13 power to deploy or mobilise the STF?  
14 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
15 Spesiale Taakmag kan selfs op die versoek van 'n  
16 stasiebevelvoerder ontplooi word, en dan pertinent deur die  
17 eenheidsbevelvoerder van enige van die taakmag eenhede ook,  
18 dan by implikasie die Seksiehoof, Spesiale Taakmag, myself,  
19 die  
20 Afdelingskommissaris, en so ook die Nasionale Kommissaris.  
21 MR MPOFU: Yes, but I'm talking about  
22 situations such as this. Would you describe the Marikana  
23 operation as a national operation?  
24 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
25 nee, Marikana bly 'n provinsiale optrede en operasie.

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1 MR MPOFU: Yes, but you would agree that  
2 it had a national flavour insofar as the deployment of  
3 persons coming from outside the North West province is  
4 concerned?  
5 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
6 ondersteuning deur nasionale eenhede en ook ander  
7 provinsies.  
8 MR MPOFU: Yes, correct. Thank you. And  
9 that although it's correct that a unit commander – I think  
10 that's how it's described – may request, as you correctly  
11 pointed out, the deployment of the NIU, when as in the  
12 situation of Marikana it's an operation that has a national  
13 flavour and people from other provinces have to be  
14 deployed, obviously that would be outside of the  
15 jurisdiction of even a Provincial Commissioner?  
16 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
17 die prosedure is dat die Provinsiale Kommissaris, of dan  
18 enige van haar adjunkte sal nasionale eenhede, hetsy deur  
19 die Afdelingskommissaris van Operasionele Reaksie Dienste  
20 of dan die Komponentshoof, in die geval myself, versoek.  
21 In terme van die versoek vir Openbare Orde Polisiëring hulp  
22 sal daar gewoonlik 'n oproep gemaak word vanaf die een  
23 provinsie na die ander provinsie net om te verneem of daar  
24 beskikbare personeel is, en daarna sal die NATJOC versoek  
25 word, formeel versoek word om sodanige ontplooiing vanaf 'n

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1 ander provinsie te fasiliteer.  
2 MR MPOFU: Okay. Well, for instance it  
3 should become clear in the next question, I don't accept  
4 everything you've said now, but for the purposes of this  
5 question let's assume what you've said is correct. Even if  
6 that was so, am I correct that the deployment of the NIU  
7 would then be done at a national level - let's just limit  
8 it to that – at a national level? In other words the local  
9 person who's requesting cannot then go and deploy people  
10 from another province. It will be done at a national  
11 level. By whom, we'll get to it just now. Agreed?  
12 GENERAAL-MAJOOR ANNANDALE: Dit is  
13 korrek, Voorsitter.  
14 MR MPOFU: And so that I don't attract  
15 the ire of the Chairperson, I will read one sentence from a  
16 document which if necessary will be given to you later for  
17 later comment. Chairperson, it's in the SAPS documents,  
18 page 550. I have a feeling that this pagination, or rather  
19 the indexing, I think Mr Pretorius told me that the  
20 indexing has been changed, so we'll give it a proper  
21 identification.  
22 CHAIRPERSON: How is the document  
23 described?  
24 MR MPOFU: It's called "The National  
25 Instruction 9 of 2011, Mobilisation of the Special Task

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1 Force."  
2 CHAIRPERSON: Thank you. I take it  
3 you're familiar with that document, Major-General?  
4 MR MPOFU: Yes.  
5 GENERAAL-MAJOOR ANNANDALE: Ek is bewus  
6 van die dokument, dis korrek, Voorsitter.  
7 MR MPOFU: Thank you. Thank you very  
8 much. We'll still give you a copy, but the section I'm  
9 reading, if you have the SAPS documents, maybe Mr Pretorius  
10 can give us the new pagination, but in any event, it's not  
11 a long section. It's section 4 of that document. Are you  
12 trying to get hold of it?  
13 GENERAAL-MAJOOR ANNANDALE: Mmm.  
14 MR MPOFU: 4(1) just says, or rather the  
15 heading of that section says, "Circumstances in which the  
16 Special Task Force may be mobilised," and then section 1 I  
17 won't read it – it simply says what we already know, that  
18 the STF is for hostage situations, and so on, and so on.  
19 Section 2, which is the one I want to read, or subsection  
20 2, 4(2), let's call it that, says, "Notwithstanding  
21 paragraph 1, the National Commissioner may at any time and  
22 for any reason mobilise the STF and the section head of the  
23 STF must coordinate the operation." You accept that as at  
24 least what is in the documentation? Once again it may well  
25 be that GGG20 will show that you are also in the mix, but

<p style="text-align: right;">Page 9512</p> <p>1 as far as this is concerned, the National Commissioner is  2 the only one who can mobilise and the –  3 CHAIRPERSON: I'm not sure that that  4 document says she's the only one. It empowers her to do  5 that.  6 MR MPOFU: Well, exactly –  7 CHAIRPERSON: I didn't hear the word  8 "only" there.  9 MR MPOFU: Fine. Well, okay. Like I say  10 the heading says "Circumstances in which the Special Task  11 Force may be mobilised," and maybe the Chairperson is  12 right. Let me just say, the people who are specified as  13 having that power in this document specifically are the  14 National Commissioner to mobilise and the section head, who  15 must coordinate, and we've already established that you are  16 neither the section head nor the National Commissioner.  17 I'm just saying at face value that's what the situation is.  18 What GGG20 will tell us is another matter.  19 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  20 nee, by implikasie is as 'n eenheidsbevelvoerder of 'n  21 stasiebevelvoerder, hulle kan mobiliseer. Dan is dit ook  22 die seksiehoof, en dan is dit ook die komponentshoof en dan  23 is dit ook die Afdelingskommissaris "Operational Response  24 Services."  25 MR MPOFU: Yes, no, no, that may well be,</p>	<p style="text-align: right;">Page 9514</p> <p>1 once one of those types can mobilise –  2 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  3 ek wil net vir mnr Booï kans gee om te vertaal, dan sal ek  4 my punt maak.  5 MR MPOFU: Sorry.  6 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  7 ek –  8 CHAIRPERSON: Sorry. Mr Mpofu, I take it  9 we'll be given copies of the document to which you're  10 referring after the tea adjournment? Yes, thank you.  11 MR MPOFU: Yes, Chairperson, I must  12 apologise.  13 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  14 so paragraaf 4(2) is dan die Nasionale Kommissaris kan vir  15 enige ander rede nie vermeld onder (a) tot (d) kan sy dit  16 doen, maar (a) tot (d) is dan eenheidsbevelvoerder,  17 stasiebevelvoerder, of dan enigiemand in die rangorde.  18 COMMISSIONER HEMRAJ: Is there a copy of  19 this document available so that we can follow this debate?  20 Because it's very difficult to just listen to them and be  21 able to understand what –  22 MR MPOFU: Yes, Chairperson, really I am  23 sorry, Chairperson. Can I just go to something else and  24 we'll deal with this. It's just one or two more questions  25 anyway –</p>
<p style="text-align: right;">Page 9513</p> <p>1 and most of that will be a matter for argument. All I'm –  2 or something that comes up out of GGG20. All I'm saying to  3 you is simply that as far as the, once again the primary  4 repositories of the power, the specified ones, it's only  5 the National Commissioner for mobilisation and section head  6 for coordination. What implications one might draw from  7 that and so on is a matter that we will argue, but those  8 are the people specified. Correct?  9 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  10 dis nie waar nie.  11 MR MPOFU: Before you answer, General,  12 remember we've made the distinction between the ability of  13 a local or unit commander to request within their  14 jurisdiction. We are talking here about a Marikana type  15 operation which has a national flavour, so whatever your  16 answer, you must bear that in mind.  17 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  18 subparagraaf 2 kan nie gelees word sonder subparagraaf 1  19 van paragraaf 1 nie, en pertinent 4(1)(c) wat sê, "Any  20 criminal related high-risk operation in which the  21 specialised skills and equipment of Special Task Force are  22 required."  23 MR MPOFU: Yes. No, there we are ad  24 idem, we agree that's as to the type of activities for  25 which the STF was established. We are now busy with who,</p>	<p style="text-align: right;">Page 9515</p> <p>1 CHAIRPERSON: It's 6 minutes to 11. If  2 there's another point you can deal with before we take the  3 tea adjournment, then by the time when we come back to this  4 after tea, we'll hopefully have the document in front of us  5 –  6 MR MPOFU: Yes.  7 CHAIRPERSON: - and we can all follow and  8 not just the privy few who have got the document at the  9 moment.  10 MR MPOFU: Yes, the – no, I do have  11 something else which is kind of preliminary, but it doesn't  12 belong to this section.  13 CHAIRPERSON: If you want me to take the  14 tea adjournment now then we can get the document and you  15 can carry on – the problem has been solved in another way.  16 MR MPOFU: Yes, thank you, Chairperson.  17 Section 4, Chairperson and Commissioners, section 4, it's  18 the short section, 4(1) is just for reference; it's not  19 important. 4(2) is what we are busy with. Or well, it has  20 become important now because the witness has referred to  21 it.  22 CHAIRPERSON: Mr Mpofu, we studied the  23 document. You may now proceed.  24 MR MPOFU: Thank you, Chairperson.  25 General, just so that we wrap up this point before tea, I</p>

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1 was busy saying that you and I are of the same mind as to  
 2 what 4(1), it's what we have already read here about  
 3 hostage situations and what have you. The issue I'm saying  
 4 to you is that subsection (2) says, "Notwithstanding  
 5 paragraph (1) the National Commissioner may at any time,"  
 6 in other words it doesn't mean that she may deploy it for  
 7 mountain roadblocks, if you know what I mean. It still has  
 8 to be hostage situation and high-risk operations and all  
 9 that.

10 MR SEMENYA SC: Chair –

11 CHAIRPERSON: I must confess, I don't  
 12 read it that way. You see the "Notwithstanding" one seems  
 13 to indicate that never mind what (1) says, that any time or  
 14 for any reason, the National Commissioner may at any time  
 15 or for any reason. So mountain roadblocks presumably are  
 16 covered by any reason. So I don't think prima facie what  
 17 you're putting is correct. I don't want to be unduly  
 18 disruptive with your cross-examination, but that's being  
 19 the –

20 [10:56] MR MPOFU: No, no, Chairperson, you're  
 21 quite right, and I'll concede that point. Assume that it  
 22 could be for any reason, mountain roadblock or painting a  
 23 school, but the point is that it's the National  
 24 Commissioner who may mobilise the STF and the section head  
 25 of the STF must coordinate the operation once she has

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1 mobilised it for any reason, and the crucial point I'm  
 2 making is that that section would apply in a national –  
 3 well, you said it's not a national, an operation which has  
 4 a national flavour, such as Marikana, which you and I have  
 5 agreed. Correct?

6 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 7 nee, die Nasionale Kommissaris se toestemming is nie nodig  
 8 vir die vier aspekte vermeld in 4(1)(a) tot (d) nie.

9 MR MPOFU: Okay, General, I don't want to  
 10 debate what, as I say what may be a matter for legal  
 11 argument with you, but surely you're not suggesting that  
 12 the National Commissioner is excluded from mobilising the  
 13 STF for a terrorism incident, surely. Surely any reason  
 14 includes also those things that are in 4(1).

15 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 16 nee, die Nasionale Kommissaris word nie geken as hulle  
 17 gemobiliseer word vir die betrokke redes vermeld in 4(1)(a)  
 18 tot (d) nie. Slegs as dit iets buiten dit sou wees, dan  
 19 het die Nasionale Kommissaris die reg om hulle ook te  
 20 gebruik vir iets wat nie dan vermeld is nie.

21 MR MPOFU: Okay, I'll leave that for  
 22 argument.

23 CHAIRPERSON: Let Mr Booi interpret that  
 24 first, then I want to put –

25 MR MPOFU: I'm so sorry, Chairperson.

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1 CHAIRPERSON: I take it the point though  
 2 is that the National Commissioner is not excluded even in  
 3 situations covered by subparagraph (1), so if there's a  
 4 situation falling under 4(1)(c) and the National  
 5 Commissioner feels that action should be taken by the STF  
 6 she can give the necessary instructions. Your point I  
 7 think is that she doesn't have to because the people below  
 8 her can do it on their own authority, but certainly she  
 9 would have overriding authority; she's not excluded at all.  
 10 Would that be correct?

11 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 12 soos u dit gestel het, som dit dit presies op.

13 MR MPOFU: Thank you. I'm indebted for  
 14 the precision of the Chairperson. We'll leave the issue  
 15 for argument and interpretation, but the real issue that I  
 16 want you to help me with is this other situation which  
 17 doesn't involve the National Commissioner, which you have  
 18 described, which involves your authority to deploy, can be  
 19 gleaned from GGG20. Is that your answer? Or if not, where  
 20 are we going to find it?

21 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 22 ek dink GGG2, bladsy 2 pertinent sal omvattend daarna – of  
 23 nie omvattend nie, sal daarna verwys in terme van "ensuring  
 24 of all specialised policing operations," of "directing the  
 25 activities of the specialised operation capacities."

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1 MR MPOFU: Alright, we'll let's put it  
 2 like this. I'm handicapped because I haven't read GGG20.  
 3 If when I read it over tea it's once again a matter of  
 4 interpretation, then we'll leave it at that, but I know  
 5 what your answer is here. Thanks, Chairperson, that will  
 6 be a convenient stage to –

7 CHAIRPERSON: Are you moving on to  
 8 another topic?

9 MR MPOFU: Yes, Chairperson, thank you.

10 CHAIRPERSON: Very well, we'll take the  
 11 tea adjournment at this stage.

12 [COMMISSION ADJOURNS COMMISSION RESUMES]

13 [11:23] CHAIRPERSON: The Commission resumes.  
 14 We've been handed a copy of the National Instruction 9 of  
 15 2011, which I suspect will be exhibit GGG21.

16 MS PILLAY: That's correct, Chair.

17 VOORSITTER: Generaal-Majoor, u is nog  
 18 steeds onder eed.

19 CHARL ANNANDALE: s.o.e.

20 CHAIRPERSON: Mr Mpfu.

21 CROSS-EXAMINATION BY MR MPOFU (CONTD.):  
 22 General, all I'm going to say just for the record is that  
 23 my reading of GGG20 neither makes it clear why you took the  
 24 actions you took in respect of the deployment, and when I  
 25 say that I mean broadly the deployment of the units and

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1 your, what I've called previously your self-deployment, but  
 2 we'll leave that for argument at a later stage.  
 3 CHAIRPERSON: Mr Mpofu, may I ask you a  
 4 question, which of course I take it you're not obliged to  
 5 answer; you can plead the fifth amendment, if you wish. I  
 6 understood the Major-General to say that irrespective of  
 7 his actual authorities, which he may or may not have  
 8 according to your argument, the National Commissioner came  
 9 there on the 13th and either expressly or by clear  
 10 implication approved of and therefore ratified what he did,  
 11 if what he did was unauthorised up to that stage. I take  
 12 it when you argue the point you will deal with that point  
 13 as well?  
 14 MR MPOFU: I will, and I'll deal with  
 15 that when I cross-examine the National Commissioner and the  
 16 Provincial Commissioner in particular, and Mawela if he's  
 17 called.  
 18 CHAIRPERSON: Those two points, those two  
 19 or possibly three –  
 20 MR MPOFU: Yes, and –  
 21 CHAIRPERSON: - part of cross-examination  
 22 we can look forward to.  
 23 MR MPOFU: That's correct.  
 24 CHAIRPERSON: Carry on with your cross-  
 25 examination now.

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1 MR MPOFU: Thank you, Chairperson. Okay,  
 2 you don't have to comment. I'm just saying we disagree.  
 3 Now –  
 4 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 5 ekskuus, as ek net kan ook sê dat in Generaal Naidoo se  
 6 verklaring – en u sal onthou dat hy saam met die  
 7 Provinsiale Kommissaris in die voertuig was toe hulle my  
 8 geskakel het op die betrokke Maandag –  
 9 MR MPOFU: Sorry, it's the Provincial  
 10 Commissioner, not the National Commissioner. I think the  
 11 witness said Provincial.  
 12 MR MAHLANGU: I'm sorry, Sir, the  
 13 Provincial Commissioner.  
 14 GENERAAL-MAJOOR ANNANDALE: En op bladsy  
 15 2 van sy verklaring en pertinent paragraaf 2, die laaste  
 16 sin, ek haal aan, "The National Commissioner and Divisional  
 17 Commissioner Operational Response Services, Lieutenant-  
 18 General Mawela, was informed of the situation," en ek het  
 19 vroeër getuig dat Generaal Mawela bewus was van my  
 20 ontplooiing.  
 21 MR MPOFU: Right, now let's move back to  
 22 the issue that we were busy with on Thursday, which is the  
 23 meaning of the word "engage." Your last answer, if I'm  
 24 correct, and if I'm not you'll correct me, suggested that  
 25 "engage" in as far as you were concerned meant the spraying

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1 of water or teargas. Is that correct?  
 2 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 3 ek dink ek het verwys na gebruik van skokgranate,  
 4 potensieel CS en rubber, of skokgranaat en haelgeweer  
 5 rubber in terme van uiteendryf aksies.  
 6 MR MPOFU: Okay, well I'll make a deal  
 7 with you then. If I accept that it could mean those things  
 8 that you mentioned, are you prepared to accept that it can  
 9 also mean the firing of live ammunition?  
 10 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 11 ek het getuig dat die gebruik van die woord "engage" in  
 12 polisietaal beteken verseker nie om te skiet nie, en dat  
 13 Brigadier Calitz die enigste persoon sal wees wat die  
 14 konteks kan verduidelik. Dit kan 'n legio van potensieële  
 15 woorde beteken.  
 16 MR MPOFU: General, you do understand  
 17 that you are under oath?  
 18 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 19 ek is terdeë bewus daarvan.  
 20 MR MPOFU: I put it to you that the word  
 21 "engage" does not exclude the shooting of live ammunition,  
 22 even if it includes the things that you've mentioned. In  
 23 other words it's not confined to the spraying of water and  
 24 the other things that you mentioned.  
 25 GENERAAL-MAJOOR ANNANDALE: Voorsitter,

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1 maar ek self het dit nie beperk tot die sproei van water  
 2 nie. Ek het gesê dit kan 'n legio van potensieële goed  
 3 beteken.  
 4 MR MPOFU: And those variety of meanings  
 5 among other things would depend on the context in which the  
 6 word is used, correct?  
 7 GENERAAL-MAJOOR ANNANDALE: Konteks is  
 8 verseker belangrik.  
 9 COMMISSIONER HEMRAJ: General, in the  
 10 event that a command is given to shoot live ammunition,  
 11 what is some of the possible phrases or words that would be  
 12 used to issue that command?  
 13 GENERAAL-MAJOOR ANNANDALE: Kommissaris,  
 14 die woord "shoot" sal waarskynlik gebruik word en dit sal  
 15 dan ook aanduidend wees van in watter rigting, op wie of wat  
 16 ook al dan die omstandighede is. Kommissaris, maar in die  
 17 konteks van skarebestuur sal skiet dan verwys na haelgewere  
 18 en buite skarebestuur konteks sal dit wees met skerp-punt  
 19 ammunisie.  
 20 MR MPOFU: Okay, so let's leave then the  
 21 theoretical meaning and bring it to the context of what we  
 22 know happened on the 16th at the particular stage. Firstly  
 23 before we do that, you remember that on Friday you said the  
 24 only thing that you overheard was, "Don't engage the target  
 25 unless the target engages you," or words to that effect.

<p style="text-align: right;">Page 9524</p> <p>1            GENERAAL-MAJOOR ANNANDALE:            Op Donderdag, 2 dis korrek, Voorsitter. 3            MR MPOFU:            Ja, okay, let's decode then 4 that sentence. Firstly the target in the sentence that you 5 remember must surely be referring to the protesters, or the 6 citizens who were protesting there? 7            MR SEMENYA SC:            Chair, would this 8 conversation not be better spent with Brigadier Calitz when 9 he testifies? 10           MR MPOFU:            No. Chair, this witness, 11 incidentally these words that he used about "Don't engage 12 the target until the target engages you," were solicited by 13 Mr Semanya in his examination-in-chief and therefore I'm 14 entitled to cross-examine on that. 15           CHAIRPERSON:            That's correct, Mr Semanya, 16 I think I'll allow Mr Mpofo to continue. Sorry, did I give 17 the ruling before you had a chance to address – 18           MR BURGER SC:            No, no, may I ask for some 19 guidance from the Chair, because I have some difficulty 20 following this debate and I would like to know whether I'm 21 wasting time. I've objected a lot last Thursday and 22 Friday, and I don't want to object – 23           CHAIRPERSON:            I don't know where you were 24 objecting on Friday, but you weren't objecting here. 25           MR BURGER SC:            Wednesday and Thursday</p>	<p style="text-align: right;">Page 9526</p> <p>1 findings to parties. That might have potentially far- 2 reaching consequences for the parties involved. We 3 accordingly submit that in the process there should be 4 adherence to the demands of procedural fairness, and may I 5 give you three examples of what I submit is an unfair way 6 of going about. The first example is a statement made by 7 my learned friend Mr Mpofo to the General, and I quote his 8 ipsissima verba. He said, "The reason why there was this 9 frenzy and you drove all the way from Pretoria, uninvited, 10 was sparked by the killing of the two policemen." That led 11 that very same afternoon to a news report in News24 with 12 the heading "Revenge behind Marikana killings – Mpofo." 13            Now I have yet to hear the factual basis for that 14 statement. Fairness would dictate that if a statement like 15 that is made by an examiner, that he would pose facts and 16 on the basis of those facts, not with the witness but at 17 the end of the day argue that to the Commission so that his 18 protagonist can address that argument, either disputing the 19 facts or adding more facts to show the submission is not 20 sound. But in my view - and if it happens to my client I'd 21 like to have your guidance as to whether I should object – 22 it is unfair to put a proposition to a witness (we know 23 he's going he's going to deny it), he then denies it and 24 not put the factual basis for that very statement you've 25 put.</p>
<p style="text-align: right;">Page 9525</p> <p>1 then. We've been here so long I lose sight of the days. 2 So may I get guidance from you – and I ask it quite 3 seriously, and I ask it as to the manner in which my 4 learned friend is probing, and I don't hold any brief for 5 the police, but he may probe on to my client and I'm 6 sensitive to that, and that's why I need the guidance. 7            Chair, in saying what I'm going to say, I'm aware 8 of the distinction between courts sitting as courts and 9 commissions sitting as commissions of inquiry. I'm mindful 10 of the fact that a court of law is bound by rules of 11 evidence and pleadings and that your Commission is not. 12 You may inform yourself of facts by hearsay evidence, by 13 reading newspapers, by whatever means is meaningful in 14 order to come to a decision on the facts. However, the 15 overriding principle must be that the process must be a 16 fair one to all the parties involved. This is particularly 17 so where this Commission proceeds not on an inquisitorial 18 basis but on what I would have thought is classically an 19 adversarial basis. In that case I submit the parties are 20 entitled to expect compliance with the conventional 21 prescripts of the process and regulate their case 22 accordingly. 23            There's a further factor which I want to say by 24 way of introduction. That principle is particularly 25 important where the Commission is likely to make adverse</p>	<p style="text-align: right;">Page 9527</p> <p>1            Let me put my second example. There was an 2 allegation made by my learned friend that Mr Mathunjwa had 3 suggested that the police who shot and killed the 4 protesters on the 16th of August did so because they still 5 harboured what he called "the apartheid mentality." During 6 the course of his cross-examination of General Annandale Mr 7 Mpofo suggested to General Annandale that the police, or at 8 least some of them who shot and killed the protesters on 9 the 16th, did so because they harboured that mentality. I 10 don't remember that he laid any independent evidential 11 foundation for that claim, but he suggested that it was 12 based on an exchange between my learned friend Mr Bruinders 13 and Mr Mathunjwa, and he laid it on the tongue of Mr 14 Mathunjwa that he would have said that. 15 [11:43] Well, the record on that is at page 2378 and it 16 went like this; my learned friend Mr Bruinders asked Mr 17 Mathunjwa, "Why were you so convinced that people were 18 going to get killed?" and Mr Mathunjwa said, "I mean, (1), 19 the Provincial Commissioner who said to us this thing must 20 end today. Subsequently to that the very same Provincial 21 Commissioner is not available to meet with us to report the 22 feedback from the mountain. (2), or (3), the management 23 reneged on its commitment and subsequent to that the very 24 same management is no longer willing to meet with us, and 25 again I reminded myself of the words that were said on the</p>



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1 meeting of the 15th, where Mr Mokwena's saying they'll get  
 2 the police to go and do their job there on the mountain.  
 3 So based on those facts it was clear to me, yes, the  
 4 decision has been taken that these workers are going to be  
 5 killed."  
 6 Now there was no suggestion of an apartheid  
 7 mentality or a 1948 state of mind, and I still have to hear  
 8 the factual basis for what was, I say inelegantly put to  
 9 this witness and dealt with elegantly by him as to why  
 10 there was no merit to that.  
 11 Let me give you my further example. An example  
 12 of where theses are floated, they get into the newspapers  
 13 and then we never get the factual basis for them, as they  
 14 in fact say on this last one, News24 had a headline that  
 15 afternoon, "Revenge behind Marikana killings – Mpofo."  
 16 That's a third example. The allegation that the police  
 17 shot and killed protesters on the 16th of August based on  
 18 orders, orders to kill. The heading that afternoon in  
 19 Times Live was, "Mpofo argued that this showed that the  
 20 officers who shot at the striking Lonmin workers were  
 21 acting on orders and not in self-defence." What was the  
 22 factual basis for that?  
 23 By then I objected, and I hope I didn't waste  
 24 time, but I objected strongly to that without a factual  
 25 basis, and my learned friend then took us into his

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1 confidence and he gave us three reasons for that statement.  
 2 The one reason you had to translate to my learned friend  
 3 because he didn't understand the Afrikaans. It came from  
 4 GGG17, the statement of Vermaak, what's his rank? Colonel,  
 5 Lieutenant-Colonel, whatever, the policeman Vermaak, and in  
 6 paragraph 7 there was the statement which you translated,  
 7 and it said, "Ek het weer Brigadier Calitz se opdrag  
 8 herhaal uit die helikopter, waarop ek gesien het dat die  
 9 lede optree," and I think it became common cause that the  
 10 first reason advanced by my learned friend was just not  
 11 correct for making that statement.  
 12 But he gave a second reason. He said the second  
 13 reason for suggesting that we should find in his October  
 14 2012 opening in a paragraph which read, "The claims of  
 15 self-defence are baseless." Now with respect again that's  
 16 not correct. That does not bear out the statement he made.  
 17 He gave a third reason then. He called for a  
 18 document which he didn't have at that stage. It was the  
 19 statement by Botes, one of the Lonmin people, and he's  
 20 today now handed up the statement of Mr Botes. Well, we  
 21 know what Mr Botes says. We filed Mr Botes' statement last  
 22 year. Mr Botes –  
 23 MR MPOFU: Chairperson, I don't want to  
 24 interrupt –  
 25 CHAIRPERSON: No, no, Mr Mpofo, I must

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1 give Mr Burger an opportunity to finish.  
 2 MR MPOFU: Yes, you must, Chairperson,  
 3 but my –  
 4 CHAIRPERSON: Then I'll give you a  
 5 chance to reply. Don't worry.  
 6 MR MPOFU: But can you also give me a  
 7 chance to say something which is important, which must be  
 8 said now, Chairperson?  
 9 CHAIRPERSON: No, no, no, I think I must  
 10 let him finish and then I'll let you deal fully with what  
 11 he said.  
 12 MR MPOFU: I want to prevent suggesting  
 13 answers to the witness, so it will be too late at any other  
 14 time, but that's fine.  
 15 MR BURGER SC: My learned friend should  
 16 know me. I will not suggest the answer –  
 17 CHAIRPERSON: If that's a problem, Mr  
 18 Mpofo, we can always ask the Major-General to leave the  
 19 auditorium while this matter is being discussed, if it's  
 20 suggested that –  
 21 MR MPOFU: Yes, I'd like that to happen  
 22 now, Chairperson.  
 23 CHAIRPERSON: Alright. Major-General,  
 24 Generaal-Majoor, sal u omgee om die ouditorium te verlaat  
 25 vir 'n wyle?

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1 MR MPOFU: Thank you, Chairperson.  
 2 CHAIRPERSON: Mr Burger, would you please  
 3 proceed?  
 4 MR BURGER SC: Chair, the passage I  
 5 suspect my learned friend relies upon is in GGG19 in  
 6 paragraph 57. That is a paragraph which does not begin to  
 7 suggest that people were shot having been ordered to do so.  
 8 It does not even suggest that the speaker is Brigadier  
 9 Calitz because you'll see at paragraph 56 Calitz is named  
 10 particularly. In paragraph 58 he's named, but in the  
 11 important paragraph 57 he's not named. So the three  
 12 reasons suggested - my view, with respect – does not bear  
 13 out that there was an order to shoot, and what my learned  
 14 friend is now doing through this witness, who's got nothing  
 15 to do with this debate, is to ask him a question he should  
 16 have asked before he made that statement. He should have  
 17 taken instructions on what the word "engage" means in  
 18 police parlance, and he would have been told what this  
 19 General tells us it means. It does not mean you shoot  
 20 people with sharp-point ammunition. He should also perhaps  
 21 have looked in the Oxford Dictionary as what the word  
 22 "engage" means and he wouldn't have found an answer there  
 23 either.  
 24 So we know now that he has again made a  
 25 statement, a very contentious statement on a factual basis

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1 which we still wait to hear, and now I need your guidance  
 2 because if this is going to happen with Lonmin, I must know  
 3 whether I must keep quiet, but just before asking on your  
 4 guidance, may I quote from a recent decision in the Supreme  
 5 Court of Appeal which I submit is relevant in this process.  
 6 It's a case called AllPay Consolidated Investment Holdings  
 7 versus The Chief Executive Officer, was reported in 2013 on  
 8 the 27th of March this year, and his lordship Mr Justice  
 9 Nugent said the following. He said, "Whatever place mere  
 10 suspicion of malfeasance or moral turpitude might have in  
 11 other discourse, it have no place in courts, neither in the  
 12 evidence, nor in the atmosphere in which cases are  
 13 conducted. It is unfair, if not improper, to impute  
 14 malfeasance or moral turpitude by innuendo and suggestion.  
 15 A litigant who alleges such conduct must do so openly and  
 16 forthrightly so as to allow the person accused a fair  
 17 opportunity to respond. It is also prejudicial to the  
 18 judicial process if cases are adjudicated with innuendo and  
 19 suggestion hovering in the air, without the allegations  
 20 being clearly articulated. Confidence in the process is  
 21 built on transparency and that calls for the grounds upon  
 22 which cases are argued and decided to be openly  
 23 ventilated," and it's on that basis that I ask for  
 24 guidance. Is it fair to the parties around the table, I  
 25 ask rhetorically, to put contentious statements to

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1 witnesses without first disclosing the factual basis for it  
 2 and secondly to hold that back for argument, or at the very  
 3 lowest to the party who is suspected of having uttered the  
 4 words. In the case of "engage" for example, if it was  
 5 Brigadier Calitz, ask him what he meant by it before you  
 6 put a proposition to him which may turn out to be not  
 7 correct. I'm indebted to you for listening to me, Chair.  
 8 CHAIRPERSON: Mr Mpofo. I'll also ask  
 9 other counsel because they're all, I'm asked effectively to  
 10 give a ruling which isn't really relevant for these  
 11 particular questions in cross-examination, but also it  
 12 looks ahead to other questions that may be asked in future,  
 13 so I'll ask the evidence leaders first once Mr Mpofo has  
 14 replied. Commissioner Hemraj points out to me it will  
 15 actually be more appropriate to give other counsel who are  
 16 minded to address me along the same lines as Mr Burger a  
 17 chance to speak first, so that Mr Mpofo gets a chance to  
 18 reply to everybody at the same time. I'll ask the evidence  
 19 leaders if they wish to say anything, and then I'll ask Mr  
 20 Semenya and it may be that some of the other counsel also  
 21 would wish to say something. Mr Madlanga, anything you  
 22 wish to say in relation to this point?  
 23 MR MADLANGA SC: Nothing at all, Mr  
 24 Chairman, thank you.  
 25 CHAIRPERSON: Mr Semenya.

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1 MR SEMENYA SC: Well Chair, the only  
 2 example we can add emanating from the cross-examination  
 3 this morning is also spending time suggesting that the  
 4 witness does not have the authority to deploy units that  
 5 fall under him. Now one would have imagined that if that  
 6 proposition is correct, we would have been pointed to  
 7 something. Instead what we are told is that I differ with  
 8 you there, I will argue differently. It's just one such  
 9 example where propositions are put to witnesses without any  
 10 factual foundation for them.  
 11 CHAIRPERSON: Mr Tip, do you wish to say  
 12 anything?  
 13 MR TIP SC: Chair, yes thank you.  
 14 Broadly we align ourselves with the sentiments addressed to  
 15 the Commission by Mr Burger, particularly in relation to  
 16 the need for proper factual bases to be established before  
 17 contentious propositions are advanced, and not perhaps the  
 18 other way around. I would, if I may, just add one further  
 19 thought. In his carefully crafted submissions Mr Burger  
 20 has drawn attention to the difference between a commission  
 21 and a court of law, and quite correctly, and he has said  
 22 well in this instance the Commission is proceeding on an  
 23 essentially adversarial basis and hence, says Mr Burger, he  
 24 needs the guidance from the Commission in order for him to  
 25 understand when it would be appropriate for him to object,

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1 and there's a great deal of merit of course in that  
 2 submission as well. But what we would with respect just  
 3 add - and these are not obviously thoughts that we've had  
 4 the opportunity dwell over, they're spontaneous responses -  
 5 that the essential nature of a commission is that it is  
 6 there for the Commission to achieve through all the parties  
 7 present, whether they are representatives of persons who  
 8 have been identified in the Terms of Reference or whether  
 9 they perform the function of the evidence leaders, we are  
 10 all here to assist the Commission to establish truth and  
 11 truth in a fashion that is not in any sense defiant or  
 12 limited through the pleading process, which obviously is  
 13 not part of the process, and what that impels me to  
 14 conclude and to submit with respect, is that a balance  
 15 needs to be struck where the - as has indeed happened in  
 16 many instances, Chair - where the Commission itself will  
 17 intervene in respect of any objectionable propositions that  
 18 are put and we would certainly welcome the Commission  
 19 playing a more active role in that regard. In other words,  
 20 that if for whatever reason none of the parties raise a  
 21 pertinent objection to a particular question, then that  
 22 does not cloak that question with some sort of immunity,  
 23 and if the Commission, Chair and the Commissioners feel  
 24 that this is not a question which is calculated to advance  
 25 the findings that the Commission must make in due course,

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1 well then that will obviously raise it to an objection. So  
 2 I think those are the only remarks that we would wish to  
 3 add at this stage, Chair, and I appreciate the opportunity.  
 4 CHAIRPERSON: Do any of the other  
 5 parties' representatives wish to make any submissions on  
 6 this point before I call upon Mr Mpofo? I don't see any  
 7 red lights coming on, so Mr Mpofo, would you care to reply  
 8 now to Mr Burger, Mr Semanya, and Mr Tip?  
 9 MR MPOFU: Yes, Chairperson, let me –  
 10 I'll start at the bottom because I think the last two  
 11 inputs are much easier to deal with. As far as Mr Tip's  
 12 input is concerned, I would like to say that I think in  
 13 defence of the Chairperson and the Commissioners, if  
 14 there's one area, if anyone wants to go through the record  
 15 and find how many times the Chairperson has said to all of  
 16 us, without any discrimination, how does that advance the  
 17 question of the Terms of Reference, I'm quite sure that  
 18 you'll find more than a dozen references of when the  
 19 Chairperson has said that to me, to various other people.  
 20 So I think to end, and not even using those words when the  
 21 Chairperson has mero motu overruled many a question, so I  
 22 think that that concern is taken care of by just the  
 23 practice of what has happened. Whether it's sufficient or  
 24 not is another matter, but factually the record will show  
 25 that it has been happening, at least sometimes too

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1 frequently, particularly I think in the eyes of those who  
 2 are on the receiving end, but the point is that it has been  
 3 done. So I think Mr Tip's concern has been taken care of.  
 4 As far as Mr Semanya is concerned, I'm perplexed  
 5 by what he's saying. He says that suggestions are made to  
 6 the witness that he did not have the powers, without  
 7 something – underlined, something - being put to the  
 8 witness. Well, there are two somethings that were put to  
 9 the witness. The first something was the bullet 2 of that  
 10 slide 71 which says what it says. I don't want to repeat  
 11 it. The next something is the new document, which  
 12 incidentally I don't think has been given an exhibit  
 13 number, which will be GGG21 I think.  
 14 CHAIRPERSON: The National Instruction 9  
 15 of 2011 which we were handed as we were walking back to the  
 16 auditorium I did mark GGG21.  
 17 MR MPOFU: 21, ja. Thank you,  
 18 Chairperson. So if that, that might not be something  
 19 enough for Mr Semanya, but he can't say that the questions  
 20 that were put to the witness had no basis on something  
 21 because those are two pertinent things which say, and I  
 22 said to the witness that I'm prepared to accept that his  
 23 powers might be implied. That's a matter for argument.  
 24 I'm not going to debate that with the witness, but simply  
 25 the fact that there are specified persons in both those

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1 documents. So I think Mr Semanya's input, or objection, if  
 2 it is one, is of no basis on what happened here just half  
 3 an hour ago.  
 4 As far as Mr Burger is concerned, Chairperson,  
 5 let me start at the beginning of what we are busy doing  
 6 now. I am flabbergasted, to say the least, to say that the  
 7 matter of self-defence, I would have thought even a child  
 8 in the street who has no training in law, if you say to  
 9 them there is something called the Farlam Commission, what  
 10 do you think it's about, I'd bet you, Chairperson, any – 80  
 11 or 90% of all South Africans would say it is going to find  
 12 out whether the police killed those people in self-defence  
 13 as they claim, or whether there was another valid reason.  
 14 You don't have to be a lawyer to see the relevance of that  
 15 question. It is but the question that we are here to  
 16 probe.  
 17 Now in the light of the centrality of that  
 18 question you have a witness here who has considered that  
 19 there are two mutually exclusive means by which the  
 20 shooting might have happened. One is self-defence, and  
 21 we've all broadened that to include private defence.  
 22 [12:03] The other one, he says, is on command and the  
 23 reason the basis was laid about the mutual exclusivity of  
 24 those things, was exactly to show that the one would negate  
 25 the other. Now –

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1 CHAIRPERSON: I'm not sure that's  
 2 correct.  
 3 MR MPOFU: Well that's what the witness  
 4 said –  
 5 CHAIRPERSON: No, no, I thought we  
 6 covered that last week. An officer might give a command to  
 7 a member of the service to fire in order to defend a  
 8 colleague. In other words, where you have a private  
 9 defence situation, you could have a command to a member of  
 10 the service to fire in order to defend a colleague.  
 11 MR MPOFU: Yes.  
 12 CHAIRPERSON: That must be so.  
 13 MR MPOFU: Okay.  
 14 CHAIRPERSON: What follows from that,  
 15 that the two concepts are not mutually exclusive, but I  
 16 understand your argument to be that you say your case is  
 17 that the police didn't act in self defence. They acted on  
 18 command in a situation where that was something different  
 19 from self or private defence?  
 20 MR MPOFU: Yes.  
 21 CHAIRPERSON: That's your contention?  
 22 MR MPOFU: That's my contention.  
 23 MR MPOFU: And you rely, as I understand  
 24 it now, on effectively paragraph 57 of exhibit GGG19.  
 25 MR MPOFU: Yes.

<p style="text-align: right;">Page 9540</p> <p>1 CHAIRPERSON: As an item of evidential 2 material before the Commission in a sense as part of the 3 police hard drive that's been made available to everybody. 4 And that's the point you're going to enlarge on now? 5 MR MPOFU: Yes. 6 CHAIRPERSON: I understand that. I have 7 no problem with that. 8 MR MPOFU: Fair enough. 9 CHAIRPERSON: But Mr Burger is 10 effectively arguing for a wider proposition and that is, he 11 says that when allegation of a serious misconduct, what Mr 12 Justice Nugent called malfeasance, are put to witnesses, it 13 should not be done on a basis that it's just an allegation 14 grabbed from the air or unsubstantiated by anything. He 15 says and he asks me to rule as a matter of practice and 16 fairness, that when allegations of that kind are made, the 17 cross-examiner should refer to the evidential material on 18 which the allegation or malfeasance is being made, to 19 enable to parties who is being attacked as it were, whose 20 conduct is being criticised, to respond in respect of the 21 evidential material that's being relied on. That, if I'm 22 paraphrasing his argument incorrectly, I invite him to 23 correct me. 24 MR MPOFU: Yes. 25 CHAIRPERSON: But that's what I</p>	<p style="text-align: right;">Page 9542</p> <p>1 decision of the SCA on appeal from the Cape Provincial 2 Division, dealing with the Truth and Reconciliation 3 Commission, where it was held by the SCA that principles of 4 fairness apply to Commissions and Commissions must not 5 operate in an unfair fashion. I'd be surprised to hear 6 anybody arguing the contrary. So if it's accepted that 7 this Commission must at all times be fair, what Mr Burger 8 argues, based on that fundamental premise, is a risk 9 practices that he sketches to be followed. 10 MR MPOFU: Ja. 11 CHAIRPERSON: Do you quarrel with that? 12 MR MPOFU: No, of course, Chairperson, 13 not. I mean nobody – who is going to quarrel with the 14 proposition that there must be a factual basis for things 15 put in cross-examination. 16 CHAIRPERSON: Okay. 17 MR MPOFU: So that is all basic, as not 18 to be even worth mentioning. What I quarrel with, is the 19 fact that that objection has no place in these proceedings 20 and I'm going to show you that – 21 CHAIRPERSON: Hang on. The objection, 22 you say, is - the proposition you accept? 23 MR MPOFU: The proposition – 24 CHAIRPERSON: The basic - so insofar as 25 Mr Burger asked me to give a ruling, that that should be –</p>
<p style="text-align: right;">Page 9541</p> <p>1 understand him to be saying. Now what do you say about 2 that now? Because you will also recall, I think, that 3 during the course of these hearings, when that kind of an 4 objection had been raised, Mr Semenya, for example, has 5 raised it on a number of occasions and said, that can't be 6 put. What's the factual basis? I've always upheld him and 7 always invited the cross-examiner to provide the material 8 and then the attempt has been made, sometimes successful, 9 perhaps sometimes not that successful to provide the basis 10 of the allegation. So what I'm merely asking you is, in 11 relation to Mr Burger's central request for a ruling, do 12 you quarrel with him or do you accept that the practice 13 that has been followed, not invariably, because I've not 14 wished to be super-active in objecting, because I don't 15 want the impression to be created that I'm biased, in 16 favour of the one party or the other. And as you pointed 17 out, my interventions have been, possibly caused 18 displeasure to various parties, because they haven't come 19 because of me biased and favouring one party. But do you – 20 when the points have been pertinently raised, I certainly 21 upheld the objection. 22 MR MPOFU: Yes. 23 CHAIRPERSON: Do you quarrel with the 24 general proposition by Mr Burger, that as a matter of 25 fairness, and there's a lot of authority, there's a</p>	<p style="text-align: right;">Page 9543</p> <p>1 that practice should be followed, you won't disagree if 2 that ruling is made and you've said very fairly that that 3 must be so. 4 MR MPOFU: No. 5 CHAIRPERSON: Alright. So your concern 6 with the suggestion, and all we're busy with is one 7 particular aspect of your cross-examination. 8 MR MPOFU: Yes. 9 CHAIRPERSON: That the factual basis for 10 the allegation you put, that's been fairly being put to 11 you, you would say that it's – you tried to ascertain what 12 this passage 57 means? 13 MR MPOFU: Yes. 14 CHAIRPERSON: Criticism has been made 15 that you should have done some investigation as to what 16 "engage, engage" means, but – 17 MR MPOFU: No. 18 CHAIRPERSON: - somebody said is water 19 under the bridge. I think you can proceed with the cross- 20 examination of the General on the basis of what 'engage 21 engage' is. I'm not going to allow you to go on too long, 22 because some evidence have been given on the point already. 23 MR MPOFU: I don't intend – 24 CHAIRPERSON: The ruling that Mr Burger 25 seeks, as a general ruling, that I thought I had applied,</p>

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1 perhaps not consistently, because I didn't always take  
 2 points on where counsel didn't seem concerned with the  
 3 point to be raised, but the practice I have followed and  
 4 which he invites me to follow now invariably, that where  
 5 serious allegations are made, the factual basis on which it  
 6 – the allegation rests, should be put to the witness. That  
 7 ruling I give. But so that point can now be taken out of  
 8 the way.  
 9 MR MPOFU: Yes.  
 10 CHAIRPERSON: Just proceed shortly with  
 11 this 'engage engage' point and then move on to the next  
 12 point.  
 13 MR MPOFU: Yes.  
 14 CHAIRPERSON: Because I think it's been  
 15 thoroughly canvassed.  
 16 MR MPOFU: Thank you very much,  
 17 Chairperson, yes. Just to be sure, I say that if there is  
 18 no reason to give a ruling on the site proposition that the  
 19 factual basis must be laid.  
 20 CHAIRPERSON: I hereby give the ruling.  
 21 MR MPOFU: Ja. Okay, fine. Now  
 22 accepting that, accepting that, let's then look at Mr  
 23 Burger's examples and to show that that objection has no  
 24 place –  
 25 CHAIRPERSON: Mr Mpofu, do we have to –

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1 MR MPOFU: No, Chairperson –  
 2 CHAIRPERSON: The ruling he's asked for,  
 3 he's got.  
 4 MR MPOFU: No, Chairperson –  
 5 CHAIRPERSON: Some of the points –  
 6 MR MPOFU: Is critical to the others -  
 7 this is going to happen time and again, as it happened last  
 8 week. Please, let's put it to bed. I'm prepared to waste  
 9 the next five, 10 minutes so that we don't have to –  
 10 CHAIRPERSON: I don't like that word  
 11 'waste', but you're prepared to spend the next five minutes  
 12 on the point?  
 13 MR MPOFU: Invest, because the truth is  
 14 there is a lot of this kind of thing. Let's take one  
 15 example, Chairperson – exactly, let me just tie up the  
 16 point. The point about whether it was a command or self-  
 17 defence, must be read in the context of the opening  
 18 statement of the – of the police, which says at page 18  
 19 thereof, first starts on 17, "Officers from the TRT which  
 20 had been deployed as A support service" and so on and so  
 21 on, "at virtually less than a heartbeat of charging  
 22 protestor opened fire on the advancing protestors with live  
 23 ammunition without instruction from anyone." Now that's the  
 24 case, that's their case, Chairperson. I am busy with  
 25 trying to accept evidence, not refuse that very notion that

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1 they put, that it was without any command. Link to that,  
 2 the fact that the – it is projected in the – in their own  
 3 slides that it's one or the other, and accepted,  
 4 Chairperson, that's a matter for argument, as to whether  
 5 explicit and so on. We'll deal with, I'm sure, in good  
 6 time when we argue the case. But at the very least, I have  
 7 put that proposition to the witness. It's linked to what  
 8 the police's version is and as if that is not enough,  
 9 Chairperson, the statements, and this is why I wanted the  
 10 witness to be – to leave. If you go to Mr Botes'  
 11 statement, at paragraph 59, he links this instruction  
 12 directly to the firing of live ammunition. He says, it's  
 13 the same page 17 –  
 14 CHAIRPERSON: I see, "other than for  
 15 hearing the word engage, which is repeated several – a few  
 16 times immediately - I did not hear any specific instruction  
 17 on the use of live ammunition." Which seems to indicate  
 18 that he interpreted it in that way.  
 19 MR MPOFU: Absolutely. And that's all  
 20 I'm going to put to the witness.  
 21 CHAIRPERSON: Alright.  
 22 MR MPOFU: A person like Botes seems to  
 23 link this directly to the use of live ammunition and he  
 24 says it happened immediately before that. That is not a  
 25 small thing, Chairperson. If you are one of the victims

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1 and you have been told that this was done without  
 2 instruction, and there's evidence, concrete, coming from  
 3 somebody who was there who for all intents and purposes was  
 4 an eye witness, who says the word 'engage' was used  
 5 immediately before the shooting, then honestly,  
 6 Chairperson, how can –  
 7 CHAIRPERSON: It's a matter of argument.  
 8 The question of course is, whether his interpretation of  
 9 the word "engage" is correct, but he's not a policeman.  
 10 MR MPOFU: No.  
 11 CHAIRPERSON: As far as I understand he's  
 12 a –  
 13 MR MPOFU: No, it doesn't matter. At  
 14 least all it shows is that –  
 15 CHAIRPERSON: No, I understand that.  
 16 MR MPOFU: Yes. I won't belabour the  
 17 point. I think the Chairperson gets the point. So that's  
 18 really where I'm going. Secondly, Chairperson, and I do  
 19 hope the witness is not around –  
 20 CHAIRPERSON: I must tell you, I don't  
 21 think your fears that the witness will tailor his evidence  
 22 because of what he hears in the discussion are well  
 23 founded, but in view of the fact that you expressed  
 24 concern, I asked him to go and I'm sure he's quite happy to  
 25 go to show his bona fides in the matter. But any way,

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1 let's not go there now.

2 MR MPOFU: I don't –

3 CHAIRPERSON: I understand you've got –

4 you may wish to make other submissions and which I shall

5 listen to and if they're well founded, I'll uphold them,

6 but anyway, the point is that the – Mr Botes will also have

7 to tell us when he comes, what exactly 'immediately' meant

8 in this context.

9 MR MPOFU: Yes, of course.

10 CHAIRPERSON: But these are matters that

11 can be more fully addressed when Mr Botes is here. But

12 anyway –

13 MR MPOFU: But Chairperson, it's not

14 fair, I'm going to submit, the mere fact that these things

15 that I'm reading now, are exactly what my cross-examination

16 is going to be about. If the witness was listening, then I

17 might as well go to something else. But be that as it may

18 –

19 CHAIRPERSON: That implies that the

20 witness would dishonestly tailor his evidence in the light

21 of what you say he may have heard and I'm not sure that

22 there is a foundation for that.

23 MR MPOFU: Well, Chairperson –

24 CHAIRPERSON: But we don't have to go

25 there now. Let's not spend time on that.

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1 MR MPOFU: Ja.

2 CHAIRPERSON: I think I've heard what

3 you've had to say. Is there anything else you want to say?

4 MR MPOFU: Yes, there is, Chairperson.

5 Now that we have established that, I just want to make one

6 example of the issues that Mr Burger raises. It's true

7 that the fairness is an important factor. It's true that

8 this is not an adversarial process.

9 CHAIRPERSON: But it in fact is

10 proceeding in that fashion. If it were inquisitorial in

11 the true continental sense, I would have to say to you,

12 well, at least tell me what your questions are you want to

13 ask.

14 MR MPOFU: Yes.

15 CHAIRPERSON: I would have to ask them.

16 Now we're not going that way.

17 MR MPOFU: We know that –

18 CHAIRPERSON: We are –

19 MR MPOFU: Quasi adversarial.

20 CHAIRPERSON: That's right.

21 MR MPOFU: Yes. Now it being quasi

22 adversarial, that is why Mr Burger fiercely and

23 adversarially cross-examined the national commissioner on

24 her statements and so on. That kind of cross-examination

25 would not have been allowed in a purely inquisitorial

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1 process. The – I don't know why this particular witness

2 needs to be protected more than the national commissioner.

3 The point of the matter is that if it's quasi adversarial

4 for the national commissioner, it's quasi adversarial for

5 Annandale. There are no holy cows. Now so that's the

6 preface, but where I'm going, Chairperson, is this. Mr

7 Burger makes example about Mr Mathunjwa's statement.

8 CHAIRPERSON: I think points were put,

9 based, allegedly based upon what Mr Mathunjwa had said.

10 But a study of the record indicated it had not actually

11 reflect what Mr Mathunjwa had said.

12 MR MPOFU: Chairperson –

13 CHAIRPERSON: But that appears to be born

14 out by the passages you read to us.

15 MR MPOFU: No, that's a disingenuous way

16 of doing it, Chairperson, because firstly, it untruthfully

17 ascribes to me –

18 CHAIRPERSON: Mr Mpofu, but disingenuous

19 implies lack of integrity.

20 MR MPOFU: Well –

21 CHAIRPERSON: It's not an expression that

22 I'd allow Mr Burger to use of you and I don't propose to

23 allow you to use it of him.

24 MR MPOFU: Okay, well –

25 CHAIRPERSON: The way we have been

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1 working so far in this Commission, is cooperation and

2 harmony and all the parties concerned all striving to

3 assist from various angles –

4 MR MPOFU: Ja.

5 CHAIRPERSON: - and viewpoints for this

6 Commission to get to the truth. Once we start having

7 insults being thrown around and allegations of that kind,

8 that atmosphere will no longer exist.

9 MR MPOFU: Ja.

10 CHAIRPERSON: Please don't do that again.

11 MR MPOFU: Ja. I leave the adverb then,

12 but you can tell me then, Chairperson, what do you call a

13 person who says Mr Mpofu relied for his statement on what

14 Mr Bruinders said. I can assure you, Chairperson, you can

15 go to the record, I never mentioned the words Bruinders

16 when I was putting that question. That I'm 100% sure. So

17 Mr –

18 CHAIRPERSON: I think you misheard Mr

19 Burger. I understood Mr Burger to say that you were

20 relying on an exchange between Bruinders and Mathunjwa when

21 Mathunjwa was giving evidence.

22 MR MPOFU: It was not. That's the point

23 I'm making. We can call it ingenious or whatever, but I

24 was not, and I'll show you why. What I was relying on,

25 Chairperson, it had nothing to do with Mr Bruinders. It

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1 had all to do with, once again, a factual basis that had  
 2 been placed in this Commission, namely exhibit 009, which  
 3 states, Mr Mathunjwa placed the following, when he's asking  
 4 the people, he was trying persuade them. "The fight has  
 5 been taken, Comrades, that is why we are here amongst you  
 6 without the police escorting us. We came on our own,  
 7 because we are coming to the nation of God to try and avoid  
 8 this blood that they want to see flowing. Comrades, the  
 9 life of a black person in Africa is so cheap. The life of  
 10 a black person in Africa is so cheap, they will kill and  
 11 finish us and get other to put them and pay them salaries,  
 12 that do not do anything in the Black person's life. That  
 13 would mean we were defeated, but capitalists will be the  
 14 ones who win."  
 15 That is the factual basis. It's not anything to  
 16 do with Bruinders or whatever has been wrongly ascribed to  
 17 me. The – in other words, what I – all I'm putting to the  
 18 witness is that from this and Mr Mathunjwa says – at least  
 19 there is evidence from Magidiwana that he repeated this in  
 20 the other address. That this at least was given as a  
 21 reason or one of the reasons why these people are going to  
 22 be killed. Now all we know is that the prophesy of  
 23 Mathunjwa that they would be killed, was well – fulfilled,  
 24 they were killed. And all I'm probing is as whether the  
 25 reason that he gave, at least or one of them, had any

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1 basis. Assuming – well, accepting that Mr Bruinders is  
 2 wrong –  
 3 CHAIRPERSON: - allow you to proceed with  
 4 that cross-examination.  
 5 MR MPOFU: Thank you.  
 6 CHAIRPERSON: So what is your complaint?  
 7 MR MPOFU: Indeed, thank you. No, I just  
 8 want to debunk this myth, Chairperson. The next thing is,  
 9 yes, that addresses the apartheid issue. Bruinders is  
 10 dealt with. There was nothing – there was another example  
 11 of a headline – ja, I think I've dealt with it, it is the  
 12 revenge. Once again, this issue of revenge, Chairperson,  
 13 firstly is contained in our opening –  
 14 CHAIRPERSON: The fact that it is in your  
 15 opening statement, of course, doesn't constitute evidence.  
 16 MR MPOFU: No.  
 17 CHAIRPERSON: I was surprised Mr Burger  
 18 didn't take that point, but there were –  
 19 MR MPOFU: But that's –  
 20 CHAIRPERSON: Sorry, evidential basis was  
 21 suggesting that some at least of the police, rushed forward  
 22 to koppie 2 and might have been prompted by considerations  
 23 other than those of self or private defence.  
 24 MR MPOFU: Yes. And statements were read  
 25 out which suggested that the witnesses – the statement of

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1 Naidoo, I think the statement of Scott and the statement of  
 2 Allandale were read out, which suggested that they – let's  
 3 put it this way, prioritised the death of the police as the  
 4 reason of going there, over and above. I won't they  
 5 negated –  
 6 CHAIRPERSON: That afforded the basis for  
 7 suggesting any question of revenge?  
 8 MR MPOFU: Well –  
 9 CHAIRPERSON: But it might be that, I  
 10 think that Captain Ryland's, for example, might have  
 11 afforded some evidential basis for suggesting that some of  
 12 the shooting was at least done for reasons other than self  
 13 of private defence.  
 14 MR MPOFU: Yes.  
 15 CHAIRPERSON: Ja. And but in any event –  
 16 MR MPOFU: Ja, that's all, Chairperson,  
 17 all I'm saying is that if you have a situation where - you  
 18 have a suggestion before this Commission where some police,  
 19 some policemen shot after a command to cease fire. Others  
 20 were kicking the corpses that are lying down. Others were  
 21 laughing around the dead bodies and all sort of things,  
 22 which have already been produced here. And you – other  
 23 were at least on our version, planting weapons on the dead  
 24 bodies. If all those things are not sufficient at the very  
 25 least – it may be disproved at the end, as a basis for

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1 suggesting a level of malice and vengefulness, than nothing  
 2 ever will. That's all I want to say. And at 9.8 of our  
 3 opening statement, we say the following. "The demeanour,  
 4 underline, the demeanour and behaviour of the police showed  
 5 that they were inter alia motivated by revenge and malice."  
 6 That's what we said in our opening statement.  
 7 How else, and the Chairperson is right, but it's exactly  
 8 because of that circular argument, the fact that it's in  
 9 the opening statement, doesn't mean it has been proved, but  
 10 that's exactly why we are doing this.  
 11 [12:23] So that when, at the end of the case I say, now  
 12 Chairperson, I said I was going to establish the same  
 13 things, you said to me, well, Mr Mpofo, what do you say  
 14 about 9.8? Should I scratch it out, or did you establish  
 15 it? I should be able to then say, through the evidence of  
 16 A, B, C witnesses this was either established, or at least  
 17 an attempt was made, whether it was established  
 18 successfully or not is a matter that the Chairperson and  
 19 the Commissioners will determine. But I cannot be stopped  
 20 –  
 21 CHAIRPERSON: I just want to -  
 22 MR MPOFU: Yes, I accept that,  
 23 Chairperson. The – but I cannot for the life of me, be  
 24 stopped from canvassing the exact issue which I've put –  
 25 put to this – to these parties in October last year, as an

1 issue that I'm going to canvass. But as it were, once  
 2 again, the Chairperson did allow me. So I don't think that  
 3 – and I don't intend to revisit this, but I'm just saying,  
 4 insofar as all the examples that are used, whether it  
 5 relates to the engaged, whether it relates to the apartheid  
 6 issue, whether it refers to the revenge issue, all those, a  
 7 factual basis has – have been laid or at least have  
 8 attempted to be made, as I say, I can't say it was  
 9 successful. But what I cannot be accused of, Chairperson,  
 10 is so-called bringing those from the so-called air. These  
 11 are not from the air. Mathunjwa said the life of a black  
 12 person is cheap. That's not the air. That is the  
 13 evidence. The issue about the engage is not from the air.  
 14 It's from the statement of Lonmin. The issue about – I  
 15 forgot the third one, Chairperson, but all those issues  
 16 have been established.

17 Let me just finalise by saying this, Chairperson,  
 18 the – this wouldn't have offered some, it's just so that we  
 19 bring it back to the current, what supposedly sparked the  
 20 so-called objection. This witness have just said to me  
 21 there is a wide array of what the word 'engage' means. And  
 22 I say to him, in that wide array it depends on the context  
 23 and he agrees. And I was busy now going to go to the  
 24 context and inter alia to show him two things. One, that  
 25 the Botes other paragraph which I have already gone

1 through. Two, the fact that in Vermaak's statement the  
 2 water and tear gas incident had already occurred and  
 3 therefore this would mean that it's dealt with the third  
 4 issue around the kraal, which is live ammunition. Once  
 5 again, that may or may not be established at the end, but I  
 6 can't be stopped, Chairperson, with the greatest of  
 7 respect, from probing the central issues in this case,  
 8 which is whether those people were shot in self defence or  
 9 in – on command –

10 CHAIRPERSON: - orders, pursuant to  
 11 orders?

12 MR MPOFU: Or pursuant to orders or even  
 13 with the Chairperson's combo, whether it was this one or  
 14 the other one for the combo. That I must be entitled to  
 15 probe, Chairperson. If it was the combo, then of course  
 16 that negates the opening statement. If it was on command,  
 17 then it is either not self-defence or it was the combo. I  
 18 mean those are matters that will be dealt with in argument,  
 19 but at this stage all I'm saying, Chairperson, is that if I  
 20 can be stopped from probing what this case is all about,  
 21 what this Commission is all about, then we might as well  
 22 fold and go home.

23 CHAIRPERSON: I didn't understand Mr  
 24 Burger to say I must stop you from probing what the  
 25 Commission is all about. I understand he was more

1 concerned with the procedural matter. But I'll give him an  
 2 opportunity to reply.  
 3 MR MPOFU: Chairperson –  
 4 CHAIRPERSON: But let me say what I –  
 5 MR MPOFU: I may have missed something.  
 6 CHAIRPERSON: I said I didn't understand  
 7 Mr Burger to suggest you should be stopped from probing the  
 8 matters that are before the Commission. His concern, as I  
 9 understood was more on the procedure, the way the procedure  
 10 followed, so I understood him. But I'll give him a chance  
 11 to reply in a moment. But I understood his complaint to be  
 12 more that where a serious allegation is made in cross-  
 13 examination, it's not enough just to rely on material which  
 14 may or may not be in the background somewhere. The witness  
 15 being cross-examined and the party's witness who is being  
 16 cross-examined, should have the opportunity of knowing at  
 17 that very time what evidential material is to be used in  
 18 support of the allegation, so it can be dealt with. I  
 19 think that's his complaint –

20 MR MPOFU: No, Chairperson –

21 CHAIRPERSON: When you're finished, I  
 22 call upon him to reply. Is there any more you wish to say?

23 MR MPOFU: Yes, just one thing,

24 Chairperson, which is that the – my understanding of the  
 25 art of cross-examination is that the style of the cross-

1 examiner and how the cross-examiner gets to the point, that  
 2 point, is not a matter of that you can make a ruling on.  
 3 It is – once we've agreed that the factual basis is there,  
 4 that Mr Burger is wrong in all the instances that I've  
 5 shown, to say that there was no factual basis. I'm not  
 6 answerable for headlines or whatever, but if everything  
 7 that I've said I'm going to put, I put to the witness as  
 8 I've demonstrated, is based on evidence. So let's just get  
 9 that out of the way. Anything else Mr Burger can get away  
 10 with, but not to suggest that I just wake up one day and  
 11 say, you know, the life of a black person is cheap, from  
 12 the air? No. Chairperson, when there is concrete,  
 13 concrete suggestions and I made it clear to the witness  
 14 that I'm not just talking. That's why I said to him, I  
 15 hope you'll take this in good spirit, because – and  
 16 immediately went to approach Mr Mathunjwa, so that we're  
 17 not talking about some rumours that may be harboured by my  
 18 clients. And I did say to him, there are people among my  
 19 clients who harbour this and why did they harbour this,  
 20 Chairperson? It is because Mr Mathunjwa said it to them.  
 21 So you can't blame them. If you are one of those 3 000  
 22 people and Mathunjwa says, you're going to be killed  
 23 because the life of a black person is cheap and they are  
 24 killed, surely it must be expected that those people must  
 25 think, gee, Mathunjwa was right. And that's all I was



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1 probing. And of course the General has explained it and  
 2 put it into context and I moved on. So please, let's –  
 3 firstly let's not ascribe to me things I did not say. Two,  
 4 let's not say that there's no factual basis, when it is  
 5 there starting at us in the documentation. Thank you,  
 6 Chairperson.

7 CHAIRPERSON: Mr Burger, your reply?  
 8 Before you reply, I want to say this. That you asked me  
 9 for a ruling effectively for the future. I'm just  
 10 disinclined to say anything about the points that have been  
 11 made in relation to the past, because they have – it's  
 12 water under the bridge. You've asked me for a ruling for  
 13 the future, which I've given you, the ruling you sought.  
 14 Mr Mpofo had been here effectively defending himself in  
 15 respect of points that you made in the course of your  
 16 address. I'll give you a chance to reply, but I don't see  
 17 any advantage at this stage when dealing with things that  
 18 happened in past. But please proceed as you considerate it  
 19 appropriate.

20 MR BURGER SC: In another forum I might  
 21 have well forgone the right to reply. I'm really not used  
 22 to debate on the level that has been raised. But – and I  
 23 promise my learned friend, the out of cross-examination I  
 24 won't debate with him. But may I make three points,  
 25 because he still does not understand my argument. He says

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1 that the police's case is that the shooting happened  
 2 without command. That's in fact their case. It does not  
 3 mean that he can then put that they shot as a result of a  
 4 command. What he is entitled to do, is to probe the  
 5 veracity of that point, to probe the police to see whether  
 6 they in fact did give a command or whether they did not  
 7 give a demand. But he cannot start off a debate by putting  
 8 the proposition without the factual substructure for that  
 9 submission. That's my only question and I thought you  
 10 ruled on that?

11 CHAIRPERSON: Yes, I ruled on it and he  
 12 in fact conceded that the requirement of the factual  
 13 substructure should be there.

14 MR BURGER SC: Yes.

15 CHAIRPERSON: And he conceded that even  
 16 though this is a Commission and not a Court, the principles  
 17 of basic fairness apply, be held in many of the cases, and  
 18 the styles of cross-examination may differ. If a style of  
 19 cross-examination of a particular aspect happens to be  
 20 unfair, it can't be allowed and he doesn't fight with that.  
 21 He was really defending himself against some of the  
 22 criticisms that you addressed against him. But anyway,  
 23 please proceed.

24 MR BURGER SC: But that's just where the  
 25 debate goes array then. He accepts that principle and on

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1 the first application, he belies the principle. It does  
 2 not follow that it is the police's case that they did not  
 3 shoot on a command, that he can put a proposition that they  
 4 did shoot on a demand. That's the only point I make.

5 CHAIRPERSON: I put the combination, what  
 6 he calls, he's got another express that I don't like, but I  
 7 put the combination to you. You could have a situation –

8 MR BURGER SC: Yes.

9 CHAIRPERSON: - where members of the  
 10 service is commanded –

11 MR BURGER SC: Yes.

12 CHAIRPERSON: - I don't know if that  
 13 happened here, but is commanded to shoot someone –

14 MR BURGER SC: Yes.

15 CHAIRPERSON: - in order to defend a  
 16 colleague. The – I'm not sure that the command could  
 17 necessarily be relied on as a defence standing by itself.

18 MR BURGER SC: Yes.

19 CHAIRPERSON: But in fact the command  
 20 was to shoot in private defence and there was a shot in  
 21 private defence, then the plea of private defence would be  
 22 upheld. So the combination certainly may well apply here.

23 MR BURGER SC: I understand that.

24 CHAIRPERSON: Ja.

25 MR BURGER SC: My learned friend is

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1 entitled to probe a combo. He is not entitled to put a  
 2 proposition that a combo was in place until such time as he  
 3 has established the facts for that. He can probe, as he's  
 4 shown us, all over the place. He can probe whatever is to  
 5 be probed, but he cannot put a proposition without the  
 6 factual basis. That's the only point that – and I thought  
 7 I had a ruling on that.

8 CHAIRPERSON: I understand him to concede  
 9 that. Whether that was done entirely correct in the past,  
 10 is a matter which has no fruits to be derived from – or  
 11 advantage to be derived from going into that now. It's  
 12 past. One of the points, as I understand it, is that there  
 13 is evidential material, for example, the police hard drive.  
 14 There is evidential material in videos. He can't just put  
 15 a proposition, a general proposition and when challenged  
 16 say, well, if you look at page 500 of the hard drive, or if  
 17 you look at video, this particular video, you'll see  
 18 something in support of that, the witness to whom the  
 19 allegation is being put doesn't know what's being relied  
 20 on. He's entitled to be told what is being relied on, so  
 21 that he or she can say, it doesn't support the proposition  
 22 that you're making against me. So I would have thought  
 23 that you and he and I are at this point ad idem on that?

24 MR BURGER SC: No, I'm very happy that  
 25 you and I are at ad idem. I'm not sure at all that he's ad

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1 idem. That's why – that's what is taking some time. No,  
2 it's serious though.

3 MR MPOFU: Chairperson, can I just  
4 assist?

5 MR BURGER SC: May I just –

6 CHAIRPERSON: Please, Mr Mpofu –

7 MR MPOFU: I have never put that  
8 proposition to this witness here.

9 CHAIRPERSON: Mr Mpofu, I understand.  
10 Let Mr – in order to have an orderly debate, let us allow  
11 Mr Burger to address, address us. And then if there is  
12 something else you want to say, I'll let you. Mr Burger?

13 MR BURGER SC: So I was accused of being  
14 disingenuous. No, no, no, I was accused of that. You  
15 disallowed it, but I heard it loudly and clearly. I have  
16 never had that before. I hope I'll never hear it again,  
17 but let me say that it is in the context of apartheid  
18 mentality, I put two and two together and I thought the  
19 apartheid mentality was based on the exchange between Mr  
20 Mathunjwa and Mr Bruinders. My learned friend now says it  
21 was based on the phrase to the effect that the life of a  
22 black person in Africa is cheap. Now I would never have  
23 guessed in a month of Sundays that that lead to the  
24 proposition that was put. And that's the very problem we  
25 have. Propositions are put at, I don't know what it's

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1 based on. The witness doesn't know what it's based on and  
2 with respect, Chair, you must lead us on that. If that  
3 happens and I have to object, I have to object, but my  
4 learned friends must stand with me. We cannot allow that  
5 to happen. It's wasting of time and it's unfair to all  
6 parties. It may well be unfair to my client and I'm  
7 speaking only for my client.

8 Then very lastly, my learned friend says he's  
9 entitled to probe, because he wrote it in his opening.  
10 Well, well, well, he's not entitled to put propositions of  
11 what you wrote in your opening. You must put a factual  
12 basis and then you can explore a proposition, but it's no  
13 good today to say, revenge was referred to in my opening  
14 statement and ergo I can probe it. Not in the context of  
15 the way it was put and I'm sorry I'm taking so long, but I  
16 thought I should get that off my chest. Thank you, Sir.

17 CHAIRPERSON: Apart from criticisms about  
18 some of the questions that were asked in the past, I don't  
19 understand there to be any difference now between Mr Burger  
20 and Mr Mpofu, and Mr Mpofu and me for that matter, on the  
21 basic principles that are applicable. And I don't propose  
22 giving a ruling on whether the instances advanced as to  
23 what was said was wrongly done in the past, were in fact  
24 wrongly done in the past, because I don't see any purpose  
25 at this stage.

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1 But having said that, Mr Mpofu, do you wish to  
2 say anything more?

3 MR MPOFU: Just one thing, Chairperson, I  
4 promise, one. Once again the – Mr Burger must not ascribe  
5 to me things that I have not done. I have not as yet said  
6 to this witness that because of this and that and what have  
7 you, this thing was done on command or on the combo or  
8 whatever. So he's accusing me of I have done the exact –  
9 what he says should be done is exactly what I'm doing,  
10 which is take through the witness and then maybe at the  
11 end, once I've shown him the statements I will say, well,  
12 I'm going to say that this thing was done on command or in  
13 the combo or whatever. So it's no use – you can say  
14 whatever you want to say. If the factual basis is  
15 incorrect, if he says now he thought that I based it on  
16 Bruinders and the discussion, well, that's not what he said  
17 in his earlier address. He said, my learned friend based –  
18 said and I did not say it. So let's – if the factual basis  
19 of this debate is incorrect, as evidenced by the record,  
20 then surely what follows thereafter cannot be correct.

21 CHAIRPERSON: I don't propose spending  
22 any more time on that aspect of the matter. But one thing  
23 I will say and that is, I think there is substance in the  
24 point that the factual basis should be put first before the  
25 conclusion and the question is put, not the other way

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1 around and I think that's the problem to some extent. So  
2 can we get the General – the Major-General back for the  
3 next 20 minutes?

4 Obviously the witness has gone out of his way to  
5 make sure he was not within earshot, but here he comes  
6 back. Generaal-majoor, u is nog steeds onder eed. Mr  
7 Mpofu.

8 GENERAAL-MAJOOR ANNANDALE: s.o.e.

9 MR MPOFU: Thank you, Chairperson.  
10 Sorry, General. I just want to assure you that I was not  
11 casting any aspersions on your integrity. I just didn't  
12 want us – this debate to affect the next few questions. If  
13 you go to – let's start with GGG17, which is the Vermaak  
14 statement.

15 CHAIRPERSON: Which paragraph you're  
16 referring to?

17 MR MPOFU: At the bottom of paragraph 6.  
18 You remember that we read –

19 CHAIRPERSON: Sorry, sorry, you say the  
20 bottom of paragraph 6. Paragraph 6 starts on one page and  
21 continues on the next. By the bottom, you mean the bottom  
22 of the first page or –

23 MR MPOFU: Actually Chairperson, I don't  
24 know whether it's just my copy. It looks like there's no  
25 paragraph 6, it flows from paragraph 5.

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1 CHAIRPERSON: 6 begins with "Donderdag 16  
2 Augustus 2012 was ek aan diens gewees vanaf sewe-uur die  
3 oggend. Sewe-uur die oggend was ek bemanning op helikopter  
4 R44 RKE." That's para 6. If I may say that I understand  
5 that the –  
6 MR MPOFU: Chairperson, the shortcut is  
7 this. Let's forget about the previous part. If you go to  
8 seven, paragraph 7.  
9 CHAIRPERSON: Hm.  
10 MR MPOFU: Which starts, "Die groep het  
11 terug beweeg." Are we on the same page?  
12 CHAIRPERSON: Yes, that's the paragraph –  
13 MR MPOFU: That you read –  
14 CHAIRPERSON: That I translated on  
15 Thursday.  
16 MR MPOFU: Yes. Now I'm reading to him  
17 the last two sentences of the previous paragraph.  
18 [12:42] CHAIRPERSON: The last two sentences  
19 being, "Die lede het getalm." Or "Die groep was in daardie  
20 stadium ongeveer 3 000."  
21 MR MPOFU: The groep, that one.  
22 MS JELE: If I might be of assistance,  
23 Chair. There are two statements by Vermaak. I understand  
24 that this one is the one that's marked 13A in the –  
25 CHAIRPERSON: Well, this is the one that

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1 was referred to on Thursday, which was handed as an exhibit  
2 marked GGG17.  
3 MR MPOFU: Ja.  
4 CHAIRPERSON: But I didn't know about the  
5 second one, thank you for telling me.  
6 MR MPOFU: Okay. Now Chairperson, I just  
7 want the General, just to make it easy, to read out from  
8 "Die groep" up to the end and then I'll ask the question,  
9 because in so doing the translation will already have been  
10 done.  
11 CHAIRPERSON: No, I didn't translate the  
12 last few sentences of six and I'm not quite sure what the  
13 word 'talm' means. Mr Burger will help me.  
14 MR BURGER SC: [Inaudible].  
15 CHAIRPERSON: Yes, thank you. Maybe we  
16 should ask Mr Burger to translate for us.  
17 MR MAHLANGU: It reads, Mr Chairperson.  
18 CHAIRPERSON: Perhaps I can start from  
19 the previous sentence, "Brigadier Calitz en lede.  
20 Brigadier Calitz gave an order to the members of Nyala"-  
21 MR MPOFU: I'm still sorry, Chairperson,  
22 I'm sorry to do this. Can you start on "Die groep", the  
23 other "Die groep", the one before?  
24 CHAIRPERSON: Hm? I thought I was doing  
25 the one before. No? Well, after – I was reading,

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1 "Brigadier Calitz het lede van die Nyala opdrag gegee en –  
2 MR MPOFU: Oh yes.  
3 CHAIRPERSON: Brigadier Calitz gave the  
4 members of the Nyala an order, or the order, to close the  
5 doors, because the group was aggressive. The group, at  
6 15:46, moved to the kraal where the last Nyalas to – it's  
7 barbwire trailer, I think, was deployed. The group was at  
8 that stage about 3000 people [attackers]. Brigadier Calitz  
9 gave the order that the members should mount an operation,  
10 that's what I translated last time, I think, to protect  
11 themselves against the attacks of the mass. Ja, it must be  
12 mass or group. Photo 1515. The group hesitated. Sorry,  
13 the members hesitated and until the group or what's called  
14 the mass, were practically at them at the Nyala and the  
15 barbwire trailer. Out of the helicopter it could be seen  
16 that the water cannon were being deployed and that stun  
17 grenades and tear gas, the tear gas - granate, sorry,  
18 grenades, thank you, grenades were also being used against  
19 the attack of the group.  
20 MR MPOFU: Thank you. Thank you,  
21 Chairperson. And at least I read on the very good and  
22 reliable authority of Mr Burger, whom I asked last week,  
23 that the expression which has been translated, which means,  
24 "om te loods' –  
25 CHAIRPERSON: I think that's to mount an

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1 operation, isn't it?  
2 MR MPOFU: That can also mean to launch  
3 an offensive as it were. Alright. But we know what – it's  
4 to take action at its most neutral, but it could mean to  
5 launch and operation or to mount an offensive. Now all I  
6 want to say to you, General, about this, is that some –  
7 would you accept that from this, what Vermaak is saying is  
8 that at an earlier stage there was a command to launch an  
9 offensive, which included the water and the teargas and all  
10 that and that this was now behind us. It had already been  
11 done by the time we get to paragraph 7. Even if you just  
12 look at the time sequence. He says this happened at 15:46  
13 for example. And paragraph 7 started 16:55. So  
14 sequentially the offensive that involved tear gas and water  
15 had already occurred. Do you accept that?  
16 GENERAAL-MAJoor ANNANDALE: Ek aanvaar  
17 dit so, Voorsitter.  
18 MR MPOFU: Right. And then – so when  
19 that was done and dusted, he then moves to about 15:55  
20 where he says, the group regrouped on the –  
21 CHAIRPERSON: Mr Mpofu, perhaps for good  
22 order. I should have a go with Mr Burger's assistance to  
23 translate the next few sentences in seven.  
24 MR MPOFU: Again, yes, thank you very  
25 much.

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1 CHAIRPERSON: A platform for your  
2 questions.

3 MR MPOFU: Thank you, Chairperson.

4 CHAIRPERSON: "The group moves back and  
5 regrouped again on the other side of the kraal. Photo  
6 1516. And again attacked the police at about 15:55. It  
7 was clearly seen from the air that the group was not going  
8 to retreat or give way. Brigadier Calitz again gave the  
9 members the order to mount an operation. It almost seemed  
10 as if the members did not hear. Because of the incident on  
11 Monday, the 13th of August, where the two police members  
12 were chopped to death or hacked to death under the  
13 helicopter, I was – I realised that the members would have  
14 to act to defend themselves. I again repeated Brigadier  
15 Calitz's order out of the helicopter, upon which I saw that  
16 the members were acting. Groups [attackers] photograph  
17 1517, ran away in the direction of the shacks or the  
18 squatter's houses adjacent to the scene at 15:56."

19 MR MPOFU: Thank you. And the question  
20 firstly is, we now all accept that in terms of the sequence  
21 this happened on the other side of the kraal, General, as  
22 the statement clearly says. And the issue is this. When  
23 the instruction was given by Brigadier Calitz to mount  
24 another offensive, which was repeated by Brigadier Vermaak,  
25 because he thought the members might not have heard, do you

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1 accept that according to Vermaak that was an instruction  
2 which was necessitated by the need for the members to  
3 defend themselves? Om hulle self te beskerm.

4 GENERAAL-MAJOOR ANNANDALE: Soos dit hier  
5 vermeld is, ja, om hulleself te beskerm, dis korrek.

6 MR MPOFU: And that involved the use of  
7 live ammunition, correct? Or rather let's put it, not  
8 involved the use of water. They were not going to protect  
9 themselves or defend themselves with water?

10 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
11 soos ek dit lees, sal dit nie as dit individuele lede is  
12 waarna verwys word, sal dit nie water wees nie, maar dit  
13 kan goed wees skok granate en haelgewere ook, ek weet nie,  
14 dit kan potensieel ook -

15 MR MPOFU: And that would include  
16 defending themselves with the 9 millimetres and the R5  
17 semi-automatic rifles?

18 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
19 nee, ek kan nie sê wat was die bedoeling gewees van  
20 Brigadier Calitz nie. So ek kan nie sê dat dit 9  
21 millimetres en R5 of skerppunt-ammunisie was nie.

22 MR MPOFU: Yes. I accept that, but you  
23 cannot exclude the possibility that they would defend  
24 themselves with, not just with the stun grenades or  
25 whatever else you mentioned, but also with the rifles and

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1 shotguns that they were carrying or rather –

2 CHAIRPERSON: The shotguns, the shotguns  
3 were for the tear gas and the rubber.

4 MR MPOFU: Yes.

5 CHAIRPERSON: It's sharp ammunitions what  
6 you're talking of.

7 MR MPOFU: Sharp, yes, I think let's say  
8 sharp ammunition which you must attempt to include the R5s  
9 and the 9 millimetres.

10 CHAIRPERSON: Mr Semenya wants to say  
11 something. Mr Semenya?

12 MR SEMENYA SC: Chair, perhaps this  
13 illustrates the point. If Colonel Vermaak is going to  
14 testify and we are now being told that what he's saying  
15 here, doesn't exclude certain things, and I'm sure Mr Mpofo  
16 hasn't consulted this witness, to make that proposition to  
17 the witness again. And this is the nature of the complaint  
18 which we were debating earlier.

19 CHAIRPERSON: Mr Mpofo, isn't there  
20 something in what Mr Semenya says? Clearly the Colonel is  
21 going to give evidence. Brigadier Calitz is going to give  
22 evidence. You're really asking this witness to interpret  
23 the statements of these two witnesses. Now it would be our  
24 function at the end of the day to decide on the evidence of  
25 these two witnesses. What they say, may well be entirely

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1 with what you're putting, in agreement with what you're  
2 putting, but I don't see, with respect, any point in asking  
3 this witness how he interprets it. But –

4 MR MPOFU: Chairperson, with the greatest  
5 respect, you must remember what I'm busy with. This  
6 witness was led by Mr Semenya to say that his understanding  
7 was that the shooting was self-defence and that they were  
8 'onvermydelik' or words to that effect. Now how can I – if  
9 I don't contest that, then I'm going to be told one day six  
10 months down the line, that you did not – when the witness  
11 said the thing was 'onvermydelik'-

12 CHAIRPERSON: Isn't there an easier way?

13 MR MPOFU: - you let it go?

14 CHAIRPERSON: Mr Mpofo, isn't an easier  
15 way for instance to say, I'm not going to cross-examine you  
16 on this point, because it's only your impression, which  
17 with respect, isn't relevant. What is relevant is what the  
18 Brigadier Calitz and Lieutenant-Colonel Vermaak said and  
19 meant. So do not regard me as having accepted what you  
20 say. I'm refraining from cross-examining you on it,  
21 because I will take the matter up with Brigadier Calitz and  
22 Lieutenant-Colonel Vermaak. Once you put it like that,  
23 then no arguments such as the kind you fear, can be raised.  
24 And if they try to raise the argument, it will be  
25 dismissed.

<p style="text-align: right;">Page 9576</p> <p>1 MR MPOFU: Okay, Chairperson. If – well, 2 if I can make a deal with you then, Chairperson? 3 CHAIRPERSON: No, no, I don't make deals 4 with counsel. 5 MR MPOFU: If – I will try and truncate 6 it in those terms, but I would like to put what I referred 7 to earlier, when the witness was not here, which is 8 paragraph 59 of Botes, at least. 9 CHAIRPERSON: Let's do that after lunch. 10 One of my colleagues has to make an urgent telephone call. 11 MR MPOFU: Thank you, Chairperson. 12 CHAIRPERSON: We'll resume at half past 13 one, alright, half past one. 14 [COMMISSION ADJOURNS COMMISSION RESUMES] 15 [13:39] CHAIRPERSON: Mr Mpofu, is there a 16 problem with your clients. I see that everybody got up at 17 about – well, a lot of people got up at about 20 to 1 and 18 went off, and they haven't come back. Are they, is there 19 something – is there any reason why we shouldn't proceed? 20 I mean – 21 MR MPOFU: No, Chairperson, I'm aware of 22 the issues that are detaining them, so to speak. But – 23 CHAIRPERSON: You mustn't use that word 24 "detain." It's got unhappy connotations. 25 MR MPOFU: I know, Chairperson,</p>	<p style="text-align: right;">Page 9578</p> <p>1 CHAIRPERSON: Yes. 2 MR MPOFU: But – 3 CHAIRPERSON: Re-examination is only 4 necessary to repeat damage done in cross-examination. 5 MR MPOFU: Ja well, I think then there's 6 going to be a lot of re-examination. No Chair, the issue – 7 yes, I'm going to try and finish, but I must warn that I've 8 already moved my check-up for the afternoon, but I'm going 9 to try and finish – 10 CHAIRPERSON: No well, that's fine. If 11 you can't finish today then hopefully you'll finish 12 tomorrow – 13 MR MPOFU: Early, early tomorrow, yes, 14 but Chairperson, the other relevant issue, a proper word 15 we're talking about is that Mr Semenya and Mr Madlanga and 16 I had of course at your request discussed the matter of 17 General Phiyega and I had at that stage optimistically 18 thought I would finish by lunchtime today and we had then 19 projected that she would have to come back on Wednesday. I 20 just want to indicate that obviously we'll play it by ear 21 if by tomorrow – because we don't want her to waste her 22 time, but that's the arrangement as it stands now. If we 23 shift it, if it looks like that threat of the cross- 24 examination is carried out, then we might shift it by a 25 day, but –</p>
<p style="text-align: right;">Page 9577</p> <p>1 especially to them. 2 CHAIRPERSON: I'm sure. Generaal-Majoor, 3 u is nog steeds onder eed. 4 CHARL ANNANDALE: s.o.e. 5 CHAIRPERSON: Mr Mpofu, you did tell me 6 you're not available tomorrow. I hope that means that 7 you'll finish today. I understand it depends on injury 8 time, over which you have no control, but I would 9 appreciate it if you try very hard to finish today because 10 we'll need a witness tomorrow and – 11 MR MPOFU: Yes, Chairperson, I'm – 12 CHAIRPERSON: There are other cross- 13 examiners; I don't know how long they're going to be 14 though, when you're finished. 15 MR MPOFU: Well, if I may, I don't know 16 if I have permission to do this but at least one of the 17 cross-examiners indicated that they were going to be about 18 a day, so – 19 CHAIRPERSON: Really? 20 MR MPOFU: But Chair – 21 CHAIRPERSON: Oh dear. 22 MR MPOFU: I don't want that to attract 23 the ire to me, and I know that Mr Burger and Mr Tip are 24 going to be shortish, and then of course there's re- 25 examination.</p>	<p style="text-align: right;">Page 9579</p> <p>1 CHAIRPERSON: I wouldn't want her to be 2 inserted in the middle of the next witness. 3 MR MPOFU: Yes. 4 CHAIRPERSON: She must come in a gap 5 between witnesses, if you know what I mean. 6 MR MPOFU: Yes. 7 CHAIRPERSON: Alright, anyway – 8 MR MPOFU: Thank you, Chairperson. 9 CHAIRPERSON: Okay, carry on with your 10 cross-examination. 11 MS JELE: Chairperson, just if I might 12 for the sake of organisation and at the risk of incurring 13 the ire of the Commissioners, I would be the cross-examiner 14 that unfortunately believes that I will need at least a day 15 with the Major-General. I assure the Commissioners that we 16 are doing everything in our power to limit our cross- 17 examination as much as necessary – 18 CHAIRPERSON: Yes. 19 MS JELE: But as things currently stand 20 it still looks as though I would need that time. 21 CHAIRPERSON: No, I understand, and I've 22 been shown a number of statements that you're going to be 23 relying on, which I promise to read tonight, but – so 24 anyway, I understand what you say and I don't know whether 25 anyone has yet experienced the ire of the Commissioners,</p>

1 but perhaps it will be something that they will always  
2 remember when they finally do experience it. Mr Mpofo,  
3 would you like to carry on?

4 CROSS-EXAMINATION BY MR MPOFU (CONTD.):

5 Thank you, Chairperson. General, you've heard that we're  
6 trying to save time, so in the interest of time and also to  
7 try and make up the time that was, I'm sure the Commission  
8 will allow me to say wasted, or spent –

9 CHAIRPERSON: That was spent with quite a  
10 constructive result in the end, I submit.

11 MR MPOFU: Ja, okay, the time that was  
12 spent. I'm going to try and, I'm going to actually give  
13 you a longish statement because I expect you to deny it,  
14 which will round off this topic. But if you want me to  
15 break it down you'll tell me.

16 CHAIRPERSON: A short question is the  
17 ones which you expect to get affirmative answers to.

18 MR MPOFU: I know, yes. I'm going to  
19 base, what I'm going to argue at the end in relation to  
20 this issue of whether there was a command or not is going  
21 to be based on various things that you and I have  
22 canvassed, but mainly on the statement of Brigadier  
23 Vermaak, or Lieutenant-Colonel Vermaak who according to the  
24 issue that we read now, at least makes it clear,  
25 fortunately his statement is sequenced in terms of time and

1 what I will argue is that the occasion that he refers to  
2 when he gave an order, or repeated Brigadier Calitz's  
3 order, was after the issues of water and stun grenades –

4 CHAIRPERSON: Teargas and stun grenades.

5 MR MPOFU: And teargas, yes, and I will  
6 then argue that it was when people had gone to the other  
7 side of the kraal according to him, which relates to the  
8 shooting of the live ammunition. I'm just saying that's  
9 what I will argue. Do you understand it? You don't have  
10 to agree with me, but if you want to comment.

11 GENERAAL-MAJOOR ANNANDALE: Ek hoor dit  
12 so, Voorsitter.

13 MR MPOFU: The other basis of my argument  
14 in that respect will be your evidence as it appears from  
15 pages 8334 to 8335 where you describe - actually it also  
16 goes up to 8339, so let say 8334 to 8339, specifically  
17 where you deal with scene 1. Among other things you say  
18 that Brigadier Calitz indicated that the water cannon  
19 should move and he also remarked that where is the TRT  
20 line, the TRT line must move, and from the chopper that  
21 Colonel Vermaak indicated the direction that the people  
22 must move. You then say there was a stage where Brigadier  
23 Calitz indicated that the people must not engage unless you  
24 are being engaged, or words to that effect, and as I hinted  
25 in the morning, I'm going to argue that the word "engage"

1 in that context cannot, does not refer to water cannons but  
2 it refers to live ammunition. That's what I will argue.  
3 Once again you don't have to agree. I'm just telling you  
4 the basis of what I will argue.

5 GENERAAL-MAJOOR ANNANDALE: U is reg, ek  
6 stem nie saam nie maar ek hoor u argument.

7 MR MPOFU: And in respect of that second  
8 ground the words that you used immediately after this use  
9 of the word "engage," you then said "There was a stage  
10 where he mentioned that people must get out of the Nyalas  
11 and they must perform arrests. I can also remember that he  
12 said 'Take the panga, take the panga.' I can remember  
13 Colonel Vermaak mentioned that there are bodies lying down  
14 and he indicated that the water cannons must split and one  
15 must go to the other side," and so on. You've already  
16 answered. I just wanted for the sake of completion to  
17 inform you on what basis I'm going to argue that this  
18 referred to the shooting of live ammunition.

19 Then the third broad ground, all these other  
20 grounds obviously I'll canvass with other witnesses, except  
21 for the one where I'm quoting you. The third other ground  
22 is on the statement of Mr Botes that we have dealt with.  
23 If you jump, we dealt with paragraph 57. If you jump  
24 paragraph 58 and go to paragraph 59, he says, quote, "Other  
25 than for hearing the word 'engage' which was repeated a few

1 times (underline a few times) immediately (underline  
2 immediately) before the shooting start, I did not hear any  
3 specific instruction for the use of live ammunition." In  
4 other words he says other than that word he did not hear  
5 any other specific, or rather any specific instructions  
6 which – well, it's a matter of interpretation, but I'm  
7 going to argue means that he, well, firstly that it  
8 happened immediately before, but he took it to be an  
9 instruction for the shooting of live ammunition. Do you  
10 understand where I'm coming from at least?

11 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
12 ja, ek hoor dit is 'n saak vir interpretasie. As ek net  
13 mag meld op dit wat mnr Botes gesê het, ek het nie die  
14 woorde "engage, engage, engage" gehoor soos wat hy dit  
15 vermeld in paragraaf 57 presies so nie. Die eerste keer  
16 wat ek onthou dat ek die woord "engage" gehoor het was  
17 sekerlik omtrent so 20 minute nadat die draad uitgerol is.  
18 Dit moes dan gewees het na die toneel van toneel 1 en ek  
19 weet ook dat dit herhaal is op 'n gedeelte van 'n Protea  
20 Coin helikopter wat mens dit kan hoor en dit was verseker  
21 na 4 want ek weet hulle helikopter het min of meer eers 4  
22 uur het hy opgestyg met Generaal Mpembe. Dankie,  
23 Voorsitter, ek wou dit net meld.

24 MR MPOFU: Sorry, I think the  
25 interpretation, or rather the witness referred to the Coin

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1 helicopter, not the Oryx. Coin Security, which is  
 2 otherwise known as the Lonmin chopper in the documentation.  
 3 CHAIRPERSON: He referred to the  
 4 helicopter that Major-General Mpmembe was in, which was the  
 5 Coin one. There seems to be some connection between Coin  
 6 Security and Lonmin, so it's also called the Lonmin  
 7 helicopter, whereas I think Lieutenant-Colonel Vermaak was  
 8 in the Oryx one, I think. Is that not the Oryx? Which one  
 9 was he?  
 10 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 11 nee, die Oryx was die Suid-Afrikaanse Lugmag helikopter.  
 12 Kolonel Vermaak was in die klein Robinson R44 –  
 13 CHAIRPERSON: The Squirrel. The  
 14 Squirrel.  
 15 GENERAAL-MAJOOR ANNANDALE: Nee, hy was  
 16 nie die Squirrel nie, hy was in die Robinson.  
 17 CHAIRPERSON: Well, he says, "Ons het met  
 18 die helikopter RPB Squirrel onttrek." Unless that was  
 19 earlier. I don't know whether he was in that one on the  
 20 16th. Oh, no, on the 16th he says "was ek bemanning op  
 21 helikopter R44 RKE." That's the Robinson.  
 22 GENERAAL-MAJOOR ANNANDALE: Dis die  
 23 Robinson, dis reg, Voorsitter.  
 24 MR MPOFU: In any event, it's one of the  
 25 SAPS helicopters, not the air force one or the Coin one.

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1 MR MAHLANGU: That's correct, yes.  
 2 MR MPOFU: Okay, that's fine. I  
 3 understand that, as I said I'm not going to debate those  
 4 issues with you; I will debate it with the other witnesses.  
 5 Now moving on, there is just, I'm just going to deal with  
 6 small issues that I want to get out of the way before we go  
 7 to the next big topic. I'm sure I don't have to give you  
 8 the exhibit by now. We've dealt with it before. In  
 9 exhibit EE there is the reference that Lieutenant-General  
 10 Mbombo reported that she had spoken to the National  
 11 Commissioner who indicated that she, this is now the  
 12 National Commissioner, or rather General Mbombo told her  
 13 that the stage 3 of the plan would be implemented and that  
 14 the National Commissioner had indicated that that  
 15 information had been relayed to the Minister.  
 16 CHAIRPERSON: If you're referring to the  
 17 third page of exhibit EE, which is described as police hard  
 18 drive 1613, the passage is the second paragraph under the  
 19 heading "Closing remarks," "The Provincial Commissioner  
 20 indicated that she'd already communicated with the National  
 21 Commissioner, informing her of the current situation, that  
 22 a deadlock is reached with negotiations and also that phase  
 23 3 of the operational plan would be executed. She also  
 24 indicated that the National Commissioner indicated that she  
 25 will inform the Minister of Police on the current situation

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1 and actions that will be taken." I think that's the  
 2 passage you have in mind.  
 3 MR MPOFU: Yes, as the Chairperson has  
 4 read it, she indicated that she will inform the Minister of  
 5 Police on the current situation and the actions that will  
 6 be taken. The point really I want to make is since you  
 7 were chairing the meeting, that these remarks were made in  
 8 your presence and you can confirm that part of the minute.  
 9 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 10 dit was in my teenwoordigheid gemaak.  
 11 MR MPOFU: And well, I'm sure the purpose  
 12 of making the remarks I will ask General Mbombo, but from  
 13 your point of view did these remarks assure you that at  
 14 least the operation had the blessings of the National  
 15 Commissioner and would probably, or rather would also be  
 16 communicated to the Minister?  
 17 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 18 nie noodwendig "blessings" of goedkeuring nie, net dat die  
 19 Nasionale Kommissaris aldus ingelig is.  
 20 MR MPOFU: Yes, I thought your evidence  
 21 either in chief – no, probably during cross-examination of  
 22 Mr Budlender, was that if ever a junior person says  
 23 something to the senior and the senior agrees, then that  
 24 for all intents and purposes amounts to an order.  
 25 [13:59] CHAIRPERSON: What I do remember him

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1 saying was that if those people on the JOCOM hadn't agreed  
 2 with the Provincial Commissioner who had instructed that  
 3 stage 3 should be implemented, they would have said so. I  
 4 understood him to say that.  
 5 MR MPOFU: Ja.  
 6 CHAIRPERSON: But I don't remember – if  
 7 I'm wrong someone can show me the passage, but I don't  
 8 remember what you've now put as having been said.  
 9 MR MPOFU: Okay.  
 10 CHAIRPERSON: But again it's a point on  
 11 the peripheral, isn't it? You can get home without it or  
 12 not, as the case may be.  
 13 MR MPOFU: Yes. Okay, unfortunately I'm  
 14 not in possession of the exact passage, so I won't belabour  
 15 the point. I just want to ask you one thing. Did you say  
 16 in relation to the discussion between General Mpmembe and  
 17 the Provincial Commissioner before the 13:30 meeting, did  
 18 you say that because General Mpmembe gave the report and the  
 19 Provincial Commissioner seems to agree, that that would  
 20 indicate that the Provincial Commissioner was in agreement?  
 21 I won't put it higher than that.  
 22 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 23 dis reg. Die Provinsiale Kommissaris het saamgestem.  
 24 MR MPOFU: Thank you. Now the  
 25 intelligence that you received, I'm now talking

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1 specifically about the intelligence that was revealed in  
 2 the morning of the 16th, or even in the days before that,  
 3 indicated among other things two things. One was that the  
 4 people had said that they were armed to defend themselves  
 5 because of "an attack," as they've put it, upon them by the  
 6 NUM. That's one of the issues that they revealed.  
 7 Correct?  
 8 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 9 ek onthou dit. Ek dink die JOCOM van die 15de, nie die  
 10 16de nie.  
 11 MR MPOFU: Yes.  
 12 CHAIRPERSON: That appears from slide 114  
 13 of exhibit L. "Protesters didn't want to surrender their  
 14 weapons as they alleged that they needed them for  
 15 protection against members of NUM." That's the meeting at  
 16 6AM on the 15th.  
 17 MR MPOFU: Yes, I'm happy with that,  
 18 thank you, General. And on the 16th at least the  
 19 intelligence suggested that contrary to what Mr Mathunjwa  
 20 may or may not have said, that the people were not going to  
 21 lay down their arms and that they would resist efforts by  
 22 the police to do so. Correct?  
 23 GENERAAL-MAJOOR ANNANDALE: Dis korrek,  
 24 Voorsitter.  
 25 MR MPOFU: And that intelligence

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1 indicated that they were prepared to die.  
 2 GENERAAL-MAJOOR ANNANDALE: Ek weet nie  
 3 wat is die woorde in daardie verslag nie, maar die  
 4 strekking is wel so.  
 5 MR MPOFU: Okay, that's fine. That's  
 6 good enough for where I'm going. The issue is this. As a  
 7 result of that intelligence there was, or rather the police  
 8 devised a contingency plan. Is that correct?  
 9 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 10 nie 'n gebeurlikheidsplan nie, 'n gebeurlikheid.  
 11 MR MPOFU: Okay, please just assist me  
 12 then, what's the difference?  
 13 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 14 miskien die beste wat ek kan verduidelik, 'n  
 15 gebeurlikheidsplan sal wees as daar ontruiming moet  
 16 plaasvind uit 'n gebou uit en daar is 'n fisiese plan  
 17 geskryf in terme van as daar vuur is en die ontruiming  
 18 plaasvind, en die gebeurlikheid sal net 'n pertinente aksie  
 19 stap wees, soos byvoorbeeld ontruiming sal plaasvind. So  
 20 om dit na Marikana toe te bring, Voorsitter, was dit die,  
 21 die gebeurlikheid was gewees om die draad sleepwaens te  
 22 preposisioneer.  
 23 MR MPOFU: Okay, could you agree that if  
 24 one were to paraphrase the requirements of the applicable  
 25 regulations, one could say that there's a basic rule that

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1 teargas, stun grenades, water cannons and those kinds of  
 2 measures should only be employed after a warning has been  
 3 given?  
 4 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 5 ja, in terme van Staande Order 262 as mens sou 'n normale  
 6 protesaksie hê en jou sou dan die geleentheid kry na die  
 7 ontplooiing van defensiewe maatreëls om dan die waarskuwing  
 8 te gee voor die offensiewe maatreëls.  
 9 MR MPOFU: And since it would seem that  
 10 you knew as much as early in the morning that there would  
 11 be resistance and people might even be prepared to die, in  
 12 the contingency plan, or the contingency, whatever you call  
 13 it, was there provision made for the issuing of such a  
 14 warning? If so, at what stage was it going to be done?  
 15 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 16 dis 'n standaard vereiste voordat daar offensiewe maatreëls  
 17 gaan plaasvind, so in die geval sou dit gewees het nadat  
 18 die draad - die defensiewe maatreël - uitgerol was, dan sou  
 19 die waarskuwing geskied.  
 20 MR MPOFU: Now do you - okay, let me put  
 21 it this way. You are aware that the police had the means  
 22 to issue such a warning, and in fact we know that there was  
 23 a loudhailer which in one of the videos we heard an  
 24 announcement being made, "Media, go away. Media, go away."  
 25 So the means were there. Should we accept that?

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1 GENERAAL-MAJOOR ANNANDALE: Ja, publieke  
 2 adresseringssteme was beskikbaar gewees in ten minste van  
 3 die Nyalas, indien nie almal nie.  
 4 MR MPOFU: Yes, and I'm sure everyone  
 5 will accept that it's no use just having the means; you  
 6 must also have the opportunity.  
 7 GENERAAL-MAJOOR ANNANDALE: Dit is reg,  
 8 Voorsitter, hulle moet die geleentheid ook hê.  
 9 MR MPOFU: The evidence of the police  
 10 will suggest that there was at least, at least 90 seconds  
 11 between the approach at Nyala 4 and the crowd re-emerging  
 12 on the other side of the kraal.  
 13 GENERAAL-MAJOOR ANNANDALE: Ek aanvaar  
 14 dit so as u dit so stel.  
 15 MR MPOFU: And subject to an objection by  
 16 Mr Semanya, if you look at the picture where the 90 seconds  
 17 is depicted, one could say that there were at least another  
 18 half a minute before the actual shooting. So we're talking  
 19 "min of meer" two minutes.  
 20 GENERAAL-MAJOOR ANNANDALE: U sê twee  
 21 minute tussen die beweging na die Nyala by posisie nommer 4  
 22 en tot by die kraal?  
 23 MR MPOFU: Up to the shooting.  
 24 GENERAAL-MAJOOR ANNANDALE: Dis  
 25 potensieel verseker so.



<p style="text-align: right;">Page 9592</p> <p>1 MR MPOFU: Thank you. So if the means 2 were there, the opportunity surely was there within at 3 least that two minutes to make the warning. Correct? To 4 issue the warning. 5 MR SEMENYA SC: Chair, I do not quite 6 follow. At this stage the water cannon had already been 7 used; to make which warning? 8 MR MPOFU: Okay – 9 CHAIRPERSON: Mr Mpofu, I'm also a bit 10 puzzled. At one stage I think you were asking questions 11 about warning before the barbed wire was deployed. 12 MR MPOFU: Yes. 13 CHAIRPERSON: But if we're now at the 14 stage just before the shooting started, then obviously the 15 wire has already been deployed. So you must be referring 16 to some other warning. 17 MR MPOFU: Ja. 18 CHAIRPERSON: So what warning are you 19 referring to? 20 MR MPOFU: Well firstly, Chairperson, no, 21 that's not correct. I was certainly not talking about any 22 warning before the barbed wire was deployed. The witness 23 said very clearly in chief that the barbed wire is regarded 24 as defensive measures – 25 CHAIRPERSON: Ja.</p>	<p style="text-align: right;">Page 9594</p> <p>1 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 2 ons probeer regtig hierdie situasie nou vereenvoudig as 'n 3 baie kliniese stapsgewyse situasie, wat dit nie was nie. 4 Voorsitter, die bedoeling van die waarskuwing is nadat mens 5 nou klaar die, al ses van die Nyalas hulle draad ontplooi 6 het en daar is dan nog steeds groeperings wat gevorm is op 7 die koppie, dan sal die waarskuwings gegee word en daar sal 8 'n tyd toegelaat word en dit sou in amptelike tale gedoen 9 word, ten minste twee, plus 'n addisionele taal. 10 Voorsitter, en dan sou daar 'n tweede waarskuwing gegee 11 word en dan sou daar gemeld word aan die groep dat sou 12 hulle nie uiteengaan nie dan gaan die volgende stappe, en 13 dis die offensiewe stappe in terme van die gebruik van 14 waterkanonne of rubber of CS of dan – Voorsitter, soos ek 15 dit verstaan, toe die eerste aanslag kom op die polisielyn 16 selfs by Nyala 4, of die eerste insident, is hier nou 17 heeltemal 'n ander situasie wat hom afspeel en die 18 bevelvoerders moet self praat en Brigadier Calitz moet 19 verduidelik. 20 [14:19] Maar ek kan myself net indink, die plan soos dit 21 voorsien is om uit te speel, dit gaan nou nie so uitspeel 22 nie; hierso is nou 'n ander, 'n veranderlike, hier is nou 23 iets besig om te gebeur. So ek weet werklik nie, selfs al 24 is daar die twee minute, dit is nie asof daar in daardie 25 twee minute niks gebeur het nie. Daar was pertinente</p>
<p style="text-align: right;">Page 9593</p> <p>1 MR MPOFU: So that's, let's get another – 2 CHAIRPERSON: So what warning were you 3 talking about? 4 MR MPOFU: Well, I'm now talking about – 5 and Mr Semanya is correct, because I didn't make the 6 distinction. What I'm talking about now is a warning that 7 should have been given, albeit belatedly, before the use of 8 live ammunition, and I didn't make it clear. 9 CHAIRPERSON: In other words if you don't 10 stop your nonsense, if you don't move backwards – 11 MR MPOFU: We now – 12 CHAIRPERSON: - or stay where you are, we 13 will shoot you? 14 MR MPOFU: Yes, we'll use that one, and 15 Mr Semanya is correct, I didn't make it clear that I was 16 now talking about that, ja. 17 CHAIRPERSON: I take it he's now – 18 MR SEMENYA SC: Well, again I have never 19 known in police action that there is a requirement to give 20 a warning before you act in self-defence. 21 CHAIRPERSON: I don't know that Mr Mpofu 22 is suggesting that it's a requirement. He's simply trying 23 to establish if there was time to do it. Is that right? 24 MR MPOFU: That's right, Chairperson. 25 Yes.</p>	<p style="text-align: right;">Page 9595</p> <p>1 handelinge 2 COMMISSIONER HEMRAJ: Mr Mpofu, are you 3 putting to the witness that after the water cannons were 4 deployed, after the stun grenades, the rubber bullets were 5 being shot and the teargas, that thereafter or in that time 6 before they appeared around the kraal, that there should 7 have been a warning for them to step back or move back or 8 there's be live ammunition - 9 MR MPOFU: Live ammunition, yes. That's 10 what I'm putting, Chairperson and Commissioners. All I'm 11 saying, I accept what you're saying, General; I'm just 12 saying that for a police force that according to its 13 prescripts is committed to no loss of life, no injuries, 14 not even minimal, no loss of life and no injuries, that the 15 mere fact that an opportunity might have been missed to 16 give the warning before the water cannons surely did not 17 exempt the police from giving a warning in that two minutes 18 before people were killed. 19 MR SEMENYA SC: Chair, we would like to 20 be ready to meet whatever case is being made against the 21 police. Is this a function that obtains purely at the 22 level of common sense, or is it a requirement in any 23 particular policing activity, or is it the regulations? 24 What we fail to understand, if the police case is properly 25 understood, that the issues are about self-defence, which</p>

<p style="text-align: right;">Page 9596</p> <p>1 must mean that the threat must have been imminent to life 2 and limb. Is there a requirement somewhere there between 3 the imminent threat and the action? 4 CHAIRPERSON: Mr Mpfu, as I understand 5 the objection - it's not an objection, I think it's more of 6 query, what Mr Semanya wants to know, what is the source of 7 the obligation which you're going to contend there was 8 resting on the police to give a warning during that time 9 that you answered in response to the question asked by my 10 colleague Commission Hemraj? Just what's the source of the 11 obligation? Is it part of the law of self-defence, is it a 12 police regulation, is it a statute, is it common sense? 13 What is it? I just want to understand correctly. 14 MR MPOFU: Chairperson, the source of the 15 obligation comes from inter alia regulation 262 where it 16 says they must warn the participants according to the act 17 that, of the action that will be taken against them should 18 defensive measures fail, and I've already conceded that 19 point earlier. Then step 2 it says, "We bring forward the 20 reserve or reaction section, platoon, that will be 21 responsible for offensive measures," and I'm assuming let's 22 read that as TRT for the purposes of this case, "as a 23 deterrent to further violence should the abovementioned 24 measures not achieve the desired result." 25 CHAIRPERSON: In other words what you say</p>	<p style="text-align: right;">Page 9598</p> <p>1 deal with any measures after. 2 CHAIRPERSON: That may be the answer 3 which the witness is going to give, but you asked him what 4 he bases his contention on and he's given you something. 5 Whether that is a basis for his contention is a matter to 6 be analysed. You asked him where he gets it from. That's 7 where he says he gets it from. 8 MR SEMENYA SC: But he's pointing – 9 CHAIRPERSON: If it doesn't come from 10 there, that's a matter we can debate later, surely. 11 MR SEMENYA SC: But he's pointing me to 12 an instrument that doesn't have that basis, Chair, and 13 that's my objection. 14 CHAIRPERSON: On the face of it, Mr 15 Mpfu, it doesn't apply because paragraph 11(2)(4) talks 16 about a second warning being given before the commencement 17 of the offensive measures. Now the witness's point, as I 18 understand it, is they hadn't started with their offensive 19 measures yet when they were – their case is they were 20 attacked and they defended themselves. It's not exactly 21 offensive measures. 22 MR MPOFU: No – 23 CHAIRPERSON: Whether his interpretation 24 of the facts and whether the Commission's finding of the 25 facts is correct, it's something no-one knows the answer to</p>
<p style="text-align: right;">Page 9597</p> <p>1 is the origin of the obligation on which you rely is set 2 out in what I can call a table in paragraph 2 of section 3 11, or subparagraph 2 of paragraph 11 of Standing Order 4 262. Is that correct? 5 MR MPOFU: Yes, and all I'm saying, 6 Chairperson, and I just want to read this out. After that, 7 after the readiness of the TRT, so to speak, it says, "Give 8 a second warning before the commencement" – I'm reading 9 from paragraph 11 of 262, "Give a second warning before the 10 commencement of the offensive measures, giving innocent 11 bystanders the opportunity to leave the area," and so on, 12 and so on. The gist of what I'm saying, Chairperson, is 13 that that obligation endures – 14 CHAIRPERSON: No, I think Mr Semanya now 15 knows what you were saying. 16 MR MPOFU: Thank you. 17 CHAIRPERSON: What the origin is of the 18 rule, or obligation for which you contend. Whether it's 19 correct or not is a matter which will become apparent, we 20 hope, as the Commission proceeds, but that's where you get 21 it from. 22 MR MPOFU: Thank you, that's where I'm 23 getting it, yes. 24 CHAIRPERSON: Alright – 25 MR SEMENYA SC: No, Chair, 262 does not</p>	<p style="text-align: right;">Page 9599</p> <p>1 at the moment, but that's the police contention. The point 2 that Mr Semanya is making is that that paragraph doesn't 3 apply on the factual premise, or on the factual 4 circumstances with which the witness is dealing at the 5 moment. 6 MR MPOFU: Okay, Chairperson, I think 7 I'll answer that by asking a question. Does the term 8 "offensive measures" include the – or rather, does it 9 include both the firing of teargas, water, stun grenades, 10 as well as live ammunition? 11 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 12 offensiewe maatreëls is genoem, soos genoem deur Adv Mpfu, 13 dit kan wees gesamentlik of enkele van die. Dit hoef nie 14 noodwendig almal te wees nie, maar dit staak by die gebruik 15 van 'n haelgeweer. Voorsitter, die beginsels van die 16 betrokke Staande Order is van toepassing op skarebestuur 17 uitsluitlik, en wat belangrik is, is die paragraaf wat iets 18 lees soos hierdie gemeenregtelike beginsels van 19 selfverdediging, noodweer, of die beskerming van eiendom 20 wat nie geraak deur hierdie order nie. So daardie 21 waarskuwing is nie van toepassing in terme van 22 selfverdediging en beskerming van eiendom en noodweer nie. 23 COMMISSIONER HEMRAJ: Mr Mpfu, doesn't 24 11(4) specifically exclude live ammunition being used in 25 the execution of the plan, because that's the context in</p>

<p style="text-align: right;">Page 9600</p> <p>1 which you're reading that table, isn't it?</p> <p>2 MR MPOFU: Chairperson and Commissioner,</p> <p>3 the answer is I don't know for now, but it doesn't matter.</p> <p>4 The only issue is that offensive measures includes the use</p> <p>5 of live ammunition, which the witness has confirmed.</p> <p>6 MR MAHLANGU: The witness says no –</p> <p>7 CHAIRPERSON: From what I understand he</p> <p>8 said that defensive measures stop with the use of shotgun.</p> <p>9 So in other words stun grenades and teargas. That's the</p> <p>10 terminus, as it were, of offensive measures for the</p> <p>11 purposes of the Standing Orders.</p> <p>12 MR MPOFU: Well, can we then go to –</p> <p>13 okay, this time you will have to forgive me because I</p> <p>14 didn't anticipate, I thought this was common cause, but I'm</p> <p>15 just going to read you a definition that is contained in –</p> <p>16 and we will make copies available – National Instruction of</p> <p>17 2012, Public Order Policing, crowd regulation and</p> <p>18 management during public gatherings and demonstrations, and</p> <p>19 before Mr Semenya objects, I do understand that, I think he</p> <p>20 had raised the question at some stage about whether this</p> <p>21 particular regulation was already operational or not, but</p> <p>22 nevertheless, this is what I want to read to you. It</p> <p>23 defines offensive measures in section 2(n) thereof. I'll</p> <p>24 just read it out, Chairperson, I'll make it available. It</p> <p>25 might be an exhibit, I don't know, Ms Pillay.</p>	<p style="text-align: right;">Page 9602</p> <p>1 MR MPOFU: It says, and it was submitted</p> <p>2 by SAPS, "Offensive measures refers to reactive tactical</p> <p>3 measures required to normalise a situation which ranges</p> <p>4 from making arrests, using of pyrotechnics, to responding</p> <p>5 with firearms and includes search and seizure, push-back,</p> <p>6 evacuation, encircling, and dispersal."</p> <p>7 CHAIRPERSON: That's what it means in</p> <p>8 that document. The question is –</p> <p>9 MR MPOFU: Well –</p> <p>10 CHAIRPERSON: No, no, no, listen to me,</p> <p>11 Mr Mpofo, before I attract your ire. That's what it means</p> <p>12 in that document. What the witness is concerned with is</p> <p>13 what it means in the Standing Order and he said what he</p> <p>14 understands it to mean in the Standing Order. The fact</p> <p>15 that it means one thing in one document doesn't mean it</p> <p>16 necessarily means the same in another document.</p> <p>17 MR MPOFU: Right, okay. In the document</p> <p>18 that is not a draft, which is Order 262, there is a</p> <p>19 definition of defensive measures. In the other one there's</p> <p>20 a definition of offensive measures, which includes the use</p> <p>21 of firearms, but in 262, paragraph 2(f), it says,</p> <p>22 "Defensive measures refer to proactive tactical measures</p> <p>23 such as a static barrier which are used to protect and</p> <p>24 safeguard people or property by cordoning off, blocking,</p> <p>25 isolating, patrolling, escorting, and channelling people."</p>
<p style="text-align: right;">Page 9601</p> <p>1 MS PILLAY: Is it also confirmed that Mr</p> <p>2 Semenya said it was a draft?</p> <p>3 MR MPOFU: Possibly. That's why I'm</p> <p>4 acknowledging that, ja. But it says that "Offensive</p> <p>5 measures refers to reactive tactical measures required to</p> <p>6 normalise a situation which ranges" –</p> <p>7 CHAIRPERSON: Sorry, what page are you</p> <p>8 referring to?</p> <p>9 MR MPOFU: Of that document it's page 3</p> <p>10 of 21, (n), small letter n for Nellie, National Instruction</p> <p>11 of 2012, Public Order Policing, crowd regulation and</p> <p>12 management during public gatherings and demonstrations,</p> <p>13 which may or may not be a draft?</p> <p>14 MS PILLAY: Chair, this document is a</p> <p>15 draft document. It hasn't been entered as an exhibit as</p> <p>16 yet.</p> <p>17 MR MPOFU: Yes. I accept that.</p> <p>18 CHAIRPERSON: I thought it might be</p> <p>19 exhibit R, but I see it isn't exhibit R.</p> <p>20 MR MPOFU: No, it's not.</p> <p>21 CHAIRPERSON: It's a document that hasn't</p> <p>22 been before us.</p> <p>23 MR MPOFU: Yes, but it's part of that –</p> <p>24 CHAIRPERSON: It's just a draft though.</p> <p>25 Alright, anyway, what does it say?</p>	<p style="text-align: right;">Page 9603</p> <p>1 Do you accept that definition which is in an official</p> <p>2 document, of defensive measures?</p> <p>3 GENERAAL-MAJOOR ANNANDALE: Ek aanvaar</p> <p>4 dit so.</p> <p>5 MR MPOFU: And would you accept that the</p> <p>6 measures which are not included in the definition of</p> <p>7 defensive measures, such as those that are included in the</p> <p>8 other definition, including the use of live ammunition,</p> <p>9 aggregately constitute offensive measures?</p> <p>10 MR SEMENYA SC: No –</p> <p>11 CHAIRPERSON: Before the question is</p> <p>12 interpreted, I have a problem with that. We're busy</p> <p>13 interpreting what the expression "offensive measures" means</p> <p>14 in 262 and 262, die einste 262, says in paragraph 11(4),</p> <p>15 "The following are prohibited or restricted during crowd</p> <p>16 management operations. (b), the use of firearms and sharp</p> <p>17 ammunition, including birdshot and buckshot, prohibited."</p> <p>18 So the drafter of the Standing Order could never have</p> <p>19 intended the expression "offensive measures" in 11(2)(4) to</p> <p>20 include the use of firearms because he or she was going to</p> <p>21 go on to say in subparagraph (4) that the use of firearms</p> <p>22 and sharp ammunition were prohibited. So therefore clearly</p> <p>23 offensive measures didn't come – the use of sharp</p> <p>24 ammunition wasn't covered by, wasn't really in the</p> <p>25 contemplation of the expression "defensive measures." That</p>

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1 must be so.

2 MR MPOFU: No, Chairperson –

3 CHAIRPERSON: It's a matter of elementary

4 interpretation.

5 MR MPOFU: With respect, Chairperson,

6 that can definitely not be correct. If you go to 11(3) it

7 says, "If the use of force is unavoidable," which I

8 understand is applicable here, at least according to the

9 police, "it must meet the following requirements. The

10 purpose of offensive actions are to de-escalate conflict

11 with the minimum force to accomplish the goal and therefore

12 the success of the actions will be measured by the results

13 of the operation in terms of cost, damage to property,

14 injuries to people, and loss of life." Surely, surely the

15 offensive measures that are contemplated in 262 11(3),

16 which may lead to loss of life, cannot be said to exclude

17 when use of force is unavoidable, the use of live

18 ammunition. I mean it –

19 CHAIRPERSON: Well, even if you're right,

20 Mr Mpofu, it's a matter for interpretation which I don't

21 think can sensibly be debated with this witness. It's a

22 matter you can argue at the appropriate time, but General

23 Annandale isn't the interpreter of the Standing Orders and

24 whatever he says about it would not really be relevant when

25 one interprets the wording used.

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1 MR MPOFU: That's fine. Forget offensive

2 measures, whatever it is. Shooting people, whatever it's

3 called, would you accept that a police force that is

4 committed to no loss of life, no injuries to people, which

5 has the means and the opportunity to warn people, should do

6 so before live ammunition is used against them, whatever

7 the definition thereof is?

8 [14:38] CHAIRPERSON: Then you haven't answered

9 Mr Semenya's query. Mr Semenya wanted to know from you

10 when you put the proposition to the witness, what was the

11 source of the obligation upon which you rely, and you said

12 262. We've had a debate about that and I understand you to

13 say you don't persist in that. So then Mr Semenya then is

14 entitled to say well would you please answer my question

15 before the witness is expected to answer it.

16 MR MPOFU: No, Chairperson, with the

17 greatest respect, I've read from 262. We know that even

18 under the common law there's requirement for

19 proportionality and the duty to flee doesn't apply to the

20 police, but at the very least there must be a duty to avoid

21 the calamity. That I'm sure is not a matter for debate.

22 All I'm saying is that - because I don't want to be

23 involved in a semantic debate about offensive or defensive

24 measures – is that when you are contemplating loss of life,

25 which is prohibited by the regulations, about that there's

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1 no debate, and you have the means and the opportunity to

2 warn the people that we are now going to get to this stage,

3 call it what you want, isn't there an obligation emanating

4 – I'm prepared to concede – partly from the regulations

5 which says there should be no loss of life and it must be

6 avoided at all costs, but also just from, to answer Mr

7 Semenya's questions more directly, from common sense, but

8 that common sense is not separate from the no loss of life,

9 no injuries, and so on, which is in the regulations.

10 CHAIRPERSON: Mr Mpofu, you'll forgive

11 me, but it sounds to me as if what you're really saying is

12 that you say the source of the obligation would be the

13 common law, and if that's so, then it's not necessary to

14 ask the witness what he thinks the common law is and nor

15 would the witness's answer be receivable.

16 MR MPOFU: Yes.

17 CHAIRPERSON: So perhaps we can move on

18 then.

19 MR MPOFU: Okay. Alright, you said for

20 example that a lot of things were happening in that two

21 minutes, and I agree with you, some of the lots of things

22 that were happening, at least according to the videos, is

23 that the TRT people were being instructed to form a basic

24 line, whatever that is, and that there was a warning for

25 the media to move away. That happened in that period. You

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1 may not be aware of it because you were not there, but are

2 you prepared to accept that those are things that happened

3 in that period?

4 MR SEMENYA SC: - Mr Mpofu may just

5 assist us by explaining which period, just for our

6 edification.

7 MR MPOFU: Okay. Chairperson, let me

8 take a step back. You'll remember that I put a question to

9 Mr Magidiwana who said very clearly that between the time

10 that they were trying to access the road when Nyala 4

11 closed, and the time that they re-emerged on the other side

12 of the kraal, the TRT line – I'm using shorthand – must

13 have been formed at that time, and he said that because I

14 asked him, and I think Mr Ngalwana might even have asked

15 him, but at least I'll account for my side, that, "When you

16 were stopped at Nyala 4 you obviously had a view of where

17 the police line was. Was it there?" and he said, "No, it

18 was not there." "And when you re-emerged, was it there?"

19 "Yes." So obviously it must have been formed at that time.

20 Secondly, we have videos that show very clearly the TRT

21 line rushing to its formation and we have videos that show

22 people saying that basic line, basic line, that they must

23 form a basic line, and I'm sure we'll explore that with

24 other people as to what that means. Then we have the

25 evidence of "Media, move away. Media, move away." All

<p style="text-align: right;">Page 9608</p> <p>1 those things clearly happened in that space between Nyala 2 4, the Nyala 4 incident and the shooting, which is why I 3 locate them in the two minutes. 4 COMMISSIONER HEMRAJ: - there a reference 5 for Mr Magidiwana's evidence where he says that the line 6 was not there initially and then he saw it there? Because 7 my recollection is something else. Do you have a reference 8 or not? 9 MR MPOFU: No, I'm afraid – I'll find it, 10 but I'm a thousand percent sure, because I asked the 11 question myself, either in chief or in re-examination, but 12 I'll find it, Commissioner. 13 CHAIRPERSON: I must confess I haven't 14 got a recollection one way or the other, so you may well be 15 right, but how does this point help us in relation to the 16 evidence of this witness, or more accurately, how does the 17 evidence of this witness help us in relation to this point? 18 MR MPOFU: Well, Chairperson, the 19 evidence of this witness, as I've said earlier, is that the 20 shooting was "onvermydelik." I'm busy putting propositions 21 to him which show that it could have been avoided, one of 22 which – 23 CHAIRPERSON: Okay, carry on. 24 MR MPOFU: Thank you. 25 MR SEMENYA SC: Chair, just for the</p>	<p style="text-align: right;">Page 9610</p> <p>1 you later, and if they are taken, as I told you before, I 2 won't allow them. 3 MR MPOFU: Thank you. Chairperson, I'm 4 happy to do that for no other reason than to try and save 5 time, but what I have to say is this is the result of the 6 four-day evidence-in-chief where this witness was asked 7 among other things by Mr Semenya whether the actions of the 8 police were avoidable or not. If he did not want that 9 subject to be discussed then he should not have elicited it 10 in chief, but I take what the Chairperson was saying. 11 Okay, I won't even repeat what the Chairperson has said. 12 I'll leave it at that, but you see where I was going with 13 that, what I'm going to argue on that point, but I won't 14 explore it with you any further. But this I'm going to ask 15 you. Your evidence, and indeed it's supported by 16 everything in the regulations, including the definition of 17 defensive measures that I read to you, is that barbed wire 18 is the primary means by which a crowd is blocked or 19 dissuaded from causing damage to life or property in a 20 particular area. Is that a fair statement? 21 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 22 ek weet nie of ek gesê het dat lemmetjiesdraad is die 23 primêre metode in alle gevalle nie. Ek het verwys in die 24 Marikana geval. 25 MR MPOFU: Yes, I'm prepared to accept</p>
<p style="text-align: right;">Page 9609</p> <p>1 record – 2 MR MPOFU: I'm sorry, "onvermydelik" by 3 the way means unavoidable. 4 MR SEMENYA SC: Chair, for the record, 5 even in evidence-in-chief the witness is not saying that 6 the police action was in self-defence. The witness's 7 evidence is he was informed by various stages of commanders 8 that their action was, the action of the police was 9 actuated by self-defence. So you cannot test the 10 correctness of that assertion, if it is that, through this 11 witness. It would have to be those who took the action 12 themselves who must answer to it. 13 CHAIRPERSON: But isn't that right, his 14 evidence on that point is hearsay, so I understand you 15 don't want to be accused of having not challenged his 16 evidence on the point so that it could be argued later that 17 you accepted it. You've made it clear you don't accept it. 18 But inasmuch as his evidence on the point is based on, is 19 hearsay based on what other people told him, it's enough 20 for you to say I'm going to put to the witnesses who gave 21 you your information that they were wrong, it wasn't 22 unavoidable, but I don't propose dealing with it with you. 23 MR MPOFU: Okay – 24 CHAIRPERSON: If you do it that way then 25 it's fine. Then none of those points can be taken against</p>	<p style="text-align: right;">Page 9611</p> <p>1 that. Let's talk about Marikana. You said "Die draad was 2 dan juis ontplooi om enige benadering tot die polisielyn te 3 ontmoedig." Among other things, but the point of the 4 matter is that in the Marikana situation the method by 5 which the police had decided the people will be dissuaded 6 or prevented from entering the police line was barbed wire, 7 hence the drawing of the first four Nyalas, correct? 8 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 9 dit was die draad, maar dit was ook die magsvertoon, die 10 ontplooiing van die ekstra getalle om dan enige so 'n 11 benadering te ontmoedig. 12 MR MPOFU: Yes, but in terms of the so- 13 called force continuum you would agree that barbed wire is 14 a more preferable way of blocking people than semi- 15 automatic rifles? 16 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 17 ons gebruik nie wapens om mense te blok nie. Ons het die 18 draad ontplooi om hulle te ontmoedig om in daardie rigting 19 te beweeg. 20 MR MPOFU: Alright, again to save time, 21 let me cut to the chase. The Nyalas 5 and 6 still had 22 their barbed wire undeployed. Correct? 23 GENERAAL-MAJOOR ANNANDALE: Ek het dit so 24 ook, Voorsitter. 25 MR MPOFU: We are back to our discussion</p>

<p style="text-align: right;">Page 9612</p> <p>1 of the means and the opportunity. So the means were there;  2 the barbed wire was available. We've established that, and  3 the two minutes was there, and we've already established  4 that, plus-minus. Now I want to say to you that – and I  5 want your comment – the gap where 16 or so people were  6 killed is about, we've already established that this is not  7 scientific, about 20, at most 25 metres – I measured it  8 myself – and it is between the kraal and the corner of the  9 fence. You know where the people died, where they were  10 lying down. That gap is about plus-minus 20, 25 metres.  11 Would you accept that?  12 GENERAAL-MAJOOR ANNANDALE: As ek u nou  13 reg verstaan, die, daar is drie krale, so die klein kraal  14 waar die sterftes plaasgevind het, vanaf die kraal tot by  15 'n draad wat u na verwys, 'n hoek draad, of 'n "corner of a  16 fence?"  17 MR MPOFU: Okay, well in your evidence  18 you referred to it as unprotected, but I'll assist you. If  19 you go to 208, look at 208 and 209 – sorry, exhibit L, 208  20 and 209 – you see the shack in 208?  21 GENERAAL-MAJOOR ANNANDALE: Ek doen, dis  22 reg, Voorsitter.  23 MR MPOFU: Okay, you can also see it in  24 209 in a different profile, from an aerial point of view.  25 GENERAAL-MAJOOR ANNANDALE: Ek sien ook</p>	<p style="text-align: right;">Page 9614</p> <p>1 GENERAAL-MAJOOR ANNANDALE: Ek is met u.  2 [14:58] MR MPOFU: Ja, now what I'm saying to you  3 is that that gap of 25 metres could and should have been  4 blocked with the barbed wire, the 200 metres of barbed wire  5 that was still available would have more than sufficiently  6 covered that 25 metres.  7 MR SEMENYA SC: No, Chair, surely we must  8 ask where does this come from now? Is it again a matter of  9 common sense? When would the police have known that  10 there's going to be a third breach going in that direction  11 for them to put the barbed wire?  12 MR MPOFU: They did.  13 CHAIRPERSON: Mr Mpofo, you heard the  14 query.  15 MR MPOFU: Yes, Chairperson, that I must  16 say is what you call a red herring. The police went there  17 and formed a basic line and stood with automatic rifles  18 ready, exactly in that gap. So we're now being told that  19 they did not know that the people are going to use that  20 gap. That was the only, the only gap available, that's why  21 they stood there with those guns. That's why they moved in  22 there –  23 CHAIRPERSON: Mr Mpofo, let's not go  24 there at the moment –  25 MR MPOFU: Well –</p>
<p style="text-align: right;">Page 9613</p> <p>1 'n klein plakkershut of sinkhutjie.  2 MR MPOFU: Yes. Right, now you see that,  3 going back to 208, that there's a fence around that shack?  4 CHAIRPERSON: I think it's probably a  5 shed actually, but anyway. It's probably a shed, but it  6 doesn't really matter, I suppose. Shed or shack will be –  7 MR MPOFU: Yes, a shed. It's probably a  8 shed actually, yes, because it's probably the storeroom for  9 that other kraal, yes. I think the Chairperson is right,  10 but you know that I mean, the corrugated iron structure.  11 GENERAAL-MAJOOR ANNANDALE: Ek sien  12 daarso is, lyk soos doringdraad wat gespan is.  13 MR MPOFU: Now the gap I'm talking about,  14 General, is between the corner of that fence that's around  15 the shed, and the – if you draw a straight line from that  16 corner towards the kraal, and that in fact you'll  17 appreciate better if you look at 209, so 208 is good in  18 that it shows you the fence, 209 shows you the profile, but  19 you won't be able to see the fence, so you must read those  20 pictures together. It is that gap between that corner and  21 a straight line, or a tangent to the kraal that I'm talking  22 about, which I measured to be about, what we earlier called  23 20 Mpofo paces, but I'm prepared to stretch it to 25 metres  24 just so that I'm sure that I'm not unduly minimising it.  25 I'm sure it's less than that, but let's say 25.</p>	<p style="text-align: right;">Page 9615</p> <p>1 CHAIRPERSON: No, no, no, I'll tell you  2 why.  3 MR MPOFU: Okay, that's the answer –  4 CHAIRPERSON: There is a lot of evidence  5 about different paths and that kind of thing, but what you  6 do say is that obviously the police seemed to have thought  7 that the strikers might want to come in that direction –  8 MR MPOFU: Yes.  9 CHAIRPERSON: - hence they placed,  10 positioned themselves there.  11 MR MPOFU: Correct.  12 CHAIRPERSON: That seems to be your  13 answer to the question. So I think Mr Semanya is now  14 informed as to what he wanted to know and you can now carry  15 on with the question.  16 MR MPOFU: Thank you.  17 CHAIRPERSON: And when you reach a  18 suitable stage we'll take the adjournment-  19 MR MPOFU: Yes.  20 CHAIRPERSON: But you might want to round  21 this point off first.  22 MR MPOFU: I just want to round off the  23 barbed wire point, yes. General, in the answer, or if you  24 were distracted by that debate and you want me to repeat  25 the question, then I will.</p>

<p style="text-align: right;">Page 9616</p> <p>1            GENERAAL-MAJOOR ANNANDALE:        Voorsitter, 2 soos ek dit het, die polisie het nie voorsien dat daar 'n 3 gaping gaan wees en dat 'n groep van die stakers na daardie 4 gapings toe sou gaan nie. Voorsitter, as ons kyk na 5 "slide" 210, en ek is seker daar is dalk beter foto's wat 6 dit kan wys, maar die eerste een links bo wat wys 15:40, 7 dan sal u merk die ses Nyalas met die draadkarre wat 8 ontplooi is, en dan agter hulle is daarso vyf Nyalas wat 9 net so 'n paar meter agter hulle in 'n ry staan, en dan sal 10 u merk daar is 'n sy flank wat ook, dit is vyf voertuie wat 11 waarskynlik vier Nyalas en een Casspir voertuig is wat ook 12 geposisioneer is, wat so half in 'n noordelike rigting sal 13 ek sê wys. Voorsitter, en al hierdie voertuie wat ek nou 14 na verwys is voertuie wat beman is deur Openbare Orde 15 Polisiëring, en dan sal u merk agter die vyf Nyalas wat 16 geposisioneer is net 'n paar meter agter die ses Nyalas met 17 die draad, is daar groot spasie en dan is daar wat ek weet 18 is sagte-dop voertuie, Voorsitter, en dis waar die TRT lede 19 ontplooi was, en ek is seker as ons hierdie foto opblaas 20 sal ons sien daar is nie 'n lyn van die TRT wat gevorm is 21 by die kraal en dat eers later, die laaste foto wat dit lyk 22 vir my na 15:51, dan is daar 'n lyn. So soos wat dit aan 23 my oorgedra is, en ek kan suiwer net sê wat aan my oorgedra 24 is met die eerste beweging van die stakers na die 25 polisielyn toe, die eerste aanval, toe het die lede begin</p>	<p style="text-align: right;">Page 9618</p> <p>1 vroeër omdat daar 'n gaping was. 2            CHAIRPERSON:            It's my impression – I must 3 say I don't know if I'm correct, but if I'm wrong I trust 4 I'll be corrected – it was my impression that that line of 5 blue squares sort of was formed, as it were, shortly before 6 the shooting in an attempt to block the advance of the 7 strikers who were coming around what I call the left-hand 8 side of the kraal. I think that's right, isn't it? 9            GENERAAL-MAJOOR ANNANDALE:        Ek het dit 10 ook so, Voorsitter, dat hulle beweeg het van waar die 11 sagte-dop voertuie was en toe daar opgevorm het. 12            CHAIRPERSON:            Mr Mpofu, so when it's 13 convenient – 14            MR MPOFU:            I will indicate – 15            CHAIRPERSON:            - we'll take the tea 16 adjournment, but it's for you to tell me when we do it. 17            MR MPOFU:            Thank you, Chairperson, one or 18 two questions then. Just to round off this point, General, 19 and bear in mind what the Chairperson has put to you, would 20 you accept that if you look at the – you've referred us to 21 that picture already – the 15:51 picture of slide 210, you 22 see the police line which has formed there, which is 23 probably already in basic line. I don't profess to know 24 what that means. Can you see that? 25            GENERAAL-MAJOOR ANNANDALE:        Ek sien die</p>
<p style="text-align: right;">Page 9617</p> <p>1 op vorm en begin vorentoe beweeg. Ekskuus, Voorsitter, as 2 ek net kan teruggaan na "slide" 205, en ek weet nie of dit 3 'n lyn is wat ek regs bo in die hoek sien van polisielede 4 nie, maar dit blyk dat hulle eers toe begin beweeg het in 5 die rigting van waar hulle dan daardie sogenaamde spies- 6 formasie van 'n groot groep persone gesien beweeg het. 7            CHAIRPERSON:            Major-General, if we look 8 at slide 209 you'll see a number of blue squares from which 9 the firing took place. You see the firing being indicated 10 by the red arrows, the direction of the bullets, and the 11 blue line being the position of the shottists, so am I 12 correct in thinking that the strikers were coming around, 13 as one looks at this photograph, on the left-hand side of 14 the kraal one can see that shed which appears to have bits 15 of wood or something on the roof, just to the left of that 16 opening, and then if it's correct that the strikers were 17 coming around on the left-hand side of the kraal, moving 18 towards the line of blue squares, and the shottists are 19 represented by the blue squares, that it seems to indicate 20 that at the time the shooting took place that there was a 21 line of policemen in front of the strikers. Am I 22 interpreting 209 correctly, or am I misunderstanding it? 23            GENERAAL-MAJOOR ANNANDALE:        Voorsitter, 24 ek het dit ook so, maar my punt was op Adv Mpofu se 25 veronderstelling dat ons reeds die TRT lyn daar gevorm het</p>	<p style="text-align: right;">Page 9619</p> <p>1 lyn, dis reg, Voorsitter. 2            MR MPOFU:            And you'd agree that that 3 line, just like the blue line that the Chairperson referred 4 to, is facing the gap. In fact those people are facing the 5 gap that you and I had discussed earlier. 6            GENERAAL-MAJOOR ANNANDALE:        Ek het geen 7 rede om te glo dat hulle in die ander rigting kyk nie. Ek 8 aanvaar hulle kyk na daardie gaping. 9            MR MPOFU:            Yes, and what I'm suggesting 10 to you is that for that line to form, and unfortunately 11 these are not static pictures, in the mobile pictures 12 you'll see that there is some time that gets – they sort of 13 rush in and then somebody says "Basic line, basic line," 14 and then they form up the basic line. So that process took 15 place before the strikers emerged from around the kraal. 16 Would you agree? 17            MR SEMENYA SC:            Maybe Chair, during 18 adjournment Mr Mpofu will take us there where there is 19 evidence of that happening before, as he put it. 20            MR MPOFU:            Okay. 21            COMMISSIONER HEMRAJ:        Can I just ask, the 22 police line that's visible on 15:41 of 210, is it perhaps 23 visible on 15:49, Mr Mpofu, of 210? 24            MR MPOFU:            Sorry, Commissioner, I missed 25 a portion. You referred to 15:49?</p>

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1 COMMISSIONER HEMRAJ: Slide 210.  
 2 MR MPOFU: Yes, there's no 15:41 there.  
 3 It's 15:40 –  
 4 COMMISSIONER HEMRAJ: No, 15:49.  
 5 MR MPOFU: 49, yes.  
 6 COMMISSIONER HEMRAJ: Do you perhaps see  
 7 the police line there at that time as it appears in the  
 8 picture with the time 15:51?  
 9 MR MPOFU: No, that's exactly the point.  
 10 My evidence according to Mr Magidiwana is that that is the  
 11 approach, if you notice, Commissioner, of the place where  
 12 Nyala 4 closed.  
 13 COMMISSIONER HEMRAJ: Yes.  
 14 MR MPOFU: Closed off, and Magidiwana's  
 15 evidence is exactly that that line was not there, otherwise  
 16 he would have seen it. So which is why I'm saying that  
 17 line was formed during the 90 seconds to two minutes when  
 18 they were moving around. That's exactly the point, that it  
 19 was not there at 15:49 and it was there at 15:51. So one  
 20 doesn't have to be a mathematician to say if it wasn't  
 21 there at 15:49 but it was there at 15:51, it must have been  
 22 formed in that period, in that two-minute period between 49  
 23 and 51. In other words, Commissioner, what I am saying is  
 24 that, and as I've said, and I'll respond to Mr Semenya's  
 25 request by maybe playing the video in the morning. In a

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1 static picture you can, you just deduce 49, 51, but in the  
 2 mobile pictures you can clearly see that the people rushing  
 3 in and then somebody saying to them "Basic line, basic  
 4 line," and then they form the line and so on, and so on,  
 5 but by the time the strikers emerge, they've already formed  
 6 the line. So clearly that must have happened between 15:49  
 7 and 15:51.  
 8 COMMISSIONER HEMRAJ: The videos you  
 9 refer to, do they show the policemen running from another  
 10 line-up to this particular line-up?  
 11 MR MPOFU: Well, I don't know where  
 12 they're running from. It doesn't matter where they were  
 13 running from. The issue is that they ran to that place and  
 14 then formed the line. Where they came from I don't think  
 15 is –  
 16 CHAIRPERSON: Yes, the witness can't  
 17 really help us because he wasn't there.  
 18 MR MPOFU: No. All I'm asking the  
 19 witness, Chairperson, is that those people formed that line  
 20 in front of that specific gap before the people, or while  
 21 the –  
 22 CHAIRPERSON: Yes, I understand what's  
 23 your question you're asking him.  
 24 MR MPOFU: Yes.  
 25 CHAIRPERSON: My problem is I'm not sure

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1 he can answer your question because he'll say "andazi," you  
 2 know, if he was giving evidence in isiXhosa; he would say I  
 3 suppose "ek weet nie," he'll say in his own language. He  
 4 doesn't know, he can't know. The eyewitnesses you can ask  
 5 and you can confront them with the video and so on, but is  
 6 it not with respect a waste of time to ask this witness?  
 7 I'm not intending any disrespect either to you or to him,  
 8 but trying to be practical. Shall we take the tea while  
 9 you can think about it? We'll take the tea adjournment.  
 10 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 11 [15:31] CHAIRPERSON: The Commission resumes.  
 12 Those responsible for the sign can change it. Generaal-  
 13 Majoor, u is nog steeds onder eed.  
 14 CHARL ANNANDALE: s.o.e.  
 15 CHAIRPERSON: Mr Mpofo, you have some  
 16 more questions in cross-examination, I believe.  
 17 CROSS-EXAMINATION BY MR MPOFU (CONTD.):  
 18 Thank you, Chairperson. General, in response to what the  
 19 Chairperson put to me before tea, I want to try and short-  
 20 circuit this discussion as follows. The Chairperson is of  
 21 course correct that the people who were on the spot who  
 22 formed the line, or who might have asked others to form it  
 23 and so on, and the shooters, as we call them, will at some  
 24 stage be here. Not all of them. So the question as to why  
 25 they formed that line before the people emerged and so on

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1 and all that will be put to those people. You yourself  
 2 were not there. So the proposition I'm going to put to you  
 3 is going to be based on the, assume that when those people  
 4 come they will either concede or accept that what we see in  
 5 the pictures, that the line was formed before the people  
 6 came. Assume that to be the case. The issue I really want  
 7 to raise with you is that if that is so, then the barbed  
 8 wire could and should have been extended to cover that 25  
 9 metres. You understand where I'm going? Once again you  
 10 don't have to agree with me, just so that you and I don't  
 11 debate were they standing there or not, because you were  
 12 not there. Do you accept that?  
 13 GENERAAL-MAJOOR ANNANDALE: Voorsitter,  
 14 ek kan slegs getuig in terme van wat die beplanning was met  
 15 die draad. Dit sou gewees het –  
 16 MR MPOFU: Yes. No, no, I accept that,  
 17 and we have video that I was going to play to illustrate  
 18 this, but I won't even do that. As I say, assume that  
 19 those videos will be played to those witnesses who were on  
 20 the ground, and maybe the best way to illustrate the point  
 21 I want to make to you is to go to slide 203, L203, and look  
 22 at the third bullet. It says, "Nyala 6, barbed wire group,  
 23 went around the kraal (underline) without releasing the  
 24 barbed wire, to block protesters that were approaching from  
 25 the northern side of the kraal in the direction of the



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1 police line." You see that?

2 GENERAAL-MAJOOR ANNANDALE: Ek sien dit,

3 Voorsitter, maar -

4 MR MPOFU: Yes, and the sum total of my

5 criticism is that that Nyala, instead of driving around and

6 all that to block the protesters, all that they should have

7 done is just to close that gap, because that Nyala 6 had

8 100 metres of barbed wire, should have closed the gap and

9 the massacre would, the tragedy would have been averted.

10 That's really where I'm going, but I won't debate it with

11 you any further. In other words, instead of not releasing

12 the barbed wire, that the barbed wire should have been

13 released and the people would have been prevented from

14 doing anything beyond the barbed wire. Okay, sorry, I know

15 it's a long question. More particularly because we know

16 that when Nyala 4, when Nyala 4 closed them off, that was

17 sufficient deterrent for them to take another route.

18 CHAIRPERSON: The phrase they use in

19 exhibit L is "circumnavigate," I think.

20 MR MPOFU: Yes. Okay, General, just stay

21 with me. Do you accept that on the version that you were

22 given, when Nyala 4 closed against the kraal, the people

23 turned back? They could not go any further.

24 GENERAAL-MAJOOR ANNANDALE: Voorsitter,

25 ek wil net eers klaarmaak wat ek nou-nou mee begin het in

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1 terme van die beplanning vir die uitrol van die draad.

2 Voorsitter, die beplanning sou gewees het dat Nyala 6 sou

3 nie daar na daardie klein hutjie toe beweeg het nie. Nyala

4 6 sou parallel terugbeweeg het in 'n oostelike rigting. So

5 my punt is daardie betrokke spasie wat mnr Mpofo na verwys

6 het van 25 meter sou in elk geval oopgebly het, en dan die

7 laaste vraag wat u gestel het in terme van dat hulle

8 teruggedraai het, Voorsitter, ons doen almal interpretasies

9 nou van die foto's. Dis maar soos dit aan my oorgedra is.

10 Hulle het teruggedraai om te hergroepeer en hulle het toe

11 weer vorentoe beweeg, net na 'n ander posisie op die

12 polisielyn.

13 MR MPOFU: Okay. Okay, General. You

14 see, I don't want us to be drawn into another debate. The

15 version of the protesters is that they were accessing the

16 road to go to the settlement. I know that the version of

17 the police is that they were not going to the settlement,

18 they were attacking, but I just want you to stay with me on

19 one thing. All I'm asking you now is do you dispute the

20 evidence that the closing of the gap with the barbed wire

21 by Nyala 4 had been sufficient to dissuade them to take

22 another route to attack, if they were attacking, but not to

23 proceed on the route that they had planned?

24 GENERAAL-MAJOOR ANNANDALE: Ek dink dit

25 was waarskynlik 'n kombinasie van 'n fisiese versperring,

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1 maar ook die handeling deur die polisie, want soos ek

2 verstaan het hulle daarso reeds begin om rubber, "stun" en

3 CS te gebruik.

4 MR MPOFU: Yes, fair enough. Actually

5 that is the evidence, but that combination of things, which

6 I don't have to enumerate now, was sufficient, well firstly

7 did not result in anybody dying, and (2), was sufficient to

8 dissuade them from proceeding any further. Yes?

9 GENERAAL-MAJOOR ANNANDALE: Dit wil so

10 voorkom, Voorsitter.

11 MR MPOFU: Thank you, General.

12 Chairperson, unfortunately before I move to the next topic,

13 there's a matter that I've been instructed to address with

14 the Commission, which is a little bit uncomfortable.

15 During the lunch break, as the Chairperson remarked, there

16 was a meeting of some of the people that we represent.

17 They have come back to us and requested us to voice their

18 concern regarding what they perceive to be the treatment of

19 the victim parties, including not being given an

20 opportunity to present the case or certain aspects thereof,

21 but also more pertinently that the representatives of

22 Lonmin seem to be, according to them, deliberately

23 disrupting the cross-examination, and also what they

24 perceive to be assistance of the police witnesses. Yes,

25 it's those kinds of issues, Chairperson.

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1 I have, as I indicated this morning, assured them

2 at least as a practitioner that although there are all

3 these skirmishes, that two things, Chairperson, that at

4 least from the Chair, or from the Commissioners' point of

5 view, as I indicated in the morning, such complaints as we

6 might have are probably shared by anyone else, if there

7 are, and such praises as we might have are also shared by

8 anyone else. In other words, even though we might grumble

9 about a particular ruling, I'm sure everyone else has done

10 so. In other words, the element of whatever complaints are

11 there, the element of bias should not be included therein,

12 and I do believe that, Chairperson, and I was sharing that

13 with them as someone who has been in various courts and

14 have seen much worse, even when, once again when there's no

15 malicious intent, as it were. As the Chairperson knows, I

16 am duty-bound to raise the concern. It's a serious concern

17 for what it's worth, insofar as it is perceived, and we on

18 our side will do what we can to assuage those feelings.

19 But nevertheless, we have to raise the issue.

20 As far as the issue of the Lonmin party is

21 concerned, I must say, Chairperson, that just an example of

22 what happened on Thursday and today, I do share the concern

23 that has been raised by the clients in that as we

24 demonstrated, obviously every party is entitled to object

25 and -

<p style="text-align: right;">Page 9628</p> <p>1 CHAIRPERSON: [Inaudible]  2 MR MPOFU: No, I'm sure the interpreter  3 will paraphrase, but I suppose since this involves the  4 clients directly I should give the interpreter an  5 opportunity.  6 MR MPOFU: Thank you. To cut it short,  7 Chairperson, the complaint regarding the Lonmin party is  8 twofold – (1), that the issues that are being discussed at  9 this stage at least are issues that concern the police and  10 the victims, and I did once again explain that, as the  11 Chairperson I think on Thursday indicated, although  12 strictly speaking that is the case, all the parties have a  13 broader interest. The mere fact that they are accepted as  14 parties means that they have a struggling interest, as it  15 were, but I think the second part is where the gist is,  16 which is where they perceive the objections to be without  17 foundation and that there's no attempt to admonish or to  18 try and restrict at least those types of objections which  19 don't have a proper factual basis, whose only effect is  20 just to disturb the cross-examination.  21 By saying this I don't mean to restrict any  22 party, and I'm sure neither do the clients, from exercising  23 its rights. We're all employed as professionals to do  24 whatever we can for the parties that have engaged us, but  25 Chairperson, we also know that this process is very</p>	<p style="text-align: right;">Page 9630</p> <p>1 addressed. Thank you, Chairperson.  2 [15:50] CHAIRPERSON: Mr Madlanga, do you wish to  3 say anything in – sorry, before Mr Madlanga gets a chance –  4 MS MOTLOENYA: Yes, Chairperson. Chair,  5 just to put it on record that this perception is a  6 perception that is shared by the families. However, it  7 hasn't been raised in the Commission because we are  8 currently dealing with that issue with the families  9 privately.  10 CHAIRPERSON: What exactly is the  11 perception? That they have been treated unfairly or their  12 counsel had been treated unfairly, or both?  13 MS MOTLOENYA: Well Chair, a bit of both.  14 To the families it seems that this bears a bit of bias on  15 the side of SAPS in terms of certain objections being  16 upheld and things of the like. However, we are trying to  17 explain to them under what basis those objections had been  18 upheld and things like that, but just to put it on record  19 that they do share a similar perception.  20 CHAIRPERSON: Yes, thank you. Mr  21 Madlanga.  22 MR MADLANGA SC: Mr Chairman, as evidence  23 leaders I want to believe that we are the last people to be  24 considered to be partisan in the matter. I have been in  25 these proceedings from the beginning and perhaps I've not</p>
<p style="text-align: right;">Page 9629</p> <p>1 important. The reason the Chairperson reminds us about  2 time and so on is not so much just to save the time; it's  3 also because we know that the nation is waiting for the  4 outcome, but with due respect, the people who are directly  5 affected, we must do everything in our power to make them  6 feel that this is a process which will benefit them in the  7 sense that that was intended in getting down to the truth  8 and that there's no party that is "assisted" unduly, nor  9 any other party that is prejudiced or negatively viewed in  10 the sense that it might predetermine the outcome, and I'm  11 just appealing to the Chair and all of the other parties  12 that we make sure that the integrity of the process is  13 maintained in that regard, and I suppose that's also a  14 statement about our own collegiality and things like what  15 the ruling that the Chairperson had said earlier, which has  16 nothing to do with cross-examination, about when there are  17 issues to be raised counsel should as much as possible try  18 and raise them. It's those kinds of, and that Chair will  19 remember was a matter that I had raised specifically with  20 the Commissioners in chambers, and the outcome was that  21 there was a general understanding, and it has eased that  22 kind of thing which is also likely to contribute to the  23 perceptions. So maybe we should think of other ways -  24 without pointing fingers, all of us – of making sure that  25 those feelings insofar as they may legitimately exist are</p>	<p style="text-align: right;">Page 9631</p> <p>1 been here only for one or two days at the most, and in my  2 observation of what has been happening here I want the  3 families and the victims to be assured that the process  4 that has been going on here has gone on in a very fair  5 manner. I am happy to hear from both my colleagues, Mr  6 Mpofo and Ms Motloenya that they have explained to the  7 families and the victims that what has been happening has  8 been in accordance with what should happen in a process of  9 this nature. Ms Motloenya does go so far as to say that  10 even at this very moment they are in the process of  11 addressing the perceptions that the families and victims  12 have.  13 That said, I want to move on and touch on the  14 matter that relates to Mr Burger specifically. Mr Burger  15 may be more forceful perhaps –  16 CHAIRPERSON: I'm sorry, Mr Madlanga, is  17 it a good idea for the interpreter to interpret what you  18 said so far and then he can interpret what you have to say  19 about Mr Burger once you've said it?  20 MR MADLANGA SC: Although of course I'm  21 sure Mr Burger will speak for himself, I cannot resist  22 saying this. Perhaps he has been more alert than most of  23 us regarding the need to intervene and object. I recall  24 for example that when I was cross-examining, I think it was  25 one of the NUM witnesses, he objected no less than three</p>

1 times and I do remember, and I must confess to the  
2 Commission and to him that at one point I did get a bit hot  
3 under the collar, but I am the last person to say that the  
4 objections that he raised were not well considered, not all  
5 of them, if I'm not mistaken, were upheld, but one cannot  
6 go so far as to say that there was no point at all to them  
7 being raised.

8 The short point I'm making in this regard is that  
9 it has not only been when the families or victims are  
10 involved that he has objected. He has objected a number of  
11 times when a number of other parties are involved, and I  
12 want again to assure, or rather to ask the Commission to  
13 assure the families and the victims that this does not  
14 necessarily have to do with the fact that now it is counsel  
15 for the victims who is cross-examining. Perhaps it's only  
16 because the cross-examination has taken much longer and  
17 therefore the interventions and objections may be more.  
18 With me with the three objections or so, my cross-  
19 examination was something like 45 minutes or even less, but  
20 there were three objections. Again finally I just want to  
21 say thus far my own observations have been that the process  
22 has been going on fairly and in a manner that a, or rather  
23 proceedings of this nature should be conducted.

24 CHAIRPERSON: Thank you, Mr Madlanga.  
25 Any of the parties' representatives wish to say anything?

1 Mr Burger, I see you've been making notes. Do you want to  
2 say something?

3 MR BURGER SC: Yes, I should say a few  
4 things, Chair. I would have very much liked my learned  
5 friend Mr Mpofo to tell us what advice he gave to his  
6 clients when they complained about the fact that I  
7 interrupted him and that I seem to be making common cause  
8 with the SAPS. I wonder what he said to them.

9 I cannot remember last Wednesday and Thursday  
10 when I objected what the score was, but my recollection was  
11 that most of the objections were upheld. That meant they  
12 were considered to be valid by the Chair, but let me not  
13 speak in my own defence.

14 As to trying to protect the SAPS, anybody who had  
15 listened to the questioning of the National Commissioner  
16 would find that a comic submission, with respect. There  
17 are perceptions out there, and the perception I will speak  
18 to again is a perception that I and my colleagues are not  
19 assisting the Commission in getting to finality, that we  
20 take too long with witnesses, that we don't have a system  
21 where a lead questioner asks questions and the rest have a  
22 limited time to ask questions to get it over with. We  
23 cannot do a General a month; we don't have that luxury.  
24 That's what we're doing. I've said it before and if the  
25 need be I'll say it again. I say it in the interest of the

1 Commission and in the interest of my client. We cannot go  
2 this slowly.

3 Then lastly, my learned friend says he is counsel  
4 for the victims. I'm also counsel for the victims. My  
5 client lost two of its employees on the 12th. It lost an  
6 employee on the 14th under the most atrocious circumstances.  
7 It lost 34 employees or thereabouts on the 16th. It caused  
8 a trauma to my client from which it is still trying to  
9 recover. So to suggest that we're, any of us are not here  
10 to protect victims is an oversimplification. Put  
11 differently, to suggest that only some parties represent  
12 victims is with great respect not correct. That's all I  
13 wish to say, Chair.

14 CHAIRPERSON: Your client actually lost  
15 four people on the 12th – the two security guards and two  
16 mine employees.

17 MR BURGER SC: I stand corrected on that.  
18 The point I make is I act for victims and my client is  
19 hugely concerned about that fact and that's why I do this  
20 case with some emotion. Lives were lost here. We're  
21 concerned about the lives that were lost.

22 MR SEMENYA SC: Chair, on behalf of SAPS,  
23 if it is of any comfort to anybody, we're feeling as a team  
24 that we are carrying a huge burden in relation to the  
25 issues before the Commission. We have been overruled more

1 often than we would have find comfort necessarily, but it's  
2 in the nature of the process. We take those on the chin  
3 and we go to the next point, but as to whether there is any  
4 collusion toxic in the fiery language of the opening  
5 statement doesn't help us. It just reasserts something  
6 that has no factual foundation to it. I certainly don't  
7 feel assisted by Mr Burger, not one inch. I have seen him  
8 take on the National Commissioner, as he must. I've never  
9 protested that, and we have never objected to any questions  
10 that did not merit an objection, and we take the rulings as  
11 we are supposed to do as professionals, in good stead. If  
12 there is no malice intended in them they must be a  
13 consequence of the proceedings that we are having.

14 CHAIRPERSON: Thank you, Mr Semanya. Mr  
15 Tip.

16 MR TIP SC: Chair, we don't really have a  
17 contribution to make. We are not the, we have not been  
18 identified as being an entity that is complained about, but  
19 perhaps I may just say that objections form a very  
20 important part of the process and that in our view by and  
21 large the objections are made in order to seek to advance  
22 the process and to bring about a more expeditious  
23 traversing of the relevant evidence, and we believe that  
24 that is important.

25 I may just add, and if I may perhaps say that as

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1 someone who has been in practice for rather a good number  
 2 of years and have been in courts over thousands of days and  
 3 have been involved in the assembly of records that  
 4 traversed tens of thousands of pages, I have seen a great  
 5 many objections being raised by parties; I have seen  
 6 various fora in action, and although it's certainly not for  
 7 me to be precocious enough to advance any sort of  
 8 judgmental comment from the vantage point that I have  
 9 temporarily in the second row as it may be, we have  
 10 certainly not seen signs of bias on the part of the  
 11 Commission in respect of its attitude to any parties, and I  
 12 might say as well that Mr Mpofu should not feel that his  
 13 cross-examination has been unduly curtailed. To the  
 14 contrary, he has been given a great deal of latitude and  
 15 the occasional or frequent objections, as they may be, from  
 16 time to time have not affected that.

17 So we would with great respect urge the families  
 18 and the victims not to feel that these proceedings are not  
 19 well balanced and I'd like just to echo that NUM also  
 20 represents, my legal team also represents victims, and I  
 21 might put on record that we now act for Mrs Fundi, and of  
 22 course her husband was one of the people who died in very  
 23 unfortunate circumstances on the morning of the 12th of  
 24 August. So we speak not as an entity on the outside; we  
 25 also have victims amongst our ranks, both present and past.

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1 MR MPOFU: Chair -  
 2 CHAIRPERSON: Yes.  
 3 MR MPOFU: If I, I just would like rather  
 4 to have you having the last word, so can I just address one  
 5 or two of the issues -  
 6 CHAIRPERSON: Yes, you may.  
 7 MR MPOFU: Thank you, Chairperson.  
 8 Chairperson, I just want to clarify a few things. Firstly  
 9 apropos what Mr Tip is saying, that I - and Mr Tip more  
 10 than anyone else would know, that you know, I've been in  
 11 this profession for almost 30 years and worked with Mr Tip,  
 12 Mr Bizos, and other people. So I have no problems with  
 13 taking it on the chin. Anyone who knows me will know that  
 14 I take it on the chin more than, or at least I take as much  
 15 as I give. This has nothing to do with me, really. And to  
 16 answer Mr Burger's question of what advice I gave, I will  
 17 answer to that.  
 18 [16:10] I said the first thing that I said to the clients  
 19 was what I've said earlier, that this is normal. As I said  
 20 earlier, this process is quasi adversarial and insofar as  
 21 it is adversarial to whatever extent, then of course there  
 22 are stances that get taken, and I think that's understood  
 23 by everybody.  
 24 The second thing that I advised was that this was  
 25 not a matter that should be raised in the open forum but it

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1 should be raised in chambers with the Commissioners, and  
 2 they specifically said no, they wanted it - they had  
 3 discussed and they wanted it to be raised here, and I  
 4 indicated that to the Chairperson before we came here. So  
 5 those are the issues.

6 Apart from that I accept what all my colleagues  
 7 have said. The only thing really that I wanted to say is  
 8 where I would draw the line, and that's what I was saying,  
 9 trying diplomatically to say we must also caution  
 10 ourselves, is a situation such as what happened this  
 11 morning where the objections do not have a factual basis,  
 12 or are as a result of somebody not having read the  
 13 particular document in the record, and so on. I think  
 14 let's try and avoid those because they just add to the  
 15 perception. So that's the only place where I would draw  
 16 the line, but of course the Chairperson has in fairness  
 17 more than once even admonished us for the nature of the  
 18 objection that we make if he was of the view that the basis  
 19 of the objection itself was unfounded. So these are the  
 20 kinds of examples that I've given to the clients, but  
 21 nevertheless all of us here would know that I'm duty-bound  
 22 to raise the issue once it has been raised. This is akin  
 23 to the situation where you are instructed to ask the judge  
 24 to recuse himself or herself. You might think that this is  
 25 the best judge who's ever graced the bench, but if the

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1 client has a perception which they reasonably hold, based  
 2 on their vantage point, then you have a duty to raise it,  
 3 even if the judge was your best friend.

4 So I just wanted to clarify just those points,  
 5 and of course it's not a competition of who's more of a  
 6 victim than any other one. I accept that the victims,  
 7 properly defined, are all over. The police for that matter  
 8 have lost people. So to that extent I mean everybody to  
 9 some extent or another represents the victims. I'd go as  
 10 far as to say even the evidence leaders represent all the  
 11 victims that we represent, so I didn't mean it in the sense  
 12 of starting a competition. Yes, that's all, Chair, that I  
 13 just wanted to clarify, apart from what I've added.

14 CHAIRPERSON: Thank you all for what  
 15 you've said. I'm pleased that the point has been raised in  
 16 the open auditorium so that the parties' families and  
 17 anyone here can be aware of the feelings and perceptions,  
 18 and they can be discussed. It's only right that that  
 19 should happen in the spirit of openness, and so forth.

20 Those who are sitting in the auditorium, many of  
 21 them I'm sure haven't had the opportunity of sitting in  
 22 court cases for a long time, at least I hope they haven't  
 23 had that opportunity. Those who have had the opportunity  
 24 to sit in court cases for a long time will see that it's  
 25 what happens all the time. Questions are asked, parties

1 object. If the objections are well-founded they're upheld.  
 2 If they're not well-founded they're dismissed, and that's  
 3 what happened. A number of the objections raised against  
 4 some of the questions Mr Mpofu had asked were disallowed,  
 5 the question, he was allowed to proceed. In other cases  
 6 the objections were upheld. Other parties who have,  
 7 counsel who have raised objections against other parties,  
 8 sometimes I upheld the objections when I thought they were  
 9 correct; other times I dismissed them when I thought they  
 10 were wrong, they were bad.

11 If I ever perceive a situation where there's a  
 12 whole series of objections being asked without foundation  
 13 in order to harass or intimidate or disrupt cross-  
 14 examination, I won't hesitate to take strong action. But I  
 15 would appeal to those who are sitting here in the  
 16 auditorium who haven't, as I've said, had the misfortune  
 17 before to sit in legal proceedings for a long time, to  
 18 accept that that's the way the system works and not to  
 19 think because their side has a ruling given against them  
 20 that the ruling is unfair because I can assure you that the  
 21 other side, when an objection is upheld against them, also  
 22 are inclined to think the same. I have tried from the very  
 23 beginning of this Commission, and will do so to the end, to  
 24 be fair to all parties, to give all of them a fair  
 25 opportunity to put their case, mindful however of the point

1 result of the process. But as I've said, I'm pleased  
 2 however that the matter has been brought up here before us  
 3 to be openly discussed, and I'm also pleased to hear that  
 4 the representatives of those who have this perception are  
 5 endeavouring, and as we were told, are still endeavouring  
 6 to explain to them how the system works and why it is that  
 7 these perceptions have arisen, but why it is that the  
 8 perceptions we believe are unfounded. But on that note we  
 9 will adjourn until half past 9 tomorrow morning. On that  
 10 basis we will take the adjournment now until half past 9  
 11 tomorrow morning. I understand we're going to be given  
 12 some statements from the side of the Human Rights  
 13 Commission, which we will study overnight, and we will  
 14 continue again, as I've said, at half past 9 tomorrow.

[COMMISSION ADJOURNED]

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1 that I've stressed over and over again that we, apart from  
 2 the need to get an answer sooner rather than later for the  
 3 country's sake, apart from the parties, that we have a  
 4 limited amount of time and we must try to use it as  
 5 gainfully as we can. So some of the objections, some of  
 6 the rulings I've given have been designed to speed the  
 7 proceedings on.

8 Insofar as to suggest that I have assisted  
 9 certain witnesses, what I've done sometimes if I thought  
 10 the witness was trying to say something but wasn't  
 11 articulating it as briefly as he or she should, I have  
 12 suggested what I thought the answer was, something that has  
 13 to be done very carefully because obviously one mustn't put  
 14 answers in witnesses' mouths and must merely say what one  
 15 thinks the witness is trying to say but he's stumbling over  
 16 saying.

17 But if people think I'm biased I'm sure there's  
 18 nothing I can do about it except to say this, that I  
 19 genuinely and honestly believe that my colleagues and I are  
 20 not biased; we're doing our best to be fair to everybody.  
 21 We are determined to get as far as is possible to do so, to  
 22 the truth of what happened, and if in the result we end up  
 23 criticising the police, so be it. If we end up criticising  
 24 some of the other participants, so be it. We may end with  
 25 all of them to some extent dissatisfied, but that may be a

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